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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF
FINANCE, SECURITIES BUREAU,

Complainant,

v.

GREGORY LEO KESTEN,

Respondent.

Docket No. 2017-7-15-N

**DECISION AND ORDER
REGARDING COMPLAINANT'S
MOTION FOR PRELIMINARY
ORDER**

This matter having come before the Hearing Officer on the Motion for Preliminary Order filed by Complainant (the Department);

FINDINGS OF FACT

1. The Department on September 16, 2021 filed a renewed motion for Sanctions and Default against Respondent.
2. This motion was supported by a Declaration of Counsel and supporting Exhibits.
3. In the motion the Department seeks to have the Hearing Officer impose sanctions against Gregory Kesten (Respondent) based upon allegations that the Respondent has failed to provide requested materials in response to discovery requests.
4. The Department on October 4, 2021 filed a Motion for Preliminary Order seeking a full resolution to the matter based upon IDAPA 04.11.01.260 (hereinafter IDAPA Rule

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PRELIMINARY ORDER - 1**

number) and an assertion that no issues of material fact are present and that the Hearing Officer may issue a preliminary order based upon the materials submitted to date.

5. The Department presented the Motion for Preliminary Order as an alternate to the prior pending request for sanctions.

6. The Respondent provided no substantive response to the Motion for Preliminary Order within the 14 day time period specified under IDAPA 270. The Respondent did, after that time period, submit correspondence from a third party which disputes in part certain allegations made in materials previously submitted by the Department in support of its motion.

7. This matter as indicated by the initial Order to Cease and Desist concerns allegations that the Respondent violated Idaho Code Sections 30-14-301, 30-14-401 and 30-14-501 in the offer and sale of unregistered securities by an unregistered agent and in so doing committed fraud.

8. The initial Order to Cease and Desist was followed by an Administrative Complaint pursuant to IDAPA 240.

9. In the course of this action the Department requested and was granted an opportunity to undertake discovery.

10. Respondent was not in 2016 registered to sell securities in the State of Idaho. Deposition of Gregory Leo Kesten, June 7, 2021, Exhibit L to the Declaration of Counsel, Page 93 Line 17 (hereinafter Depo of GK Pg/Ln); Pg 95 Ln 7; Pg 195 Ln 21-24.

11. The Respondent had prior to this time period, been a registered broker in at least one other jurisdiction. Depo of GK Exhibits A and B

12. An Idaho investor, MM, purchased an instrument in April of 2016, this instrument was issued by Woodbridge Mortgage Investment Fund 3A, LLC and was in the form of a promissory note. Declaration of Kristen Butler (Declaration of KB) Exhibits M, N and S.

13. Respondent designates himself as a “Financial Coach” Depo of GK Pg 23 Ln 6-8; Pg 24 Ln 8-10.

14. Respondent in 2016 worked with a company known as the Annua Group, LLC. (hereinafter Annua) and introduced clients to that entity. Depo of GK Pg 202 Ln 1-9; Depo Exhibits NN, VV, WW; Declaration of KB Exhibit C Pg 2.

15. This included Idaho investor MM. Depo of GK Pg 202 Ln 10-13; Depo Exhibits NN; Declaration of KB Exhibit C Pg 1.

16. Woodbridge Mortgage Investment Fund 3A, LLC is one of several Woodbridge entities involved with various sales and offerings of instruments. The Department has a history with this and related Woodbridge entities. Woodbridge entered a Consent Order with the Department regarding transactions involving the sale of instruments. See State of Idaho, Dpt. of Finance v. Woodbridge, et al Docket No 2017-7-15, Consent Order dated 5/2/2018 (Hereinafter Woodbridge Consent Order); Declaration of KB Exhibits A and B.

17. The Woodbridge entities have gone through various administrative actions in a number of jurisdictions. Declaration of KB Exhibits A and B.

18. Woodbridge was also the subject of a proceeding instituted by the Securities and Exchange Commission.

19. Woodbridge and the related entities went through bankruptcy proceedings. Declaration of KB

Exhibit CC.

20. Ultimately during 2016, Respondent transitioned from his direct relationship with Annua to one that did not utilize Annua but instead transacted directly with Woodbridge. Declaration of KB, Exhibit C Pg. 9. This occurred subsequent to the subject transaction.

21. As part of the relationship Respondent had with both Annua and Woodbridge, instruments from Woodbridge were offered to investors. Declaration of KB; Exhibits C Pg 1-14, 21-157 and VV.

22. Woodbridge instruments were during the subject time period of 2016 and 2017, sold in numerous jurisdictions to a multitude of parties. Transactions list Respondent as an involved party. Declaration of KB Exhibit C Pg 4-14, 21-157.

23. The instruments sold by Woodbridge generated payments for the entities or individuals who acted as broker for the transaction. Declaration of KB Exhibit F, Depo of GK Exhibit AA.

24. On an unknown date a Utah entity known as Financial Independence Coaching (hereinafter FIC) was formed.

25. Respondent's wife was the named owner of FIC. Depo of GK Pg 149 Ln 13-14; Pg 166 Ln 18-21.

26. Although the precise relationship of Respondent and FIC remains unclear, Respondent denies any ownership interest in the entity, Depo of GK Pg 199 Ln 6-8.

27. Respondent had the capability to control the flow and direction of monies going to FIC as he provided direction to third parties, e.g., Woodbridge, as to how payments from them were to be made to FIC. Declaration of KB Exhibit C Pg 145.

28. As concerned investors involved with FIC, documents revealed a number of payments going to

FIC for instruments purchased by these investors. See Exhibit AA to Depo of GK.

29. Respondent refused to provide any information regarding the nature and reason that the monies were being paid to FIC. Depo of GK Pg 149 Ln 6-9.

30. Respondent did acknowledge that Woodbridge paid these monies to FIC. Depo of GK Pg 149 Ln 14.

31. Respondent is listed as “Broker” or “Financial Planner” on numerous documents generated by Woodbridge regarding the submission paperwork to Woodbridge for purchase of various instruments. Declaration of KB Exhibit C Pg 25-157.

32. A payment was made from Woodbridge to Annuia for the sale of the subject instrument to MM then in turn a payment was made from Annuia to FIC. Declaration of Counsel Exhibits AA and N.

33. Respondent did not disclose that the instrument sold to MM was unregistered, the fact Respondent was himself not licensed and that Respondent had not performed any due diligence on Woodbridge. Depo of GK Pg 94 Ln 8-25.

34. Respondent in his deposition when asked numerous questions concerning the contested matters in the case, choose to not answer the inquiries and instead pled the Fifth Amendment in his defense. Depo of GK. This included the nature and details of any transactions with the Idaho resident, MM. See Depo of GK, Pg 90, Line 16-25; Pg 91, Line 1-25; Pg 92, Line 13-25; Pg 93, Line 1-16.

CONCLUSIONS OF LAW

35. Initially, the Motion for Preliminary Order is being considered as one similar to that of a Motion for Summary Judgement under Rule 56 of the Idaho Rules of Civil Procedure. That is, a request that the Hearing Officer consider the evidence submitted and determine if that evidence

is sufficient as a matter of law, to establish the allegations that Respondent violated the subject Idaho Code provisions. While the Hearing Officer is not constrained under the IDAPA to apply the Rules of Civil Procedure (IDAPA 52) the framework of IRCP 56 is appropriate in consideration of the present Motion.

36. The determination of whether a party is entitled to summary judgment is to be based upon the pleadings, depositions and admissions on file, together with the affidavits, if any, submitted by the parties. See, *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990); *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 125 (1988); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 818 (1985); See also, *Ambrose Ex Rel. v. Buhl Joint School District No. 412*, 126 Idaho 581, 887 P.2d. 1088 (Ct. App. 1994).

37. Although the non-moving party may establish disputed facts, this alone is not sufficient and will not defeat summary judgment if the non-moving party has not established sufficient facts to make a prima facie case. A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial. *Summers v. Cambridge Joint Sch. Dist. No. 432*, 139 Idaho 953, 88 P. 3d 772 (Idaho 2004). The moving party is entitled to summary judgment as a matter of law where the non-moving party fails to make a sufficient showing on an essential element of its case on which it bears the burden of proof at trial. *Dunnick v. Elder*, 126 Idaho 308, 312, 882 P. 2d 475, 479 (1994).

38. In this matter, in the course of discovery, Respondent first in response to written discovery provided little substantive information other than general denials to interrogatories and admissions. Document requests were answered by responses which stated that no materials were kept by Respondent.

39. As noted in his deposition, Respondent asserted his Fifth Amendment rights and pled such as an answer to the vast majority of questions posed. Depo of GK. As a result, Respondent has to a number of matters alleged, elected to not present evidence in his potential defense.

40. While under the standard for summary judgment all reasonable inferences made from the record will be made in favor of the party resisting the motion, as will be discussed, Respondent's silence is insufficient to rebut certain matters established by the Department. Further, a party's Fifth Amendment rights when applied to a civil matter, does not preclude inferences still being drawn from the invocation of the right. *See e.g. Idaho Department of Health and Welfare v. Doe*, 151 Idaho 300, 256 P. 3d 708 (2011)

41. Count One of the Department's Complaint alleges that Respondent engaged in conduct that violated Idaho Code Section 30-14-301 by offering and selling an unregistered security to an Idaho investor.

42. Idaho Code Section 30-14-301 provides in part that:

It is unlawful for a person to offer or sell a security in this state unless: (a) The security is a federal covered security; (b) The security, transaction or offer is exempted from registration ...; or (c) The security is registered under this chapter.

43. Count Two of the Department's Complaint alleges that Respondent engaged in conduct that violated Idaho Code Section 30-14-401 by engaging in unregistered broker activities by offering and selling an unregistered security.

44. Idaho Code Section 30-14-401 provides in part that:

It is unlawful for a person to transact business in this state as a broker... unless the person is registered under this chapter as a broker... or is exempt from registration...."

45. Count Three of the Department's Complaint alleges that Respondent engaged in conduct that violated Idaho Code § 30-14-501 by engaging in conduct which constitutes a

securities fraud by making material misrepresentations and material omissions regarding securities sold.

46. Idaho Code Section 30-14-501 provides:

It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly... to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;...

47. The Department in this matter has presented voluminous materials regarding the past activities of Respondent and transactions with Annua, the Woodbridge entities and investors. The specific complaint allegations concern an Idaho investor, referred to as MM, and a promissory note instrument from Woodbridge Mortgage Investment Fund 3A, LLC.

48. The previously entered Consent Order between the Department and Woodbridge, provides additional insight into the subject course of events. This Consent Order though, contains restrictions in the acknowledgement language which indicates the matters alleged and facts recited are not directly admitted to. As a result, the hearing Officer is reluctant to use the information contained within as a basis of conclusive determinations in the present matter.

49. Other information presented does, however, give sufficient basis for such findings and conclusions. Under the applicable administrative proceeding rules IDAPA 600, a broad admissibility standard exists for consideration of materials submitted. The consideration here, is as a result, not restricted to the limits of the Idaho Rules of Evidence.

50. The Respondent while prior to 2016 had been a registered broker in at least one other jurisdiction was not then registered to sell securities in the State of Idaho.

51. As part of the underlying dispute in this matter is the question of what precise role Respondent played in the transaction concerning the instrument purchase by MM. In turn the role Respondent played

in the transaction with Annua as regards MM's purchase of the instrument is dispositive.

52. Respondent relies on an assertion that he did not perform the actual sale of the subject instrument.

53. Respondent apparently also relies on a lack of evidence to show a direct sale by him of the subject instrument to MM. This reliance is not well placed. Idaho law does not require under the Idaho Securities Act that a party be a direct seller of the instrument to be within the scope of regulation under the subject Idaho statutory provisions.

54. Initially the subject instrument qualifies as a security for purposes of Idaho Code Section 30-14-102(28); *State v. Gertsch*, 137 Idaho 387, 49 P. 3d 392 (2002). A promissory note of the type at issue is clearly within the contemplated statutory scope; see also *State Dept. of Finance v. Resource Service Co. Inc.*, 130 Idaho 877, 950 P.2d 249 (1997).

55. Next, Idaho, for purposes of defining a "Seller" of a security utilizes the "financial benefit test" as outlined in the U.S. Supreme Court decision of *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988). As adopted by the Idaho Supreme Court in *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000) the financial benefit test, defines a seller of securities as, one who is motivated by pecuniary gain. This definition is not restricted to the actual person or entity which directly transfers the security but also extends to "the person who solicits the purchase, motivated at least in part by desire to serve his own financial interests or those of the securities owner." *Id*, at 848, 993 P. 2D at 613.

56. Evidence is sufficient to satisfy the requirements of this test in this matter. The showing of a payment, made through a third party, supports this conclusion.

57. A reasonable inference can be drawn from the payment made to FIC, a Company owned

by the Respondents wife, that this payment, annotated to refer to the subject instrument being sold to the Idaho investor MM, is a form of compensation for the consummation of the sale. In sum a commission.

58. It is apparent from the evidence submitted that Respondent is relying on the veiled framework of using an entity formed by and in the name of his spouse, to channel payments for activities he contends to either have no knowledge of or instead simply denies inquiries into, using the Fifth Amendment, to somehow sufficiently mask and insulate him from legal culpability. These arguments lack credibility. Respondent is sufficiently connected to FIC for purposes of establishing a tie to the financial benefit provided to that entity.

59. The course of events during 2016 and 2017, including that of MM, illustrate numerous transactions concerning parties where the Respondent introduced investors to Annua and later Woodbridge directly, to facilitate sales of the subject instruments. Respondent's apparent reliance on the claim that these "referrals" or "introductions" are insufficient to constitute a violation of Idaho Code is inaccurate. Merely characterizing the course of events a referral or introduction is not exculpatory.

60. While respondent is not specifically named as the "broker" on the instrument with MM (Declaration of KB Exhibits M, N and S) this is not required under Idaho law. Respondent's activities concerning MM suffice to show introduction and recruitment as an investor.

61. Records show payment from Woodbridge to Annua for the commission on the sale to MM then in turn payment from Annua to FIC. The payment from Annua entails an obvious combination of commission proceeds from the transaction involving MM and another party. The annotation on the

payment supports this conclusion. Declaration of Counsel Exhibits AA and N.

62. These records are sufficient to establish that a payment went to FIC from Annua for a commission from the sale of the instrument to MM.

63. Though not dispositive for the determination of the subject violations, it is also of note that the investor, MM purchased a second instrument which illustrates a similar but more direct compensation path. Declaration of Counsel Exhibits T and AA pg 151. In that instance payment of the commission was made directly from Woodbridge rather than Annua, as Respondent had by then begun working directly with Woodbridge. KB Dec Exhibit C pg 9. Of further note is with the second instrument purchased by MM the previous veil of a third party listing as the “broker” on the transaction, has been lifted as the correspondence sent to Respondent as part of the instrument acknowledgement, identifies Respondent directly as the broker for the transaction. Depo of GK Exhibits P and R.

64. Additionally, evidence is in the record which establishes a renewal of the initial subject note. Declaration of KB Exhibit C, Pg. 91. This email from Woodbridge lists Respondent as the subject broker for this transaction with MM.

65. Respondent, unregistered in Idaho, offered to sell, engaged in broker activities and transacted in the sale of an unregistered security. This constitutes a violation of both Idaho Code Sections 30-14-301 and 30-14-401.

66. Next as to Count Three of the Department’s complaint, evidence is sufficient to establish that the Respondent committed a violation of Idaho Code Section 30-14-501(2).

67. The Idaho Courts have held that in determining a violation concerning fraud under the Idaho Securities Act, it is not required that a showing of intent on the part of the offering party be

established., *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 273, 899 P.2d 977, 983 (1995). It is sufficient that the person engage in those enumerated activities, in connection with the offer, sale, or purchase of a security, to commit securities fraud. *Id* at 273, 899 P. 2d 983. Further, reliance by the purchaser is not required to be shown. *State, Dep't of Fin. v. Tenney*, 124 Idaho 243, 249, 858 P.2d 782, 788 (Ct. App. 1993).

68. As indicated under the statute, the subject omission, must though be of a matter which is material. *Dept of Fin., Sec. Bureau v. Zarinegar*, 167 Idaho 611, 629-30, 474 P.3d 683, 701-02 (2020). As a result the Department must establish two elements: (1) the omission of a fact; and (2) such omission was material. In *Zarinegar* the court noted that "the question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor" (Cite omitted), and an omitted fact must have "actual significance in the deliberations of the reasonable (investor)"... "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' or information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445, 96 S. Ct. 2126, 2133, 48 L.Ed.2d 757, 764 (1976).

69. The Department here points to numerous matters it contends were not disclosed regarding the Woodbridge investments. This includes significant matters such as non-registration of the instruments, the fact no due diligence was undertaken by Respondent, the prior sanctioning of Woodbridge in other jurisdictions, risk assessment of the investment, and the nature of the ultimate use of the invested monies.

70. The materiality of those items is clear.

71. While Respondent in providing testimony during his deposition frequently pled the Fifth Amendment, he did openly admit that as regards his conduct with the Idaho investor MM, he did not disclose the fact the investment was unregistered, the fact Respondent was himself not licensed and that Respondent had not performed any due diligence on Woodbridge. Depo of GK Pg 94 Ln 8-25.

72. These matters are viewed as material in connection with the instrument offered.

73. Respondent failed to disclose that the securities being offered were not registered as required under the Act. Respondent's omission concerning the registration status of the securities and matters such as no due diligence being undertaken by Respondent, the prior sanctioning of Woodbridge in other jurisdictions, risk assessment of the investment, and the nature of the ultimate use of the invested monies constitute omissions of material facts in connection with the sale of a security, in violation of Idaho Code Section 30-14-501(2).

IT IS HEREBY ORDERED that the Complainant's Motion for Preliminary Order is GRANTED.

IT IS HEREBY FURTHER ORDERED:

1. That the Respondent, Gregory Leo Kesten, has engaged in conduct that violated Idaho Code section 30-14-301, by offering and selling an unregistered security to investor MM in April 2016;
2. That the Respondent has engaged in conduct that violated Idaho Code Section 30-14-401, by engaging in unregistered broker activities by offering and selling an unregistered security to investor MM in April 2016;
3. That the Respondent has engaged in conduct that violated Idaho Code section 30-14-501, by

engaging in securities fraud by making material omissions regarding a security sold to MM in April 2016;

4. That, pursuant to Idaho Code Section 30-14-604(a), Respondent be ordered to cease and desist from engaging in any further violations of the Idaho Uniform Securities Act (2004), including specifically any further violations of Sections 30-14-301, -401, and -501;

5. That as a result of the three foregoing violations, Respondent is ordered pursuant to Idaho Code section 30-14-604(d) to pay a civil penalty to the Department of Finance of \$5,000 per violation, for a total penalty of \$15,000;

6. That Respondent is further ordered to pay the actual cost of the Department's investigation and the actual cost of this administrative proceeding, pursuant to Idaho Code Section 30-14-604(e) and/or Idaho Code Section 12-117, in an amount to be demonstrated by the Department after the issuance of the preliminary order pursuant to IRAP 741.

7. As a result of this decision and order, previously submitted motions by the Department requesting sanctions concerning discovery responses are considered moot.

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Finance unless any party petitions for reconsideration before the Hearing Officer or appeals to the Director for the Department of Finance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for

reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code §67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Finance (or the designee of the Director.) Otherwise, this preliminary order will become a final order of the Department of Finance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Finance. Written briefs in support of or taking exception to the preliminary order shall be filed with the Director of the Department of Finance (or the designee of the Director). The Director may review the preliminary order on his own motion.

If the Director of the Department of Finance (or his designee) grants a petition to review the preliminary order, the Director (or his designee) will allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or his designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or his designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 23rd day of November, 2021.

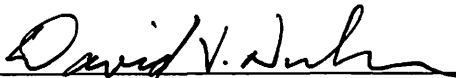
By: _____

David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of November, 2021, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

Loren Messerly State of Idaho Department of Finance P.O. Box 83720 Boise, ID 83720-0031	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E- Mail
Gregory Kesten 10444 Chanticleer Lane South Jordan, UT 84009	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> U.S. Mail Certified <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E- Mail



David V. Nielsen