STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:	)	
	)	
Joseph Giuttari, Hybrid Capital Group, LLC, The Fens Company, LLC & Peerless Hi Yield Realty Group	)	**FINDINGS, RULINGS AND ORDER COM2021-0005**
	)	
	)	
Respondents	)	
	)	

Procedural History

On March 17, 2022, the Bureau of Securities Regulation (hereinafter referred to as "the Bureau") filed a *Staff Petition for Relief* against the above Respondents alleging violations of New Hampshire RSA 421-B and requesting relief. A *Cease and Desist Order* was issued that same day commencing the adjudicative proceeding in this matter. The *Order* and *Staff Petition* were delivered to the Respondents via certified mail. On May 10, 2022, the Bureau filed a *Motion for Default* asserting the Respondents failed to request a hearing on the matter. Hearing Officer Kevin Moquin issued a Default Order on May 12, 2022. On June 29, 2022, the Respondents field a *Motion to Remove Default*, and a hearing on said Motion was held on June 29, 2022. Hearing Officer Moquin granted in part Respondent's motion and ordered the parties to confer and propose a hearing schedule to be submitted no later than July 20, 2022. Hearing Officer Moquin retired from state service and on July 1, 2022, this matter was re-assigned to Hearing Officer Barry Glennon for disposition. The parties were unable to reach agreement on deadlines and key dates for production and discovery. A scheduling conference was held on August 16, 2022. An *Order to Confer* was subsequently issued on August 23, 2022, directing the parties to commence discussions related to potential scheduling issues and reach agreement on a proposed schedule. The parties ultimately agreed to a discovery schedule dated September15, 2022 outlining dates for completion of depositions, exchange of witness list and exhibits, expert witness reports, and filing of dispositive motions.

Final witness lists were filed by the Bureau and Respondent on March 31, 2023. On April 5, 2023, the Bureau filed an *Objection to Respondent's Final Witness List* claiming that disclosure of the Respondent's expert (due January 15, 2023) was not disclosed until March 31, 2023, nor was it provided the opportunity to depose the expert. The Bureau's motion was granted on April 7, 2023.

On April 18,2023 the Bureau filed a *Request for Informal Conference Rulings* (addressed below). A pre-hearing conference was held on April 19, 2023. During this conference, the

parties stipulated to the following: (1) thirteen records kept in the normal course of business, and thirty-two TD bank records kept in the regular course of business reflected in the Bureau's April 18, 2023 filing. (2) admission of the Bureau's deposition of the Respondent and answered interrogatories (3) admission of the Bureau's affidavit of Linda Elkins (BSR Ex.3) relative to the Bureau's system of recordkeeping for filing and grant of securities exemption requests and (4) the Bureau's intended use of demonstrative exhibits of banking records during the administrative hearing. The final hearing on the merits was set for April 26, 2023. The Bureau's request was approved.

Synopsis of Case

In its *Staff Petition for Relief*, the Bureau alleged that the Respondents unlawfully sold three unregistered and non-exempt promissory notes in the State of New Hampshire; that the three promissory notes are securities; the Respondents failed to disclose material information to Mr. Jones when they sold the notes to him, including that the notes were not registered for sale or exempt from registration in New Hampshire; that the Respondents were in financial trouble; that a significant amount of investor funds would be used to pay Mr. Giuttari' s prior debts, and a significant amount of investor funds would be withdrawn in checks made payable to Giuttari.

The Respondent argued through its *Pre-Hearing and Post Hearing Briefs* and Motion to Dismiss that pursuant to N.H. RSA 421-B:2-202 the three loans or alleged "notes" by Mr. Giuttari are not securities or should be considered exempt from registration. Further, that the N.H. Securities Act does not apply therefore the Bureau lacks jurisdiction over the "notes" at issue. In addition, the Respondent argued the U.S. Supreme Court recognizes a blanket exemption for all notes which have a maturity at the time of issuance not exceeding nine months.

Hearing

This matter was heard on April 26, 2023, at the State Archives building in Concord, New Hampshire. Representing the Bureau was Attorney Jeff Spill, Deputy Director of Enforcement, and Michael Kirwin, Staff Attorney. The Respondent was represented by Attorney Andrew J. Tine.

As a preliminary matter, Attorney Spill asked that the record reflect an affidavit submitted by the Bureau (BSR #3) from Linda Elkins be made part of the record. Attorney Tine stipulated to its entry. Attorney Spill also asked that the record reflect that the exhibits to be presented are so marked and made part of the proceedings as well as PowerPoint slides identifying certain banking records. Attorney Tine stipulated to their entry as exhibits with the exception of any demonstrative exhibits where discrepancies may exist with respect to their content. Attorney Spill also noted the Bureau received Mr. Giuttari's signed deposition and errata sheet, however the errata sheet was not part of the collection of exhibits to be introduced and requested that the errata sheet be attached to the Deposition. Attorney Tine had no objection. Attorney Spill further requested entry of Mr. Giuttari's on-the-record deposition as an exhibit. Attorney Tine objected on the basis that the transcripts contain hearsay and questions not

objected to in a typical deposition, that live testimony should be heard and considered and not the deposition. This Hearing Officer noted that hearsay evidence may be admissible in an administrative hearing and allowed its entry. The Bureau raised one other dispositive issue regarding an oversight where it did not submit as an exhibit the resume of its expert witness. Attorney Tine indicated he would not stipulate to this person being an expert witness, but not challenging his qualifications. The Bureau indicated it would cover the expert's qualifications before he provided expert testimony.

[Note: At the conclusion of the Hearing, the parties agreed any *Closing Briefs* would be submitted on or before May 15, 2023.]

Testimony of the Witnesses

Direct examination of Webster Jones by BSR Attorney Michael Kirwin

Mr. Jones is a 64 year old farmer from Conway, New Hampshire. At the outset of his testimony he stated he did not have a much in the way of investment experience. He first learned of Peerless, Hybrid Capital and The Fens Company through an advertisement appearing in the NH Union Leader in January 2021 (BSR Ex. 2). It was Mr. Jones testimony that he connected with Joseph Giuttari, and asked for more information and was told that he (Mr. Giuttari) had been in Hybrid Capital Group for quite a few years, that it was a stable company, and "went on his own" heading up Hybrid Capital Group. Although unclear about the discussions that took place at the time, Mr. Jones said he received a brochure about the Hybrid Capital Group (BSR Ex. 1) and a business card. When asked by the Bureau as to his understanding how the investment worked, Mr. Jones stated "You invest in what they call bridge loans I guess – he lent money out to these other guys, people, contractors, and they would pay him back and I'd get money from them." Mr. Jones also said he received a handwritten note from Mr. Giuttari, believing it was to "make me more comfortable on how it was going to work and that type of thing." (BSR Ex. 20.) Mr. Jones received these documents before making his first investment.

According to Mr. Jones, his first investment with Mr. Giuttari was for $200,000 and understood it was for a period of 6 months at 12% interest, that he would receive $1,000 per month, and was told it would be secured by the Sturbridge lots located in Connecticut. Mr. Jones received a promissory note and mortgage evidencing his investment (BSR # 3). When asked by the Bureau as to his understanding about the Sturbridge lots and how he would be repaid, Mr. Jones testified that he was told by Mr. Giuttari the contractors would borrow the money to build homes on the properties, that they would pay Mr. Giuttari back, and Giuttari would pay him. When asked by the Bureau if Mr. Giuttari told him the funds would be used to pay Giutarri himself, pay any of his debts, company debts, loans that Giuttari may have owed money on, if Giuttari or any of his companies were in financial trouble, that the promissory note issued was an unregistered security, or that he had any liens on the (Sturbridge) properties, he replied "no".

Mr. Jones testified the first check that he sent was for $200,000 and was told by Mr. Giuttari to make it payable to the Fens Company (BSR Ex. 4). He then received a promissory note from Mr. Giuttari in February of that year (BSR Ex. 5) and would receive a monthly interest

payment of $2,000. Mr. Jones corrected his earlier testimony having indicated the monthly interest payment would be $1,000. Mr. Jones received four $2,000 interest payments from the Fens Company (BSR Ex.7, 7a,7b, 7c).

According to Mr. Jones, Mr. Giuttari asked him if he was interested in investing more money and was told the investment would be secured by Mr. Giuttari's house. His actual testimony was as follows:

> "He kind of explained what, he said part of it would be secured by his house, which he owed roughly $185,000 to $200,000. I remember because I thanked him because I though he was honest at the time. I said I appreciate your honesty then the other part he said would be more than secured, the whole loan would be more secured by that, his house which he didn't say he owed money on it, but half whatever and then the four Sturbridge lots would be worth more than enough to cover the $400,000."

Mr. Jones testified that he sent Mr. Giuttari $200,000 and was told to make the check payable to The Fens Company (BSR Ex. 15) and received a promissory note for the second loan, the terms of which were 12.5% with monthly payments (BSR Ex. 13). Also, that Mr. Giuttari would pay him an additional amount to "make it a little more appealing to me." According to Mr. Jones, he did receive interest payments (BSR Ex's. 17, 18) and one payment included an additional amount he be believed was for having received payment possibly a week late from Mr. Giutarri (BSR Ex. 7c). When asked by the BSR whether Mr. Giuttari told him he was going to use the funds to pay off prior debts of himself, prior company debts, other loans, had any personal financial troubles or that the note was not a registered security, his answer was "no" to each question.

According to Mr. Jones, Mr. Giuttari later asked him if he was interested in investing $185,000, but it didn't appeal to him and did not want to invest anymore. However, Mr. Giuttari told him he would give him another check for $185,000 that he could cash in two weeks. Mr. Jones said he thought it was safe -- if he gave Mr. Giuttari a check for $185,000, he would receive a check that he could cash in a couple weeks (BSR Ex. 22). When asked by the Bureau if he knew what the $185,000 would be used for, Mr. Jones responded saying "He wanted to put it in toward a credit line type of deal and that way he could pay me back quickly." Mr. Jones said he received a check for $185,000 from Mr. Giuttari and was told he could cash it in two weeks (BSR Ex. 21). When asked by the Bureau if the note was secured, he replied "no." When asked by the BSR whether Mr. Giuttari told him he was going to use the funds to pay prior debts, prior company debts, prior personal debts, whether Mr. Giuttari was having any personal financial trouble, or if any of his companies were having financial trouble, he responded "no" to each. However, when asked if it (the investment) was an unregistered note, he stated "I guess I knew it wasn't" and when asked if he would have invested in this note knowing any of above, he replied "Probably to be honest with you because I had a check in my hand for $185,000, I was getting a check for $185,000 I just thought that was very illegal to give someone a check that isn't any good, so I guess I just trusted that and that was crazy and stupid but I guess that was my..." Mr. Jones wrote a check in the amount of $185,000 and was told by Mr. Giuttari to make it out to the Fens Company. (BSR Ex.22)

Mr. Jones stated that he received a check from Mr. Giuttari to pay off the loan, and could cash it May 14, but not until then because Mr. Giuttari was going to Florida as is mother died and would take care of it upon his returned (BSR Ex. 24). Mr. Jones later spoke with Mr. Giuttari

upon his return and was told "something had happened, kept making excuses, don't cash it, not yet. I just felt bad because he said his mother died, I don't know I just..." According to Mr. Jones he took the check to Norway Saving Bank (his bank) and was told they could not cash it as it was not written on a Norway account. A month later he took the check to TD Bank in North Conway. When asked if the money ever cleared, he replied "no". Mr. Jones stated all the checks he previously received from Mr. Giuttari except the check for $185,000 cleared, and the checks he gave to Mr. Giuttari payable to the Fens Company cleared his account.

Cross Examination of Webster Jones by Respondent's Counsel Attorney Andrew Tine

Counsel for Mr. Giuttari examined Mr. Jones on a variety of matters raised during direct. Initially, Mr. Jones was questioned regarding his recollection of conversations with Mr. Giuttari regarding the three loans and his understanding as to how they would be secured. Mr. Jones testified that he understood the first loan would be secured by the Sturbridge lots, the second loan secured by the Sturbridge lots and Mr. Giuttari's house and Mr. Giuttari would be giving him a mortgage on same. Counsel asked Mr. Jones if he spoke with Mr. Giuttari about whether or not the securities were registered securities. Mr. Jones indicated that he did not remember.

Counsel inquired as to Mr. Jones's experience with investing. He recalled having once invested in a company called Financial Resources Management in Meredith, that it was involved in the same type of business such as bridge loans, lending money for properties, and receiving notes and mortgages on properties. Mr. Jones stated he invested $805,000 with FRM and lost it all. He further stated he did not discuss this previous FRM investment with Mr. Giuttari.

Counsel inquired about the first promissory note for $200,000 with a term of six months. Mr. Jones stated he understood the first note was for a short term and secured by a mortgage on the Sturbridge lots. He did not know the value of the lots before, but recalls having received a mortgage. Counsel then inquired as to whether Mr. Jones consulted with an attorney regarding the first promissory note and mortgage. Mr. Jones testified that he did meet with an Attorney Michael Friedman, however claims that Attorney Friedman "just glanced over it".

Mr. Jones was then asked to review (on screen) the advertisement that he first saw regarding Peerless, Hybrid Capital, The Fens Company, and Joseph Giuttari. Mr. Jones testified that Mr. Giuttari told him he (Giuttari) "was kind of like the bank, there were four different titles, and Peerless, he controlled all four of them and he basically got the money in and gave out the money." When asked if Mr. Giuttari told him that he was associated with Peerless, Mr. Jones replied "yes". Counsel then inquired as to whether any of the documents he received were in the name of Peerless or if the checks he wrote were made payable to Peerless. Mr. Jones replied no, and acknowledged the promissory note was signed by Mr. Giuttari personally.

Counsel then inquired as to whether Mr. Jones recalled whether Mr. Giuttari discussed with him as to whether the money would be used to correct Giuttari's cash flow problems or pay off creditors. Mr. Jones replied "no". When asked if it was his understanding the funds would be loaned to contractors, Mr. Jones replied "yes sir, to build houses and that type of thing, and they would pay him back when they sold the property and the house." In a series of questions, when asked if thought he was a business partner of Mr. Giuttari, doing anything operating his business or investing with him in some business enterprise, Mr. Jones replied

"no sir" to each. However, subsequent questioning of Mr. Jones provided a slightly different answer. When asked if Mr. Jones believed the loans made him a part owner of the business, part of Mr. Giuttari's business endeavors or business enterprises, Mr. Jones replied "I guess you'd say that, because I'm supposed to be a mortgage holder on each of the properties."

Mr. Jones was then asked about the second loan for $400,000 secured by a mortgage on Mr. Giuttari's home in Cranston, Rhode Island. He understood the home was valued somewhere in the vicinity of $400,000 and he received a mortgage. When asked by counsel whether Mr. Jones believed the mortgage made him somehow involved with a business endeavor with Mr. Giuttari, he replied "No, I just figured it was collateral between his house what he had left – between $180,000 to $200,000 roughly – what it was worth besides what he owed money on." Counsel asked if giving this collateral made him a business partner, Mr. Jones replied "I don't know, I don't know how you figure it."

Counsel inquired of Mr. Jones if he understood pursuant to the note he would be paid the same amount no matter what he (Giuttari) did with the money. Jones replied "I presumed he was investing in the business." Mr. Jones acknowledged the payment he would receive had nothing to do with whether the business made money or not, or that he would receive a portion of the profits. When asked if the Peerless advertisement had anything to do with giving a $400,000 loan secured by Mr. Giuttari' s home, Mr. Jones replied "I thought it was part of the company." When asked again by counsel if Mr. Jones knew Peerless was a company that he (Giuttari) was involved in, Mr. Jones stated "Yes sir, I thought he told me he owned the company, I don't know - did three or four different things that he was head of, he basically controlled the whole company Hybrid Capital Group."

Examination of Respondent Joseph Giuttari by BSR Deputy Director Jeffrey Spill

Joseph Giuttari resides at 147 Hillcrest Drive North, Cranston, Rhode Island and has been at that location for the past thirty years.

According to Mr. Giuttari, he has been the owner of Hybrid Capital for 30 years and owner/operator of The Fens Company as he described "for 10, maybe 15 years". When asked about his status as owner/operator of Peerless High Yield Realty Fund LP, Mr. Giuttari stated he was a partner in that company that commenced operation around 2019-2020, but has since closed. However, all three entities were in operation at the time of his dealing with Mr. Webster Jones. Mr. Giuttari also testified a Jeffrey Link was also a partner in Peerless.

Mr. Giuttari was asked if he placed an advertisement in a N.H. newspaper (BSR Ex. 2). He responded in the affirmative indicating he helped write the ad. He was asked to review the second bullet point in the advertisement. The Bureau then asked if he was involved with originating lending as stated in the ad, he responded in the affirmative – that it was Peerless. Mr. Giuttari stated they were commercial brokers and were not lenders. The Bureau further inquired about the ad and its reference to Hybrid Capital. Mr. Giuttari stated that he had sent three or four ads to the NH paper and they kept editing them and sending them back for final proofs and it reached the point where the newspaper was told just "print it but it was incorrect...a division of Hybrid Capital Group technically was not a part of the ad."

When asked if he explained to Mr. Jones that his money would be involved in lending, Mr. Giuttari replied "no", but told Mr. Jones the monies would be used to buy other properties, that they were borrowers of his money that would be used to expand the business.

Mr. Giutarri was asked to review the Hybrid Capital Group brochure marked as BSR Ex. 2 and the language indicating Hybrid Capital as specializing in private financing. Mr. Giuttari acknowledged that the sent the brochure to Mr. Jones and a hand-written letter to him in January 2021 which contained the following: "the three separate companies are all owed by me and your investment funds would go directly into short term real estate secured loans in the New England area only."

Mr. Giuttari testified that he gave a note to Mr. Jones dated February 19, 2021, with an attached mortgage and security agreement against four house lots in Sturbridge, Massachusetts (BSR Ex. 3). When asked if he had any kind of deed on the lots, Mr. Giuttari stated Horizon LLC already owned the lots, that Horizon LLC was owed by a Byron Vartanian, but he was a 60% owner in Horizon. When asked about the development status of the lots at the time he gave the mortgage to Mr. Jones, Mr. Giuttari stated one lot was cleared ready for construction of one house, and the other three lots were still slightly wooded, but ready for construction, and each valued at approximately $100,000 plus or minus $10,000 to $20,000.

Mr. Giuttari was shown a copy of a document titled Mortgage and Security Agreement that was attached to the note given to Mr. Jones that also contained a page titled Worcester South District Registry of Deed Electronically Recorded Document. (BSR Ex. 3) Mr. Giutarri testified that Mr. Jones's mortgage was recorded with this registry. When asked about the reference to the letters "AGR" contained on the registry of deeds document, Mr. Giuttari stated it was an agreement between himself and Horizon "to verify that Fens was the owner of the property." He was then asked about a Mortgage Modification Agreement dated March 11, 2021 filed with the Worcester Registry of Deeds on March 25, 2021 deeding the four Sturbridge lots from Horizon LLC to The Fens Company (BSR Ex. 9) and whether he explained this agreement to Mr. Jones at the time he received Jones's $200,000 in February, 2021. Mr. Giuttari stated that he told Mr. Jones about other entities that had a mortgage against the properties, that he had ownership of the four Sturbridge lots prior to the transaction with him, and that the properties were deeded to The Fens Company on March 12, 2021.

Mr. Giuttari was asked about other lien amounts that existed on the Sturbridge lots. An exchange took place between the Bureau and Mr. Giutarri regarding his prior deposition testimony and answers to interrogatories provided to the Bureau regarding the dollar amounts of said liens against the properties. After considerable discussion as to the amounts, Mr. Giuttari indicated that he believed $120,000 was borrowed from an entity called Sachem Capital, $60,000 from an individual named Conoyer, and $100,000 from Juice Capital. It should be noted answers to Interrogatories provided to the Bureau in November 2022 regarding the lien amounts were $165,000 from Sachem Capital, $75,000 from Conoyer, and $140,000 from Juice Capital. Ultimately, Mr. Giuttari acknowledged the late November numbers were fairly accurate. When asked by the Bureau if it was fair to say when he gave a mortgage to Mr. Jones on the four Sturbridge lots that they were not fully secured, Mr. Giuttari replied "no". When asked if the note to Mr. Jones was fully secured against the Sturbridge lots with pre-existing liens of about $300,000, Mr. Giuttari replied "I would say yes." The Bureau further inquired as to what position Mr. Jones was in given the three lienholders. Mr. Giuttari stated, "Jones would be second on two lots behind Sachem and third behind Juice and

Conoyer, but second behind Sachem on the other two." When asked if he talked about the liens with Mr. Jones, Mr. Giuttari testified that he believed he talked about it, and definitely mentioned Sachem because they had a line of credit for construction. Mr. Giutarri was then shown a copy of a mortgage given to Finch Holdings LLC entered in August, 2021 by The Fens Company (BSR Ex. 11). When asked by the Bureau if the mortgage was secured against the four Sturbridge lots for $615,000, Mr. Giutarri replied "yes". When asked if there was any equity in the lots as of August 2021, he replied "no". Mr. Giuttari also testified that Finch Holdings sued him approximately six months ago, but the suit was "at a standstill". When asked as to the current status of the four Sturbridge lots, Mr. Giuttari stated that two have been foreclosed on, and the other two are in the possession of Fens.

When directed to BSR Ex. 44, Mr. Giuttari was asked about a mortgage against his personal residence in Cranston, Rhode Island. He testified that the original mortgage was for $480,000 made on March 28, 2008, and the mortgage balance was about $410,000 when he gave a mortgage against his property to Mr. Jones. Mr. Giuttari further testified that the current mortgagee is Rushmore, that Rushmore initiated a foreclosure action, having owed approximately $40,000 in back amounts with a current loan balance of $420,00. When asked what he believed was the market value of the home at the time, Mr. Giuttari stated $600,000 to $650,000. He was then shown a copy of a tax record from the City of Cranston, Rhode Island indicating an assessed property value of $453,100. (BSR Ex. 46) When asked by the Bureau in his opinion given the value in the mortgage given to Mr. Jones of $400,000 that Mr. Jones would be under-secured, Mr. Giuttari replied "correct". When asked how much Mr. Jones would have been under-secured at the time he gave the mortgage in April 2021, Mr. Giuttari stated "It was about $200,000." When further asked if he told Mr. Jones it would be under-secured, Mr. Giuttari testified "Yes, we talked about it, first mortgage was approximately $400,000, he (Jones) was going to do another $400,000, the house was worth $600,000 so he was safe, for let's say $200,000, but more risk for the other $200,000."

The Bureau asked Mr. Giuttari about the net worth of his companies at the time he was dealing with Mr. Jones. He replied that he did not know as it was a very up and down business but acknowledge that he owed Finch Lane Capital $615,000 having given them a mortgage against the four Sturbridge properties, Sachem Capital $120,000, Juice Capital $100,000 and Conoyer $60,000.

Mr. Giuttari was shown a copy of document filed in connection with a lawsuit brought by Mr. Jones in Federal District Court and his Answer Number 13 to the suit (BSR Ex. 16). When asked if he referred to the transactions with Mr. Jones as investment opportunities and investments, Mr. Giuttari stated "I just admitted sending him documents on all our companies."

The Bureau further examined Mr. Giuttari relative to bank accounts that he opened at TD Bank for himself, The Fens Company, LLC and Hybrid Capital, including monthly bank statements, deposit slips, and checks written on the accounts. Bank records were presented and displayed in the form of PowerPoint slides and are referred to herein as Demonstrative Exhibits (DE's) ranging from 1 to 76.

Mr. Giuttari acknowledged that the TD Bank account ending in 9467 belonged to The Fens Company. Referring to the February 2021 bank statement, Mr. Giuttari acknowledged the opening balance of the account that month was $5,321.39 with and ending balance of

$19,941.94, and that the first check from Mr. Jones for $200,000 for the first promissory notes was deposited into this account (DE# 2, 3, 5 & 6).

Mr. Giuttari was then shown a series of checks that he acknowledged as having signed and made payable that month to Sachem Capital for $1,490 as "an interest payment to Sachem"; checks in the amount of $1,650 and $2,300 payable to himself "for business-related items"; $600 to Glen Ferens described as "just a friend"; $4,780 to Adew LLC "a real estate management company"; $35,668 to BZP, LLP "to pay off a loan that I co-signed with a Bill McCreary, a Massachusetts builder", $3,455 to Investors Capital for reasons unknown, $5,566 payable to himself and stated "It could be working capital or converting cash into certified checks"; $7,152 to Jeff Britt..."just does real estate management work with us...;$10,000 payable to himself "for certified checks"; $992 to Gary Harvey "a contractor"; $1,426 to Northeast Asset Lending... "just a payment to a lender on a property in Maine"; $250 to Direct Express, "a courier company"; $41,1843 to Jeff Britt, "paying off a loan that I co-signed for Gerald Shaw"; $16,979 to BZP, "unsure what for"; $20,000 to MG Commercial Real Estate "for fees owned to them, property inspections, and business referrals"; and $1,492 to Sachem Capital "a monthly interest payment for the Sturbridge properties." (DE #8)

Mr. Giuttari was a shown a series of withdrawal slips from the same Fens Company, LLC account and testified that the $500 "would have been just for working capital, that's how we get money, just withdraw the money, it's our account"; $10,000 "that would be certified checks, you have to do the withdrawal from TD, and then they issue the certified check." When asked by the Bureau if it was fair to say all of Mr. Jones's $200,000 has been spent at this point, Mr. Giuttari replied "yes". (DE #13)

Mr. Giuttari acknowledged The Fens Company April 2021 checking account had a beginning balance of $3,273.84 and ending balance of $12,658.99 (DE #15) and that Mr. Jones's check for $400,000 payable to The Fens Company for the second promissory note was deposited into this account on April 12, 2021 (DE #19).

Mr. Giuttari was then shown a series of checks that he acknowledged as having signed and made payable from The Fens Company account that month to Daniel Link for $4,000, a mortgage lender "for monies owed Dan on one of our properties"; $10,100 (payable to himself) "for working capital or again certified checks to other people" and $6,000 (payable to himself) "...converting cash into either money orders or certified checks." Mr. Giuttari was then shown a series of wire transfers of funds from the account to three different parties. (DE # 23). He acknowledged a $100,000 wire transfer to Schwab for the benefit of The Hochman Living Trust, a lender. According to Mr. Giuttari, this was for repayment of monies borrowed by a John Delgado, "one of my clients as a mortgage broker." A second wire transfer of $4,000 to CIM Securities LLC described by Mr. Giuttari as "...a broker, they just basically held conferences for raising capital, getting private financing, things like that. He's just a consultant." and a third wire for $3,750 to Fire of Life Ministry, described as a lender to Hybrid.

Mr. Giuttari was shown five withdrawal slips from TD Checking Account Number 9467, one dated April 14, 2021 for $40,000, a second dated April 17, 2021 for $42,000, a third dated April 16, 2021 for $3,000, a fourth dated April 23, 2021 for $3,750, and a fifth dated April 15, 2021 for $55,000. (DE #24). When asked what the withdrawals were for, Mr. Giuttari stated they were for business payments of some sort, certified checks, or that he couldn't recall. He was then shown a summary of the running balance in The Fens Company checking account

indicating a negative balance of $-944.90 on April 9, 2021, and a balance of $398,632.20 for the same account on April 12, 2021. (DE # 16) When asked if the $398,632.20 balance was after his deposit of Mr. Jones's check, he replied in the affirmative, and when asked if it was fair to say throughout the month of April that he used up all of Mr. Jones's money, he replied "yes".

Mr. Giuttari was shown a portion of the Fens Company checking account statement for the period May 1 to May 31, 2021 indicating a beginning balance of $12,685.99, deposits of $193,620 and an ending balance of -$2,122.31 (DE # 29). When asked if he received Mr. Jones's check for $185,000 that month and whether the balance amounts appeared accurate, he replied yes. Mr. Guittari was then asked if he completed a deposit slip dated May 23, 2021 for Mr. Jones's $185,000 check, he replied "yes" (DE #33). When asked if it was fair to say all of Mr. Jones's money was used up by the end of the month, he replied "yes".

The Bureau asked and Mr. Giuttari confirmed The Fens Company checking account had a January, 2021 beginning balance of $40,532.98 and ending balance of $5,321.39 (DE #47). He also confirmed the June, 2021 opening balance was negative -$2,122.31 and an ending balance of $0.00 (DE #52). When asked if he told Mr. Jones not to cash the $185,000 check given to him because the account had been closed, Mr. Giuttari testified that he was told by TD Bank that his checking accounts were hacked, that the two accounts were closed, and he then opened an identical Fens Company on June 7,2021 account. (DE #54) Mr. Giuttari also acknowledged the account he opened in June, 2021 had a beginning balance of zero and ending balance of $39,670.91. (DE #55)

Referring back to The Fens Company checking account No.9467 May 2021 statement, and check written to Mr. Jones for $185,000 on May 14, 2021, Mr. Giuttari was asked if he had enough money in the account (to cover the check). He replied "the check was written on May 1, it might have been dated...". The Bureau pointed out the check was dated May 14. Mr. Giuttari replied "So that was the targeted payoff date I believe." The Bureau then asked when he delivered the check to Mr. Jones without funds in the account, Mr. Giuttari stated "we had an agreed upon extension already at that point." When asked if he requested Mr. Jones to hold the check, Mr. Giuttari replied "yes". When asked why, Mr. Giuttari stated "I was in Florida for most of May, my mother had passed away and May was just it, I was in Florida, I couldn't attend to business so I just talked to Web (Mr. Jones) and agreed to hold the check because we're working on the credit line anyway, that's going to be the source of re-payment which was targeted for May."

The Bureau then presented a series of demonstrative exhibits pertaining to TD checking account # 5550 for Hybrid Capital Group LLC opened May 17, 2019. Mr. Giuttari was asked if Account No.5550 had a January 2021 beginning balance of $349.61 and ending balance of $267.42, a February 2021 beginning balance of $267.42 and ending balance of $7.42, a March 2021 beginning balance of $7.42 and ending balance of $56.82, a April, 2021 beginning balance of $56.82 and ending balance of -$21.38, a May, 2021 opening balance of -$21.38 and ending balance of -$149.56. (DE # 59,60,61,62,63 & 64) He answered in the affirmative to each indicating he believes the account is now closed. When questioned, Mr. Giuttari acknowledged that he opened a new account for Hybrid Capital, account No.6345 in June 2021 with a beginning balance of $0.00 and ending balance of $165.46 (DE #65).

The Bureau inquired and Mr. Giuttari' acknowledged that he opened a personal account at TD Bank account No.1458 in November 2020. Mr. Giuttari further acknowledged the ending balances in this account for January 2021 was $69; February 2021 $37.00; March-April 2021 $5.00; May-June 2021 $10.00; and June-July 2021 -$5.00.

Examination of Joseph Giuttari by his Counsel Attorney Andrew Tine

Counsel for Mr. Giuttari first inquired about the third promissory note dated May 2, 2021 for $185,000 and asked Mr. Giuttari if his agreement with Mr. Jones was to give him a check dated May 14, 2021 at the time the promissory note was signed. He answered in the affirmative. Directing Mr. Giuttari to the Bureau's DE #8, a check to Sachem Capital, he was asked if it was his testimony that the check was an interest payment for the mortgage paid to them, and in furtherance of an ownership interest through Horizon Capital in that property. He replied "yes". When asked if the paperwork to transfer the (Sturbridge) property to the Fens Company took a little longer to effectuate until April, Mr. Giuttari stated that he thought it was March. Counsel also asked if prior to February 12, 2021 when he made the $1,440 payment to Sachem if he had any discussions with anyone about taking full ownership interest in the Sturbridge properties through Fens, Mr. Giuttari replied "yes".

Mr. Giuttari was shown Respondent's Ex. #1 and asked to describe its contents. Mr. Giuttari stated it was an equity participation agreement between the Fens Company and Horizon Properties dated April 5, 2021 signed and notarized by him and Byron Vartanian, who he described as a construction person involved in some of his projects. When asked at what point did he come to an agreement with Mr. Vartanian memorializing the agreement, Mr. Giuttari stated "It was sometime in February because that's when Sachem was doing a mortgage modification, which took them an extra two weeks lingering into the beginning of March. When asked if that lead him into making payments directly to Sachem, Mr. Giuttari replied "Correct, I think I was even making payments to them before that, I'm sure I was."

Counsel then inquired about Mr. Giuttari's personal residence, its value, statements he made during his deposition relative to the Bureau's Ex. 21. When asked whether market values are typically higher than assessed values by towns, in his experience, Mr. Giuttari replied "yes". When asked how the real estate market was during the timeframe in 2021, Mr. Giuttari replied "fairly strong I think". When further asked if it was his recollection that housing prices were high during Covid, Mr. Giuttari replied "yes". Counsel asked with the $632,000 value on his house with the first mortgage in place if he would have had enough equity or security for a $200,000 note to Mr. Webster. He replied "yes".

Mr. Giuttari was asked a series of questions and provided testimony relative to the Peerless Hi Yield Realty Fund, the extent of its activity, and the advertisement marked at BSR Ex. 2. Mr. Giuttari was asked whether Peerless made any loans or received any money from anyone after the accident; whether he offered those loans to anyone else in New Hampshire in 2021; whether he made or took loans from more than 25 different people in any 12 month period during 2020-2021; whether Hybrid has made any general solicitations or advertisements to sell or offer securities to anyone in the State of New Hampshire; whether he considers the Peerless Hi Yield Realty Fund an advertisement by Hybrid, whether The Fens Company has made any general solicitations or advertisements or general solicitations; or whether he personally made any such advertisements or solicitations, Mr. Giuttari replied "no" to each question.

Counsel asked Mr. Giuttari if Mr. Webster pursued a loan with Peerless. He replied "No…he didn't want the long term nature of the loan, with Peerless it was a one or two year lock-in period…so we immediately agreed that we weren't going to do anything with Peerless." Counsel then asked whether there were multiple individuals who made loans on similar terms with Mr. Webster, to him, or his business during this timeframe in 2021, Mr. Giuttari replied "no". When asked if the loans between him and Mr. Webster was a unique situation, he replied "yes". Counsel further asked if there were any other individuals where he received loans from that had the same situation and risks associated with the loans that Mr. Webster was subject to, his response was "no".

Mr. Giuttari was then asked the following questions: Did you take his money and pool it with any other investor money to make investments somewhere; did you ever tell him he was part of an investment pool; did you ever tell him he was part of a fund; or did you ever tell him he was part of a business enterprise or business venture with you. Mr. Giuttari replied "no" to each question.

Counsel asked Mr. Giuttari what the initial $200,00 loan funds were used for. Mr. Giuttari replied, "Primarily for debt consolidation, paying off some other lenders who I know will come back and re-loan the money to us on different properties, so a lot of it was re-positioning things basically with the company in order to get a new, bigger credit line." Asked if he made it clear to Mr. Jones that his $400,000 was being secured by a mortgage on his personal residence, Mr. Giuttari replied "yes". Asked if at that point in time the loan was made if there was sufficient equity to cover the $400,000, Mr. Giuttari replied "To cover about $200 of it. The first mortgage balance was about $420, so we knew the property was at $620, so a buffer of about $200,000." Referring to the $185,000 loan, Counsel asked what he told Mr. Webster about the loan. Mr. Giuttari responded by saying "Again, it was to pay certain people who were going to, debt consolidation, pay certain lenders who were going to re-loan us money for the credit line. It was getting specific at the time." When asked if he made it known to Mr. Webster as early as the $400,000 loan that he was pursing a credit line, Mr. Giuttari replied "I may have mentioned it, it was always part of the plan, I may have mentioned it but I don't recall."

Re-Direct of Mr. Giuttari by Deputy Director Spill

Referring to Respondent's Ex. #1 Equity Participation Agreement, Attorney Spill directed Mr. Giuttari's attention to language stating that Horizon Properties now agrees to transfer 100% of all ownership interest in this project to The Fens Company, LLC, and the document as being dated April 5, 2021. Mr. Giuttari replied "yes". Attorney Spill then posed the following: "So that would have been after the first note to Web (Mr. Jones) in February 2021 and the first mortgage for the Sturbridge land in February 2021 to Webster, correct? Mr. Giuttari replied "Correct, but we had already signed the Sachem mortgage modification a month before even that document. Asked if that would have been March of 2021, Mr. Giuttari replied "yes".

Attorney Spill asked Mr. Giuttari if the name of Hybrid Capital Group appeared in the advertisement (BSR Ex. 2) and whether he had a conversation with Web Jones following placement of the ad. He replied "yes". When asked if knew Web Jones prior to placement of the ad, Mr. Giuttari replied "no". When asked if he became acquainted with Web Jones as a result of the ad, he replied "sure".

Direct Examination of Attorney Philip Feigin by BSR Deputy Director Jeff Spill

The Bureau called Attorney Philip A. Feigin to testify as its expert witness in this matter. A curriculum vitae was provided detailing his experience as an expert witness, extensive securities practice, a description of Federal Court and State Court matters where he offered expert opinions, testimony declarations, affidavits and other statements of record for the period January 2003 to present, and a listing of his publications for the period January 2000 to present. Based on the above as well as testimony provided regarding his experience in the area of securities and securities regulation, Mr. Feigin is qualified as an expert in his field and allowed to testify as an expert witness in this matter.

Mr. Feigin testified the revised 2002 N.H. Uniform Securities Act adopted in 2016 contained two unique features, noting that most state securities laws have a definition of securities...described as a laundry list of what constitutes a security without further explanation. However, N.H adopted a description of some of the features of an investment contract, noting it adopted in statutory form what is generally referred to as the "Howey Test", a test espoused by the U.S. Supreme Court in the case of SEC v. W.J. Howey Co.,328 U.S. 293 (1946) regarding federal securities law based on state securities cases that had come before it. According to Mr. Feigin, the court created a four part formular where there is an investment of money, in a common enterprise, with the expectation of profit, based solely on the efforts of the promoter or third party. Based on his review, Mr. Feigin stated N.H. had no State Supreme Court decision on what constitutes an investment contract, so N.H. almost verbatim adopted the Howey test from the U.S. Supreme Court case.

Mr. Feigin stated the term common enterprise from the Howey Test has been the subject of appellate jurisprudence as to what the term means and described the courts historical application of horizontal and vertical commonality tests and noted the common enterprise element of the Howey test, which is incorporated in the N.H. Securities Act accommodates both the horizontal and vertical commonality.

Mr. Feigin also commented about another issue that payment of interest (to an investor) would suffice for the profits requirement described in the Howey test. Mr. Feigin testified "The matter was litigated in the U.S. Supreme Court case of SEC v. Edwards, 540 U.S. 389 (2004) having ruled to look at profits narrowly to be an accounting term was inappropriate – that the Howey test was to be construed broadly – that the statute was to protect investors and paying interest would suffice for the profits element. That concept was incorporated into the N.H. Securities Act as well."

When asked by the Bureau whether there was a part of the N.H. Uniform Securities Act addressing institutional investors, Mr. Feigin testified in part that the 2002 Uniform Securities Act adopted by N.H. was more specific about the term financial institution or institutional investor "and N.H. pretty much adopted verbatim the much more in-depth definition of what constitutes an institutional investor – and they are basically businesses – in the business of engaging in financial and commercial dealings – to be treated separately from individual investors."

The Bureau then inquired of Mr. Feigin as to the scope of his work and analysis. Mr. Feigin indicated that he was asked if the three notes constitute securities under N.H. law. Also, whether the *Statement of Policy* by former Securities Director Professor Joseph Long and the

Supreme Court case of Reeves V. Ernst & Young 494 U.S. 56 (1990) that Long considered but rejected in favor of using the Howey test to determine if a note was an investment contract. When asked to discuss the holding in Reeves, Mr. Feigin offered the following:

> Reeves was a private civil case brought by plaintiffs under rule 10-B-5 under the Securities Exchange Act of 1934 – trying to determine what notes would be securities under federal law.
> Two circuits had derived what they call a family resemblance test - described a note, even though notes were presumed to be securities, but also knew especially from Wall Street practice and the way major corporations operate and banks, their were a lot of things called notes, but were they meant to be traded as securities under federal securities law. The family resemblance test said basically that notes that consumers sign in order to get money from a financial institution are not the sort of notes the federal securities laws wanted to regulate. That's not what the securities laws meant. The two circuits also started listing those circumstances – the kind of notes that were not securities. But the Supreme Court realized that suppose someone comes up with a new kind of note that isn't on the list, do they have to go to the appellate courts or Supreme Court again if that's the kind of note that meets the family resemblance test? They needed to come up with some additional markers to describe whether a note should be a security – those were motivation, the means of distribution, whether there was public trading, and whether somebody else regulated them. The securities laws are fairly replete with hand-offs if somebody else has the ball...by that I mean a certificate of deposit could be construed as a note or investment contract that a bank issues to depositors, but those are clearly regulated by federal and state banking authorities. So they said we're not going to do it if you're doing it.
>
> Courts were trying to say when the consumer writes the check and the institution gets the money, those have always been and continue to be securities because those are the type of notes federal and state securities were meant to protect and oversee. The notes transacted between major institutions, those are probably not meant to be securities at all, or if so, are subject to exemption from the registration provisions, and only dealt with at the anti-fraud level.
>
> Reeves tried to address things that applied across the board. It's also important to note that it was brought under Rule 10-B-5. There is a variation between the 1934 Act definition of a security and the 33 Act definition of a security. The 34 Act deals primarily with secondary trading in securities, not capital formation. In an effort to leave the commercial notes they did not want to regulate, there was a carve-out in the definition under the 34 Act what is generally referred to as short term paper. If it matured within less than 9 months for the 34 Act purposes, it was not going to be considered a security. But Reeves was seen as applying to, across the board, also applying to the capital formation side of things, and if you look in the 33 Act, there is no such short term paper carve-out from the definition of note. It is still exempt from registration as a security. For state securities law, there has never been a carve-out from the definition of note. There has been a commercial paper exemption from registration in the Uniform Act. I don't believe it ever found its way into the NH Act, for whatever reason. Maybe it has. There was certainly no carve out from the term note for short-term paper, so notes borrowing from the Reeves case are presumed to be

securities...that's not much of a reach. I think they're meant to be securities because its right out of the shoot, I believe it goes back to 1911- the idea that an interest bearing investment, where the writer of the note has to make the payment regardless of how well they are doing has always been a lot more attractive to citizen investors than has stock– and interest paying investments have always been more attractive to a lot of investors. The problem is if the enterprise is not generating any revenue, the "interest payment" that you're getting is merely getting your own money back or getting somebody else's money back. The venture is not producing a profit, so that's why one of the elements why notes are securities – you have to look at them carefully if that interest paying feature is really viable.

Mr. Feigin was then asked given his examination of the notes, the context in which they were used, and his understanding of federal and state securities laws, if in his opinion the three notes (given to Mr. Jones) were securities. Mr. Feigen replied "In my opinion, at all levels, those notes would be construed as securities. I believe in N.H. they should be, I believe they would be viewed as securities in every state in the country and I believe The Securities Exchange Commission, or under federal securities law if they were examined under federal securities law, they would also be construed as notes in the securities definition."

When asked if the notes were securities in accordance with the holding in Reeves v. Ernst & Young, he responded in part "Absolutely, as I say, they do not qualify for any of the family resemblances tests that were established." When asked in his opinion if there was a public solicitation in this case, Mr. Feigen replied "I believe so, yes." When asked in what way, he replied, "Public solicitation is a factor in whether or not under federal law and state law a security that is being sold is exempt from the registration requirements" and further stated "the way Mr. Jones was finally located was based on a public solicitation by Mr. Giuttari...the test under public solicitation is whether the promoter, whether the seller of the investments has a pre-existing or personal relationship with the investor." Mr. Feigin indicated it is a matter of the investor knowing the promoter so the investor is in a position to understand the promoters financial background, history, and track record so the investor can trust what is presented to them. Mr. Feigin testified "I do not think that was present in this case."

The Bureau then asked if he was aware of any carve-out in the federal statutes that would not treat these notes as securities. Mr. Feigin stated, "No. I think these are the kind of notes Reeves talks about...they were clearly securities, and I think that position would be held under every state law." When asked if the notes would be treated as securities under the N.H. Securities Act, he replied "I believe so." He described the position articulated in a writing by former N.H. Securities Director Long and his interpretation, relying on at the time the Uniform Securities Act of 1956 and 2002 that notes secured by a mortgage chattel or real estate mortgages were not securities. However, Mr. Feigin indicated for the term "secured" to make any sense, it must mean fully secured. He testified in part "...I think the common parlance is that the note has to be offered and sold as a unit with the mortgage, which means that, in my view there are no senior - there aren't any other creditors involved, it not offered and sold as a unit if there are other creditors involved, so you're really talking about a note that is fully secured by a first position in real estate. So those kind of notes might be securities but they're exempt from the registration requirements." Commenting further on the Long *Interpretive Order*, Mr. Feigin stated "Professor Long took the approach, the test for whether notes were going to be securities in N.H. was going to be the Howey test. Investment of money in a common enterprise, with the expectation of a profit based on the efforts of the promoter for a

third party…if N.H wants to adopt the Reeves test now, they're securities. The three notes here were securities under Reeves. If they want to go along with the Joe Long approach that the test for notes in N.H. is going to be the investment contract test, they're investment contracts too."

Mr. Feigin testified that he did not believe there was adequate disclosure and information provided to Mr. Jones, that a securities disclosure statement is usually a book 50 to 60 pages long describing all the risks and how the money would be used. Mr. Feigin stated "you have to fully disclose what the risks are, and then the investor has a fair shot a determining how things are going to be."

Cross Examination of Attorney Philip Feigin by Respondent's Counsel Andrew Tine

Respondent's counsel first inquired of Mr. Feigin whether (determination of) the notes is a fact driven analysis. Mr. Feigin replied "No, it's facts and law." Counsel then asked about his statement during direct examination that notes secured by real estate in N.H. in general would be exempt. Mr. Feigin testified "No, there is a difference between exclusion from the definition which means not securities at all, and they are securities but exempt from the securities provision. I believe it was Professor Long's conclusion that notes secured by real estate were not securities at all as opposed to exempt from registration, so it was a stronger or more important distinction than just being exempt." When asked if his conclusion was based on caselaw in N.H., Mr. Feigin replied "no but there is caselaw elsewhere that talks about insufficient security. For instance, if you secure a million dollar note with a pencil, it's obviously not secured. If you secure a million dollar note with a thousand dollar lot, it's not fully secured. So, the caselaw conclusion was that if it's secured at all, its unsecured, the part of the note that is above and beyond the collateral was an unsecured note."

Mr. Feigin was asked if he examined any federal law in N.H. applying the Howe Test, he replied "no, but if I had a N.H. tax question, I would not look in the Internal Revenue Code – it's a separate law."

Counsel asked Mr. Feigin if he agreed the advertisement in this case speaks about Peerless. He replied "I think it had Hybrid in it but its title Peerless is a division of Hybrid Capital. That Peerless is a division of Hybrid, I think that's even worse because that makes it a part of a bigger company that is Hybrid. Mr. Feigin was then asked what is wrong with this advertisement if it says a division of Hybrid Capital? He replied in part "Mr. Giuttari was looking for investors by placing the ad because he was using these different trade names and names of different businesses – that doesn't matter to securities law – he was engaged in general solicitation…"

Referring to the third note for $185,000, counsel asked if it was obvious to him that this was a short term note to cover cash flow issues, Mr. Feigin replied "On one hand I'd say so what, but I don't think it makes any difference. It's an investment of money in a common enterprise with the expectation of profit based on Mr. Giuttari's efforts. When asked if it is an investment contract and also a note, Mr. Feigin replied "yes. When further asked even if it's a short term note used for cash flow issues, Mr. Feigin replied "term is irrelevant." And when asked if the purpose and use of the money is irrelevant also, Mr. Feigin replied "As long as it used in a common enterprise, yes."

Findings of Fact

1. Joseph Giuttari is a resident of Cranston, Rhode Island. He is the principal owner of Hybrid Capital Group, The Fens Company, LLC and former part owner of Peerless High Yield Realty Group, LP.
2. Joseph Giuttari was responsible for the placement of an advertisement in a New Hampshire newspaper, advertising investments referencing "Peerless Hi-Yield Realty fund, a division of Hybrid Capital Group."
3. The aforementioned advertisement also contained language indicating "Peerless Hi-Yield Realty Fund, LP capital wanted – earn 12% annualized returns! Short term mortgages (3-6 month loans, fully secured by real estate) Generate extremely high returns (higher interest rates and higher fees) in all market conditions continuously and safely."
4. The first two notes issued to Mr. Jones were not fully secured. The third note was wholly unsecured.
5. The three notes were securities as defined by RSA 421-B The N.H. Uniform Securities Act.
6. Joseph Giuttari failed to register the securities with the Bureau of Securities Regulation as required under RSA 421-B.
7. Mr. Webster Jones, a New Hampshire resident, responded to the aforementioned advertisement in early 2021 and spoke to Mr. Giuttari via telephone regarding the investment offering. Mr. Giuttari offered to sell to Mr. Jones short-term promissory notes with an interest rate of 12%.
8. The first promissory note made from Hybrid Capital, The Fens Company, LLC and Joseph Giuttari was for $200,000 dated February 19, 2021, at an interest rate of 12% per annum with a maturity date of August 19, 2021.
9. Mr. Jones wrote a check for $200,000 payable to and was deposited into The Fens Company checking account at TD Bank by Mr. Giuttari.
10. Mr. Giuttari represented to Mr. Jones that the note was secured by four building lots located in Sturbridge, Massachusetts, and confirmed in a writing to Mr. Jones that the loan proceeds would be invested into short term mortgages for a maximum six month term only. In actually, the note was under-secured, with several other creditors holding superior positions to the building lots ahead of Mr. Jones.
11. At the time Mr. Jones's first check for $200,000 was deposited, the opening balance of The Fens Company check account for February 2021 was $5,321.19. The Fens Company bank statement reflected thirteen checks written by Mr. Giuttari to a variety of business entities and people known to him or associated with The Fens Company. Four other checks from this same account were made payable to and signed by Mr. Giuttari himself. In addition, withdrawals for $500 and $10,000 were made by Mr. Giuttari from The Fens Company account that month. The ending balance of this account for February 2021 was $19,941.94. Through his own testimony at hearing, Mr. Giuttari acknowledged that all of Mr. Jones's $200,000 had been spent at that point.
12. On April 12, 2021, Joseph Giuttari, Hybrid Capital Group, The Fens Company and JG Family Trust made a second note to Mr. Jones in the amount of $400,000 at a rate of 12.5% per annum. Mr. Jones sent a check to Mr. Giuttari dated April 9, 2021, for $400,000 made payable to and deposited into The Fens Company checking account

on or around April 13, 2021. Mr. Giuttari represented to Mr. Jones that the note was secured by a mortgage on his personal residence when in fact that note was under-secured by at least $230,000, and subject to a mortgage of $480,000 to JP morgan Chas Bank, NA, later assigned to Rushmore Loan Management Services, LLC.

13. At the time Mr. Jones's check for $400,000 was deposited, the beginning balance of The Fens Company checking account for April 2021 was $3,373.84. The bank statement reflects two checks made payable to one party for $4,000, two checks payable to himself totaling $16,100, three wire transfers by Mr. Giuttari to different parties totaling $107,750, and five withdrawals made by Mr. Giuttari for $143,750 claiming they were for business payments or converting to certified checks. The ending balance of this account for April 2021 was $12,658.99. Through his own testimony at hearing, Mr. Giuttari acknowledged that through the month of April he used up all of Mr. Jones's money.
14. On May 3, 2021, Joseph Giuttari, Hybrid Capital Group, and The Fens Company, LLC issued a third note to Mr. Jones in the amount of $185,000 at a rate of 12.75% interest per annum. An origination fee of $11,100 was paid to Mr. Jones. This note was due and payable May 14, 2021. The note was not secured by real estate or any other type of collateral.
15. At the time Mr. Jones's check for was deposited by Mr. Giuttari into The Fens Company, LLC checking account on May 23, 2021, the beginning balance of the account for May 2021 was $12,685.99 and an ending balance of $2,122.31. Following a series of conversations by and between Mr. Jones and Mr. Giuttari, Mr. Giuttari wrote a check to Mr. Jones for $185,000 dated May 14, 2021. When Mr. Jones later attempted to cash the check at a local TD Bank branch, he was advised the account had insufficient funds and the check was not honored.
16. Mr. Giuttari failed to disclose to Mr. Jones that the securities being offered were not properly registered for sale with the Bureau.
17. Mr. Giuttari failed to disclose to Mr. Jones that all of his money would be used by Mr. Giuttari and his business to pay off his prior debts, or for cash withdrawals.

Rulings of Law

The presiding officer makes the following conclusions of law relative to the Bureau's factual allegations:

1. Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi Yield Realty Group, LP are "persons" within the meaning of N.H. RSA 421-B:102 (39).
2. The notes between Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi Yield Realty Group, LP and Webster Jones are securities as defined by RSA 421-B:1-102(53) and RSA 421-B:1-102(29)(A).
3. Pursuant to RSA 421-B:3-301(a), it is unlawful for any person to offer or sell any security in this state unless it is registered under 421-B, the security or transaction is exempt, or it is a federal covered security. Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi-Yield Realty Fund, LP violated this provision.

4. Pursuant to RSA 421-B:501(a), it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: (1) To employ any device, scheme or artifice to defraud; (2) To make any untrue statement of a 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 are made, not misleading; or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. Joseph Giuttari, Hybrid Capital Group, and The Fens Company, LLC violated the N.H. Uniform Securities Act Fraud and Liabilities provision is section when it failed to disclose to Mr. Jones that the three notes were not properly registered for sale in New Hampshire, that Mr. Jones's money would be used to pay prior debts and be withdrawn in checks made payable to Mr. Giuttari.
5. Pursuant to RSA 421-B:6-604(e), the secretary of state can order the payment of restitution to Webster Jones. Joseph Giuttari, Hybrid Capital Group, the Fens Company, LLC and Peerless Hi-Yield Realty Fund, LP are subject to this provision and shall pay to Mr. Jones restitution in the amount of $737,466.00, plus interest at the legal rate.
6. Pursuant to RSA 421-B:6-604(a), if the secretary of state determines that a person has, is, or is about to materially aid in an act, practice, or course of business constituting a violation of this chapter, the secretary of state may issue an order directing the person to cease and desist from engaging in an act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter. Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi-Yield Realty Fund, LP are subject to this section shall cease and desist from violating RSA 421-B:3-301 and RSA 421-B:5-501.
7. Pursuant to RSA 421-B:6-604(d), the secretary of state may impose a civil penalty up to a maximum of $2,500 for a single violation. In addition, every such person who is subject to such civil penalty, upon hearing, and in addition to any penalty provided by law, be subject to such suspension, revocation, or denial of any registration or license, or be barred from registration or licensure. Joseph Giuttari, Hybrid Capital Group, and The Fens Company, LLC are subject to this provision and are jointly and severally fined $22,500 for nine violation of RSA 421-B:5-501(a) and Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi-Yield Realty Fund, L.P. shall jointly and severally pay a fine of $7,500 for violations of RSA 421-B:3-310 and are barred from conducting further securities business in New Hampshire.
8. Pursuant to RSA 421-B:6-604(g), in any investigation to determine whether any person has violated any rule or order under this title, the secretary of state shall be entitled to recover the costs of the investigation. Joseph Giuttari, Hybrid Capital Group, The Fens Company, LLC and Peerless Hi-Yield Realty Fund, L.P. shall pay the Bureau's costs of $25,000.

Discussion

The Bureau of Securities has presented evidence that Mr. Webster Jones, a hay farmer from Conway, N.H. was solicited by Mr. Joseph Giuttari to invest in Giuttari's several companies. Mr. Jones was sold three, unregistered and nonexempt promissory notes totaling $785,000. It is the position of this hearing officer that the testimony of Mr. Webster Jones was honest, credible and an accurate account of what he believed transpired when dealing with Mr. Joseph Giuttari.

It is unnecessary to restate here all of the facts and testimony of this case. However, it is clear Mr. Jones did not fully understand the nature of Mr. Giuttari's business nor the relationship between Mr. Giuttari's various business entities. Mr. Jones was unaware the securities sold to him were not registered in the State of New Hampshire. He relied on representations made by Mr. Giuttari that his investments were secured by real estate when in fact they were under-secured exposing him to significant investment risk. Perhaps more importantly, the advertisement for Peerless Hi Yield Realty Group, LP that Mr. Jones responded to clearly stated "fully secured". Mr. Guittari failed to disclose to Mr. Jones material information regarding the investments, that he personally and his businesses were experiencing financial troubles, and that Mr. Jones's money would be used to pay Mr. Giuttari's prior debts. Of particular concern were the multiple checks Mr. Giuttari paid to himself, claiming they were certified checks for a number of people and companies. However, at no point did Mr. Giuttari present at hearing any documents or business records to show those withdrawn funds were used to pay the very people and businesses mentioned during this testimony.

Attorney Philip Feigin's testimony and expert report accurately described the development of federal securities caselaw, particularly with respect to application of the Reves and Howey tests as it pertained to this matter. As Attorney Feigin stated in his review of Joseph Long's *Statement of Policy When are Notes A Security under the N.H. Securities Act*, "The proper test for the presence of a N.H. "note" security is set forth in SEC v. W.J. Howey Co. defining the term investment contract. To determine if the two less secured notes and the under secured note issued by the Respondents are securities, they must be analyzed under Howey." RSA 421-B:1-102(29) as adopted by the N.H. legislature clearly defines investment contract and nearly mirrors the dicta set forth in SEC v. Howey.

The notes issued and sold by Mr. Giuttari to Mr. Jones are clearly notes as set forth in the N.H. Securities Act and are securities. I disagree with the Respondent's argument that the notes are exempt from registration and that the loans should not be deemed securities. Therefore, Respondent's initial and post-hearing *Motion to Dismiss* is denied.

Referring to RSA 421-B:6-613(v), the Bureau must prove the allegations contained in its *Petition* by a preponderance of the evidence. They have met that burden in this matter.

Order

WHEREAS, finding it necessary and appropriate and in the public interest and for the protection of investors and consistent with the intent and purpose of the New Hampshire Securities Act, RSA 421-B, it is hereby **ORDERED**, that:

1. Pursuant to RSA 421-B:23, the Respondents shall cease and desist from violations under the New Hampshire Securities Act.
2. The Respondents shall pay the Bureau's costs in the amount of $25,000.
3. The Respondents shall jointly and severally pay administrative fines and penalties in the amount of $22,500.
4. The Respondents are permanently barred from licensure or registration pursuant to RSA 421-B:4-412(c) and RSA 421-B:4-412(d)(2).
5. The Respondent shall pay restitution to Webster Jones in the amount of $737,466, plus interest at the legal rate.

SIGNED,
David M. Scanlan
Secretary of State
By His Designee:

Date: June 30, 2023

Barry J. Glennon
Presiding Officer
N.H. Bureau of Securities Regulation