

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

IN THE MATTER OF:)
)
Used Apple Store and) FINDINGS, RULINGS AND ORDER
Bill Williams) I-2015000013
)
Respondents)
)

Procedural History

On April 23, 2015, the Bureau of Securities Regulation (hereinafter referred to as “the Bureau”) filed a Staff Petition for Relief against the above-captioned Respondents alleging violations of New Hampshire RSA 421-B¹ and requesting relief. An Order to Cease and Desist was issued on April 23, 2015, commencing the adjudicative proceeding in this matter. A hearing regarding whether to make permanent the Order to Cease and Desist was opened on June 5, 2015 and, pursuant to the presiding officer’s authority under N.H. RSA 421-B:26-a, XIV, adjourned without objection to a future date. The previously adjourned hearing was reopened on June 25, 2015, at which time the parties agreed to continue the hearing to July 7, 2015. The parties also agreed that the Order to Cease and Desist should remain in effect until such time as the hearing reopened. A hearing was held on July 7, 2015, at which time the Respondents failed to appear, and an Order Making Permanent the Order to Cease and Desist was issued. This Order made permanent the Order to Cease and Desist of April 23, 2015, until such time as a hearing could be held on the merits in this matter and a final order issued after hearing. A hearing on the merits was scheduled for September 17, 2015, but orders to continue hearings were issued on August 7, 2015 and September 3, 2015. A final hearing on the merits in the above-captioned matter was held on August 29, 2016.

Synopsis

This matter was heard on August 29, 2016 at the N.H. Department of State, Bureau of Securities Regulation in the State House Annex in Concord, New Hampshire. Representing the Bureau was Eric Forcier, Staff Attorney. The Respondents were represented pro se by Respondent Bill Williams acting on his own behalf and on behalf of The Used Apple Store.

¹ Please note – references to N.H. RSA 421-B in this document are to the statute as in effect at the time that the Respondent’s violations occurred.

In this case, the Bureau has alleged that the Respondents were offering securities to the public through a post on a Facebook page. The Bureau stated that they contacted Respondent Williams on April 21, 2015 to recommend that Mr. Williams take down the post and work with the Bureau to resolve the issue, but Mr. Williams did not at that time remove or edit the post. The Bureau alleged they contacted Respondent Williams again on April 22, 2015 and told him if the post on Facebook was not removed by day's end, the Bureau would take action against the Respondents. The Bureau alleged that the Respondents were not licensed to conduct securities-related business in New Hampshire, the securities offered by the Respondents were not registered, and the Respondents violated the antifraud provisions of the Securities Act by failing to disclose to the investing public the lack of securities licensure or registration and by stating that the offering made by the Respondents was "no risk." The Respondents argue that they did not know and could not have known that they were violating the law by making the postings in question on Facebook and therefore should not be liable for the alleged violations. In addition, the Respondents argue "intent" is a required element for a finding of securities fraud.

Hearing

The Bureau was called to present its case. As a preliminary issue, the Respondents agreed that a list of stipulated facts supplied by the Bureau was accurate and agreed to the stipulated facts, with the caveat that the Respondents asserted that there were other relevant facts that had not been included in the stipulated facts. As a result, the central facts in this matter are not in dispute, only each party's interpretation of the facts. Attorney Forcier offered one witness and introduced a total of three exhibits. Subsequently, Respondent Williams was called to present the Respondents' case. He offered two witnesses, including himself, and attempted to an affidavit signed by him as his only evidence. This was rejected since Respondent Williams was present and available to testify to the facts contained in the affidavit.

Testimony of the Witnesses

The Bureau's sole witness in this matter was Respondent Williams. Mr. Williams resides in Nashua, New Hampshire and is the owner of The Used Apple Store in Derry, New Hampshire. Mr. Williams acknowledge that he had posted on Facebook on April 19, 2015 a post soliciting readers to give The Used Apple Store any amount of cash up to \$1,000.00 and get double the money back in 90 days. (BSR Ex. A) The post purported that The Used Apple Store doubled its own "internal investments" in approximately ten days by purchasing, fixing or upgrading, and reselling items. Mr. Williams stated that he did this in part as a marketing idea to get people interested in his business and to get people to understand that what he was proposing could actually be done. He further stated that no one ever gave him money pursuant to any of the posts on Facebook nor did anyone contact The Used Apple Store. Mr. Williams testified that he subsequently amended the post to reserve the right to "decline any person for any reason." While Mr. Williams testified that he thought the Facebook page was only viewable by customers of The Used Apple Store, he also acknowledged that anyone could "Like" the page and that he did not review page "Likes" to verify that each "Like" came from someone who was a customer. In addition, Mr. Williams acknowledged that the Facebook post said the offer was extended not only to customers but to "anybody."

As part of his testimony, Mr. Williams explained how he was able to purchase broken electronic items, quickly fix them, and then resell them and attested that on average he is able to resell an item for twice what he paid for it. Mr. Williams testified that he further amended the Facebook post at some point to state, "This is written as a promissory note or loan as it is commonly known." This appeared to be an attempt to steer clear of the securities laws and avoid further scrutiny from the Bureau. In addition, Mr. Williams stated that he changed the post to state that he would return money to people who responded to the post within 90 days with "no risk." He characterized this as a "guaranteed return," which he believes characterizes a loan rather than a security.

Mr. Williams testified that neither he nor The Used Apple Store has ever been registered as a securities professional or organization. He also stated that neither he nor The Used Apple Store has ever filed an income tax return with the United States Internal Revenue Service. He further stated that he once attempted to register The Used Apple Store as a trade name in New Hampshire but was told he could not as the name was too similar to another trade name. Mr. Williams testified that he was not aware of whether the offerings made in the Facebook posts were subject to any exemptions under state or federal law. He expressed the opinion that, because no money was taken in as a result of these posts, the laws regulating the registration of securities did not apply to him.

Mr. Williams then put on his case. He acted as a witness in his own case and provided testimony related to a sworn affidavit that he attempted to submit as evidence. As part of this testimony, Mr. Williams attested to his good faith belief that he did not intend to violate any New Hampshire laws, enter into any investment contract, make any untrue or misleading statements, or display the offering to anyone other than customers of The Used Apple Store. He also stated that he never knew about the Bureau and thought states securities regulators were divisions of the federal government that regulated insider trading. He also stated his belief that at the time he was contacted by the Bureau he thought he was receiving a "prank" call. Mr. Williams stated his belief that a finding of securities fraud requires intent but was unable to offer any binding legal authority to back up this claim.

Next, Mr. Williams called Adrian LaRochelle, Bureau Staff Attorney. Mr. Williams questioned Attorney LaRochelle regarding a Craigslist post that was substantially similar to the Facebook posts posted by Mr. Williams. The questioning was deemed irrelevant to the case. Then, Mr. Williams was sworn in again to give testimony regarding individuals he alleged were seeking to discredit him by manipulating the Bureau's investigation of him. However, this testimony was also deemed irrelevant.

Findings of Fact

1. The Used Apple Store is a business located at 6 West Broadway, Derry, New Hampshire 03038. The name of the business is not registered with the New Hampshire Department of State, Corporations Division.
2. Bill Williams is the sole proprietor of The Used Apple Store with a residential address in Nashua, New Hampshire.

3. At all times relevant to this case, The Used Apple Store maintained a Facebook page on which Mr. Williams made posts.
4. A post to the Facebook page dated April 20, 2015 offered to its “customers or anybody” to give The Used Apple Store any amount of cash up to \$1,000 and to return double the amount within 90 days based on its perceived ability to buy and fix or upgrade electronic items and resell them at double the price.
5. Mr. Williams was contacted by the Bureau on April 21, 2015 and advised to remove the post. Mr. Williams did not do that.
6. On April 22, 2015, the Bureau once again contacted Mr. Williams, advising him to remove the post and stating that if the post was not removed, the Bureau would file an action against the Respondents. Mr. Williams did not remove the post.
7. At all times relevant to this matter, neither Mr. Williams nor The Used Apple Store was licensed to conduct securities-related business in New Hampshire. The Used Apple Store was not licensed as an issuer-dealer, and Mr. Williams was not licensed as an issuer-dealer agent. In addition, neither The Used Apple Store nor Mr. Williams has established an exemption from licensure.
8. The offering posted to The Used Apple Store’s Facebook page was not registered in the state of New Hampshire nor have either of the Respondents established an exemption from the securities registration requirements.
9. The offering posted to The Used Apple Store’s Facebook page on or around April 3, 2015 (BSR Ex. C) stated that the offering was “no risk.”
10. The offering posted to The Used Apple Store’s Facebook page in various forms from April 20, 2015 to April 23, 2015 did not disclose the Respondents’ lack of licenses nor the lack of securities registration for the offering.

Rulings of Law

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

1. The Respondents are “persons” within the meaning of N.H. RSA 421-B:2, XVI.
2. The Used Apple Store is an “issuer-dealer” within the meaning of N.H. RSA 421-B:2, XIII-a.
3. Bill Williams is an “agent” of The Used Apple Store within the meaning of N.H. RSA 421-B:2, II.
4. The offering being made via The Used Apple Store’s Facebook page represented the offering of an “investment contract” within the meaning of N.H. RSA 421-B:2, IX-c.
5. The offering being made via The Used Apple Store’s Facebook page was a security within the meaning of N.H. RSA 421-B:2, XX.
6. Pursuant to N.H. RSA 421-B:3, it is unlawful for any , in connection with the offer, sale, or purchase of any security, directly or indirectly: to employ any device, scheme, or artifice to defraud; 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 to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. For purposes of N.H. RSA 421-B:3, a fraudulent or deceptive device or contrivance shall include, but shall not be limited to

representing in the offer or sale of securities, in writing or orally, that there is a guarantee against risk or loss. The Respondents are subject to and have violated this provision by offering securities in the state of New Hampshire without disclosing that the securities being offered were not properly registered and that the Respondents were not properly licensed to conduct securities business in New Hampshire. Furthermore, the Respondents violated this provision by representing that the offering was “no risk” and thus representing that there was a guarantee against risk or loss.

7. Pursuant to N.H. RSA 421-B:6, I, it is unlawful for any person to transact business in this state as a broker-dealer, issuer-dealer, investment adviser, or agent unless such person is licensed under N.H. RSA 421-B. The Respondents are subject to and have violated this provision by offering securities in the state of New Hampshire without obtaining proper licensure or establishing an exemption to the licensing requirements.
8. Pursuant to N.H. RSA 421-B:11, it is unlawful for any person to offer or sell any security in this state unless it is registered under N.H. RSA 421-B, the security or transaction is exempted under N.H. RSA 421-B:17, or it is a federal covered security for which the fee has been paid and documents have been filed as required by N.H. RSA 421-B:11, I-a. The Respondents are subject to and have violated this provision by offering securities that are not properly registered or exempt from the registration requirements
9. Pursuant to N.H. RSA 421-B:22, in any investigation to determine whether any person has violated or is about to violate N.H. RSA 421-B or any rule or order under N.H. RSA 421-B, upon the secretary of state's prevailing at hearing, or the person charged with the violation being found in default, or pursuant to a consent order issued by the secretary of state, the secretary of state shall be entitled to recover the costs of the investigation, and any related proceedings, including reasonable attorney's fees, in addition to any other penalty provided for under N.H. RSA 421-B.
10. Pursuant to N.H. RSA 421-B:23, whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of N.H. RSA 421-B or any rule or order thereunder, the secretary of state shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of N.H. RSA 421-B.
11. Pursuant to N.H. RSA 421-B:26, III, any person who, either knowingly or negligently, violates any provisions of N.H. RSA 421-B may, upon hearing, and in addition to any other penalty provided for by law, be subject to an administrative fine not to exceed \$2,500.

Discussion

The relevant facts of this case are not in dispute. The Respondents, on or around April 19, 2015, posted an offering that meets the definition of a securities offering. Pursuant to N.H. RSA 421-B:2, XX, a “security” includes, in pertinent part, notes, which are construed to include promissory notes, as well as investment contracts. While the Respondents amended the posting to characterize the investment opportunity as a “promissory note or loan,” this did not change the essential nature of the investment being offered. An investment contract analysis appears to be most applicable to this offering.

IX-c. (a) "Investment contract" means either: (1) an investment in a common enterprise with the expectation of profits to be primarily from the efforts of the promoter or some third-party; or (2) the investment of money or money-worth including money, goods furnished, or services performed, in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decisions of the venture.

(b) For the purposes of subparagraph (a), the following shall apply:

(1) The investment may take the form of money actually paid to; securities or other real or personal property actually delivered to; the right to use such securities and other property granted to; or services actually performed for, the common enterprise or some other entity designated by the promoter or common enterprise to receive the investment.

(2) "Profits" shall include the promise to pay money, deliver securities, or deliver kind goods;

(3) The third-party providing the efforts may or may not be an affiliate or associated with the promoter or the common enterprise. Such efforts are those day-to-day management efforts which affect the success or failure of the enterprise, and do not include physical or mechanical efforts or extraordinary efforts such as the removal of the management of the common enterprise.

(4) "Benefits" shall mean any bargained-for benefit to the investor or to a person designated by the investor; or any bargained-for legal detriment to the common enterprise, the promoter, or some entity identified by the investor. (N.H. RSA 421-B:2, IX-c.

From a plain reading of the statute, there can be no doubt that what the Respondents were offering were investment contracts. Here, the Respondents solicited offerees to provide cash to The Used Apple Store, a company in the business of reselling repaired or upgraded electronic items. The offering created an expectation of profits, specifically a promise to pay double the offeree's investment within 90 days, to be derived from the efforts of the Respondents in purchasing, fixing or upgrading, and reselling electronic merchandise. This was specifically outlined in the postings to The Used Apple Store's Facebook page (BSR Ex. A-Ex. C), wherein it was represented that the Respondents were able to resell repaired and upgraded items for twice the amount paid for them on average within approximately ten days. It is clear that the investment was meant to be a passive investment wherein the Respondents would actually generate the profits to be returned to investors.

With this being established by the Bureau, it is clear that the Bureau has met its burden in proving violations of N.H. RSA 421-B:3, RSA 421-B:6, and RSA 421-B:11. Specifically, the Bureau asserted that the Respondents were not licensed in any capacity to sell securities. The Respondents acknowledged they were not licensed. Furthermore, the Respondents failed to demonstrate that they were subject to an exemption from the licensing requirements. The Bureau also asserted that the securities offered by the Respondents were not registered. The Respondents acknowledged they did not register the securities. They failed to demonstrate that the securities were subject to an exemption from the registration requirements. Based on this, it is also clear that the Respondents violated N.H. RSA 421-B:3, I(b) in that they omitted to state in their offering that the securities were not registered and that neither The Used Apple Store nor Mr. Williams was licensed to sell the securities. Contrary to Mr. Williams argument at hearing, a plain reading of the statute demonstrates that "intent" is not required to be shown in proving a violation of N.H. RSA 421-B:3, I(b). It is also a

reasonable conclusion that one can negligently omit to state material facts necessary to make other statements made in an offering not misleading.

As noted, the plain language of N.H. RSA 421-B:3 discloses no requirement that "intent" be demonstrated. This is particularly pertinent to the issue of Mr. Williams amending the Facebook posting to reflect that the investment solicited involved "no risk." According to Mr. Williams testimony, he was trying to make clear that the investment was a "promissory note or loan." As previously noted, promissory notes are treated as securities under N.H. RSA 421-B. But beyond this, it appears that Mr. Williams attempted to play a game of cat-and-mouse, in which he thought he could avoid the scrutiny of the Bureau by simply changing a few words in the offering and transforming the offering of a security into the solicitation of a loan. Had Mr. Williams cooperated with the Bureau from the start, the outcome of this process might have been quite different for the Respondents. And Mr. Williams' protestations that he thought the Bureau's calls were "prank" calls are not believable. He could very easily have determined the identity of the Bureau staff and the legitimacy of their communications with him. Instead, he chose to ignore the Bureau. As a result, Mr. Williams further violated N.H. RSA 421-B:3 by amending the Respondents' posting on Facebook to reflect a guarantee, which by definition is a fraudulent or deceptive device or contrivance.

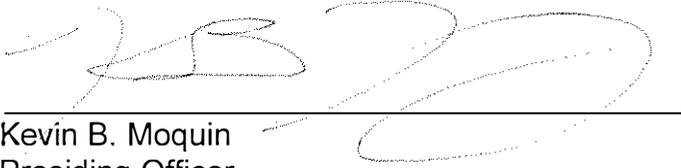
Order

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, R.S.A. 421-B, it is hereby **ORDERED**, that:

1. The Respondent shall cease and desist from further violations of N.H. RSA 421-B pursuant to N.H. RSA 421-B:23.
2. The Respondent shall within 30 days from the date of this order pay the Bureau's costs of investigation in the amount of \$713.50 pursuant to N.H. RSA 421-B:22.
3. The Respondent shall within 30 days from the date of this order pay administrative fines and penalties in the amount of \$5,000.00 pursuant to N.H. RSA 421-B:26, III.

SIGNED,
William M. Gardner
Secretary of State
By His Designee:

Date: 9/30/11



Kevin B. Moquin
Presiding Officer
N.H. Bureau of Securities Regulation