

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

IN THE MATTER OF:)
)
Advent Medical Products, Inc., and) **RESPONDENT'S MOTION FOR**
) **RECONSIDERATION OF FINDINGS,**
Randall Fincke) **RULINGS, AND ORDER**
)
Respondents) **ORDER**
)
) **I-2018-00036**
)

Procedural History

An Order of Findings and Rulings concerning the above captioned matter was issued on October 1, 2024, with a supplemental Order issued on October 25, 2024. A Motion for Reconsideration of Finding, Rulings, and Order and separate Motion to Stay Orders was filed by the Respondents on October 31, 2024. Respondent's Motion to Stay Orders was granted on November 8, 2024. On November 12, 2024 the Bureau of Securities filed an Objection to Motion for Reconsideration.

Discussion

Advent Medical Products, Inc. and Randall Fincke request this Presiding Officer reconsider and reverse the October 1, 2024 final order and October 25, 2024 supplemental Order, citing the following reasons:

I. The Presiding Officer erred by holding Mr. Fincke secondarily liable for Advent's purported violations of RSA 421-B:11 and RSA 421-B:5-501.

I disagree. Based on the evidence presented including the testimony of multiple investors, extensive documentation, and testimony of Randall Fincke, it is clear that he exercised control over and was responsible for the conduct of Advent Medical Products as its President, Chief Executive Officer and sole executive officer. It was the testimony of several investors that Mr. Fincke met with them before investing in the company and communicated with them through various mailings. The Bureau established by a preponderance of the evidence that Randall Fincke directly controlled and currently controls the company, materially aided Advent's conduct, sold securities to investors, and therefore pursuant to N.H. RSA 421-B:6-604(a)(1) Advent Medical and Randall Fincke are jointly and severally liable and subject to the provisions of N.H. RSA 421-B.

II. The Presiding Officer erred by holding that the Bureau has jurisdiction over the investment by Candace Corvey (Investor #4) and Kevin Kijek (Investor #13).

I disagree. RSA 421-B:30, I effective prior to January 1, 2016 and RSA 421-B:6-610(a) effective since January 1, 2016, grants jurisdiction to the Bureau to enforce the New Hampshire Uniform Securities Act when an offer to sell is made in this state. An offer to sell is made in this state, regardless of whether either party is located in this state if it originates from New Hampshire. RSA 421-B:30,III and RSA 421-B:6-610(c).

As noted in my final order, Gary Finke utilized a home office at this home on Prescott Lane in Hampton Falls, New Hampshire as well as a New Hampshire cell phone number and New Hampshire office telephone number to promote, solicit, market, offer and sell the Advent securities. [REDACTED], a Maine resident, testified at the final hearing that she understood Gary Finke lived in New Hampshire, and received an email from him that included investment documents. The Bureau established by a preponderance of the evidence that Gary Finke resides in New Hampshire, that [REDACTED] knew Gary Finke resided in New Hampshire, and communicated with her via email to effect the sales. With respect to the transaction involving New Hampshire resident [REDACTED] (Investor #13) having transpired in the Commonwealth of Massachusetts, the Bureau correctly asserts in its Objection to Motion to Reconsider that Mr. [REDACTED]'s residency in New Hampshire and interaction with Advent's New Hampshire based representative established a substantial connection with New Hampshire justifying its jurisdiction over [REDACTED] investment. As noted in Gary Finke's on-the-record testimony, he met with Mr. [REDACTED] in Manchester to discuss the investment Finke, see OTR p.94. The extent of Gary Finke's interaction with Mr. [REDACTED] and the transaction itself was such that Finke was aware that Mr. [REDACTED] was a New Hampshire resident. In addition, Advent continued to send materials to Mr. [REDACTED] at his home in Manchester, New Hampshire following the sale. It is clear the Bureau retained jurisdiction over the investment as provided by RSA 421-B:6-610.

III. The Presiding Officer erred in concluding that Respondents violated 421-B:5-501(a)(2).

I disagree and concur with the Bureau's argument relative to the Respondent's application of *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024) where Respondents claim that an omission must be tied to another statement and there must be a duty to disclose for it to be fraudulent under RSA 421-B:3 I(b). There is no duty requirement for omissions to be actionable as securities fraud in New Hampshire. However, there is a duty to disclose prior litigation. Pursuant to RSA 421-B:3,I(b) effective prior to January 1, 2016 and RSA 421-B:5-501(a)(2) effective January 1, 2016, it is unlawful for any person, in connection with the offer, sale, or purchase of any security, to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. Advent Medical and Randall Finke failed to disclose the Zoll lawsuit and Access Cardiosystems action to New Hampshire investors when they purchased Advent securities. Respondents had a duty to disclose this prior litigation. Respondents claim that the Bureau failed to prove fraud by misrepresentation because Advent and Randall Finke believed at the time they were soon going to market with its devices, is not relevant here. The Bureau correctly notes in its Objection to Motion to Reconsider that the intent to commit fraud is not an element of either RSA 421-B:3 or RSA 421-B:5-501. Proof of scienter is not required.

IV. The Presiding Officer incorrectly tabulated the number of non-exempt securities sales.

I disagree. As note in Rulings of Law 3,4,5, and 6, the sale of promissory notes, call and put options are securities because they are notes, evidence of indebtedness and investment contracts and they were sold to investors contemporaneously. Respondents now assert for the first time that certain securities sales were exempt under RSA 421-B:17 I(P). The Bureau correctly points out in its Objection to Motion to Reconsider that this exemption argument was not raised during the final hearing. It was not addressed in the final order and therefore not a consideration here.

V. The award of civil penalties, rescission, and costs imposed on Respondents jointly and severally in the Final Decision, and Supplemental Order banning Respondents from future securities sales in N.H. constitute errors of law which must be reduced and/or vacated.

I disagree. Again, Respondents raise for the first time a claim that its constitutional rights have been violated, claiming the fines imposed are excessive nor do they offer a deterrent effect. RSA 421-B:26,III, effective prior to January 1, 2016 and RSA 421-B:6-604(d) since January 1, 2016, authorizes the secretary of state to impose a civil penalty up to a maximum of \$2,500 for a single violation of RSA 421-B. In addition, pursuant to RSA 421-B:26, V and RSA 421-B:26,VI effective prior to January 1, 2016 and RSA 421-B:6-604(e) since January 1, 2016 after notice and hearing, the secretary of state may enter an order of rescission, restitution, or disgorgement direct to a person who has violated provisions of 421-B. The secretary of state is authorized to order the rescission of securities sales made the Advent investors. Advent exceeded the numerical threshold of sales to qualify for the registration exemption. Therefore, the investors are entitled to a return of their money. Clearly the Respondents disagree with several of my findings and the number of violations to be counted when calculating the total fine. The fines are neither disproportional or unconstitutional and reflect the number of violations set forth in my final order.

RSA 421-B:22,IV and RSA 421-B:6-604(g) authorizes the secretary of state to order payment of the Bureau's costs of investigation and enforcement. It is clear from the record that the Bureau began its investigation in 2018, conducted multiple witness interviews, depositions, presented expert testimony at hearing, and incurred considerable staff time and expense. Granting costs in the amount of \$60,000 was reasonable in this case.

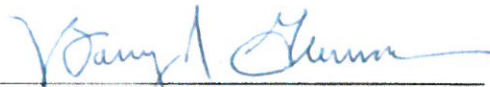
Order

Having reviewed Respondent's motion, the applicable law, and the record in this matter, Respondent's motion is DENIED. The original Order issued on October 1, 2024, and supplemental order dated October 25, 2024 remains in full force and effect.

In view of the extensive evidence presented at hearing relative to Respondent's unlawful offering of securities and misrepresentations to New Hampshire investors, my supplemental order directing the Respondents to permanently cease and desist from offering and/or selling securities in the State of New Hampshire stands.

SIGNED,
DAVID SCANLAN
SECRETARY OF STATE
BY HIS DESIGNEE:

Dated: November 25, 2024



BARRY J. GLENNON, DIRECTOR,
BUREAU OF SECURITIES REGULATION