

STATE OF NEW MEXICO

SECURITIES DIVISION
2550 Cerrillos Rd.
Santa Fe, NM 87505

IN THE MATTER OF:)
)
ARTHUR HERLIHY,) Order No. 12-10-059-008
BRUCE BECKNER, AKA BILL EVANS)
SEAN CURTIS,)
)
)
Respondents)

**FINAL ORDER INCORPORATING FINDING OF FACT AND CONCLUSIONS
OF LAW**

ARTHUR HERLIHY,
BRUCE BECKNER, AKA BILL EVANS, and
SEAN CURTIS,

This matter came before the Director of the New Mexico Securities Division (the "Director") and the Director, being duly informed in the premises, does hereby FIND that:

1. Order No. 11-10-059-016 (the "Order") was issued by the Director on or about September 7, 2011 along with a Notice of Contemplated Action (the "Notice"), attached hereto as Exhibits "1" & "2".
2. Respondents were served with the Order and Notice and timely requested a hearing.
3. A hearing was held on December 12th and 13th, 2011, in which the Respondents did not appear and Counsel withdrew after having received Notice of Hearing, Discovery, and Notice of Opportunity for a Hearing, attached hereto as Exhibit "3".

4. The hearing officer has submitted a "Summary" in which he concluded that the Respondents violated the New Mexico Securities Act, N.M. SA 1978 §58-13B-1 et. seq. and the Uniform New Mexico Act, NMSA 1978, §58-13C-1 et. seq. The violations consist of the following:
 1. Securities Fraud, contrary to §58-13B-30 and 39; and §58-13C-501
 2. Effecting transactions in securities without a license contrary, to §58-13B-3; and §58-13C-401;
 3. Selling unregistered securities, contrary to §58-13B-20; and §58-13C-301.
5. Entry of this Order is in the public interest, appropriate for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the New Mexico Securities Act of 1986 and the Uniform Securities Act, NMSA 1978 §58-13C-1 et. seq. (the "Acts").

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

Respondents Herlihy, Beckner (A/K/A Evans) and Curtis shall each pay the sum of \$125,000.00 as civil penalties for violations of the New Mexico Securities Act of 1986 as well as the Uniform Securities Act (2010), collectively, The "Acts".

The \$125,000.00 is computed as follows:

The nine violations involve 3 counts of Securities fraud; contrary to NMSA 1978 §58-13B-30 and §58-13C-501; 3 counts of effecting securities transactions without a license, contrary to NMSA 1978 §58-13B-3 and §58-13C-401; and 3 counts of selling unregistered securities, contrary to NMSA 1978 §58-13B-20 and §58-13C-01. Each count is assessed a civil penalty of \$10,000.00 of each violation, for a total of \$90,000.00.

Respondents shall each pay an additional \$10,000.00 for a total of \$30,000.00 for the
aforementioned violations directed towards investor Howard Glickman, a person who at
the time of the violation was sixty-two years of age or older. Each Respondent shall pay
\$5,000.00 for the investigative costs of the New Mexico Securities Division.

DATED the 25th day of July, 2012



Daniel S. Tanaka, Director
New Mexico Securities Division



STATE OF NEW MEXICO
SECURITIES DIVISION
2550 CERRILLOS ROAD
SANTA FE, NEW MEXICO 87505

IN THE MATTER OF:)
Savoy Travel Center, LLC)
Fuel 4 Less, LLC)
Arthur Herlihy)
"Bill Evans" and)
Sean Curtis)
 Respondents.)

Order No. 11-10-059-016

ORDER TO CEASE AND DESIST

The Director of the Securities Division ("the Director") after investigation has good reason to believe, and therefore alleges the following:

1. Savoy Travel Center LLC ("Savoy") (aka Fuel 4 Less LLC), has its principle place of business in Deming, New Mexico;
2. Arthur Herlihy, Sean Curtis and a person known as "Bill Evans" are all corporate officers or employees of Savoy;
3. The listed address for Savoy is 14150 Hwy 418 S.W. Deming, New Mexico 88030;
4. At all times relevant Respondents were not licensed in New Mexico as broker-dealers or sales representatives, and were not exempt from such licensure;
5. Respondents are advertising for and soliciting the sale of unregistered promissory notes via newspaper advertisements and other means;
6. Respondents sold promissory notes to investors between at least August 2008 and June 2010;
7. Respondents have violated the New Mexico Uniform Securities Act ("the Act") by offering and selling unregistered securities, without being registered themselves or seeking an exemption, in violation of Sections 58-13C-201, 58-13C-202, 58-13C-301 and 58-13C-401 NMSA 1978;

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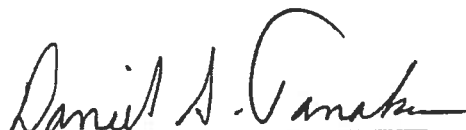
8. Respondents have violated the New Mexico Securities Act of 1986, by offering and selling unregistered securities, without being registered themselves or seeking an exemption, in violation of Sections 58-13B-1 et seq and 58-13B-20 NMSA 1978;
9. Purchasers of securities sold by Respondents as described herein are entitled to notification of their rights under the New Mexico Uniform Securities Act. Respondents are liable to all purchasers for purchases of aforementioned securities, as provided by Section 58-13C-509 of the Act;
10. Entry of this Order is in the public interest, appropriate for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the New Mexico Uniform Securities Act.

IT IS THEREFORE ORDERED THAT:

11. Pursuant to Section 58-13C-604 of the Act, Respondents **cease and desist** offering and selling securities of any kind in New Mexico without first complying with all requirements of the Act;
12. Respondents shall within (15) days of receipt of this Order, notify all investors of their rights as outlined in Paragraph nine (9) of this Order. Prior to notifying New Mexico residents, Respondents shall submit to the Director for review, the written notice that Respondents intend to present;
13. Pursuant to Section 58-13C-604 of the Act, Notice of Opportunity for Hearing will be sent certified mail, return receipt requested, advising that a hearing will be granted on this Order upon written request timely filed with the Director and, **in default of such request, that this Order, and the proposed Order immediately following, shall become final.** Respondents' request for such hearing must be received by the Director within fifteen (15) days after Respondents' receipt of this Order.

ENTERED AT Santa Fe, New Mexico this 7th day of September 2011.





Daniel S. Tanaka
Director
New Mexico Securities Division



BEFORE THE SECURITIES DIVISION OF THE REGULATION AND
LICENSING DEPARTMENT OF THE STATE OF NEW MEXICO

IN THE MATTER OF:

SEC CASE NO. 10-059/1

Arthur Herlihy
10 Silver Rock Rd.
Santa Fe, NM 87508

RESPONDENT.

NOTICE OF CONTEMPLATED ACTION

1. The Respondent fraudulently solicited and sold unregistered securities. Further, Respondent was not licensed to sell securities within the State of New Mexico, nor was he a licensed agent. Respondent's actions are subject to the jurisdiction of the New Mexico Securities Division (SEC).
2. SEC has before it sufficient evidence, which if not rebutted or satisfactorily explained, will justify the Division's entering a Cease and Desist order against Herlihy and assessing monetary penalties in accordance with Sections 58-13C-201, 58-13C-202, 58-13C-301, 58-13C-401, 58-13C-402, and 58-13C-501 of the New Mexico Uniform Securities Act ("the Act") NMSA 1978.
3. This action is based on the following allegations:
 - A. The Respondent has solicited customers for unregistered securities through the use of national advertising:

On or about July 8, 2008 through May 2011, Respondent was responsible, along with others, for soliciting customers for unregistered securities through placing a monthly advertisement in the Los Angeles Times.

Section 58-13C-604(A) states that if the director determines that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of the Act, or that a person has materially aided, is materially aiding or is about to materially aid an act, practice or course of business constituting a violation of the Act, the director may issue an order directing the person to cease and desist from engaging in the act, practice or course of business or to take other action necessary or appropriate to comply with the Act.

Section 58-13C-604(B)(1) provides that "the director may commence an administrative proceeding by entering either a notice of intent to do a contemplated act or a summary order."

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Section 58-13C-604(C) provides that “in a final order pursuant to Subsection B of this section, the director may impose a civil penalty of up to ten thousand dollars (\$10,000) for each violation.”

B. The Respondent has sold unregistered securities:

Respondent did not register nor does Respondent have a valid exemption for the securities.

Section 58-13C-604(A) states that if the director determines that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of the Act, or that a person has materially aided, is materially aiding or is about to materially aid an act, practice or course of business constituting a violation of the Act, the director may issue an order directing the person to cease and desist from engaging in the act, practice or course of business or to take other action necessary or appropriate to comply with the Act.

Section 58-13C-604(B)(1) provides that “the director may commence an administrative proceeding by entering either a notice of intent to do a contemplated act or a summary order.”

Section 58-13C-604(C) provides that “in a final order pursuant to Subsection B of this section, the director may impose a civil penalty of up to ten thousand dollars (\$10,000) for each violation.”

C. Respondent was not registered to sell securities in the State of New Mexico:

Respondent did not register with the Securities Division nor seek an exemption for registering as a broker dealer, investment advisor or as an agent of a broker dealer.

Section 58-13C-604(A) states that if the director determines that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of the Act, or that a person has materially aided, is materially aiding or is about to materially aid an act, practice or course of business constituting a violation of the Act, the director may issue an order directing the person to cease and desist from engaging in the act, practice or course of business or to take other action necessary or appropriate to comply with the Act.

Section 58-13C-604(B)(1) provides that “the director may commence an administrative proceeding by entering either a notice of intent to do a contemplated act or a summary order.”

Section 58-13C-604(C) provides that “in a final order pursuant to Subsection B of this section, the director may impose a civil penalty of up to ten thousand dollars (\$10,000) for each violation.”

D. The Respondent has employed a device artifice or scheme to defraud and made a false representation of material fact and/or withheld information in relation to the offering and selling of unregistered securities:

On or about December 28th, 2009 and June 28th, 2010, unregistered securities were sold to "Subject A", through false representation of material fact and/or through withholding information in relation to the offering and selling of the unregistered securities;

On or about August 3rd, 2009 and January 3rd, 2010, unregistered securities were sold to "Subject B", through false representation of material fact and/or through withholding information in relation to the offering and selling of the unregistered securities;

On or about February 1, 2010 unregistered securities were sold to "Subject C", through false representation of material fact and/or through withholding information in relation to the offering and selling of the unregistered securities;

Section 58-13C-604(A) states that if the director determines that a person has engaged, is engaging or is about to engage in an act, practice or course of business constituting a violation of the Act, or that a person has materially aided, is materially aiding or is about to materially aid an act, practice or course of business constituting a violation of the Act, the director may issue an order directing the person to cease and desist from engaging in the act, practice or course of business or to take other action necessary or appropriate to comply with the Act.

Section 58-13C-604(B)(1) provides that "the director may commence an administrative proceeding by entering either a notice of intent to do a contemplated act or a summary order."

Section 58-13C-604(C) provides that "in a final order pursuant to Subsection B of this section, the director may impose a civil penalty of up to ten thousand dollars (\$10,000) for each violation."

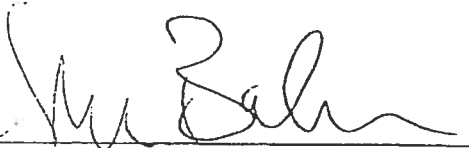
NOTICE OF RIGHTS

Respondent should take notice that the Respondent has the following rights pursuant to the Uniform Securities Act:

1. **Rights as set forth pursuant to Section 58-13C-604 NMSA 1978 and corresponding Rule 12.11.1.12.**
2. **Judicial Review and Appeal**

A. A final order issued by the director pursuant to the New Mexico Uniform Securities Act [58-13C-101 NMSA 1978] is subject to judicial review in accordance with the provisions of Section 39-3-1.1 NMSA 1978.

B. The filing of an appeal pursuant does not, unless specifically ordered by the court, operate as a stay of the director's order or rule, and the director may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

By:  Date: 10/14/2011
Meredith M. Baker
Senior Regulatory Attorney
Regulation and Licensing Department, Securities Division
State of New Mexico
2550 Cerrillos Rd
Santa Fe, NM 87505
(505)476-4554
Meredith.Baker@state.nm.us

cc:

Bruce R. Kohl, Attorney for Respondent
Attorney at Law
P.O. Box 31164
Santa Fe, NM 87594

STATE OF NEW MEXICO
SECURITIES DIVISION
2550 CERRILLOS ROAD
SANTA FE, NEW MEXICO 87505

IN THE MATTER OF:)
Savoy Travel Center, LLC)
Fuel 4 Less, LLC)
Arthur Herlihy)
"Bill Evans" and)
Sean Curtis)
Respondents.)

Order No. 11-10-059-017

NOTICE OF OPPORTUNITY FOR HEARING

TO: Tamara G. Hurt, *agent for Savoy Travel Center, LLC*
216 South Gold Avenue, Deming, New Mexico 88031

Arthur G. Hurt, *agent for Fuel 4 Less, LLC*
518 Old Santa Fe Trail Suite 1-475, Santa Fe, New Mexico 87505

Arthur Herlihy, *Individually and as an officer of Savoy Travel Center, LLC/Fuel 4 Less, LLC*

"Bill Evans," *Individually and as an officer of Savoy Travel Center, LLC/Fuel 4 Less, LLC*

Sean Curtis, *Individually and as an officer of Savoy Travel Center, LLC/Fuel 4 Less, LLC*

YOU ARE HEREBY NOTIFIED THAT:

1. Pursuant to the New Mexico Uniform Securities Act ("the Act"), a Cease and Desist Order has been issued in the above-titled matter, bearing the Order No. 11-10-059-016.
2. The grounds for issuing said Order and Notice are set forth in the Cease and Desist Order.
3. Pursuant to the Act, you will be afforded a hearing on the allegations of violation of the Act upon written request made to the Director of the New Mexico Securities Division, if such request is filed with the Director within fifteen (15)

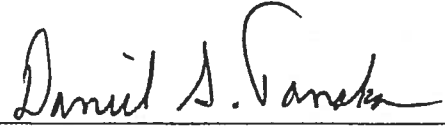
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days after your receipt of this Notice, all as provided for in Section 58-13C-604 of the Act.

IF YOU FAIL TO REQUEST A HEARING WITHIN FIFTEEN DAYS OF YOUR RECEIPT OF THIS NOTICE, AS SET FORTH HEREIN, THE PROPOSED ORDER NO. 11-10-059-016 WILL BECOME FINAL.

DATED this 7th day of September, 2011.



Daniel S. Tanaka

Director

New Mexico Securities Division



BEFORE THE SECURITIES DIVISION
FOR THE STATE OF NEW MEXICO
ETHAN SIMON, HEARING OFFICER

ARTHUR HERLIHY, RESPONDENT
BRUCE BECKNER, AKA BILL EVANS, RESPONDENT
SEAN CURTIS, RESPONDENT

SUMMARY

In September 2011, the Director of the Securities Division, pursuant to NMAC 58-13C-604 appointed Ethan Simon as Hearing Officer over the above titled action. Bruce Kohl initially represented the Respondents, Meredith Baker the Securities Division. Included in this action but later stayed indefinitely were administrative actions against Savoy Travel Center, LLC, and Fuel For Less, LLC. The latter two respondents are in receivership and the Securities Division evidently did not believe that administrative action against these legal entities would be productive. Administrative hearings were set for on or about November 15, 2011. A pre-trial conference was held in early November 2011, and in attendance were Bruce Kohl, Meredith Baker, and Patrick McNertney, assisting Ms. Baker. At that time, Mr. Kohl complained that he had too little time to prepare for the Hearing, as discovery had not been provided in a manner he felt sufficient. The Hearing Officer was assured at that time that all written discovery

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had been provided and there was some confusion as to where the discovery was sent. Mr. Kohl requested a continuance at that time, which was opposed by the State.

The next week, Mr. Kohl was provided discovery and the State agreed to a continuance. A continuance was granted by the Hearing Officer with the assurance that a new date could be procured within the 90-day time frame outlined by statute. Some two to three weeks before the new Hearing dates of December 12, 2011 and December 13, 2011, Mr. Kohl abruptly withdrew as Counsel for Respondents. He did not do so with leave of the Hearing Officer, the Director, nor did he seek stipulation from opposing counsel. Approximately a week before the newly scheduled Hearing, criminal counsel for Respondent Arthur Herlihy requested additional time and contacted the Hearing Officer. Concerned the 90-day window would collapse before the Hearings could be rescheduled, the Hearing Officer denied this request and Hearings commenced on December 12 and December 13, 2011. Not only were Respondents without counsel, they did not appear in any event. The State requested that the Hearings take place in abestentia and the Hearing Officer concurred.

The Director of the Securities Division has the authority to assess a regulatory or administrative penalty based on securities fraud without the complication of a Hearing. The State desired to make a record in support of Respondents' liability despite the lack of any participation by the Respondents. The Hearing Officer entertained evidence on the relevant two dates in support of Respondents' violation of New Mexico Blue Sky Laws.

Respondents submitted no evidence, despite having notice of the Hearings and Subpoenas to appear. Therefore, a default judgment (and arguably one upon the merits) against each Respondent in the amount of \$10,000 per violation is appropriate. Each Respondent may be additionally fined \$10,000 for defrauding Mark Glickman, an individual in excess of 65 years of age, should the Director so find that Mr. Glickman is indeed in excess of 65 years of age.

SUMMARY OF THE FACTS

Messrs. Herlihy, Beckner and Curtis conspired to defraud investors by selling promissory notes, investments in Savoy Travel Center LLC and Fuel 4 Less LLC, a truck stop and gas station in Southern New Mexico. Herlihy and Curtis were listed as organizers of the two LLCs and

Beckner ran operations. The Promissory Notes constituted securities under New Mexico Law. The three advertised business opportunities in the Los Angeles Times. The three co-conspirators were not registered agents or broker dealers permitted by New Mexico Law to offer or sell securities. The three co-conspirators withheld material facts from the purchasers of these securities, notably that Mr. Beckner (aka Mr. Evans) was a felon convicted previously of securities fraud, and that the UCC Liens provided to the investors to protect their investments were replicated again and again rendering them meaningless, and subordinated to the New Mexico Finance Authority. Initially interest payments were made on the promissory notes. However, the businesses were failing and interest payments eventually ceased. The underlying investments were not returned, defrauding investors of hundreds of thousands of dollars.

Testifying at the Hearing were Brian Wakil, Nauman Malik, and Mark Glickman. All three testified that they purchased \$100,000 promissory notes from the co-conspirators with a promise of 2% interest and the option to renew the notes.

SUMMARY OF THE LAW

The purpose of State Securities Laws or "Blue Sky Laws" is to "...protect the public against blue sky promotions and promoters, and other stock transactions not otherwise covered by Law." Nelson v. State, 355 P.2d 413 (Okla.Cr.1960). The Law "fulfills the legitimate governmental purpose of protecting the public from the many means promoters may use to separate the unwary from their money." State v. Ramos, 116 N.M. 123, (Ct. App. 1993) quoting Armstrong v. State, 811 P.2d 593, 598-599 (Okla. Crim. App. 1991). The purposes of the securities laws - to prevent fraud and encourage disclosure - are given effect through (1) anti-fraud provisions that make it unlawful to misrepresent material facts or to fail to make full disclosure of all material facts in connection with the offer or sale of securities; (2) registration provisions that require the filing of disclosure statements with state and federal agencies; and (3) licensing requirements that ensure that salespersons have been tested and know of the law's requirements.

The requirements of the New Mexico Securities Act NMSA 1978 Section 58-13B-1 et. seq., apply whenever an instrument is a security. Unless a "security" is involved, the Act does not apply. If a security is

involved, the law requires the securities to be registered, the salespersons to be licensed, and that full disclosure of all material information be given to investors.

Whenever an investor relinquishes control over his funds and submits their control to another for the purpose and with hopeful expectation of deriving profits therefrom, he is, in fact, investing in a security. Investment Co. v. Camp, 274 F. Supp. 624 (D.D.C. 1967). A security takes many different forms. The U.S. Supreme Court explained that "in searching for the meaning and scope of the word 'security', form should be disregarded for substance and the emphasis should be on economic reality." Tcherpnin v. Knight, 389 U.S. 332, 336 (1967).

The definition in the New Mexico Securities Act lists the many forms a security may take. The definition under the Act is similar to the definition in federal law. NMSA 1978 58-13B-2 (X) of the Act states as follows:

Unless the context requires otherwise, "security" means a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, any limited partnership interest, any interest in a limited liability company, collateral-trust certificate, preorganization

certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, an interest in oil, gas or other mineral rights, any put, call, straddle or option, entered into on a national securities exchange, relating to foreign currency; any put, call straddle or option on any security, certificate of deposit or group or index of securities, including any interest therein or any certificate of interest or participation in or based on the value thereof; or, in general, any interest or instrument, commonly known as a security or any certificate of interest or participation in, guarantee of or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include landowner royalties in the production of oil, gas or other minerals created through the execution of a lease of the lessor's mineral interest.

New Mexico case law has construed the foregoing definitional section to be of broad scope. In absence of ambiguity, statutory words are to be given their usual ordinary meaning absent an expressed legislative intent to the contrary. "Note" and "Evidence of Indebtedness" were to be given ordinary and usual meanings because no

legislative intent to the contrary appeared in the Act. State v. Sheets, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980).

The definition of an investment contract has remained essentially intact for over sixty years. The landmark case setting out the elements of an investment contract was SEC v. W.J. Howey Co., 328 U.S. 293 (1946). There are four elements to the Howey test:

1. Investment of Money. It does not have to be cash. It may also be goods, services, a guarantee of a loan, or an idea or patent.
2. In a Common Enterprise. It means a direct relationship between the success and failure of the promoter and that of his investors. Brodts v. Bache & Co., 595 F. 2d 459 (9th Cir. 1978). Under NMAC 12.11.1.7(D)(1), "common enterprise" means, an enterprise in which the fortunes of the investor are interwoven and dependent upon the successes of those seeking the investment of a third party.
3. With the Expectation of a Profit. There need only be "an expectation", not a realization of profit. It may include money or capital appreciation. The profits need not come from the promoter of the enterprise. Profits may originate from general market or other forces, if it was made possible by the promoter.

4. To be Made Solely Through the Efforts of Others. The "solely" portion of the Howey test has been modified "to include situations where the investor participates in the investment scheme in some way, whether significant or minor. The critical inquiry is whether the managerial efforts are functionally essential or undeniably significant to that profit..." State v. Dean Shade, Jim Vincent, 104 N.M. 710, 716 (Ct. App. 1986) quoting Cameron v. Outdoor Resorts of America, Inc., 608 F. 2d 187, 193 (5th Cir. 1979).

In determining whether an investment is a security, it is impossible to rely on the manner in which the products are characterized or titled by the offeror. Rather, in each instance, the courts will look to the "economic realities" of the investment in order to determine whether the investment is a security. Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981). If the fact situation of a case is comparable to Howey; where a promoter solicits money from investors inexperienced in that industry, and uses that money to manage the enterprise, promising to return the investment - plus profits - to investors, the investment is a security. Many times a security will fall into more than one category of a

security. If it meets any one category, it is a security. It does not have to meet all the tests. Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).

Appellate courts have interpreted numerous terms in the New Mexico fraud statute. The New Mexico Securities Fraud Statute is found in NMSA 1978 Section 58-13B-30 and states as follows:

In connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly:

1. employ any device, scheme, or artifice to defraud
2. make an untrue statement of a material fact or fail to state a necessary material fact where such an omission would be misleading; or
3. engage in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person.

In New Mexico, it is not necessary to prove a specific intent to defraud under the Act. In State v. Ross, 104 N.M. 23 (Ct. App. 1986), the Court differentiated statutory fraud under NMSA 1978 Section 30-16-6 with securities fraud and found both statutes to be entirely different in terms of the proof of facts needed for conviction. In Ross, the

Court cited the differences between the two (statutory, or general fraud requires specific intent to defraud, actual misappropriation, proof of value, and reliance on the part of the investor, while securities fraud does not) and concluded there was no basis under principles of both general/specific rule as well as under the doctrine of merger/double jeopardy to bar either a conviction and/or sentencing for both general fraud and securities fraud. Ross at 27.

In a criminal securities fraud prosecution, "willfulness" does not require that the defendant intended the ultimate result, i.e. the fraud; rather "the defendant must have acted 'willfully' in misstating or omitting material facts.

State and federal securities laws require the disclosure to investors of all material facts. A fact is material "if there is a substantial likelihood that a reasonable [purchaser or seller] would consider it important in deciding [whether or not to purchase or sell]... Put another way, there must be a substantial likelihood that the disclosure of the [misstatement or the] omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the

information made available." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976). The Supreme Court reiterated this position in Basic Inc. v. Levinson, 485 U.S. 224 (1988), where the Court said that the test for materiality is whether there is "a substantial likelihood that the [correct] fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" Id. At 231-232.

"The question of materiality as it relates to the importance or significance of the omitted information is ... a factual issue to be determined by the jury." State v. Larsen, 865 P.2d at 1363.

Reliance on respondent's misrepresentations and omissions in relation to the offer or sale of a security is not an element of securities fraud. Therefore, the State need only demonstrate that a reasonable person or investor would have attached importance to the misrepresentations or omissions made by the defendant. "It is unnecessary to prove that a victim parted with the money or property in reliance on misrepresentations." United States v. Amick, 439 F. 2d 351 (7th Cir. 1971).

Both section 5 of the Securities Act of 1933, 15 U.S.C.A. Section 77a, and NMSA 1978 Section 58-13B-20, of

the Act make it unlawful to offer or sell any security unless it is properly registered or the security or transaction is exempt from registration. Registration is accomplished by filing a registration either with the SEC and/or the New Mexico Securities Division. The prospectus is distributed separately to prospective investors. The information required to be contained in both Part I and Part II are prescribed the by the SEC in Regulation S-K, 17 CFR Sections 229.10-229.915 and define the types of disclosures needed to avoid fraud.

In order to register securities for sale in New Mexico, a registration statement making appropriate disclosure about the company, its business activities and management must be filed with the New Mexico Securities Division. The court in Technomedical Labs. Vs. Securities Division, 744 P.2d 320, 322 (Utah Ct. App. 1987) summarized the various forms registration of securities may take under the Securities Act: Three forms of securities are prescribed in the New Mexico Act: registration by qualification (section NMSA 1978 58-13B-23), registration by coordination (section NMSA 1978 58-13B-22), and registration by filing (section NMSA 1978 58-13B-21). Registration by qualification may be used to register any

security and is therefore the method used when no other method of registration or exemption is available. The section enumerates a number of specific requirements and generally applies to non-federally registered issues of new companies. Registration by coordination correlates state registration with the Federal Securities and Exchange Commission by permitting the federal prospectus to be substituted for the ordinary state application form and coordinating the time when both registrations become effective. The state disclosure requirements are minimal under registration by coordination since the federal requirements are quite exacting. Registration by filing is a streamlined procedure, which allows for minimal, yet adequate disclosure of information in the registration statement and automatic effectiveness of registration absent any affirmative action by the Division.

A security need not be registered if the offeror demonstrates that he qualifies for a statutory exemption. The NM court of Appeals in Ramos at 128, held that the N.M Securities Act explicitly details the types of transactions that are exempted. See NMSA 1978 Section 58-13B-27. The court concluded that the Defendant did not point to any evidence indicating that the notes given by her (the

defendant) were exempt securities under NMSA 1978 58-13B026 or that the acts giving rise to each of her convictions were exempted transactions under Section 58-13B-27 of the Securities Act. Id. The State need not prove that an exemption from registration was unavailable unless defendant "produces some evidence [that the exemption applies] thus properly raising the issue." State v. Swensen, 838 P.2d 1136 at 1138 (Utah 1992). If the defendant properly raises the issue through credible evidence, the burden remains on the State to prove beyond a reasonable doubt that the exemption was unavailable.

The Respondents are also accused of transacting business as a broker-dealer without being licensed as such with the New Mexico Securities Division in violation of Section 58-13B-3 of the Securities Act. The section provides, "It is unlawful for any person to transact business in this state as a broker dealer or sales representative unless licensed or exempt from licensing under the New Mexico Securities Act of 1986.

APPLICATION OF FACTS TO LAW

The Promissory Notes were Securities

Terri Orton testified for the State. Terri Orton is a four-year retiree and twenty year veteran of the New Mexico

Securities Division. She held the post of Manager of the Registration Section, Securities Division at the time of her retirement. Ms. Orton testified that the Section was "responsible for the review of securities offerings involving common stock, preferred stock, debt securities, limited partnerships, direct participation programs, including real estate, oil and gas, commodity pools, collateralized debt obligations and mutual funds... Also reviewed any types of notifications that came in regarding exemptions from registration and interpreted the securities laws, make[ing] sure that all the terms and conditions of the Securities Act were complied with." Ms. Orton testified that the promissory notes issued to the three testifying victims (Wakil, Malik and Glickman) were, indeed, securities.

Q: You mentioned notes, and in this case there has been evidence regarding promissory notes.

A: Yes

Q: Is that one and the same kind of thing that's listed or enumerated in the Securities Act as a note?

A: Yes. Promissory notes are part of notes, yes... An investment of money for a specified principal that promises a return on that investment... with a promise to pay back

both the principal and interest over time [with] a term requirement. (Herlihy Transcript at 75-77).

Specifically regarding the notes that were sold to Mr. Malik, Mr. Wakil and Mr. Glickman, the State inquired: "did they fall under anything that would put them outside the scope of the securities laws?" Answered Orton, "Well, yes, because those commercial notes differ from an investment note in that - of the definition under the Howey Test that the investor is giving that consideration - giving the note- is giving the consideration in exchange for that note in anticipation of profit and he is motivated by that profit."

Most importantly, the Promissory Notes were not registered as securities with the Securities Division, in violation of the law. Nor were the respondents registered broker-dealers, and they therefore sold fraudulent securities in violation of the law.

The Respondents Made Material Fraudulent Statements to Investors

Marquita Russell testified that the entire operations and chattel belonging to the two business entities involved were pledged to the New Mexico Finance Authority. Despite this pledge, each of the three relevant investors in Savoy

Travel and Fuel 4 Less were provided with UCC Liens allegedly securing the property to them in event of default on the promissory notes. The Respondents pledged the assets of their fraudulent enterprises to as many individuals and entities, it would seem, as possible in order to create the impression that the investments were securitized, when clearly this was not the case.

Furthermore, Bruce Beckner was previously entangled in securities fraud, leading to a conviction. At no time were the investors given this information, information that would have proven valuable to any investor.

Nancy Huerta testified as a Compliance Officer for Broker-Dealer Licensing. Ms. Huerta testified that none of the Respondents were licensed broker-dealers in the State of New Mexico, despite having sold promissory notes (securities) to the three relevant victims in this case.

Anne Marie Layne, a Forensic Analyst for the Securities Division, testified that the businesses were in miserable financial shape, and that their ongoing operations were to be held in serious doubt. This information was never relayed to the relevant victims.

Conspiracy Liability

The Uniform Jury Instruction for Conspiracy follows

(14-2810):

1. The Defendant and another person by words or acts agreed together to commit securities fraud;
2. The Defendant and the other person intended to commit securities fraud;
3. This happened in New Mexico on or about [].

The testimony of Agent Benjamin Baker as well as the victims makes clear that the three engaged in a conspiracy to defraud investors in the procurement of investment in Savoy Travel and Fuel 4 Less. Each is therefore liable as a co-conspirator.

Conclusion

Herlihy, Curtis and Beckner conspired and acted in an individual capacity to defraud investors. They advertised, promoted, and sold unregistered securities when none of them were registered broker-dealers. In doing so, they withheld material information from investors that would have given even the least savvy investor pause. The record is sufficient to support administrative assessment of a penalty of \$10,000 each and an additional \$10,000 for defrauding Mr. Glickman, who was obviously over the age of 65.

/s ETHAN SAMUEL SIMON
HEARING OFFICER