

**STATE OF NEW MEXICO
REGULATION AND LICENSING DEPARTMENT
SECURITIES DIVISION**

In the Matter of)
)
J.H. DARBIE & CO., INC. (CRD # 43520))
CHRISTOPHER M. OVERMAN (CRD #6384310))
TROY A. ORLANDO (CRD #6055474))
)
Respondents.)

NOTICE OF CONTEMPLATED ACTION

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

I. PROPOSED FACTS

A. Persons

1. J.H. Darbie & Co., Inc. (“Darbie”) is a securities broker-dealer with its principal place of business located at 40 Wall St., 30th Floor, New York, NY 10005.
2. Christopher M. Overman (“Overman”) is a broker-dealer representative associated with Darbie. While supervised by Darbie, Overman’s business address was 40 Wall St., 30th Floor, New York, NY 10005. Overman began his employment with Darbie on August 12, 2014.
3. Troy A. Orlando (“Orlando”) is also a broker-dealer representative associated with Darbie. While supervised by Darbie, Orlando’s business address was 40 Wall St., 30th Floor, New York, NY 10005. Orlando began his employment with Darbie on January 19, 2011.
4. Darbie is a registered broker-dealer with the State of New Mexico (the “State”) as of May 29, 2013. However, Darbie is not registered as an investment advisor with the State.
5. Neither Overman nor Orlando is a registered investment advisor with the State.
6. Overman is not registered as a broker-dealer with the State of New Mexico. On February 11, 2015, Orlando became registered as a broker-dealer with the State.

7. John Elling ("Elling"), a resident of Santa Fe, NM, is President and CEO of Acoustic Biosystems, Inc. with its principal place of business at 3900 Paseo del Sol, Santa Fe, NM 87507.

B. Contact between Overman, Orlando, and Elling involving high pressure sales tactics

8. Sometime in late December 2014 or early January 2015, Elling claims he began receiving unsolicited phone calls from Darbie. Elling estimates that Darbie attempted to contact him approximately six times without Elling answering. Calls from Darbie routinely displayed no information on Elling's caller ID.
9. Darbie's records indicate a total of 18 calls made to Elling from Darbie between February 4, 2015 and February 16, 2015. Darbie provided no record of any calls made to Elling from Darbie prior to February 4, 2015. *Exhibit 1.*
10. When Elling did speak with a Darbie representative for the first time in early January, Overman introduced himself only as "a stockbroker." According to Elling, Overman went on to indicate that the reason for his call was due to a previous conversation between Elling and Overman, in which Overman suggested an investment to Elling about which Elling had allegedly asked Overman to call him back. Elling denied this previous conversation with Overman ever took place and told Overman that his statement was a fabrication.
11. Elling asked Overman if he knew Elling's number was listed on the federal "do not call" list, to which Overman replied, "it did not matter if he (Elling) wanted to make some serious money."
12. Elling made further inquiries into Overman's identity and attempted to ascertain Overman's employer for purposes of reporting the matter to the Do-Not-Call Registry. Overman indicated he worked for "JH Traders," but would only provide his first name, Chris.
13. Elling informed Overman he was not interested in purchasing any products from him and ended the call.
14. A short time later, Overman called Elling back despite Elling's stated disinterest and told Elling, "You need to listen to me if you want to make some serious money."
15. At this point, Elling decided to "play along" and invited Overman to present his full sales pitch. Elling then learned that Overman was attempting to sell shares in Achillion Pharmaceuticals ("Achillion") (NASDAQ: ACHN).
16. Overman told Elling that while he could not guarantee Achillion's stock price would rise, it was as close to a sure bet as Overman could make because he claimed to have information from "contacts inside Gilead Sciences, Inc." concerning "acquisition discussions" between the two companies. Overman went on to claim that Elling could

triple his money by investing in Achillion, which Elling disbelieved because of Elling's own knowledge of the biotechnology industry.

17. In response to repeated refusals to identify the company, Elling asked Overman to send over the account paperwork which would necessarily contain this identifying information. Overman asked Elling to confirm his address and Overman provided him with an old address that Elling no longer used. According to Elling, it was clear at this point that Overman had obtained Elling's information from a cold call list. In his response, Overman states that he did initiate a cold call to Elling, but that he then passed the call to Orlando so that Orlando could talk to Elling about Achillion. Overman and Orlando are in agreement on these facts.
18. At no time did Elling ever indicate to Overman or Orlando that he wanted to open an account with Darbie, nor did he express an intention to purchase shares of Achillion.
19. Subsequent to these conversations, Elling began receiving regular phone calls from Overman demanding payment for 1000 shares of Achillion. Elling states he never authorized a purchase of Achillion and, indeed, had no account through which to make such a purchase.
20. After Overman began demanding payment, Elling started to receive calls from Orlando as well, inquiring "how quickly he (Elling) could get them the check."
21. Elling received a letter from Darbie signed by both Overman and Orlando that was dated February 4, 2015 and contained sufficient information to identify the company. *Exhibit 2*. The letter states, "Thank you for your commitment to become a customer of JH Darbie & Co and purchase 1,000 shares of Achillion Pharmaceuticals (ACHN)." (emphasis in original).
22. Included with this letter was a pre-filled "Investment Account Application." *Exhibit 3*. The application already contained answers to questions regarding Elling's annual income, net worth, and investment objective (to wit: "Speculation").
23. Although Darbie's new account packages are pre-approved by its Chief Compliance Officer John Catalano, in this instance Catalano was not advised per firm policy that a new account package was going out to Elling. *Exhibit 4*.
24. At no point did Overman or any other Darbie representative ask Elling any of the typical questions necessary to determine the suitability of Achillion stock as an investment. Elling stated that he was asked only if he "traded stocks," but not about his financial background, investment objectives, risk exposure, time horizon, investment knowledge or liquidity needs.
25. Nothing in the materials sent by Darbie to Elling contained information regarding Darbie's trading fees. During a follow-up call from Overman to Elling, Elling attempted to obtain this information without success.

26. Elling states that in addition to the calls he received from Overman, Orlando called him at least three times demanding payment for the stock purchase. Elling noted that both Overman and Orlando told him specifically that he owed them \$12,000 for the trade. Elling was unaware how Overman and Orlando arrived at that amount for the trade and stated that both brokers led him to believe that the trade had already been executed. It was only through his own diligence that Elling discovered an approximate price per share for Achillion was \$12. In reality, no trade for 1,000 shares of Achillion had ever been executed for Elling's benefit.

C. Attempt to sell securities by an unregistered agent

27. Darbie was and is registered to do business in the State of New Mexico.

28. Neither Overman nor Orlando were registered with the State to sell securities – whether as investment advisors or broker-dealers – at the time of the offer to transact securities with Elling took place.

29. Owing to statements made to Elling, both Overman and Orlando believed they were covered under a *de minimus* exemption for broker-dealer representatives, allowing them to contact New Mexico residents without first registering as broker-dealer agents with the State. Darbie notes that the firm did not advise either Overman or Orlando of the exemption, and that they made their own independent determination on this point.

30. New Mexico is not a *de minimus* state. Therefore, broker-dealers and their representatives must register before conducting business in New Mexico. Any sale or offer to sell a security in the State without first securing the requisite registration is a violation of the New Mexico Uniform Securities Act.

II. PROPOSED CONCLUSIONS OF LAW

1. Section I is incorporated.
2. Stock in Achillion is a security under NMSA 1978, § 58-13C-102(DD).
3. The Director has jurisdiction over this matter pursuant to NMSA 1978, § 58-13C-601 and § 58-13C-610.
4. Darbie violated NMSA 1978, § 58-13C-402(D), Employment of an Unregistered Agent, by being a broker-dealer engaged in offering or selling securities in New Mexico and employing or associating with agents who transact business in New Mexico on its behalf without being registered. This constitutes one violation for each of the two unregistered agents, Overman and Orlando.

5. Darbie violated Rule 12.11.4.10 NMAC, Supervision, by failing to adequately supervise Overman and Orlando's solicitation of New Mexico investors without first ensuring that they met New Mexico's corresponding registration requirements.
6. Darbie violated Rule 12.11.4.15(C) NMAC, Suitability, by sending a pre-filled Investment Account Application to Elling and making the recommendation to buy shares of Achillion Pharmaceuticals without properly inquiring or verifying the information contained in the Application.
7. Darbie, Overman, and Orlando violated Rule 12.11.4.15(Q) NMAC with respect to FINRA Rule 2212, Initiating Telephone Solicitation with a Person on the Federal Trade Commission's National Do-Not-Call Registry, by cold calling John Elling, a person whose number appears in the registry.
8. Darbie, Overman, and Orlando violated Rule 12.11.4.15(Q) NMAC with respect to FINRA Rule 2010, by failing to notify Darbie's Chief Compliance Officer when mailing out account opening documents to Elling as required by Darbie's procedures.
9. Darbie, Overman, and Orlando violated NMSA 1978, § 58-13C-402(A), Offer to Sell Securities by an Unregistered Agent, by attempting to sell shares in Achillion to John Elling, a New Mexico resident, without first being licensed to do business in New Mexico.
10. Darbie, Overman, and Orlando violated NMSA 1978, § 58-13C-501(C), Securities Fraud, by misrepresenting to Elling that the cold call contact came about in response to a previous investment inquiry and Elling's request to be called back.
11. Darbie, Overman, and Orlando violated NMSA 1978, § 58-13C-501(C), Securities Fraud, by leading Elling to believe that he owed the brokers \$12,000 for the unauthorized trade of Achillion stock.
12. Darbie, Overman, and Orlando violated NMSA 1978, § 58-13C-501(B), Securities Fraud, by claiming to have insider information from Gilead Sciences, Inc. concerning "acquisition discussions" between Gilead and Achillion in order to induce Elling to purchase shares of the latter.

III. PROPOSED ORDER

After administrative hearing or waiver of such hearing by Respondent, the Director proposes to issue a Final Order that:

1. Pursuant to NMSA 1978, § 58-13C-604(A)(2) and Rule 12.11.4.10 NMAC, Darbie's license to transact business in New Mexico as a broker-dealer will be suspended pending a sufficient showing that its supervisory system may be reasonably expected to prevent and detect violations of the suitability obligation that the company owes to New Mexico customers.

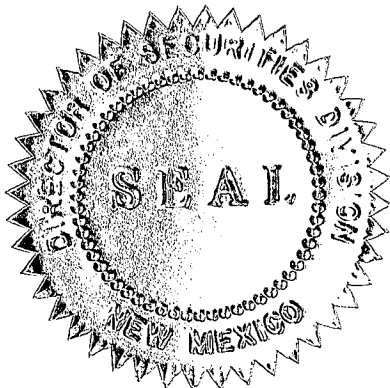
2. Pursuant to NMSA 1978, § 58-13C-604(A)(2) and Rule 12.11.4.10 NMAC, Overman and Orlando will be permanently barred from transacting securities in New Mexico.
3. Pursuant to NMSA 1978, § 58-13C-604(C), the Director will assess a fine of up to \$10,000 against Darbie, Overman, and Orlando for each violation of the New Mexico Uniform Securities Act and its Rules, taking into consideration the extent of Respondents' conduct and the resources of the Respondents committing such violations. The Director will consider each discrete instance of conduct in determining an appropriate fine.
4. In this case, Darbie faces nine (9) counts; Overman faces six (6) counts; and Orlando faces six (6) counts.


NOTICE OF ADMINISTRATIVE HEARING RIGHTS

Each Respondent is hereby notified of its statutory right to request an administrative hearing on the Notice of Contemplated Action in the above referenced matter. Administrative hearings are governed by NMSA 1978, § 58-13C-604(b)(4)-(11). Respondents have fifteen (15) days from receipt of this notice to file a written request for a hearing. The request may be sent by U.S. Mail RRR or via e-mail to the Clerk at feliz.sandoval@state.nm.us. The Director will set the matter for hearing no more than sixty days (60) nor less than fifteen (15) days from receipt of the hearing request. The Director will promptly notify the Respondent of the time and place for hearing. The Director or an appointee will conduct the hearing. The Director or his appointee will pass upon the admissibility of evidence and may exclude evidence that is incompetent, irrelevant, immaterial or unduly repetitious.

As discussed more fully in NMSA 1978, § 58-13C-604(b), any Respondent requesting a hearing is entitled to: appear on its own behalf or may be represented by an attorney; present all relevant evidence; to examine all opposing witnesses who appear on any matter relevant to the issues; and request and obtain discovery, including the names and addresses of witnesses.

ENTERED AT Santa Fe, New Mexico this 9th day of July 2015.




 Alan R. Wilson, Director
 New Mexico Securities Division