

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

IN THE MATTER OF) Docket No. 13IID008
)
KENNETH GOMEZ AND)
BRIAN SULLIVAN,) **PROPOSED DECISION**
)
Respondents.)

A contested case hearing was held on June 25, 2013. Attorney Bob Koppin represented the Iowa Insurance Division. Sue Fagen and Jim Sperr appeared and testified on behalf of the Division. Respondents Kenneth Gomez and Brian Sullivan appeared and testified. Exhibits 1 through 18 were admitted into the record.

FINDINGS OF FACT

Sperr is in the restaurant business and owns two Dairy Queen franchises. Sperr met Gomez through a telephone solicitation in 2010. Sperr uses Edward Jones for investing in the stock market.

Gomez contacted Sperr about investing in an oil exploration venture. Gomez was working as a salesperson for Fairfield Energy. Sperr had invested in four of five oil well ventures in the past. Sperr told Gomez he was interested. As a follow-up to Gomez' conversation with Sperr, Ron Banta, the General Manager for Fairfield Energy, sent Sperr the following letter on January 16, 2012:

Due to the tremendous amount of success we have had with the first three wells in the Amazon Field, Fairfield Energy is excited to present to you the Amazon 13-29 Well. This well is in our Amazon Field also but with a much higher potential for Oil production, due to the fact that this is a new drill and not a redevelopment or re-entry.

The Amazon 13-29 well will be drilled right next to the RGM 13-28 disposal well, which, when first drilled produced at a rate of 125 barrels of oil per day. We will be targeting the "J" sand zone, (approximately 5,395 ft), the most oil prolific zone in this area.

With the help of the same engineers that advised us on our first three wells, we believe the Amazon 13-29 to be an excellent, low-risk prospect for our next producing well.

We look forward to speaking with you about this latest venture.

(Exhibit 1).

Sperr spoke with Gomez about the venture and went to Winter Park, Colorado and met Gomez and Sullivan. Sullivan is the Chief Executive Officer of Fairfield Energy. Sperr stayed at Gomez's home for four days. Gomez and Sullivan also invested in a pyramid investment Sperr is involved with, Qivina.

On March 21, 2012, Sperr signed an Execution Page and Limited Power of Attorney Joint Venture Agreement of Amazon Exploration LLC for Amazon 13-29 Well Joint Venture. Sperr acknowledged he had received a copy of the Joint Venture Agreement and the Confidential Information Memorandum. Sperr agreed to purchase .25 of a unit in the Joint Venture for \$21,428.50, and to purchase .125 of a unit the Joint Venture for \$10,714.25. (Exhibits 4, 5).

The Confidential Information Memorandum contained a discussion of the risks:

Inherent in this Venture are risks, among others, related to: ◇ Speculative Nature of Oil and Gas Exploration ◇ Speculative Revenues from Production, if any ◇ General Liability of All Venturers as General Partners ◇ Inability to Sell or Transfer Units ◇ Assessments and Abandonment of Interests for Non-Payment ◇ Uninsured Risks ◇ Possible Loss of Entire Purchase Amount ◇ Pollution Hazard ◇ Newly Formed Managing Venturer. See "RISK FACTORS."

(Exhibit 8). The Confidential Information Memorandum informed Sperr the venture involved a "HIGH DEGREE OF RISK." (Exhibit 8 at 15).

Sperr acknowledged separately that he "possesses extensive experience and knowledge in business affairs" and is "capable of intelligently exercising" his management powers as a Joint Venturer. (Exhibit 4 at 4). Sperr further acknowledged he is an "accredited investor" with an individual net worth exceeding \$1,000,000, and individual income exceeding \$200,000 or joint income with his spouse of \$300,000 in the last two years and he expected his income to be the same in the present year. (Exhibit 4 at 5).

Sperr sent two investment checks of \$21,428.50, and \$10,714.25 for the Venture, made out to Amazon Exploration LLC. Sperr reported he knew that investing in an oil venture could involve risk. He viewed the risk as the same as opening a new business and understood there was no guarantee he would make a return on his investment. Sperr was made aware of tax incentives with the Venture.

Banta sent Sperr a follow-up letter confirming the receipt of his funds and noting that "at Fairfield/Amazon Exploration, we pride ourselves on making your investment as simplified as possible." (Exhibit 7).

Sperr later received a \$17 dividend check from Fairfield Energy, which bounced. He received another check in the same amount, but he did not cash it. Sullivan told Sperr he needed to invest another \$13,000 in the venture or he would be penalized. Sperr reported he asked Sullivan why he should spend another \$13,000 when the check he received

bounced. Sperr testified the conversation became heated and ended abruptly. Gomez and Sullivan cancelled their interest in Qivana.

Sperr reported the state of Colorado contacted him regarding an ongoing investigation involving Sullivan and Fairfield Energy and encouraged him to contact the Division. Sperr contacted the Division and filed a complaint.

Fagen is employed as an Examiner/Field Auditor for the Division. She requested a copy of the Colorado file involving Sullivan and Fairfield Energy and copies of other filings from other states, discussed below.

In February 2007, the state of California issued a Desist and Refrain Order to Sullivan, Fairfield Energy and others. In the Desist and Refrain Order, California found Sullivan and another individual offered and sold securities in a gas development well project, without obtaining “a permit or other form of qualification authorizing any person to offer or sell these securities in [California].” (Exhibit 13). The California Order ordered Sullivan, Fairfield Energy and others to desist and refrain from offering or selling securities in California.

In January 2011, the state of Nebraska issued Findings of Fact, Conclusions of Law and Order to Cease and Desist to Fairfield Energy, Sullivan and others. The Nebraska Order found Fairfield Energy offered joint venture interest shares in Fairfield Energy to investors in multiple states, including Nebraska, when the Fairfield Energy interests were not registered for sale in Nebraska and when no person acting on behalf of Fairfield Energy was registered as an agent of a broker-dealer in Nebraska. The Nebraska Order ordered Fairfield Energy and Sullivan “to immediately cease and desist from the further offer or sale of securities” and from “acting as a broker-dealer or agent unless registered with” Nebraska.” (Exhibit 14).

On May 11, 2011, the state of Washington issued a Final Order against Sullivan and Fairfield Energy finding Sullivan and Fairfield Energy were offering and selling securities in Washington without registering the securities and by offering and selling securities without being registered as a securities salesperson or broker-dealer in Washington. Washington ordered Fairfield Energy and Sullivan to cease and desist from violating Washington law and to each pay a \$5,000 fine, and \$1,500 in costs.

On July 12, 2012, Sullivan, Fairfield Energy and others entered into a Stipulation for Order of Permanent Injunction and Other Relief with the state of Colorado admitting investments issued by Fairfield Energy are “securities under the Colorado Securities Act.” (Exhibit 16). Sullivan and Fairfield Energy agreed to be “immediately and permanently restrained and enjoined from engaging, directly or indirectly” in the offering or sale of securities in the state of Colorado unless the securities or investments are registered or exempt from registration, and from engaging in business in Colorado as a securities broker-dealer, sales representative, investment adviser, or investment adviser representative. The Colorado Order entered judgment against Sullivan, Fairfield Energy and others in the amount of \$975,000. Sullivan testified he did not agree to the terms of the Stipulation and he is pursuing an action against his attorney.

Fairfield Energy did not register any securities in Iowa or file for an exemption. (Exhibit 18). Fairfield Energy did not register as a broker-dealer with any state or jurisdiction. (Exhibit 17). Sullivan and Gomez are not licensed as agents of a broker-dealer in Iowa.

The Division filed a Statement of Charges against Gomez and Sullivan. The Division avers Gomez and Sullivan: (1) violated Iowa Code section 502.301 by offering and/or selling unregistered, non-exempt and non-federal covered securities in Iowa; (2) violated Iowa Code section 502.402 by acting as unregistered agents in Iowa; (3) made untrue statements of material fact in violation of Iowa Code section 502.501; and (4) failed to state material facts in violation of Iowa Code section 502.501. The Division requests Gomez and Sullivan be ordered to cease and desist and each pay a \$5,000 civil penalty.

CONCLUSIONS OF LAW

Iowa has adopted the Iowa Uniform Securities Act, which governs the offering and sale of securities in Iowa.¹ The Insurance Commissioner administers the Iowa Uniform Securities Act.² If the Insurance Commissioner determines a person has engaged in, is engaging in, or is about to engage in an act, practice, or course of business constituting a violation of Iowa Code chapter 502, the Insurance Commissioner may proceed with civil or administrative enforcement.³ When the Insurance Commissioner seeks administrative enforcement, the Insurance Commissioner may issue a cease and desist order, and assess penalties and actual costs of an investigation or proceeding.⁴

I. Unregistered, Non-Exempt Securities

The Division contends Gomez and Sullivan offered and sold unregistered securities in Iowa, by selling Sperr interests in Amazon 13-29. Gomez and Sullivan contend the interests they sold to Sperr are not securities.

It is unlawful for a person to offer or sell a security in Iowa unless the security is a federal security, the security is exempt from registration under Iowa Code chapter 502, or the security is registered under Iowa Code chapter 502.⁵ Under Iowa Code section 502.102(28), the term security includes an interest in oil, gas, or other mineral rights. Gomez and Sullivan offered and sold to Sperr portions of a unit for the Amazon Exploration of oil wells. (Exhibits 1, 4-5, 8, 9). The evidence supports Gomez and Sullivan offered and sold Sperr securities.

It is undisputed the securities at issue were not registered in Iowa or exempt from registration. Both Gomez and Sullivan offered and sold unregistered securities to Sperr in Iowa. The Division has proven Gomez and Sullivan violated Iowa Code section 502.301.

¹ Iowa Code chapter 502.

² *Id.* § 502.601.

³ *Id.* §§ 502.603, .604.

⁴ *Id.* § 502.604.

⁵ *Id.* § 502.301.

II. Unregistered Agents

The Division avers Gomez and Sullivan offered and sold securities in Amazon 13-29 without being registered agents. It is unlawful for an individual to transact business in Iowa as an agent unless the individual is registered under Iowa Code chapter 502 or is exempt from registration as an agent under Iowa Code section 502.402(2).⁶ An agent is a person, other than a broker-dealer who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or represents an issuer in effecting or attempting to effect purchases or sales of the insurer's securities.⁷

The following individuals are exempt from registration: (1) an individual representing a broker-dealer in effecting transactions in Iowa limited to those described in 15 U.S.C. section 78(h)(2); (2) an individual who represents a broker-dealer that is exempt under section 502.401(2) or (4); (3) an individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries, and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based on transactions in those securities; (4) an individual who represents an issuer who effects transactions in the issuer's securities exempted by Iowa Code section 502.202; (5) an individual who represents an issuer that effects transactions solely in federal covered securities of the issuer; (6) an individual who represents a broker-dealer registered in Iowa or is exempt from registration under Iowa Code sections 502.401(2), in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars acting for the account of others pursuant to discretionary authority in a signed record; (7) an individual who represents an issuer in connection with the purchase of the issuer's own securities; (8) an individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; and (9) any other individual exempted by rule or order.⁸ The evidence reveals Gomez and Sullivan are not exempt from registration in Iowa. They both offered and sold securities to Sperr without obtaining a registration. The Division has proven Gomez and Sullivan violated Iowa Code section 502.402 by transacting business as agents without being registered under Iowa Code chapter 502.

III. Untrue Statements and Omissions of Material Fact

The Division next alleges Gomez and Sullivan made material misrepresentations because the Confidential Information Memorandum does not discuss material issues, including the prior success or failure of other wells, the commissions or other compensation paid to solicit the purchase of units, and the prior litigation taken against Fairfield Energy, Amazon Exploration and its officers, agents, and employees.

Under Iowa law it is unlawful for a person, in connection with the offer, sale, or purchase of a security to make an untrue statement of material fact or to omit to state a material fact

⁶ *Id.* § 502.402(1).

⁷ *Id.* § 502.102.

⁸ *Id.* § 502.402(2).

necessary in order to make the statements made not misleading.⁹ During the hearing Sperr acknowledged prior experience investing in oil and gas. Sperr acknowledged he was an accredited investor. The Division did not present any competent evidence showing Gomez and Sullivan withheld information concerning the prior success or failure of other wells, or the commissions or other compensation paid to solicit the purchase of units.

The evidence revealed Gomez was not a party to the actions taken against Sullivan and Fairfield Energy in California, Nebraska or Washington. The Division has not proven Gomez had knowledge of the prior actions in California, Nebraska or Washington. The Division has also failed to prove when Sullivan had knowledge of the Colorado action.

Sullivan and Fairfield Energy had been ordered to cease and desist from offering and selling securities in California, Nebraska and Washington akin to the securities offered and sold to Sperr in Iowa prior to the offer made to Sperr. The evidence reveals Sullivan was aware of the prior cease and desist orders, but withheld this material information from Sperr. The Division has proven Sullivan violated Iowa Code section 502.501 by omitting a material fact in the offering and sale of securities. The Division has not proven Gomez made any omissions of material fact in the offering or sale of securities in Iowa.

IV. Imposition of a Civil Penalty

The Division seeks imposition of a \$5,000 civil penalty against Gomez and Sullivan for violating Iowa Code chapter 502. When the Insurance Commissioner determines a person has violated Iowa Code chapter 502, the Insurance Commissioner may impose a civil penalty of \$5,000 for a single violation or \$500,000 for more than one violation, and may recover the actual cost of an investigation or proceeding.¹⁰ Gomez and Sullivan offered for sale and sold unregistered securities to Sperr in Iowa. They also transacted business on behalf of Amazon Exploration and Fairfield Energy without being registered as agents in Iowa. Sullivan further omitted information concerning other actions brought against him and Fairfield Energy in California, Nebraska and Washington. I conclude imposition of a \$5,000 civil penalty against Sullivan is proper. Because Gomez' culpability is less severe than that of Sullivan, imposition of a \$2,000 civil penalty against Gomez is appropriate.

ORDER

Gomez and Sullivan violated Iowa Code section 502.301 by offering and selling nonexempt, unregistered securities in Iowa. Gomez and Sullivan shall cease and desist from offering and selling unregistered, nonexempt securities in Iowa. Gomez and Sullivan violated Iowa Code section 502.402 by transacting business in Iowa without obtaining a registration or possessing an exemption from registration as agents in Iowa. Gomez and Sullivan shall cease and desist from transacting business in Iowa without obtaining a registration or possessing an exemption from registration as agents. The Division has proven Sullivan made omission of material fact in the sale of securities in Iowa and he shall cease and desist from making omissions of material fact in the sale of securities in Iowa. The Division has not proven Gomez made omissions of material fact in the sale of securities in

⁹ *Id.* § 502.501.

¹⁰ *Id.* § 502.604

Iowa. Sullivan shall pay a \$5,000 civil penalty. Gomez shall pay a \$2,000 civil penalty. The Division shall take any steps necessary to implement this decision.

Dated this 18th day of July, 2013.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Kenneth Gomez (First Class Mail and Certified Mail)
Brian Sullivan (First Class Mail and Certified Mail)
Bob Koppin and Irene Vega (Electronic Mail)

Notice

An adversely impacted party may appeal a proposed decision to the commissioner within 30 days after the issuance of the proposed decision.¹¹ The appeal must be filed with the commissioner's office in writing. The commissioner's office is at 330 Maple Street, Des Moines, Iowa 50319. The notice shall specify: (1) the proposed decision or order appealed from; (2) the party initiating the appeal; (3) the specific findings or conclusions to which exception is taken; (4) the grounds for relief; and (5) the relief sought.

¹¹ 191 IAC 3.27.