

to entry of judgment against them on Count XIX, with all remaining counts being **DISMISSED**. The defendant Jerry Revalee has stipulated to entry of judgment against him on Counts I through VII, XV, XVII and XVIII in favor of David Andrews in the amount of \$50,000, plus interest, and in favor of Raymond St. Laurent in the amount of \$187,500, plus interest. Revalee has also stipulated to entry of judgment for no more than \$237,500 on Galen Shawver's cross-claim seeking contribution as to the amounts David Andrews and Raymond St. Laurent sent to bank accounts in the First Tennessee Bank, with all remaining claims and cross-claims against Jerry Revalee being **DISMISSED**. The plaintiffs have dismissed without prejudice their claims against Auman Jobe. The only remaining defendants whose liability is in question are Michael Cassidy and Galen C. Shawver.

These are my findings of fact and conclusions of law under Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. The plaintiffs David Andrews, Richard Dingwell and Raymond St. Laurent are residents of the State of Maine. The defendant Michael Cassidy is a resident of the State of New Hampshire. The defendant Galen C. Shawver is a resident of the State of North Carolina.

A. Galen Shawver and the Emerald Green Pension Fund

2. Galen Shawver³ is the president and sole stockholder of Commercial Mortgage & Associates, Inc. ("CMA"). In 1996, CMA's primary business was to qualify borrowers for loans from The Money Store. Shawver had a mortgage

³ Galen Shawver testified and I found much of his testimony unworthy of belief.

banking license, which did not permit CMA to be a depository or trust institution. Shawver, however, held CMA out to be the custodial bank for the Emerald Green Pension Fund (“Fund”).

3. Shawver created the Emerald Green Money Pension Plan, of which the Emerald Green Pension Fund Money Purchase Trust is part, in 1996. Although the pension plan’s stated purpose was for retirement investment by employees of CMA, Shawver told Auman Jobe, the plan’s administrator, that the plan was also designed to earn profits for outside investors. But under the plan’s terms, only employees could contribute through payments made by their employer, CMA.

4. Shawver established a trust under the pension plan to hold the assets of the plan and any employer contributions made by CMA. CMA was trustee. Under the terms of the trust, the trustee was permitted to combine the trust’s assets with any other trust established by CMA pursuant to a qualified employee benefit plan.

5. While nothing in either the trust or the plan authorized the trustee to permit investments by non-employees such as the plaintiffs, Shawver held out the trust for investment to outsiders as the Emerald Green Pension Fund Trust and himself as trustee.⁴ Although Shawver claims that there is a separate “common law trust” part of the pension plan that permits this, the only trust provided for in the

⁴ Although this “investment” vehicle has been referred to by several different names, such as the “Emerald Green Trust,” “Emerald Green Pension Trust,” “Emerald Green Pension Fund” and “Emerald Green Pension Fund Trust,” it is clear that they all refer to the trust as part of the pension plan.

plan document and trust agreement is the trust described above. That trust is solely for the benefit of the participating employees.

6. Shawver also ensured that those closest to the Fund would not or could not expose any illegality—he appointed Auman Jobe, a naïve and trusting individual, to be the plan’s administrator despite his lack of experience with federal laws regarding ERISA. Shawver provided his accountant with only sparse accounting records for 1996, the year prior to the majority of the investment activity and the Fund did not even have a bookkeeping system. Finally, Shawver brought in an attorney with no experience with pension funds or ERISA for ostensible compliance purposes.

7. After creating this “investment opportunity,” Shawver attempted to isolate himself from the investors he was supposed to serve as trustee. “Joint venture agreements” used in recruiting investors such as the plaintiffs stated that if they attempted to contact the trustee (Shawver), they would be assessed a \$1,000,000 penalty and their investment contracts would be canceled. Investors like the plaintiffs were told that Shawver dealt with only major players rather than small-time investors like themselves.

B. Michael Cassidy

8. Michael Cassidy⁵ had a NASD license that expired in 1990 and was not renewed. He has never had a license to sell securities in Maine, and has never

⁵ Michael Cassidy testified and I found much of his testimony unworthy of belief. Cassidy also objected before trial to the admission of the deposition of Jerry Revalee. At closing argument, he informed me that he had withdrawn the objection.

registered to be an investment advisor or broker dealer in Maine, New Hampshire, or Massachusetts.

9. In 1997, Cassidy opened a New Hampshire bank account under the name of ShuKu International, a foreign trust that he formed and for which he claims to be an agent. Beginning in October 1997, that account received and sent a number of wire transfers, sometimes totaling over \$200,000 in one month. Cassidy often used this account to send his clients' investments in the Fund.

10. Cassidy and his wife collectively report taxable income of \$20,000 (or less) per year for a family of four. Cassidy has transferred ownership of his home to his brother for no consideration, but still pays the mortgage each month. Despite his ostensibly limited means, Cassidy is able to afford regular trips to the Caribbean to participate in investment seminars. Cassidy has regularly withdrawn a substantial amount from ShuKu International's account through petty cash each month for "trust expenses." By November, 1998, the ShuKu International account had a balance of only \$1.27.

11. Cassidy's initial connection with the Fund was through Clyde Beverly. Beverly told Cassidy about Shawver and the Fund. Beverly also provided Cassidy with joint-venture agreements and the letters of intent that Cassidy had "investors" sign before sending their money to the Fund's accounts. Beverly also provided Cassidy with some of the wiring instructions for the plaintiffs' initial investments.

Cassidy began soliciting investors on behalf of the Fund and both he and Beverly sent many investors' money into the Fund's account.⁶

12. In the Fall of 1997, a nonparty, Al Sargent, introduced Cassidy to the plaintiffs David Andrews and Raymond St. Laurent at a restaurant in Massachusetts. At that meeting, Cassidy told Andrews and St. Laurent that he was a licensed security broker and a student of international finance. He told them that he could arrange investments that were not available to the common investor such as a North Carolina pension fund he represented that had an ERISA-qualified trustee. Cassidy said that this fund had been consistently producing income for over one and one-half years and would continue to provide substantial returns. Andrews and St. Laurent trusted Cassidy because he knew Sargent. They did not conduct any further research into his background.

13. After that meeting, Cassidy telephoned Andrews and St. Laurent several times at their homes in Maine. Cassidy told them that their funds would be invested in a manner that would yield a high rate of return, certainly no lower than 8% to 12% per month and, if they maintained their investment for two to three months, potentially as large as 300%. Cassidy also said that the defendant Galen Shawver owned a bank and was the trustee of the pension fund he was describing. In response to questions about the security of their funds, Cassidy told Andrews and St. Laurent that their funds would be guaranteed by one of the top twenty-five

⁶ By March 1998, Clyde Beverly no longer participated in this investment scheme, having fled to Europe with \$410,000 of the Fund's money that Cassidy had directed to a bank account in Texas. The plaintiffs' funds had not been sent to this account.

banks in the world and would be protected by an insured bank account, with bonding to protect against any loss. Cassidy explained that the pension fund was operated under Shawver's banking license, and that Shawver had several such licenses. Cassidy also told Andrews that he himself had been doing business with the Fund long enough to receive a payout from it.

14. The plaintiff Richard Dingwell was at St. Laurent's house during a December, 1997 phone call when Cassidy made similar representations. During this conversation, Cassidy said that the fund was called the Emerald Green Pension Fund and described it as a vehicle for trading bank debentures. The plaintiffs understood that Cassidy represented the Fund.

15. Despite his statements to the three plaintiffs, Cassidy knew that there had never been a payout from the pension fund, that the fund assets had never been traded, that there was no top twenty-five bank guarantee, and that any investment would not be secured in a "bonded" account.

16. Cassidy gave the plaintiffs instructions on how to wire their contributions to the Fund. Cassidy also sent all three plaintiffs a joint venture agreement, which stated that the profits were to be split three ways: one-third to the particular investor, one-third to Clyde Beverly/Palladian,⁷ who Cassidy said was a subcontractor for the Fund and would help distribute profits, and one-third to the Cassidy group.

⁷ Clyde Beverly is the president of Palladian International, Inc.

17. Because of Cassidy's misrepresentations, Andrews wired \$30,000 to the Fund's North Carolina bank account on December 10, 1997.⁸ Because of Cassidy's misrepresentations, St. Laurent wired \$70,000 to the same account on December 16, 1997. Because of Cassidy's misrepresentations, Dingwell wired \$20,000 to the same account on December 16, 1997. Had they known the truth, none of the plaintiffs would have invested.

18. The investments in this case were not registered with the Securities and Exchange Commission. Cassidy knew this fact and did not so advise the plaintiffs. No one provided a prospectus to the plaintiffs.

C. North Carolina Investigation

19. Shortly after a January 17, 1998 conversation, Cassidy sent Shawver a list of all the investors that he had directed to the Fund, including the three plaintiffs.

20. On January 28, 1998, the State of North Carolina obtained an order from a North Carolina court to freeze the bank accounts of CMA and the Fund. Although Shawver notified Cassidy of the freeze, neither Shawver nor Cassidy notified the plaintiffs.

21. Andrews wired an additional \$60,000 to the Fund's North Carolina bank account on February 2, 1998. Before this wire transfer, Cassidy had told Andrews that Andrews had earned a 50% return on his initial investment (a later

⁸ The plaintiffs are not claiming that this investment is a basis for the federal securities claims under the Securities Act of 1933 because it occurred beyond the statute of limitations period.

statement showed a 150% return). In fact, the Fund had no income except interest and gains earned through repurchase agreements.

22. After the freeze order, Shawver's attempts to isolate himself from exposure from the Fund continued. Shawver told Jerry Revalee to set up a bank account in Revalee's name⁹ at the First Tennessee Bank as an alternate destination for investors' funds. (Contrary to instructions, Revalee opened the account in the joint names of both Revalee and Shawver.) Shawver then told Cassidy to send investor funds to the First Tennessee Bank account rather than to North Carolina. Once this account was open, Cassidy sent investor funds there from the ShuKu International account.¹⁰ Shawver then directed Revalee to transfer money from these accounts to Shawver, his wife and other individuals. Shawver also agreed that Revalee could use the funds in the First Tennessee Bank account if Revalee would guarantee immediate replacement of any money borrowed. Shawver did not ask for any security or collateral in this "loan" arrangement—Revalee could use the account like a credit line. Revalee took advantage of this arrangement on several occasions to, among other things, buy cars and settle a civil suit pending against him. Revalee did not repay the funds that he "borrowed."

⁹ At this time, Revalee was under a cease and desist order from the Securities and Exchange Commission.

¹⁰ The funds directed by Cassidy actually went to the personal account of Jerry and Peggy Revalee. Shawver and Revalee had agreed that the investors' funds needed to be sent to Revalee's personal account before they were transferred either to the Revalee/Shawver account or to a separate account in the Union Planters' Bank, over which Revalee had signing authority.

23. On March 11, 1998, The Money Store filed a complaint in North Carolina Superior Court against Shawver and CMA claiming, among other things, breach of fiduciary duty, fraud and breach of contract. The Money Store requested the appointment of a temporary receiver of the same North Carolina bank accounts the state had frozen. She was appointed on April 16, 1998.¹¹

24. By March, 1998, Clyde Beverly absconded with \$410,000 of the Fund investors' money that had been directed by Cassidy to an account in Texas. While Beverly attempted to convince Cassidy to transfer all of the Fund's assets (which would have included the amounts invested by the plaintiffs) to this Texas account in January, Cassidy did not do so.

25. In March, Cassidy and Andrews exchanged a series of e-mails. Responding to Andrews's concern for greater security for his investment, Cassidy assured him that his funds were blocked in a fiduciary's account, bonded, and insured to prevent loss due to theft. Cassidy also notified Andrews that Andrews had by now earned a \$60,000 return amounting to a "90 windfall" for Andrews.

26. In April, 1998 the plaintiffs each received either by fax or by mail a statement of account, prepared by Shawver (or by Cassidy under Shawver's instructions) and forwarded by Cassidy. That statement showed that they had

¹¹ During the hearing regarding The Money Store's application for the appointment of a temporary receivership, Assistant Attorney General McNeill Chestnut, on behalf of the State of North Carolina, consented to a release of the frozen funds if the court ordered a temporary receivership. Tr., Mortgage, Inc. v. Commercial Mortgage & Associates, No. 98 CvS 5342, at 24, lines 15-19 (N.C. Super. Ct., Guilford Cty. Apr. 16, 1998) (Pls.' Ex. 24). I have not relied upon the objected-to testimony of Leonidas McNeil Chestnut in this trial nor upon the Declarations of Special Agent Daniel E. Guerrini.

each earned a 300% return on their investments. Neither Shawver nor Cassidy disclosed that in fact no investment activity at all had occurred, except interest and repurchase agreements.

D. Bank of Bangkok Guarantees

27. On December 26, 1997, CMA president Shawver, acting as trustee of the Fund, acquired from Steven Brooks two so-called Bank of Bangkok guarantees with a face amount totaling \$900 million. To pay for these guarantees, Shawver transferred \$500,000 from the Fund's account to an escrow account in the name of Cowen & Company for the credit of Brooks. This money subsequently disappeared, allegedly misappropriated by Brooks and Cowen. In early 1998, Shawver told Revalee that he was having problems with his North Carolina bank in authenticating the Bank of Bangkok guarantees. These guarantees were "canceled" by Brooks on March 1, 1998. Bank of Bangkok's United States legal counsel informed Shawver by letter on June 24, 1998 that the guarantees were fraudulent. In his June 24th response letter, Shawver acknowledged that he had been aware of the fraud allegations for at least 30 days. Shawver never informed the plaintiffs that the guarantees were fraudulent or that money had been misappropriated.

28. In May, 1998, Cassidy contacted Andrews in Maine and told him that Shawver had discovered a one-time opportunity (the Bank of Bangkok guarantees), which promised exceptional returns for four cycles. Because of this representation, Andrews wired, pursuant to Cassidy's instructions, an additional \$50,000 to the

First Tennessee Bank account. Andrews was told that Revalee, the second name on the account, was an additional trustee of the Fund. Andrews understood that he was still investing in the Fund.

29. In May, 1998, St. Laurent wired an additional \$187,500 to this First Tennessee Bank account pursuant to Cassidy's wiring instructions. In deciding whether to invest again with the Fund, St. Laurent relied upon the return listed in his April 1998 statement and Cassidy's representation that there could be possibly a 200-300% return.

30. Although Cassidy told Andrews and St. Laurent that the First Tennessee Bank account was another of the Fund's accounts and the wiring instructions Cassidy provided indicated that the Tennessee Bank account was that of Revalee and Shawver, the account number listed in the wiring instructions was actually that of Jerry and Peggy Revalee's personal account. The funds that Andrews and St. Laurent sent to First Tennessee Bank went to Revalee's personal account and were co-mingled with Revalee's personal funds.

31. Shawver used the funds in the First Tennessee Bank accounts to settle The Money Store's claim against Shawver and CMA. At Shawver's direction, Revalee also sent \$100,000 of the First Tennessee Bank funds to Azzan Financial Group, a d/b/a for Louis Chilelli,¹² who had invested in the Fund prior to the plaintiffs' investments. Neither Shawver nor Cassidy informed the plaintiffs that the First Tennessee Bank funds were used for these purposes.

¹² For more about Mr. Chilelli, see n.13, infra.

32. On May 8, 1998, the United States Attorney's Office for the Middle District of North Carolina instituted a forfeiture action against the North Carolina bank accounts, which were then frozen the same day as North Carolina released them. As of May 8, the accounts did not have sufficient assets to satisfy fully each investor's claims

33. Neither Cassidy nor Shawver informed the plaintiffs that the North Carolina bank accounts had been frozen or placed into a receivership, that the Fund and CMA were being investigated, that the Bank of Bangkok guarantees were deemed fraudulent, or that there had been no actual trading on their first investments. Had they learned any of this information, Andrews and St. Laurent would not have invested further.

34. In June, 1998, Andrews received a second statement of account from Cassidy, which was prepared by Shawver. It showed that there was a total return of 300% and a final cash distribution available of \$350,895. Andrews requested an \$87,500 cash distribution and sent the request to Cassidy. To this date, Andrews has not recovered any of his investment.

35. On June 16, 1998, Dingwell received a statement of account from Cassidy, which stated that he had earned \$30,000 from trades involving the Fund. Dingwell understood from Cassidy that this represented actual profits and that there had been trades involving the Fund. Dingwell then spoke with Cassidy about whether he should leave his money in the Fund or receive a cash disbursement. Because Cassidy told him that there would be additional trades, Dingwell kept his

money in the Fund. Neither Shawver nor Cassidy informed Dingwell of the seizure, the investigation, the lack of actual trades, the theft from the Fund or the personal use of the investors' funds.

36. On June 16, 1998, St. Laurent received a statement of account from Cassidy that listed a total return of 300% and a final cash available distribution of \$644,790. Cassidy told him he would receive a check for \$161,257 in July, with later payments to follow. As of the trial, St. Laurent had not received any of his money.

37. The plaintiffs received a "Guarantee Payorder" signed by Shawver on August 1, 1998, that Cassidy said was their way of recovering their principal through CMA, the custodial bank. The terms of each payorder stated that it was "payable to the benefit of: ShuKu International, located at c/o Michael Cassidy, as its Treasurer" for the credit to the individual plaintiffs.

38. In August, 1998, Cassidy informed Andrews that there was some administrative misunderstanding with North Carolina authorities regarding the North Carolina bank account. Andrews and St. Laurent phoned Shawver from St. Laurent's home. Shawver told them that if they did not sign an affidavit stating that they were satisfied with Shawver's management of their funds, their risk of losing their capital would increase. Shawver and Cassidy told Andrews and St. Laurent that this was the only way they could have any assurance of seeing their money again. Andrews and St. Laurent refused to sign the affidavit.

39. On August 4, 1998, Cassidy signed this affidavit purportedly as an agent on behalf of all participants in the Fund. Cassidy had no authority to sign on the plaintiffs' behalf. In the affidavit, Cassidy stated that all participants were satisfied with Shawver's actions as trustee and requested that the United States Attorney's Office release the frozen account to Shawver's control.

40. In September, 1998, Shawver told Andrews that if investors wished to involve the federal or state authorities, it would cause a messy audit of the last three years and the government would refuse to disburse the funds.

41. Despite their attorney's demands for the recovery of their investments, the plaintiffs have not received any money from the defendants.¹³

42. In summary, Shawver masterminded a fraudulent investment scheme that, with Cassidy's help, ensnared the plaintiffs. While Shawver distanced himself from the scheme at the outset and had Cassidy and Beverly woo unwitting investors, Shawver remained influential throughout: he created the trust; he prepared fraudulent revenue statements; he directed the opening of new bank accounts for receipt of investor funds after the North Carolina government, aware

¹³ On the last day of trial, before CMA settled with the plaintiffs, Louis Chilelli testified for CMA. He testified that Cassidy had persuaded him to put \$1.5 million into the Emerald Green Pension Fund. But Chilelli believes in Shawver and thinks that the State of North Carolina and the United States Attorney's Office are up to no good. As a result, he has *withdrawn* his claim against the Emerald Green Pension Fund in exchange for a personal claim against Shawver. The security? A couple of parcels of unidentified real estate and, of course, the emerald after which the Fund was named. Chilelli had the "emerald" with him in court, but no admissible evidence of its value. If all this works, the amount currently under seizure in North Carolina is sufficient to meet the claims of all other investors, including these plaintiffs. I do not know whether Mr. Chilelli is a part of the scheme or just frantically grasping at straws as he confronts the loss of all his money.

of his scheme, froze his North Carolina accounts; he continued to hold out the bank guarantees as legitimate lucrative investment opportunities when he knew or should have known that they were fraudulent; he used the investors' money for improper purposes; and he directed a cover-up of his scheme when the federal government began to investigate him. Cassidy also caused the losses the plaintiffs suffered. Cassidy recruited them through the intentional and repeated use of fraudulent statements and helped conceal the scheme from the authorities and the investors.

CONCLUSIONS OF LAW

Subject matter jurisdiction exists under the Securities Act of 1933, 15 U.S.C.A. § 77v(a) (West 1997), the Securities and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.A. § 78aa (West 1997), and 28 U.S.C.A. § 1367(a) (West 1993).¹⁴

Personal jurisdiction exists over Cassidy and Shawver as to the federal securities claims because Cassidy and Shawver have minimum contacts with the United States. 15 U.S.C.A. § 78aa (West 1997). See, e.g., Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (under 15 U.S.C. § 78aa); United Elec., Radio and Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992). Under the doctrine of pendent jurisdiction, there is jurisdiction over Cassidy and Shawver as to the related state law claims, even if personal jurisdiction would not be otherwise available. See IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056-57 (2d Cir. 1993); ESAB Group, Inc. v.

¹⁴ Diversity jurisdiction also exists as to Andrews and St. Laurent.

Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997); 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.2 (Supp. 2000) (noting that most courts have followed Herrmann). The claims here “derive from a common nucleus of operative fact,” United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); all stem from the defendants’ scheme to induce the plaintiffs to invest in the Fund through a series of false or misleading statements and material omissions.

I will deal with the Counts of the Seventh Amended Complaint¹⁵ that concern Cassidy’s and/or Shawver’s liability and all Counts that concern damages against any defendants who have not settled or been dismissed.

A. FEDERAL SECURITIES CLAIMS (COUNTS I THROUGH VI)

A “security” is, among other things, an “investment contract.” 15 U.S.C.A. § 77b(1) (West 1997). In United Housing Found. v. Forman, 421 U.S. 837, 852 (1975), the Supreme Court stated that the “touchstone” of defining an investment contract is “the presence of an investment in a common venture premised on the reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.” See also Securities & Exch. Comm’n v. W.J. Howey, Co., 328 U.S. 293, 298-99 (1946). Further, “in searching for the meaning and the scope of the word ‘security’ in the Act, form should be disregarded for substance and the emphasis should be on economic reality.” Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Here, the common enterprise was Emerald Green Pension Fund.

¹⁵ During trial, the plaintiffs moved to amend the complaint to add an additional count for settlement purposes with what they labeled their Seventh Amended Complaint. Because the new complaint reiterates the counts of the Fifth Amended Complaint, those at issue at trial, I refer to the Seventh Amended Complaint.

Investors like the plaintiffs were led to expect profits solely from the efforts of Galen Shawver and were recruited through Cassidy's misrepresentations of the potential for enormous returns from the leverage of these secured or "bonded" funds. Further investments were induced through the fraudulent accounting statements Shawver prepared and Cassidy provided that listed a 300% return. The plaintiffs clearly expected profits solely from the efforts of a third party. Finally, the interests in the Fund were offered and sold by use of the instrumentalities of interstate commerce. Therefore, an investment in the Fund amounts to an investment contract under the Act.¹⁶

Count I: Sale of Unregistered Securities (15 U.S.C. § 77e(a))

Under section 12(1) of the Securities Act of 1933, a plaintiff may bring a private cause of action against any person who "offers or sells a security in violation of section 77e of this title." 15 U.S.C.A. § 77l(a)(1) (West 1997). Section 77e prohibits a person from directly or indirectly selling or delivering an unregistered security. 15 U.S.C.A. § 77e(a) (West 1997).

Liability under section 12 is extended to those who "offer or sell" a security; to those who either pass title or "who successfully solicit[] the purchase, motivated at least in part by a desire to serve [their] own financial interests or those of the

¹⁶ It is unclear whether either defendant is pressing a private offering defense. In any event, the defense has not been proven. See Securities & Exch. Comm'n v. Ralston Purina Co., 346 U.S. 119, 126 (1953) (noting that party claiming exemption has burden of proving the existence of private placement); Pinter v. Dahl, 486 U.S. 622, 627 n.4 (1988) (same).

securities owner.” Pinter v. Dahl, 486 U.S. 622, 642, 647 (1988) (Section 12(1)); Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1214-15 (1st Cir. 1996) (Section 12(2)).

The interests in the Fund that were offered and sold were not registered with the Securities and Exchange Commission. Therefore, Cassidy, Shawver, Beverly, Brooks and ShuKu International are jointly and severally liable under this Count for the consideration the plaintiffs paid within the limitations period,¹⁷ plus interest.

Count II: Failure to Provide a Prospectus relating to the Sale of Securities

The Securities Act makes it unlawful for a person, directly or indirectly, “to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.” 15 U.S.C.A. § 77e(b)(2) (West 1997).

Because no prospectus was provided to the plaintiffs, Cassidy, Shawver, Beverly, Brooks and ShuKu International have violated 15 U.S.C.A. § 77e(b) (West 1997) and are therefore joint and severally liable under 15 U.S.C.A. § 77l(a)(1) (West 1997) for the same amount as under Count I.

Count III: Violation of 15 U.S.C. § 77l(a)(2): Communication of Untrue or Misleading Facts and/or Material Omissions

Section 12(2) provides for liability against any person who

offers or sells a security . . . by the use of any means or instruments of transportation or communication in

¹⁷ For Andrews, \$110,000, for St. Laurent, \$187,500 and for Dingwell, \$20,000.

interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission) . . .

15 U.S.C.A. § 77l(a)(2) (West 1997).

While the plaintiffs refer to a conspiracy to violate this section, see 7th Am. Compl. ¶ 62, I find that Cassidy and Shawver are each liable as primary actors and do not address the conspiracy allegation.¹⁸

It is clear that the interests in the Fund were sold by false or misleading statements and material omissions both at the time of St. Laurent's and Dingwell's initial investments and at the time of Andrews's and St. Laurent's subsequent investments. Shawver created the pension plan and trust, which were designed solely for employee investment purposes, yet he knowingly held out the trust for outside investors, who could not invest in the trust pursuant to the trust agreement. Shawver had his agents, Cassidy and Beverly, solicit investors such as the plaintiffs to invest in the trust account. Cassidy omitted the fact that the Fund assets had never been traded while falsely claiming it had been consistently producing substantial returns. He falsely claimed that the Fund was secured by a top twenty-five bank guarantee and that the plaintiffs' investments would be

¹⁸ While not deciding the issue, I note that under the reasoning of Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164 (1994) and Pinter v. Dahl, 486 U.S. 622, 641 (1988), a civil conspiracy claim may not be available under section 10(b) of the Exchange Act of 1934 and under section 12(2) of the Securities Act of 1933. See Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorokin, 135 F.3d 837, 842 (2d Cir. 1998) (civil conspiracy claim is not available under section 10(b)).

“bonded” to protect against any loss. Cassidy misrepresented to Andrews that Andrews had earned substantial returns to induce Andrews to invest a second time. Both Cassidy and Shawver misrepresented that the plaintiffs had earned a 300% return to induce Andrews and St. Laurent to invest further. Despite having a duty to disclose to the plaintiffs any material information before their investments, Shawver and Cassidy failed to disclose the North Carolina investigation, the freezing of the Fund’s account and the fact that no trading had occurred. These misrepresentations or omissions were intentional and were designed to defraud the plaintiffs. All of this information was material: had this information been accurately disclosed, it would have influenced a reasonable investor’s decision. Therefore, Cassidy, Shawver, Beverly, Brooks and ShuKu International are liable to St. Laurent and Dingwell for the amount of their initial investments, plus interest, and liable to Andrews and St. Laurent for their subsequent investments, plus interest.

Counts IV and VI: Liability of a Controlling Person

Section 15 of the Securities Act imposes joint and several liability on any person who “pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls” a person found liable under 15 U.S.C.A. § 77l “unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.” 15 U.S.C.A. § 77o (West 1997). Section 20(a) of the Exchange Act

also imposes joint and several liability on a person who controls any person that commits a violation of the Exchange Act. 15 U.S.C.A. § 78t (West 1997).

To recover under both provisions, a plaintiff must show a primary violation by a controlled person, and that a controlling person was in some meaningful sense a culpable participant in the fraud. See Securities and Exchange Commission v. First Jersey Sec., Inc., 101 F.3d 1450, 1472 (2d Cir. 1996); In re Crazy Eddie Securities Litigation, 747 F. Supp. 850, 860-61 (E.D.N.Y. 1990). The burden is on the defendant to show good faith. First Jersey, 101 F.3d at 1473.

The plaintiffs have proven that Shawver is a controlling person over Cassidy for purposes of these sections. Cassidy acted as Shawver's agent throughout: he solicited investors, including the plaintiffs, for the scheme, directed their money to the various bank accounts pursuant to Shawver's directions, worked with Shawver to prepare or distribute the fraudulent statements of account, and participated in a cover up to mislead the authorities and other investors. Cassidy benefitted from the scheme through his frequent petty cash withdrawals from ShuKu International's account, an account that received investor funds intended for the Emerald Green Pension Fund Trust. Shawver's participation, both directly and indirectly through Cassidy, caused harm to the plaintiffs. Shawver is therefore liable as a controlling person under both sections and is jointly and severally liable to the extent of Cassidy's liability. Brooks and Beverly are also jointly and severally liable under these sections.

Count V: Use of Manipulative and Deceptive Devices

Section 10(b) of the Exchange Act makes it unlawful for any person to use or employ directly or indirectly in connection with the sale of a registered or non-registered security “any manipulative or deceptive device.” 15 U.S.C.A. § 78j(b) (West 1997).

To establish liability under section 10(b) for misrepresentations, a plaintiff must prove: (1) damage; (2) caused by reliance on defendant’s misrepresentations or omissions¹⁹ of material facts, or on a scheme by the defendant to defraud; (3) made with scienter; (4) in connection with the purchase or sale of securities; and (5) which is furthered by the defendant’s use of the means of interstate commerce or of the mails. Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1015 (2d Cir. 1989). The plaintiffs have done so here.

Before St. Laurent’s and Dingwell’s initial investment, Shawver knowingly and intentionally created this scheme to defraud. In furtherance of this scheme, Shawver held out interests in the trust as a legitimate investment opportunity for outside investors when there was no legitimate investment opportunity. Cassidy, who held himself out as an agent of the Fund, affirmatively misrepresented the Fund’s trading history and the security of an investment within it, intending to induce them to invest in the Fund. Both plaintiffs relied upon Cassidy’s misrepresentations and wired money into the Fund’s accounts.

¹⁹ A duty to disclose may arise if a person “has previously made a statement of material fact that is either false, inaccurate, incomplete, or misleading in light of the undisclosed information.” Gross v. Summa Four, Inc., 93 F.3d 987, 992 (1st Cir. 1996).

Before Andrews's second investment, Cassidy affirmatively misrepresented the return Andrews had earned from his first investment when in fact there had been no trading. Before Andrews's and St. Laurent's final investments, in order to induce further investment in the Fund, Cassidy and Shawver falsely stated that the plaintiffs had earned a 300% return on their investments even though both knew the Fund assets had never been traded and had never earned a return on the Bank of Bangkok guarantees. Despite Cassidy's representation that the Fund was a secure investment, neither he nor Shawver disclosed the existence of the North Carolina investigation, The Money Store lawsuit, the theft of the Fund's assets, or the freeze on the North Carolina bank account. In making their final investments, both plaintiffs relied on these representations and failures to correct material misinformation. Had the plaintiffs known any of the relevant information prior to each investment, they would not have invested in the Fund. Despite their demands, their money has not been returned. Therefore, Cassidy, Shawver, Beverly, Brooks and ShuKu International are jointly and severally liable to Andrews for \$140,000, plus interest, to St. Laurent for \$257,500, plus interest, and to Dingwell for \$20,000, plus interest.

B. STATE LAW CLAIMS (COUNTS VII THROUGH XVIII)

Counts VII - XI: Fraud and/or Deceit and Fraudulent Misrepresentation

To establish liability for fraudulent misrepresentation,²⁰ a plaintiff must prove by clear and convincing evidence that the defendants (1) made a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it was true or false (4) for the purposes of inducing another to act or to refrain from acting in reliance on the representation, and (5) that the other person justifiably relied on the representation and acted upon it to his detriment. See Mariello v. Giguere, 667 A.2d 588, 590 (Me. 1995).

Information is “material” if it alters the “total mix” of facts available to the investor and “there is a substantial likelihood that a reasonable [investor] would consider it important” to his investment decision. Milton v. Van Dorn Co., 961 F.2d 965, 969 (1st Cir. 1992); see also Mariello, 667 A.2d at 590.

For a fraudulent misrepresentation claim, omissions are actionable only if there is actionable concealment or a special or fiduciary relationship between the parties. Glynn v. Atlantic Seaboard Corp., 728 A.2d 117, 120 (Me. 1999).

As to the plaintiffs’ initial investments, there is clear and convincing evidence that Cassidy and Shawver defrauded the plaintiffs. Cassidy and Shawver knowingly held the Fund out to be a legitimate investment in a qualified ERISA trust in a deliberate scheme to defraud—when, under the terms of the Trust, the Emerald Green Pension

²⁰ The plaintiffs have labeled Counts VII through XI as “fraud” or “misrepresentation.” Because under Maine law the elements are the same, Jack H. Simmons, et al., Maine Tort Law § 11.02 (1999), I use the same analysis for each Count.

Plan and Trust were not available for outside investment. Cassidy, on behalf of the Fund, further misrepresented that the Fund had been consistently producing returns (despite the fact that its assets had never traded), that it was a secure investment insured by a bonded account, and that it was guaranteed by a top twenty-five bank (the only guarantees to be involved were the subsequently acquired fraudulent Bank of Bangkok guarantees). The plaintiffs had no access to information about the Fund other than what was provided by Cassidy. They were never provided a prospectus or any other written document by which they could verify Cassidy's assertions about the Fund. I find that all of these statements were "material" factual misrepresentations, made purposefully to obtain the plaintiffs' money, and that the plaintiffs justifiably, though not wisely, relied upon them to their detriment.²¹ Therefore, Cassidy, Shawver,

²¹ Cassidy, Shawver, Beverly, Brooks and ShuKu International are also liable under Counts IX-X for fraudulently inducing Andrews and St. Laurent to make further investments into the Fund. Before his second investment, Cassidy told Andrews that he had made substantial returns on his initial investment, when there had been no actual trading on his account. That misrepresentation caused Andrews to invest an additional \$60,000 in the Fund.

Before their final investments of \$50,000 and \$187,000, respectively, Andrews and St. Laurent received a statement of account prepared by Shawver and delivered by Cassidy that showed they earned a 300% return on their previous investments. Neither Shawver nor Cassidy told the plaintiffs about the bank account seizures, the fact that some of the Fund's money was misappropriated, used for personal reasons and to pay off The Money Store action, or that the Fund was never and could never be traded. Instead the defendants represented that the Fund would continue to make trades. As far as the plaintiffs knew, the Fund had been a legitimate and successful investment. All of this information was material, and the plaintiffs justifiably relied on both the misrepresentations and the failure to disclose material information to their detriment.

Cassidy, Shawver, Beverly, Brooks and ShuKu International are also liable on Count XI for fraudulently inducing Dingwell to remain as an investor. A person is also liable for fraud if, in addition to satisfying all the other elements, he induces another to refrain from acting. See Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990). After receiving a statement of account indicating he had made a 300% return, Dingwell contacted Cassidy and attempted to withdraw his funds. Cassidy persuaded him that he
(continued...)

Beverly, Brooks and ShuKu International are liable for the total value of the plaintiffs' investments (\$417,500),²² and for punitive damages²³ in the amount of \$300,000.

Count XV: Negligent Misrepresentation

A party is liable for negligent misrepresentation if, in the course of a transaction in which he has a pecuniary interest, he supplies false information for the guidance of another in his business transactions and the other party justifiably relies upon this information to his pecuniary detriment. Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990); Restatement (Second) of Torts § 552(1) (1977). As discussed above, the defendants intentionally misrepresented many facts to the plaintiffs to induce them to invest in the Fund, and the plaintiffs justifiably and detrimentally relied

²¹ (...continued)

had earned \$60,000 on his first investment and that the Fund would continue to trade. However, no trades had ever or would ever be made on behalf of the Fund. Relying on Cassidy's misrepresentation, Dingwell decided to remain as an investor in the Fund. Despite his attorney's demand, Dingwell has never recovered his investment.

²² In Maine, compensatory damages for fraud are available to redress injury to pecuniary interests and are measured under the 'benefit of the bargain' rule. Andrew M. Horton & Peggy L. McGhee, Maine Civil Remedies § 21.15 (1992). Damages for mental distress are unavailable. Id.

²³ To recover punitive damages, a plaintiff must demonstrate by clear and convincing evidence that the defendant acted with express or implied malice. See Firth v. City of Rockland, 580 A.2d 694, 697 (Me. 1990); Tuttle v. Raymond, 494 A.2d 1353, 1363-64 (Me. 1985). (Punitive damages may also be assessed against defaulting defendants if the complaint alleges tortious conduct committed with express or implied malice requesting punitive damages. Firth, 580 A.2d at 697 (defaulting defendant "is deemed to have admitted the existence of malice sufficient to get the plaintiffs over the threshold justifying punitive damages"). In their complaint, the plaintiffs here alleged that the defendants' fraudulent actions and misappropriations "involve malice." 7th Am. Compl. ¶ 82.) In assessing the amount of punitive damages, if any, to be awarded, the factfinder must explore the circumstances of the tort, including the outrageousness of the defaulting tortfeasor's conduct and any relevant aggravating or mitigating factor. Firth, 580 A.2d at 697.

on the information fraudulently supplied to them. Therefore, Cassidy, Shawver, Beverly, Brooks and ShuKu International are also liable under this Count.

Count XVI: Breach of Fiduciary Duty

“The salient elements of a [fiduciary relationship] are the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the action.” Morris v. Resolution Trust Corp., 622 A.2d 708, 712 (Me. 1993) (internal quotations omitted) (finding fiduciary relationship between bank loan officer and borrower because bank officer professed superior knowledge and prior experience with third party he recommended to borrower).

The plaintiffs have not met their burden in establishing the creation of a fiduciary relationship between them and either Cassidy or Shawver. The fact that they entrusted approximately \$400,000 blindly to a third party promising large returns does not establish a “great disparity of position and influence.” (The plaintiffs made no effort to investigate either defendant or the Fund; rather, they trusted the defendants because Al Sargent, an acquaintance, knew Cassidy.) Cassidy may have been a smooth talker, but the broker relationship he established with the plaintiffs, without more, does not establish a fiduciary relationship.

Neither can the plaintiffs establish a fiduciary relationship with Shawver. Although Shawver is the trustee of the Trust, which would establish a fiduciary relationship with the beneficiaries of the trust, outside investors such as the plaintiffs were not permitted to participate in the trust. Therefore, Shawver could not act as a trustee for their benefit.

*Count XVII: Violation of Revised Maine Securities Act,
32 M.R.S.A. § 1060(5) (West 1999)*

The plaintiffs charge the defendants with violating the Revised Maine Securities Act (“RMSA”) in two ways: by engaging in fraudulent practices and by transacting business in Maine as broker/dealers or sales representatives without a license.

Because the Law Court has followed the federal interpretation of an “investment contract,” see Bahre v. Pearl, 595 A.2d 1027, 1031 (Me. 1991), the plaintiffs’ investment in the Fund constitutes an “investment contract,” a security covered under the RMSA. 32 M.R.S.A. § 10501(18) (West 1999). It is clear that the plaintiffs did not have any power over their investment. They invested money in the Fund, intending that the profits would come solely from the work of the trustee.

As described above, Shawver and Cassidy engaged in acts that operated as a fraud or deceit upon the plaintiffs. Under the RMSA, “any person who offers or sells a security in violation of section 10201 [fraudulent and deceptive practices in connection with the offer, sale or purchase of any security], . . . 10301 [Broker-dealer and sales representative licensing requirement] . . . is liable to the person purchasing the security from that person.” 32 M.R.S.A. § 10605(1) (West 1999). Therefore, Shawver and Cassidy are liable under this provision.

Cassidy is also liable because he acted as a broker-dealer without being licensed or exempt from licensing under the RMSA. Under the RMSA, a “[b]roker-dealer” means any person engaged in the business of effecting transactions in securities for the account of others . . .” with certain exceptions not relevant here. 32 M.R.S.A. § 10501(1).

Cassidy is also not exempt under 32 M.R.S.A. § 10302(1) (West 1999) because he is not currently registered as a broker-dealer under the Exchange Act.

Cassidy, Shawver, Beverly, Brooks and ShuKu International are therefore liable for the total amount each plaintiff invested, plus interest and reasonable attorney fees. 32 M.R.S.A. § 10605(1).

Count XVIII: Conversion

The plaintiffs claim that Shawver and Revalee converted the funds transferred by Andrews and St. Laurent to the Tennessee bank account. They also claim that Brooks and Beverly converted \$500,000 from the Fund's North Carolina bank account. Beverly and Brooks are liable by default. Revalee has stipulated to entry of judgment against him in favor of David Andrews in the amount of \$50,000, plus interest; in favor of Raymond St. Laurent in the amount of \$187,500, plus interest; and to entry of judgment for no more than \$237,500 on Galen Shawver's cross-claim seeking contribution as to the amounts David Andrews and Raymond St. Laurent sent to bank accounts in the First Tennessee Bank. All that remains to be resolved, therefore, is the claim against Shawver.

To establish a claim of conversion, the plaintiffs must prove that (1) they have a property interest in the property allegedly converted; (2) they had the right to possess the property at the time it was taken; and (3) if the holder took the property rightfully, that they made a demand for the property's return that was denied by the holder. Withers v. Hackett, 714 A.2d 798, 800 (Me. 1998).

The evidence clearly establishes that Shawver is liable for conversion of the \$237,500 that Andrews and St. Laurent sent to the First Tennessee Bank account for investment purposes. Rather than being sent to an account used solely for investment purposes, the plaintiffs' funds were sent to Revalee's personal account pursuant to both Shawver's and Revalee's instructions. Further, Revalee, at Shawver's direction or with Shawver's permission, repeatedly used the First Tennessee Bank money to settle other claims against them and for their own personal benefit.

Counterclaim by Shawver

Shawver has counterclaimed against the plaintiffs, claiming that the plaintiffs have breached the terms of their trust agreement with Emerald Green Pension Fund by maintaining this lawsuit and failing to pay their portion of the legal defense of the trust and the trustee's fees.²⁴ Because I have found that the outside investors such as the plaintiffs are not covered by the trust terms, the plaintiffs are not liable to Shawver on his counterclaim.²⁵

²⁴ Specifically, Shawver claims the plaintiffs have breached the trust agreement by (1) making false accusations that they invested in the ERISA plan; (2) wasting the corpus of the trust by continuing suit after they had entered into an agreement with the U.S. Attorney's Office in the Middle District of North Carolina; (3) overstating the amount of funds they placed in the North Carolina bank account; (4) causing unnecessary legal expense to the trust; and (5) failing to pay their portion of the cost of the legal defense of the trust and their portions of the trustee's fees.

²⁵ Further, even if the terms of the trust agreement applied, the plaintiffs are not liable. For example, the plaintiffs have not made false accusations against the Trust or Shawver, have not overstated the amounts they placed in the North Carolina account, and have not caused unnecessary legal expense. They also have not wasted the trust's corpus by bringing suit because there was a controversy about whether the North Carolina bank account had sufficient assets to satisfy all of the investors' potential claims and Andrews and St. Laurent had sent additional money to a separate bank account not subject to the settlement agreement.

C. CONCLUSION

A. Galen Shawver is liable on Counts I-XI, XV, XVII and XVIII in the amount of Four Hundred Seventeen Thousand Five Hundred Dollars (\$417,500), plus interest; and Three Hundred Thousand Dollars (\$300,000) punitive damages on Counts VII-XI; and reasonable attorney fees on Count XVII.

B. Michael Cassidy is liable on Counts I-III, V, VII-XI, XV and XVII in the amount of Four Hundred Seventeen Thousand Five Hundred Dollars (\$417,500), plus interest; and Three Hundred Thousand Dollars (\$300,000) punitive damages on Counts VII-XI; and reasonable attorney fees on Count XVII.

C. Jerry Revalee is liable on Count XVIII for Two Hundred Thirty-Seven Thousand Five Hundred Dollars (\$237,500), plus interest. Jerry Revalee is also liable to Galen Shawver, on Shawver's cross-claim, for Two Hundred Thirty-Seven Thousand Five Hundred Dollars (\$237,500), plus interest.

D. ShuKu International is liable on Counts I-III, V, VII, IX-XI and XVII in the amount of Four Hundred Seventeen Thousand Five Hundred Dollars (\$417,500), plus interest; and Three Hundred Thousand Dollars (\$300,000) punitive damages on Counts VII and IX-XI; and reasonable attorney fees on Count XVII.

E. Steven Brooks is liable on Counts I-VII, IX-XI, XV, XVII- XVIII for Four Hundred Seventeen Thousand Five Hundred Dollars (\$417,500), plus interest; and Three Hundred Thousand Dollars (\$300,000) punitive damages on Counts VII and IX-XI; and reasonable attorney fees on Count XVII.

F. Clyde Beverly is liable on Counts I–VII, IX–XI, XV, XVII and XVIII for Four Hundred Seventeen Thousand Five Hundred Dollars (\$417,500), plus interest; and Three Hundred Thousand Dollars (\$300,000) punitive damages on Counts VII and IX–XI; and reasonable attorney fees on Count XVII.

G. Emerald Green Pension Fund is liable to the plaintiffs pursuant to the Consent Order dated July 10, 2000.²⁶

The Clerk shall enter judgment accordingly.

This is a bizarre case. It speaks volumes about people’s willingness to throw caution to the wind when riches are promised just around the corner—and, of course, charlatans are always lurking around that corner. How Shawver persuaded outsiders to believe that CMA’s Money Purchase Pension Plan was somehow a place to put their investments and make easy money remains a mystery. In fact, it became a Ponzi scheme. There never were any investments—only money market account interest, repurchase agreements and fraudulent bank guarantee agreements. But, as Chilelli’s testimony about his claim and about the “emerald” reveals, the scheme goes on.

SO ORDERED.

DATED THIS 27TH DAY OF SEPTEMBER, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

²⁶ The Consent Order (Docket Item 183) states that the plaintiffs’ complaint may be amended with respect to Count XIV (the promissory estoppel claim). This count is actually Count XIX of the plaintiffs’ Seventh Amended Complaint.

U.S. District Court
District of Maine (Portland)
Civil Docket for Case #: 98-CV-436

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