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STATE OF NORTH DAKOTA
SECURITIES COMMISSIONER

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STATE OF NORTH DAKOTA

IN THE MATTER OF:

Michael C. Parke and
Michael C. Parke Management
Services, Inc.

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FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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On January 7, 1997, the Office of Securities Commissioner requested the designation of an Administrative Law Judge ("ALJ") from the Office of Administrative Hearings to conduct a hearing in regard to this matter, *i.e.* to serve as procedural hearing officer. This matter involves the Commissioner's administrative action in the form of a January 3, 1997 Denial of Registration, an order denying the application for registration as an investment adviser in North Dakota of Michael C. Parke (hereinafter "Parke") of Michael C. Parke Management Services, Inc. (hereinafter, "his company"). On January 8, 1997, the undersigned ALJ was designated. On January 14, 1997, the Commissioner requested that the designated ALJ conduct the hearing and issue a final order in regard to this matter.

On January 8, 1997, the ALJ issued a Notice of Hearing. On January 13, 1997, upon motion of counsel, the ALJ issued a Notice of Continued Hearing, continuing the hearing on this matter indefinitely. Pursuant to notice, a prehearing conference was held. As a result of the prehearing conference, discovery and other timeframes were set and the hearing date rescheduled. Thereafter, the hearing was rescheduled again at the request of counsel for the parties. The hearing was held as rescheduled on June 5, 1997, in the Red River Room, State Capitol,

Bismarck, North Dakota. The Commissioner was represented by Mr. James L. Norris, Special Assistant Attorney General, Bismarck, and Mr. Matthew Bahrenburg, Attorney, Office of Securities Commissioner. Mr. Norris presented the State's case. The applicant, Mr. Parke, was present, along with his attorney, Mr. Orell D. Schmitz, Bismarck. Seven witnesses testified at the hearing, including Mr. Parke. The testimony of three witnesses was taken at deposition in lieu of hearing testimony. Parke offered 27 exhibits (Nos. 1-27), all of which were admitted. The Commissioner offered 10 exhibits (A-J), all of which were admitted, except exhibit J, which was submitted under an offer of proof. Some of the exhibits were admitted as confidential or partially confidential exhibits and have been placed in a sealed envelope (exhibits 3, 13, 14, 15, 16, C, D, and E were admitted as confidential exhibits; exhibit 4 was admitted as partially confidential - that part marked as 4A and sealed). The depositions of two of the witnesses contained three exhibits, deposition exhibits 4-6, which are admitted along with the deposition testimony of the three deposition witnesses.

The ALJ requested simultaneous, written closing argument (briefs) from counsel. Both briefs were received by the ALJ on July 1, 1997.

Based on the evidence presented at the hearing and the briefs of counsel, the administrative law judge makes the following findings of fact and conclusions of law indicating that the Commissioner has authority and a factual basis for the denial of a registration to Michael C. Parke.

FINDINGS OF FACT

1. Parke is a current applicant for registration with the Commissioner, under N.D.C.C. ch. 10-04, as an investment adviser. Parke is currently a certified public accountant (CPA), a

personal financial planning specialist (PFPS), a certified financial planner (CFP), and a United States (SEC) registered investment adviser.

2. While working at a bank in Dickinson in the late 1980s, early 1990s, as a trust officer, Parke guaranteed to two bank customers that they would not lose money on their investments while Parke was working at the bank. In effect, Parke was guaranteeing to them an unspecified rate of return on their investments or securities that they had with the bank's trust department. See exhibits B, at 3, D, and E. Parke made these guarantees in his sole discretion. Parke made the guarantees under the guise of offering refunds, making up for losses in investment results on securities of customers with the bank's trust department. He used the guise of offering refunds for other bank customers, too. Although refunds were offered and made to others besides the two, it cannot be said that he actually guaranteed the others, but he did virtually admit to guaranteeing the two. These actions by Parke are dishonest and unethical conduct or actions.

3. Also, Parke, in effect, falsified bank records in the process of making refunds, misleading at least some customers, if not the bank, as to the results of actual investment transactions. Parke implemented a dual accounting system for refunding to trust department customers through which he created discrepancies in bank reports that could not be reconciled without an understanding of the dual accounting system and the refunding policy. The refunding policy was not really an official bank policy because it was subject to the sole discretion of Parke, though the bank certainly knew about it. Customers, at times, needed to personally talk with Parke to determine and understand their true investment results. The fact that there were discrepancies demonstrates that one of the two reports was false and misleading. The refunds made by Parke and demonstrated as discrepancies were wrong in that they did not represent the current market value as indicated in the one report. Further, the figures of one report did not

represent a refund of a customer's investment. Instead, the refunding policy amounted to a guarantee (refund) that the customer would not receive less than a certain amount despite the fact that the security was actually valued significantly lower than the figures determined by Parke in the report. Thus, the discrepancies demonstrate that Parke created false and misleading documents and that these false and misleading documents provided either a guarantee of a higher return than would be generated by a sale of the security on the open market, if the security was sold at that time, or they provided a refund, if the security was sold at that time, of the losses that would occur from the sale of the security below a price determined by Parke for what performance for the security ought to have been, in Parke's judgment. This activity was the subject of an audit by the Fiduciary Training Institute (FTI), *see* exhibit C, and resulted in Parke entering into a pretrial diversion in Federal Court, on July 18, 1995, *see* exhibit B. These actions by Parke were dishonest and unethical conduct or actions.

4. In the pretrial diversion Parke accepted responsibility for his behavior in regard to the bank. The pretrial diversion indicates that Parke "intentionally falsified records inflating the value of the portfolios of several customers of the bank." Exhibit 6, at 1. Parke's business reputation was harmed by the FTI audit and the federal pretrial diversion. Parke entered into this pretrial diversion knowing that he was ineligible to work in any federally insured financial institution for a ten-year period from the time of his acceptance in the program, and that there was a risk of his being decertified as a financial planner or certified public accountant. *See* exhibit B, at 11. Parke's pretrial diversion is also evidence of a dishonest, fraudulent or unethical practice.

5. Two former colleagues of Parke, still currently involved with the bank (American State Bank of Dickinson) testified that Parke is not an ethical and honest person. Their testimony was based on the activities of Parke while he was the bank's trust officer, more specifically,

regarding the dual accounting system and the policy of guaranteeing against loss or refunding losses. Although the bank had actual knowledge about the generalities of the guarantees and refunds, *i.e.* that it was done, the specifics were the province of Parke. Parke had sole authority or discretion about what to do and when to do it.

6. Parke also offered and gave investment advisory services to several North Dakota residents in 1994 and 1995. By Parke's own representations of his services, as indicated through the testimony of several individuals, he engaged in organizing data, performing analyses, providing suggestions and recommendations, and assisting in decision making with regard to investments. Parke also held himself out as providing these services for compensation. Parke was not registered as an investment adviser at that time. Parke's investment advisory services were not solely incidental to his activity as an accountant. Not only does Parke clearly give investment advice to certain individuals, but he holds himself out as giving such advice and his pay or compensation from certain individuals is based, in part, on the advice which he promised to give. *See* deposition exhibit 4, investment policy statement. In other words, purporting to act in some other capacity, Parke held himself out to perform investment advisory services and actually provided such services for compensation. Parke discussed financial objectives or overall plans for investments with clients, provided them with investment options, looked at specific investments on the Morning Star rating, discussed specific investments with them, including pointing out which ones were high risk and discussing which were better investments, and recommended attractive stocks. *See* depositions of Bares, Ellenbecker, and Miessel. *See* also deposition exhibits 4-6; exhibit 16. There are others, too, who were not deposed for this hearing who were clients of Parke to whom Parke provided financial planning/investment advisory services. These are identified in exhibits 16 and I.

7. Though Parke never sent a separate billing for investment advice, it is clear that he was giving it and being compensated for it. He was, in fact, billing for investment advisory services as a financial planner and investment adviser, not incidental to accountant services, as an integral component of financially-related services. *See* deposition exhibit 4 (Investment Policy Statement Douglas and Bertha Ellenbecker); deposition exhibit 5 (bills for investment policy statement update, consulting, tax planning, and accounting); deposition exhibit 6 (agreement between Ernest Miessel and Parke); exhibit 16 (billings for financial planning); and exhibit I. He held himself out to be a financial planner and/or investment adviser, misled clients as to the true nature of the advice given, and misled clients as to the true nature of the billings for services. In effect, Parke sold investment advisory services to at least three individuals, and likely to others, too.

8. Parke listed his company using a false and misleading name "Michael C. Parke Investment Services, Inc." as a complimentary listing under the heading "investment advisory services" in the 1993 U.S. West Yellow Pages while Parke was not registered by the Commissioner to offer investment advisory services. Parke did not pay for the listing and made an effort to ensure that the listing would be removed. In other words, when he found out this was inappropriate, he attempted to correct it.

9. Parke listed his company as a complimentary listing under the heading "investment advisory services" in the 1994 U.S. West Yellow Pages while Parke was not registered by the Commissioner to offer investment advisory services. Parke did not pay for the listing and made an effort to ensure that the listing would be removed. In other words, when he found out this was inappropriate, he attempted to correct it.

CONCLUSIONS OF LAW

1. N.D.C.C. § 10-04-02 is the definitions section in the North Dakota securities law. In it, “[i]nvestment advisor” is defined as follows:

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. ‘Investment adviser’ includes financial planners and other persons who, as an integral component of other financially-related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. ‘Investment adviser’ does not include:

c. ... [an] accountant.... whose performance of these services is solely incidental to the practice of the person’s profession.

N.D.C.C. § 10-04-02 (3). (Emphasis supplied.)

2. It is unlawful for investment advisers to transact business in this state unless they are registered. N.D.C.C. § 10-04-10 (3). However, a person may transact business in this state as an investment adviser if his only client is a bank or one of the other specifically listed clients in N.D.C.C. § 10-04-10 (3). N.D.C.C. § 10-04-10 (3)(a)(2). Parke had more than just a bank as a client.

3. Application must be made for registration as an investment adviser. See generally, N.D.C.C. § 10-04-10 (3); N.D. Admin. Code ch. 73-02-06. The Commissioner may deny a registration if the Commissioner “finds that the applicant is not of good business reputation or is

not solvent.” N.D.C.C. § 10-04-10 (3)(h). Also, the Commissioner may refuse to register an investment adviser if the Commissioner “finds that an applicant has been guilty of any act or omission which would constitute a sufficient ground for revocation of a dealer’s, salesman’s, investment adviser’s, or investment adviser representative’s registration under section 10-04-11, such act or omission may constitute a sufficient ground for a finding by the commissioner that such applicant is not of good business reputation.” N.D.C.C. § 10-04-10 (5).

4. N.D.C.C. § 10--4-11 gives the Commissioner the authority to revoke the registration of an investment adviser if the investment adviser “[h]as violated or failed to comply with any provisions of this chapter [10-04] or any order or rule of the commissioner under this chapter... [i]s, in the case of ...[an] investment adviser, insolvent... [h]as engaged in dishonest, fraudulent, or unethical practices in the securities business...” N.D.C.C. § 10-04-10 (1)(a-c).

5. “[D]ishonest” or “unethical practices” in the securities business as used in N.D.C.C. § 10-04-11 are further defined by rule “for any person” other than a sales agent as:

15. Guaranteeing a customer against loss in any securities account of such customer carried by the ...[person] or in any securities transaction effected by the ...[person] with or for such customer.

N.D.C.C. § 73-02-09-02. (Emphasis supplied.)

Although N.D. Admin. Code § 73-02-09-02 is worded throughout most of its provisions in terms of a dealer, it is clearly broader in scope according to its initial terms.

6. The fact that Parke guaranteed returns to two customers while employed as a trust officer at a bank may be deemed to be an unethical or deceptive practice pursuant to N.D. Admin. Code § 73-02-09-02 (15), and is, therefore, sufficient grounds for the Commissioner to revoke an

application as an investment adviser under N.D.C.C. § 10-04-11 (1)(c), and is, therefore, sufficient grounds for refusal to register Parke under N.D.C.C. § 10-04-10 (5).

7. The fact that Parke engaged in a pattern of refunding to customers, which amounts to guaranteeing customers returns while working as a trust officer at a bank, and the fact that he created false and misleading bank documents in regard to his pattern of refunding to customers may be deemed to be an unethical or deceptive practice pursuant to N.D. Admin. Code § 73-02-09-02 (15), and is therefore, sufficient grounds for the Commissioner to revoke an application as an investment adviser under N.D.C.C. § 10-04-11(1)(c), and is, therefore, sufficient grounds for refusal to register Parke under N.D.C.C. § 10-04-10 (5).

8. The facts in this matter demonstrate that the Commissioner has grounds to deem Parke to have a bad business reputation, demonstrated by the pretrial diversion, the FTI audit, and the opinion of others, and is, therefore, sufficient grounds for the Commissioner to deny Parke's application under N.D.C.C. § 10-04-10 (3)(h).

9. The facts in this matter demonstrate that Parke the Commissioner could determine that Parke, in effect, sold investment advisory services to certain individuals, and such facts are, therefore, sufficient grounds to revoke an application under N.D.C.C. § 10-04-11 (1)(a), and are, therefore, sufficient grounds for refusal to register Parke under N.D.C.C. § 10-04-10 (5).

10. The fact that Parke listed his company, using a false and misleading name under the heading "investing advisory services" in the 1993 Yellow Pages was a holding out as an investment adviser as that term is used in N.D.C.C. § 10-04-02 (3). The fact that Parke held himself out as an investment adviser while not registered by the Commissioner to offer investment advisory services may be considered a violation of N.D.C.C. § 10-04-02 (3) and is sufficient

grounds to revoke under N.D.C.C. § 10-04-11 (1)(a), and is, therefore, sufficient grounds to refuse to register Parke under N.D.C.C. § 10-04-10(5).

11. The fact that Parke listed his company under the heading “investing advisory services” in the 1994 Yellow Pages was a holding out as an investment adviser as that term is used in N.D.C.C. § 10-04-02 (3). The fact that Parke held himself out as an investment adviser while not registered by the Commissioner to offer investment advisory services may be considered a violation of N.D.C.C. § 10-04-02 (3), and is sufficient grounds to revoke under N.D.C.C. § 10-04-11 (1)(a), and is, therefore, sufficient grounds to refuse to register Parke under N.D.C.C. § 10-04-10 (5).

COMMENTARY ON CONCLUSIONS OF LAW

In the Commissioner’s January 3, 1997, Denial of Registration, the Commissioner bases the denial on certain specified findings. *See* January 3 order; see also Parke’s Post-Hearing Brief, at 1-2. In Parke’s brief, his attorney argues that the evidence at the hearing does not show the findings and violations alleged by the Commissioner in his order. He then addresses them each specifically in his brief. The ALJ agrees that the evidence does not show that Parke violated a November 21, 1991 consent agreement as alleged; violated the pretrial diversion in regard to employment and future employment with Kirkwood Bank; that bank auditors determined that Parke’s actions violated safe and sound banking principles; that Parke’s policy of guaranteeing investors against losses violated various securities laws (except as herein noted); that Parke’s policy of guaranteeing investors against losses was, necessarily, an unfair competitive advantage; that Parke’s employment with Kirkwood Bank violated banking rules; that Parke’s policy of guaranteeing investors against losses violated N.D.C.C. § 10-04-11(1)(d); or that Parke’s policy

Parke's policy involved in the offer and sale of securities was in violation of N.D.C.C. § 10-04-11 (1)(k). However, the remaining findings and violations alleged are found to be fairly within the evidence as presented at the hearing and the laws as interpreted. Counsel for the Commissioner sets them forth clearly in his brief and the ALJ believes that they provide sufficient grounds for denial of registration or refusal to register. Although the allegations and findings are not as serious as the Commissioner in his January 3, 1997 order indicates, the ALJ believes that there is still sufficient grounds for the Commissioner to take the action he did. The Commissioner is given a great deal of discretion in the exercise of authority found in the statutes and rules, in this regard. Although one may have some doubts about whether the facts do indeed support the drastic remedy of denial, there is a degree of reasonableness to the exercise of discretion by the Commissioner in this matter. Whether Parke should be denied registration upon reapplication, at another time is another matter, not addressed in these findings and conclusions. The ALJ upholds the denial.

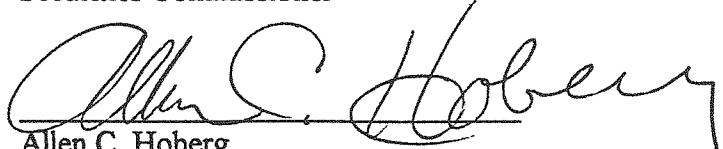
ORDER

The greater weight of the evidence shows that the Commissioner has sufficient grounds to refuse to register or to deny the application for registration of Parke as an investment adviser in North Dakota, and that the refusal or denial under the law is appropriate.

Dated at Bismarck, North Dakota, this 25th day of July, 1997.

State of North Dakota
Cal Hoovestol
Securities Commissioner

By:

A handwritten signature in cursive script, appearing to read "Allen C. Hoberg", written over a horizontal line.

Allen C. Hoberg
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street, Lower Level
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA
SECURITIES COMMISSIONER

IN THE MATTER OF:)
)
Michael C. Parke and)
Michael C. Parke Management Services, Inc.)

CERTIFICATE OF SERVICE

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The undersigned certifies that the original of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were mailed, inside mail, at the State Capitol, on the 25th day of July, 1997, to:

Commissioner Cal Hoovestol
Securities Commissioner
Office of Securities Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0510

that true and correct copies of the above documents were mailed, inside mail, at the State Capitol, on the 25th day of July, 1997, to:


Mr. Matthew Bahrenburg
Attorney
Office of Securities Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0510

and that true and correct copies of the above documents were mailed, regular mail, on the 25th day of July, 1997, to:

Mr. James L. Norris
Special Assistant Attorney General
313 North 1st Street
P.O. Box 978
Bismarck, ND 58502-0978

and that true and correct copies of the above documents were mailed, certified mail, on the 25th
day of July, 1997, to:

Mr. Orell Schmitz
Attorney at Law
Schmitz, Moench & Schmidt
116 North 4th Street
Bismarck, ND 58501



Karen L. Pollock