

STATE OF NORTH DAKOTA  
OFFICE OF SECURITIES COMMISSIONER

IN THE MATTER OF:	)	
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Preferred Trust and Management, LTD, and Mark Dostert,	)	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</b>
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Respondents.	)	
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On April 10, 2001, the Securities Commissioner issued a separate Cease and Desist Order, Notice of Civil Penalty, and Notice of Right to Request a Hearing to Mark Dostert ("Dostert"), along with a number of other individuals who had been involved in the sale of Preferred Trust and Management, LTD ("Preferred Trust"), securities in North Dakota. On May 27, 2003, the Securities Commissioner requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings ("OAH") to conduct a hearing and to issue recommended findings of fact and conclusions of law, and a recommended order in regard to this matter. Allen C. Hoberg, ALJ, was designated to preside as hearing officer for Dostert's case.

This matter is one of many in regard to Preferred Trust and individually named respondents that began in 2001. Proceedings in all of these similar actions were stayed pending an appeal on one of the cases before the Commissioner to the District and Supreme Court. Henry, et al v. Commissioner, 2003 ND 62, 659 N.W.2d 869. On April 15, 2003, the Supreme Court issued its decision in Henry, dismissing the appeal because the Commissioner's July 31, 2001, Order was not a final order. Id.

At the hearing, Dostert made a similar motion to dismiss on essentially the same basis as respondents in the Henry matter, that the Securities Commissioner did not timely

act on his request for a hearing, as required by N.D.C.C. § 10-04-12(2). While there was delay in the period of time between the issuance of the Cease and Desist Order and the request to OAH to designate a hearing officer, the Securities Commissioner appropriately declined to proceed on any of these related matters until the one on appeal was decided because if the Supreme Court had decided in favor of the Henry respondents, there would have been no reason to proceed on any of these related matters. Although the procedural issue in this matter is somewhat different than in the Henry matter, factually, the ALJ denied the motion for essentially the same reasons he denied it in the Henry matter.

On June 11, 2003, the ALJ issued a Notice of Hearing scheduling an August 15, 2003, hearing. On August 14, 2003, Dostert requested that the hearing be rescheduled and it was then set for hearing on October 31, 2003. The hearing was held as rescheduled on October 31, 2003. Special Assistant Attorney General Matthew O. Bahrenburg represented the Securities Commissioner. Dostert appeared and represented himself.

The Securities Commissioner called as witnesses its investigator and examiner, Kelly Mathias, the respondent, and two other witnesses. Dostert testified in his own behalf, but called no other witnesses, choosing only to cross-examine the Securities Commissioner's witnesses.

During the course of his testimony, Mr. Mathias was qualified as and declared an expert on high yield investment fraud and prime bank fraud. The Commissioner offered a number of exhibits. The respondent offered three exhibits, two of which were admitted. The Commissioner's Exhibits E, G-Q, R, F, Y, Z, and AA were conditionally

admitted over objection by respondents. The rest of the Commissioner's exhibits were admitted.

On November 10, 2003, the Commissioner filed a brief and closing argument. On November 26, 2003, the ALJ received Dostert's post-hearing brief, and on November 26, 2003, the Securities Commissioner stated by email that no reply brief would be filed. Accordingly, the record in this matter was closed on November 26, 2003.

On December 3, 2003, the ALJ issued Recommended Findings and Recommended Order. Although the ALJ found a number of the exhibits offered on behalf of the Commissioner were not admissible, the ALJ found the overall evidence presented sufficient to prove that Dostert had violated the securities laws as charged in the Cease and Desist Order and recommended a civil penalty of \$10,000 be assessed against Dostert.

As discussed below, the Commissioner adopts in part and rejects in part the ALJ's recommendations and, in lieu thereof, issues this final order in the matter of Dostert.

#### Admissibility of the Evidence

The ALJ originally admitted over objection as hearsay Exhibits E, G-Q, and D. These exhibits reflect documents seized from and found on the computer of Frederick Keiser, a commodities broker in Minot who acted as a principal for the Preferred Trust investment scheme in North Dakota, or summaries of those documents. The ALJ also originally admitted over objection the summaries prepared from those documents, Exhibits F and AA. All of these documents were offered through Kelly Mathias, who

qualified as an expert on high yield investment fraud and prime bank fraud. A trial deposition and trial transcripts from the trial of Fred Keiser for his actions in the Preferred Trust scheme were offered and received. The transcripts identified how the documents came to be in Mr. Mathias' possession. See Exhibits S, T, U. They, along with Mr. Mathias' testimony, show that Mr. Mathias was in attendance at the original search in which the computer was removed from Mr. Keiser's office, that the computer was taken into the possession of a Bureau of Criminal Investigation agent, that the computer was transferred to the Mid-States Organized Crime Information Center where true and accurate copies of the documents on the computer were retrieved onto a compact disc, and that the compact disc was returned to the North Dakota Bureau of Criminal Investigation and provided to the Securities Department. There was no evidence introduced that undermined the authenticity of the documents taken from Mr. Keiser's computer.

However, the ALJ "struck" the admission of those exhibits on the grounds that there was no testimony that identified the documents as business records of either the present respondent or of the absent respondent, Preferred Trust. The ALJ indicated that no witness was familiar with the offered exhibits and none had specific knowledge about the procedures under which the records were created. Finally, the ALJ claimed that there was no evidence about what these records mean in the business context, if anything, for Preferred Trust. In complete contradiction to these statements, the ALJ then identified that Mr. Mathias was able to testify about them as business records and could interpret them and could even make an apparently relevant summary about them.

The ALJ also identified that Mr. Mathis and many of the witnesses recognized the Keiser business records as part of the Preferred Trust investment scheme, a fraudulent investment scheme in which the respondent participated. Because the investment scheme was fraudulent, however, the ALJ claimed that these were not ordinary business records or subject to interpretation as common business records. The ALJ's explanation of this ground for rejecting the records is just not logical. Merely because a business is fraudulent does not mean that the records kept by the business are not accurate records of the transactions that were conducted in the course of operating the business. With the exception of one case, none of the records on Mr. Keiser's computer regarding the transactions of the respondent were shown to be inaccurate.

Further, the ALJ, in the course of three separate proceedings involving similar respondents and Preferred Trust, treated the introduction and use of these records differently as to the different respondents. The Commissioner finds this unacceptable. In the hearing for Respondents Dennis Skarphol, Gerald Henry and Brian Henry, the ALJ admitted the same now-excluded exhibits, finding that the documents "showed that the three respondents were entitled to compensation from securities referrals, and monies were possibly earmarked for them."<sup>1</sup> In the consolidated hearing for five other respondents, the ALJ refused to admit the documents and did not cite to them. In the separate hearing for Respondent Larry Borud, the ALJ struck the same exhibits relating to information taken from Fred Keiser's computer, and then extensively cited and relied upon those excluded exhibits to support his findings that Borud had violated the

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<sup>1</sup> The ALJ did not believe this evidence showed that an actual offer or sale had been proven, a finding with which the Commissioner takes issue.

securities laws, just as he does in this case in supporting his recommendations concerning Dostert. The Commissioner is unwilling to have the same evidence offered as to the various respondents treated in such an inconsistent manner. Under these similar circumstances, either they are admissible or they are not. The Commissioner finds they are admissible, as follows.

The Commissioner finds that the documents taken from Keiser's computer concerning the Preferred Trust accounts are admissible as to all respondents who were involved in the referral of potential purchasers to the Preferred Trust website and who, as a result of the referrals, were eligible to receive the equivalent of commissions for the subsequent sale of Preferred Trust shares, including Dostert. Keiser acted as an agent for Preferred Trust and maintained records of those individuals in North Dakota who had made referrals to Preferred Trust, including Dostert. Preferred Trust is a co-respondent with Dostert. Dostert referred one or more individuals to Keiser to invest in the Preferred Trust scheme. Mr. Mathias, who qualified as an expert on high yield investment fraud and prime bank fraud, was able to identify what the records meant and how they were kept in the ordinary course of Keiser's business on behalf of the fraudulent Preferred Trust investment scheme. The documents from Keiser's computer are equally relevant as to Preferred Trust and to the co-respondent Dostert. Finally, testimony of witnesses confirmed that the records are accurate as to the referrals Dostert made to Preferred Trust through Keiser for investment in Preferred Trust. Mr. Mathias laid sufficient foundation for the introduction of these records and, although hearsay, they have substantial guarantees of trustworthiness through Mr. Mathias'

explanations of their meaning and the confirmation of that meaning through the testimony of the witnesses.

Additional documents were admitted by the ALJ through Mr. Mathias' testimony that identified how the Preferred Trust scheme operated. These documents were printed from the Preferred Trust website. Mr. Mathias' testimony was accepted to prove that the Preferred Trust scheme was a prime bank fraud. Based on his understanding of the fraudulent scheme and the information on the website about the referrals and bonuses, Mr. Mathias was able to explain how each individual who "referred" someone else to the website would be paid for his referral. Finally, Mr. Mathias, based on his knowledge of the operation of the Preferred Trust scheme and his review of Mr. Keiser's documents, was able to tie Dostert to an account number and to referrals Dostert made to the Preferred Trust website or to Keiser. There was no evidence that disputed Mr. Mathias' expert testimony as to how the Preferred Trust scheme operated or how the bonuses were calculated for Dostert's referrals to Preferred Trust.

For these reasons, the Commissioner reverses the ALJ's ruling that Exhibits E, G-Q, and D are not admissible in this hearing as to Dostert. The summaries prepared by Mr. Mathias, Exhibits F and AA, are similarly admissible.

Even without recourse to the information from Mr. Keiser's computer, however, the evidence and testimony of Dostert shows that he knew that if he referred other individuals to Preferred Trust, either through the website or thorough Keiser, and the individual invested in Preferred Trust, Dostert would receive a "bonus" based on the amount of the referred person's investment. Dostert did, in fact, refer others and they did invest in Preferred Trust. Because of those referrals, Dostert was eligible to receive

and did receive a bonus of 1% of the amount invested by each referral. The amount of his bonus was reported on his statements. Dostert had access to this bonus payment as web page information identified that this bonus was "*readily available for withdrawal from the Trust Account without any penalties.*" Exh. A., Frequently Asked Questions, page 4 of 4 (emphasis added).

Finally, there arose at the hearing the question of immunity for Dostert arising out of the related district court proceeding. Dostert claims that he received some kind of immunity as a result of testifying in the district court action. Mr. Barhrenburg provided a copy of the relevant portions of the transcript from the district court. There is nothing in the transcript that provided that indicates Dostert is granted any general immunity in subsequent or concurrent administrative actions. Dostert has not provided any other documents showing that he is entitled to immunity. Dostert did not claim a Fifth Amendment privilege of immunity from self-incrimination at this hearing and the Securities Commissioner did not use Dostert's testimony from the district court action in the proceeding. None of the evidence produced at this hearing was derived from Dostert's previous testimony.

#### Findings of Fact

1. The Securities Commissioner investigated the activities of Frederick W. Keiser ("Keiser") of Minot and seized a computer from him. As a result of that investigation, separate Cease and Desist orders were issued against Preferred Trust and, amongst other individuals, Dostert.



2. Exhibits A – C and other evidence identifies Preferred Trust as a fraudulent investment scheme. Mr. Mathias testified that Preferred Trust is a fraudulent investment scheme. There was no evidence offered to the contrary.

3. Dostert knew about the Preferred Trust website and had knowledge about the fraudulent investment scheme, even if he did not actually know that it was a fraudulent scheme.

4. The information introduced directly from Keiser's computer or in summary form accurately reflects the records contained on Keiser's computer relevant to the account of Dostert as a Preferred Trust investor.

5. The respondent, Dostert, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

6. The evidence, including Dostert's own testimony, shows that Dostert referred at least fifteen (15) investors to Preferred Trust and the referrals resulted in investments by the referred people. Dostert communicated to these investors that he was personally invested in the scheme. Dostert stated that he referred the fifteen investors to the Preferred Trust website in order to complete their investment.

7. Dostert also facilitated a larger investment in another Preferred Trust program known as the Phoenix program. The testimony was that this program required a \$25,000 minimum investment. Dostert took a personal check from one of the fifteen investors he referred (exhibit V) and purportedly commingled those assets with the assets of other investors in order to meet the minimum investment amount of the Phoenix program. This investment could not have been made apart from the facilitating activities of Dostert.

8. Dostert discussed Preferred Trust with these individuals and made his referral of these individuals to Preferred Trust in North Dakota.

9. Dostert had knowledge that he would receive a bonus based on the amount of the investment made by an individual he referred to Preferred Trust. Dostert testified that on several occasions he provide his Preferred Trust account number to investors he referred so that they could make their investment in the scheme. He testified that he understood that it was necessary that he provide his account number to identify him as the referrer. Indeed, with respect to at least one investor he referred, Dostert provided the investor with the Preferred Group Application Form upon which Dostert had already written his Preferred Trust account number.

10. Dostert received bonus payments for referrals made to Preferred Trust, which bonuses were deposited in an account from which he would withdraw funds whenever he chose by using a debit card.

#### Conclusions of Law

1. The Preferred Trust investment scheme is a security as defined in N.D.C.C. § 10-04-02(15) (1999).

2. Preferred Trust is not registered or exempt from registration in North Dakota. See N.D.C.C. § 10-04-05 (1999), N.D.C.C. § 10-04-07 (1999), N.D.C.C. § 10-04-07.1 (1999), N.D.C.C. § 10-04-08 (1999), N.D.C.C. § 10-04-08.1.

3. The Preferred Trust securities were not offered for sale or sold in an exempt transaction. See N.D.C.C. § 10-04-06 (1999).

4. The Preferred Trust investment scheme is a fraudulent investment scheme.

5. An "offer for sale" or "offer to sell" includes an attempt to solicit an order for a security for value. N.D.C.C. § 10-04-02(9) (1999). This language has been interpreted to and does include action that materially aids in a sales transaction of a security, including the solicitation of a buyer. See Pinter v. Dahl, 486 U.S. 622, 646-47 (1987). Other states have found such payments of finders fees, which would be equivalent to the referral bonuses paid in this case, to require registration as an agent by the person receiving the fee. See Blue Sky Law, Joseph C. Long, Vol. 12A, §8.33, © 2003. The federal Securities and Exchange Commission has stated that it would be a violation of the securities law for an individual who was not registered to make referrals to a broker and receive compensation for the referrals. See CCH ¶79,959 (1988).

6. Dostert's referral of fifteen (15) individuals to the Preferred Trust investment scheme with the knowledge that he would be entitled to compensation when those other people invested constituted an "attempt to offer to dispose of . . . a security or interest in a security for value," and therefore would be an "offer for sale" or "offer to sell." See N.D.C.C. § 10-04-02(9) (1999). When those people actually invested, the referrals became sales under N.D.C.C. § 10-04-02(13) (1999). Dostert acknowledged referring fifteen people to the scheme and identified that he was personally invested in the scheme. Dostert knew about the bonuses available for referrals. This is sufficient evidence to establish that Dostert was a seller within the meaning of the language of N.D.C.C. § 10-04-02 (1999). As such, Dostert violated the provisions of N.D.C.C. § 10-04-04 by offering a security for sale that was not registered in North Dakota.

7. The evidence shows that Dostert violated the provisions of N.D.C.C. § 10-04-10 (1999) requiring that an individual offering for sale or selling any securities in

North Dakota must be registered as a dealer or agent. Dostert referred others to the scheme with the knowledge that he would be entitled to compensation if they invested. Those referrals constituted "an attempt to offer to dispose of . . . a security or interest in a security for value" and is, therefore, an "offer for sale" or "offer to sell" as defined in N.D.C.C. § 10-04-02(9) (1999). When Dostert referred others to Keiser or the Preferred Trust web page for investment in the Preferred Trust scheme, he was offering to sell and selling to investors in North Dakota and was acting as an unregistered agent of the unregistered securities dealer Preferred Trust (through Fred Keiser). Thus, Dostert was in violation of N.D.C.C. § 10-04-10 (1999).

8. Dostert violated the provisions of N.D.C.C. § 10-04-15(2) and (4) by offering for sale investments in a fraudulent investment scheme. Any person who solicits investors to invest in a fraudulent program is engaging in a course of business that operates as a fraud or deception upon investors. There is no intent required under N.D.C.C. § 10-04-15(2) or (4). Preferred Trust is a fraudulent investment scheme. Dostert violated the provisions of N.D.C.C. § 10-04-15(2).

9. Under N.D.C.C. § 10-04-16 (1999), a \$10,000 civil penalty may be imposed for each violation of N.D.C.C. ch. 10-04.

10. As to Dostert, the evidence shows fifteen violations of N.D.C.C. § 10-04-04 (one violation for each investor Dostert referred to the Preferred Trust scheme). The evidence shows fifteen violations of N.D.C.C. § 10-04-10 (one violation for each investor Dostert referred to the Referred Trust scheme). The evidence shows fifteen violations of N.D.C.C. § 10-04-15 (one violation of the prohibition against fraudulent practices for each of the fifteen frauds in which Dostert was engaged that were perpetrated upon

those fifteen investors). Therefore the Commissioner has authority to impose a civil penalty against Dostert in the amount of \$450,000.

Order

The greater weight of the evidence shows that Dostert violated the provisions of N.D.C.C. §§ 10-04-04, 10-04-10 (1999), and 10-04-15 and, therefore, it is ordered that the Cease and Desist Order issued against him on April 10, 2001, remain in effect, indefinitely, unless otherwise lifted or dismissed by the Securities Commissioner. Further, although a civil penalty may be imposed in the amount of \$450,000 against Dostert, the evidence shows that Dostert was, as many of the individuals who participated in the furtherance of the Preferred Trust scheme, a victim as well as a perpetrator. It would be unfair to impose a very large civil penalty against any of them.

Therefore, it is ordered that a civil penalty is imposed against Dostert in the amount of \$7,500.

Dated at Bismarck, North Dakota, this 9<sup>th</sup> day of March, 2004.

NORTH DAKOTA SECURITIES DEPARTMENT



  
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Karen Tyler  
Securities Commissioner