



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING
Whether there has been a violation of the
Securities Act of Washington by:

Robert Binkele, Michael Mariani and Prestige
Investment Management LLC,

Respondents.

Final Order No. S-18-2520-19-SC01-FO01

DFI No. S-18-2520-19-SC01

OAH No. 01-2021-DFI-00124

FINAL DECISION AND ORDER

THIS MATTER comes now before CHARLES E. CLARK, Director (“Director”) of the WASHINGTON STATE DEPARTMENT OF FINANCIAL INSTITUTIONS (“Department”), on Petitions for Review of Initial Order issued by Administrative Law Judge TJ Martin (“ALJ Martin”), dated July 13, 2022, against Respondents, ROBERT BINKELE, MICHAEL MARIANI, AND PRESTIGE INVESTMENT MANAGEMENT LLC. Respondents Michael Mariani and Prestige Investment Management LLC filed a Petition for Review of the Initial Order dated July 28, 2022 (“Respondent’s Petition”). Respondent Robert J. Binkele did not file a Petition for Review. The Department also filed a Petition for Review of the Initial Order on July 29, 2022 (“DFI Petition”).

1.0 PROCEDURAL HISTORY

On October 6, 2020, the Department’s Securities Division issued a Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs (“Statement of Charges”) to Respondents. On November 10, 2020, Heidi E. VonderHeide, of Umler & Berne LLP, attorney for all three Respondents, made a Request for

Administrative Hearing, and the Statement of Charges was referred to the Office of Administrative Hearings (“OAH”) for adjudication.

The Initial Order was issued and served by mail on Wednesday, July 13, 2022. In the Initial Order, ALJ Martin affirmed that: The Deferred Sales Trust arrangement with Gary Cline and Irene Cline constitutes the offer and/or sale of a security as defined by RCW 21.20.005(14) & (17); Prestige Investment Management LLC and Michael Mariani offered and sold securities for which no registration is on file with the Securities Administrator in violation of RCW 21.20.140; and, Michael Mariani offered and/or sold securities without being registered as a securities salesperson or broker-dealer in violation of RCW 21.20.040.¹

ALJ Martin dismissed the allegation that the Respondents operated a fraud or deceit with respect to RCW 21.20.010(3).²

ALJ Martin affirmed in part and dismissed in part the Department’s Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs.³ More specifically, ALJ Martin found that the requested penalties, sanctions, imposition of costs and fees against Prestige Investment Management LLC and Michael Mariani are appropriate, but found that the Department’s request to deny registration to Robert Binkele was not appropriate.⁴

On July 28, 2022, Respondents Michael Mariani and Prestige Investment Management LLC filed a Petition for Review. Respondent Robert Binkele did not file a Petition for Review.

¹ Initial Order, Initial Order Nos. 7.1-7.3, at Page 18.

² Initial Order, Initial Order No. 7.4, at Page 18.

³ Initial Order, Initial Order No. 7.5, at Page 18.

⁴ Initial Order, Initial Order Nos. 7.5-7.7, at Page 18.

On July 29, 2022, the Department filed a Petition for Review. On August 5, 2022, the Department filed its Response to the Respondent's Petition.

2.0 RECORD ON REVIEW

The record on review ("Record on Review") before the Director includes the entire OAH Record in the above-captioned matter consisting of, without limitation:

- 2.1 Statement of Charges
- 2.2 Respondent's Application for Adjudicative Hearing
- 2.3 Respondent's Motion for Summary Judgment and supporting exhibits
- 2.4 Department's Motion for Summary Judgment and supporting exhibits
- 2.5 Respondent's Response to the Department's Motion for Summary Judgment
- 2.6 Department's Response to the Respondent's Motion for Summary Judgment
- 2.7 Respondent's Reply in support of the Motion for Summary Judgment
- 2.8 Order Denying the Department and the Respondent's Motions for Summary Judgment
- 2.9 Department's Witness and Exhibit List
- 2.10 Respondent's Witness and Exhibit List
- 2.11 Agreed Stipulated Facts for Hearing
- 2.12 Order Clarifying Genuine Disputes of Material Fact for Evidentiary Hearing
- 2.13 Respondent's Prehearing Brief
- 2.14 Department's Prehearing Brief
- 2.15 Initial Order

3.0 FINDINGS OF FACT

The Director having considered the Record on Review contained in Section 2.0 of this Final Decision and Order, and there being no dispute as to the facts forth set therein, hereby *affirms* the Initial Order's Findings of Fact 5.1-5.97, inclusive, at pages 3-13.

4.0 CONCLUSIONS OF LAW

The Director having considered the Record on Review contained in Section 2.0 of this Final Decision and Order, hereby *affirms* the Initial Order's Conclusions of Law 6.1-6.27, *except for* Conclusions of Law 6.12, 6.17, and 6.19, and subject to the considerations as set forth in the Section 6.0 of this Final Decision and Order.

5.0 DIRECTOR'S CONSIDERATIONS ON REVIEW

5.1 Standard of Review

The Director reviews this matter *de novo* under RCW 34.05.464(4). Under WAC 10-08-211(3), a Petition for Review of an Initial Order must specify portions of the Initial Order where exception is taken and shall refer to the evidence in the record that supports the petition.

6.0 ANALYSIS

6.1 Respondent's Petition

The first issue presented by the Respondents for review by the Director is an assertion that, "The transaction at Issue in this case is not a "security" as that term is defined under RCW 21.20.005(17) or *Howey*,"⁵ and:

The ALJ concluded that the Deferred Sales Trust ("DST") at issue in this proceeding (the Lake Cavanaugh Trust) constituted a security... Specifically, the ALJ concluded that although neither the establishment of the Trust, nor the installment agreement constituted

⁵ Respondent's Petition for Review, Page 2.

a "security," an underlying, unexecuted promissory note constituted a security under Howey....⁶

The Respondents argue that the ALJ's reasoning is in error because: 1) The Department alleged that the entire DST transaction was an investment contract; 2) the Department did not allege that the promissory note was a "note" for purposes of RCW 21.20.010(3) (sic); 3) The ALJ ruled that entire transaction was not a security, but the DST was a security because it was a "note"; and, 4) A different analysis is used for determining whether a "note" constitutes a security as opposed to whether an "investment contract" constitutes a security.⁷

It is helpful to understand the exact language that the Respondents are referring to in Conclusion of Law (COL) 6.12:

The establishment of the Lake Cavanaugh Trust did not, in itself, nor the installment agreement, constitute a 'security.' However, the promissory note, ensuring the legal obligation for the Trust to repay the Clines, the original asset seller, is a 'security' as defined by RCW 21.20.010(3) (sic).⁸

The Respondents, as well as the Department,⁹ indicate that the citation to RCW 21.20.010(3) is likely a typo and should be restated to RCW 21.20.005(17).¹⁰ The Director agrees. Applying RCW 21.20.005(17), the definition of a security is:

"Security" means any **note**; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; **investment contract**; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture; voting-trust certificate; certificate of deposit for a security;

⁶ Respondent's Petition for Review, Page 1.

⁷ Respondent's Petition for Review, Page 1.

⁸ Initial Order, COL 6.12, Page 15.

⁹ Department's Petition for Review, Page 3.

¹⁰ Respondent's Petition for Review, Footnote 1, Page 1.

fractional undivided interest in an oil, gas, or mineral lease or in payments out of production under a lease, right, or royalty; charitable gift annuity; any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof; or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this subsection. This subsection applies whether or not the security is evidenced by a written document. (emphasis added).

As for assigning error on the first two points, the Director agrees with the Respondents that the Department alleged that the entire DST transaction was an investment contract and that the Department did not allege that the promissory note was a "note" for purposes of RCW 21.20.005(17).

As for assigning error based upon Respondents' the third and fourth points (the ALJ ruled the entire transaction was not a security, but the DST was a security because it was a "note," *and* a different analysis is used for determining whether a "note" constitutes a security as opposed to whether an "investment contract" constitutes a security), the Director agrees with the Respondents that there is a separate test for determining whether a promissory note is a security called the *Reves* test.

However, the Director rejects these arguments for two reasons. First, while the *Reves* test does exist, the Washington State Supreme Court has previously allowed the *Howey* test to be applied to promissory notes. In *State v. Saas*, the court stated that "A note can be characterized as a "security" where the note involves an investment of money in a common enterprise where the investor expects to reap profits from the efforts of a third party."¹¹ In that case, the Defendants

¹¹ *State v. Saas*, 118 Wn.2d 37, 44, 820 P.2d 505 (1991).

were accused of securities fraud by obtaining funds from an elderly woman to complete various construction projects in exchange for promissory notes. The court declined to apply the *Reves* test, and instead applied *Howey*-like factors to determine whether the promissory notes were considered securities.

Second, by reviewing the Conclusions of Law, the ALJ concluded that several aspects of the transaction *are* securities. The ALJ held that the Lake Cavanaugh Trust was a security in COL 6.10, the DST constituted an offer and or/ sale of a security in COL 7.1, and that the promissory note constituted a security in COL 6.12. Taken together, the ALJ found that the DST arrangement was a security.

The Director has broad administrative authority to interpret the laws and rules he or she administers. In this case, the Director agrees to adopt the *Howey* test, as enumerated in *State v. Saas* to analyze whether the promissory note is considered a security. In other words, the threshold questions as to whether the promissory note is considered a security are 1) did the note involve an investment of money, 2) in a common enterprise, 3) where the investor expects to reap profits, 4) from the efforts of a third party? Based on the Record on Review, the answer to all four questions is “yes.”

Here, none of the parties dispute that there was an investment of money. Technically, the Clines contributed real estate to the Lake Cavanaugh Trust, which was then sold, and the proceeds were then invested and held in trust; however, none of the parties have claimed that there was not an investment to start with. Therefore, the Director finds that the first prong of the test is met -- that there was an investment of money.

Second, there was a common enterprise among several parties to ensure that the DST was successful. First, Gary and Irene Cline (the Clines) were the original investors seeking a vehicle

for the DST transaction. Second, Robert Binkele (Binkele) who is a registered investment advisor in California referred the Clines to Todd Campbell.^{12,13} Todd Campbell is a Missouri attorney, CPA, and designer of the DST Concept.¹⁴ Todd Campbell drafted documents for the Clines to create the DST.¹⁵ Prestige Investment Management LLC, (Prestige) is a Nevada limited liability company that served as both the grantor and the trustee in the DST.¹⁶ Michael Mariani (Mariani) serves as a manager of Prestige.¹⁷ Clark Hurst, a general managing member of Prestige was the designated signer on the promissory note on behalf of Prestige as trustee.¹⁸ Investment advisor, Binkele, was further engaged to provide investment recommendations to the Lake Cavanaugh Trust.¹⁹ All parties had the common goal to ensure that the DST was successful, thus a common enterprise exists and the second prong is met.

The third element of whether the investor expects to reap profits from the efforts of a third party appears to be at issue. It is undisputed that the Clines sought to defer their tax liability through the DST.²⁰ The primary contention by the Respondents appears to be whether the Clines expected to reap any *profits* from the transaction. A review of the promissory note²¹ reveals the following:

- The Lake Cavanaugh Trust is the obligor on the note.
- Gary and Irene Cline are the holders of the note.

¹² Agreed Stipulated Facts for Hearing, Number 2, Page 2.

¹³ Agreed Stipulated Facts for Hearing, Number 22, Page 5.

¹⁴ Agreed Stipulated Facts for Hearing, Numbers 6, 11, 22, Pages 2-5.

¹⁵ Agreed Stipulated Facts for Hearing, Number 24, Page 5. Whether or not Todd Campbell is licensed to practice law in Washington is not addressed in the Initial Order.

¹⁶ Agreed Stipulated Facts for Hearing, Number 3, Page 2. Whether or not Prestige is a licensed trust company in the State of Nevada providing professional out-of-state trustee services in Washington is not addressed in the Initial Order.

¹⁷ Agreed Stipulated Facts for Hearing, Number 4, Page 2.

¹⁸ Department's Exhibit List, Exhibit 5, Page 4 and Exhibit 12, Page 8.

¹⁹ Agreed Stipulated Facts for Hearing, Number 33, Page 7.

²⁰ Agreed Stipulated Facts for Hearing, Number 20-21, Page 5.

²¹ Respondents' Witness List, Exhibit G, Pages 9-11.

- The note amount is \$275,000 with an interest rate of 8% per year.
- Interest-only quarterly payments, in the amount of \$4,125, were to be made to the Clines starting October 1, 2013 until October 1, 2023, with a balloon payment to be made on October 1, 2023 with the remaining balance.
- An amortization schedule was attached to the promissory note showing a schedule of interest accrued, quarterly payments of \$4,125, and ending balances from 8/31/13 to 10/1/23.²²

While the Clines certainly expected a tax deferral on the sale proceeds, based on a plain reading of the promissory note, the Clines appear to have also expected an 8% return. Furthermore, the stipulated facts support the concept that interest was expected, “If the trustee is able to generate more money from the trust assets than that necessary (sic) to pay the principal **and interest owed** on the promissory note, the trustee retains the excess.”²³ Emphasis added. The Director finds that the Clines expected to reap 8% interest (i.e., profit) from the transaction in addition to a tax deferral on the sale proceeds, therefore meeting the third prong of the test.

But, did the Clines expect to reap profits from a *third party*? The record clearly indicates that an investment advisor Binkele was engaged to invest the proceeds from the sale of the home.²⁴ Investment advisors provide investment advice and have a fiduciary duty to their client. This case is a bit more complicated as technically the Lake Cavanaugh Trust was the client of the investment advisor and not the Clines. Regardless, this does not change the fact that the Clines were to receive interest (i.e. profit) based on the efforts of at least two third parties: the trustee itself (Prestige) or the investment advisor (Binkele). In this case, the record shows that the Clines

²² Respondents’ Witness List, Exhibit G, Page 11.

²³ Agreed Stipulated Facts for Hearing, Number 18, Page 4.

²⁴ Agreed Stipulated Facts for Hearing, number 33, Page 7.

expected to reap profits from the efforts of a third party, meeting the fourth element of the test.

As all prongs of the test are met, the promissory note was indeed a security.

Based upon the above analysis, Conclusion of Law 6.12 is hereby *amended* to state:

When taking all aspects of the DST arrangement into consideration, including the promissory note ensuring the legal obligation for the Trust to repay the Clines, the DST arrangement is a 'security.' Further, the transaction including the promissory note is defined as a 'security' under RCW 21.20.005(17) when applying *Howey*-like factors as set forth in *State v. Saas*. *State v. Saas*, 118 Wn.2d 37, 44, 820 P.2d 505 (1991).

The second issue presented by the Respondents for review by the Director is as follows, "The Promissory Note was not 'offered' by Mr. Mariani"²⁵ and "The Clines' Attorney prepared the promissory note, including the terms provided by the Clines, and presented it to Mariani – Mariani did not offer or sell anything to the Clines."²⁶

Under RCW 21.20.140, it is unlawful to offer or sell unregistered securities in Washington unless it is exempt from registration. Respondents' contentions are that even if the promissory note is a security, the security was not offered or sold by Mariani or Prestige. The Respondents attempt to place attorney Todd Campbell, as a representative for the Clines, as the person or entity that offered this transaction; however, it is undisputed that Todd Campbell was also the attorney for Prestige and therefore on both sides of the transaction.²⁷ Furthermore, Exhibit D of the Respondents' Petition for Review contains a slide deck and presentation by Todd Campbell's law firm, Campbell Law, explaining the DST product and tax strategy.²⁸ That slide deck displays Mariani prominently as one of the Principals of Prestige and presumably part of the overall

²⁵ Petition for Review, Page 2.

²⁶ Respondent's Petition for Review, Page 7.

²⁷ Respondents' Petition for Review, Exhibit E, and Respondents' Witness List, Exhibit E.

²⁸ Also found in Department's Exhibit List, Exhibit 5.

strategy.²⁹ The Record on Review shows that Todd Campbell, Mariani, and Prestige were all working together to make the transaction work. As such, the Director declines to assign error in the Initial Order and does not agree that that “Mariani did not offer or sell anything to the Clines.”

The last issue presented by the Respondents for review by the Director is as follows: “The ALJ failed to consider the exemptions available to the transaction”³⁰ and “The ALJ utterly failed to address the Respondents’ Affirmative Defense that the transaction at issue, even if determined a security, was nonetheless exempt under RCW 21.20.320 and therefore no registration failure occurred.”³¹

The Respondents’ contention is that even if the promissory note is a security, it is exempt from registration. Exemptions from registering a security in Washington are located in RCW 21.20.320, and the Respondents point to subsection (1):

Any isolated transaction, or sales not involving a public offering, whether effected through a broker-dealer or not; or any transaction effected in accordance with any rule by the director establishing a nonpublic offering exemption pursuant to this subsection where registration is not necessary or appropriate in the public interest or for the protection of investors.

Respondents also point to WAC 460-44A-050(1)(d) for the definition of “isolated transaction,” which states, “Any sale of a security by or on behalf of an issuer that is one of not more than three such transactions inside or outside this state during the prior twenty-four months.” The Respondents’ claim that the Clines’ DST should be considered an isolated transaction event because it “only occurred *once*.”³²

²⁹ Respondents’ Petition for Review, Exhibit D, Page 6, and Department’s Exhibit List, Exhibit 5, Page 4.

³⁰ Respondent’s Petition for Review, Page 12.

³¹ Respondent’s Petition for Review, Page 2.

³² Respondent’s Petition for Review, Page 14.

The Director adopts the Department's argument that the Respondents have the burden of proving an exemption from the registration requirement under RCW 21.20.540. Furthermore, while the specific transaction occurred once with the Clines, the DST tax strategy and account/product set-up is publicly advertised to real estate and mortgage professionals, securities advisors, insurance professionals, CPAs, attorneys, banks, and financial institutions.³³ Attorney Todd Campbell has admitted that he has been involved in thousands of DST Transactions.³⁴ Furthermore, the Respondents have failed to demonstrate that they have not offered the DST product to only three Washingtonians in the prior twenty-four months.

In *S.E.C. v. Ralston Purina*, the court stated, "To determine the distinction between 'public' and 'private' in any particular context, it is essential to examine the circumstances under which the distinction is sought to be established and to consider the purposes sought to be achieved by such distinction" and "The focus of inquiry should be on the need of the offerees for the protections afforded by registration."³⁵ The Director agrees with the Department's reasoning that the Clines 'had investment knowledge between limited and good' and that they likely needed additional information that registration could have afforded them.³⁶ The Director also declines to apply the tests as outlined in the briefing, as all Washington cases cited are not reported. Therefore, the Director declines to assign error to with respect to whether the ALJ evaluated potential exemptions.

³³ Department's Exhibit List, Exhibit 28.

³⁴ Initial Order, Findings of Fact 5.10, Page 4.

³⁵ *S.E.C. v Ralston Purina Co.*, S.C. 346 US 119, 124-127, 73 S.Ct. 981 (1953).

³⁶ Initial Order, Findings of Fact 5.67, Page 10.

6.2 DFI Petition

The Department requests a review of COL 6.12, 6.17, and 6.19 in the Initial Order. COL 6.12 is analyzed in Section 6.1 above and therefore COL 6.12 is amended to correctly reference RCW 21.20.005(17)(a) in the Final Decision and Order in Section 7, below.

COL 6.17 in the Initial Order states:

In the present case, Michael Mariani, Prestige's Manager, does not dispute he is registered in the State of Washington as a broker-dealer or to sell securities. *FF No. 5.26 citing Stip. Facts: No. 5.*

The Department contends that COL 6.17 amounts to scrivener's error because the record shows that Mr. Mariani is *not* registered as a broker-dealer in the State of Washington.³⁷ The Director agrees. COL 6.17 is *amended* to:

In the present case, Michael Mariani, Prestige's Manager, does not dispute he is not registered in the State of Washington as a broker-dealer or to sell securities. *FF No. 5.26 citing Stip. Facts: No. 5.*

COL 6.17 is amended to correctly state that Mr. Mariani is *not* registered as a broker dealer or to sell securities in Section 7 of this Final Decision and Order, below.

COL 6.19 in the Initial Order states:

In order to establish 'fraud,' the Washington Supreme Court held, the alleging party must establish: (1) A Representation of existing fact; (2) Its materiality; (3) Its falsity; (4) The speaker's knowledge of its falsity; (5) Speaker's intent it be acted upon by the person to whom it is made; (7) The latter's reliance on the truth of the representation; (8) The right to rely upon it; and (9) Consequent damage. *Elcon Constr., v. E. Wash. Univ., 174 Wn2d 157 (2012).*

³⁷ Initial Order, Findings of Fact 5.26, Page 6.

The Department contends that COL 6.19 incorrectly states that intent to commit fraud is required under RCW 21.20.010(3). The Director agrees that intent is not required under the Washington State Securities Act.³⁸ COL 6.19 is amended to state the following:

Intent is not a requirement in an action for fraud or misrepresentation under the Washington State Securities Act. *Kittilson v. Ford*, 93 Wn.2d 223, 608 P.2d 264 (1980).

Despite the Director's amendment to COL 6.19, the fraud allegations were dismissed by the ALJ and neither party assigned error to that decision. The amendment is reflected in Section 7 of this Final Decision and Order, below.

7.0 FINAL DECISION AND ORDER

For all of the reasons set forth above, IT IS HEREBY ORDERED THAT:

7.1 The Findings of Fact set forth in Section 3.0 above and as set forth in the Initial Order are AFFIRMED.

7.2 The Conclusions of Law set forth in Section 4.0 above and as set forth in the Initial Order are AFFIRMED, subject to the following amendments:

7.2.1 COL 6.12 is AMENDED to state: "When taking all aspects of the DST arrangement into consideration, including the promissory note ensuring the legal obligation for the Trust to repay the Clines, the DST arrangement is a 'security.' Further, the transaction including the promissory note is defined as a 'security' under RCW 21.20.005(17) when applying *Howey*-like factors as set forth in *State v. Saas*. *State v. Saas*, 118 Wn.2d 37, 44, 820 P.2d 505 (1991)."

³⁸ *Kittilson v. Ford*, 93 Wn.2d 223, 608 P.2d 264 (1980) and *Aaron v. S.E.C.*, 446 U.S. 680, 696-97, 100 S.Ct. 1945 (1980).

7.2.2 COL 6.17 is AMENDED to state: “In the present case, Michael Mariani, Prestige’s Manager, does not dispute he is not registered in the State of Washington as a broker-dealer or to sell securities. *FF No. 5.26 citing Stip. Facts: No. 5.*”

7.2.3 COL 6.19 is AMENDED to state: “Intent is not a requirement in an action for fraud or misrepresentation under the Washington State Securities Act. *Kittilson v. Ford*, 93 Wn.2d 223, 608 P.2d 264 (1980).”

7.3 The Deferred Sales Trust arrangement with Gary Cline and Irene Cline constitutes an offer and/or sale of a security, as defined by RCW 21.20.005(14) & (17).

7.4 Prestige Investment Management LLC and Michael Mariani offered and sold securities for which no registration is on file with the Securities Administrator, in violation of RCW 21.20.140. The Department’s ‘Statement of Charges’ regarding this allegation is AFFIRMED.

7.5 Michael Mariani offered and/or sold securities while not being registered as a securities salesperson or broker-dealer in the State of Washington in violation of RCW 21.20.040. The Department’s ‘Statement of Charges’ regarding this allegation is AFFIRMED.

7.6 Robert Binkele, Prestige Investment Management LLC and Michael Mariani did not operate a fraud or deceit on Gary Cline and Irene Cline in violation of RCW 21.20.010(3). The Department’s ‘Statement of Charges’ regarding this allegation is DISMISSED.

7.7 The Department’s ‘Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs,’ dated October 6, 2020, is AFFIRMED IN PART, DISMISSED IN PART.

7.8 The Department’s requested denial of registration to Robert Binkele is NOT APPROPRIATE.

7.9 Respondents Prestige Investment Management LLC and Michael Mariani shall be liable for and shall pay a fine of \$20,000.³⁹

7.10 Respondents Michael Mariani and Prestige Investment Management LLC shall be liable for and shall pay costs, fees, and other expenses in the administrative investigation and hearing of this matter in the amount of \$15,000.⁴⁰

7.10 Reconsideration. Pursuant To RCW 34.05.470, Respondent has the right to file a Petition for Reconsideration stating the specific grounds upon which relief is requested. The Petition must be filed in the Office of the Director of the Department of Financial Institutions by courier at 150 Israel Road SW, Tumwater, Washington 98501, or by U.S. Mail at P.O. Box 41200, Olympia, Washington 98504-1200, within ten (10) days of service of this Final Order upon Respondent. The Petition for Reconsideration shall not stay the effectiveness of this order nor is a Petition for Reconsideration a prerequisite for seeking judicial review in this matter. A timely Petition for Reconsideration is deemed denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on a petition.

7.11 Stay of Order. The Director has determined not to consider a Petition to Stay the effectiveness of this order. Any such requests should be made in connection with a Petition for Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

7.12 Judicial Review. Respondent has the right to petition the superior court for judicial review of this agency action under the provisions of chapter 34.05 RCW. For the requirements for filing a Petition for Judicial Review, see RCW 34.05.510 and sections following.

³⁹ Division's Hearing Brief, Page 26.

⁴⁰ Division's Hearing Brief, Page 26.

7.13 Service. For purposes of filing a Petition for Reconsideration or a Petition for Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of service attached hereto.

7.14 Effectiveness and Enforcement of Final Order. Pursuant to the Administrative Procedures Act, at RCW 34.05.473, this Final Decision and Order shall be effective immediately upon deposit in the United States Mail.

Dated at Tumwater, Washington, on March 29, 2023.

WASHINGTON STATE DEPARTMENT
OF FINANCIAL INSTITUTIONS

By:



Charles E. Clark, Director

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Robert Binkele, Michael Mariani and
Prestige Investment Management,

Respondents.

Docket No. 01-2021-DFI-00124

INITIAL ORDER

Agency: Department of Financial
Institutions

Program: Securities

Agency No. S-18-2520-19-SC01

1. ISSUES PRESENTED:

- 1.1. Whether the Deferred Sales Trust arrangement with Gary Cline and Irene Cline constitutes the offer and/or sale of a security, as defined by Revised Code of Washington (RCW) 21.20.005(14) & (17)?
- 1.2. Whether Prestige Investment Management and Michael Mariani violated RCW 21.20.140 for offering and selling securities for which no registration is on file with the Securities Administrator?
- 1.3. Whether Michael Mariani offered and/or sold securities while not being registered as a securities salesperson or broker-dealer in the State of Washington, in violation of RCW 21.20.040?
- 1.4. Whether Robert Binkele, Prestige Investment Management and Michael Mariani individually, because of their administration of the Lake Cavanaugh Trust without a valid note or the lack of a valid note and without alerting Gary Cline and Irene Cline, operated a fraud or deceit, in violation of RCW 21.20.010(3)?
- 1.5. Whether the Department of Financial Institutions' 'Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs', dated October 6, 2020, should be affirmed, modified or dismissed?

2. INITIAL ORDER SUMMARY:

- 2.1. The Deferred Sales Trust arrangement with Gary Cline and Irene Cline constitutes the offer and/or sale of a security, as defined by RCW 21.20.005(14) & (17).
- 2.2. Prestige Investment Management and Michael Mariani offered and sold securities for which no registration is on file with the Securities Administrator, in violation of RCW 21.20.140. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.
- 2.3. Michael Mariani offered and/or sold securities while not being registered as a securities salesperson or broker-dealer, in the State of Washington, in violation

of RCW 21.20.040. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.

2.4. Robert Binkele, Prestige Investment Management and Michael Mariani did not operate a fraud or deceit on Gary Cline and Irene Cline in violation of RCW 21.20.010(3). The Department's 'Statement of Charges' regarding this allegation is **DISMISSED**.

2.5. The Department of Financial Institutions' 'Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs', dated October 6, 2020, is **AFFIRMED IN PART, DISMISSED IN PART**.

2.6. The Department's requested penalties, sanctions, imposition of costs and fees against Prestige Investment Management and Michael Mariani are **APPROPRIATE**.

2.7. The Department's requested denial of registration to Robert Binkele is **NOT APPROPRIATE**.

3. EVIDENTIARY HEARING:

3.1. Evidentiary Hearing: Monday, May 2, 2022, to Wednesday, May 4, 2022 and Friday, May 13, 2022

3.2. Admin. Law Judge: TJ Martin

3.3. Respondents: Robert Binkele, Michael Mariani and Prestige Investment Management

3.3.1. Representative: Heidi VonderHeide and Alan M. Wolper, Attorneys

3.3.2. Witnesses: Dennis Dumas, Securities Attorney

3.4. Agency: Department of Financial Institutions

3.4.1. Representative: Julia Eisentrout and Stephen Manning, Assistant Attorney Generals

3.4.2. Witnesses: Adam Yeaton, Department Financial Legal Examiner
Gerald 'Gary' Cline, Washington Resident
Holly Mack-Kretzler, Department Financial Legal Examiner Supervisor
Todd Campbell, Clines' Attorney and Prestige's Attorney
Robert Binkele, Respondent
Michael Mariani, Respondent

3.5. Exhibits: DFI's Exhibits 1 through 32 were admitted without objection.

Respondents' Exhibits A through FFF were admitted without objection. Ex. S, T and Z were missing.

3.6. Court Reporters: Gretchen J. Paletta, Vernon Court Reporters

4. RESPONDENTS' 'MOTION TO DISMISS': At the conclusion of the Department's case, the Respondents brought an oral 'Motion to Dismiss', arguing the Department failed to establish their case by a 'preponderance of the evidence'. The Respondents' motion was taken under advisement. After review of the Department's case, the undersigned administrative law judge finds the Department's established, a prima facie case of the allegations asserted in its 'Statement of Charges'. As a result, the Respondent's 'Motion to Dismiss' is **DENIED**.

5. FINDINGS OF FACT:

The following facts are established by a 'preponderance of the evidence':

Jurisdiction-

- 5.1. On October 6, 2020, the State of Washington's Department of Financial Institutions' Securities Division (Department) filed 'Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines and Charge Costs, Order No. S-18-2520-19-SC01 (Statement of Charges) against Robert Binkele, Michael Mariani and Prestige Investment Management, LLC (Respondents). *Testimony of Adam Yeaton (Testimony of Yeaton), Department Exhibit (Dept. Ex.) 29 and Respondents' Exhibit (Resp. Ex.) A.*
- 5.2. On November 10, 2020, the Respondents appealed the Department's 'Statement of Charges' and requested an administrative hearing.

Clines' Lake Cavanaugh Property-

- 5.3. Gary and Irene Cline (Clines) are a married couple residing in Washington. *Testimony of Gary Cline (Testimony of Cline) and Department & Respondents' 'Agreed Stipulated Facts for Hearing' (Stip. Facts): No. 7.*
- 5.4. In 1976, the Clines purchased a vacation home (Lake Cavanaugh property), located in Skagit County, Washington, for \$15,000. In 2013, the Clines became interested in selling the property. However, by 2013, it had appreciated in value to over \$200,000. The Clines were concerned with the amount of federal capital gains tax they would have to pay if they sold it. *Testimony of Gary Cline (Testimony of Cline) and Stip. Facts: No. 20.*
- 5.5. In 2013, the Clines learned of the concept of a Deferred Sales Trust (DST) through Doug Anderson (Anderson) an annuity salesman. Anderson referred the Clines to Robert Binkele (Binkele) who discussed the process by which the Clines' Lake Cavanaugh Property would be sold to a DST then sold again

by the trust to a third-party buyer, their neighbors, the Forsbergs and Hoggatts.
Testimony of Cline and Stip. Facts: No. 21.

5.6. Binkele, a California resident, has worked in the securities industry since 1993.
Stip. Facts: Nos. 1 & 2, Testimony of Robert Binkele (Testimony of Binkele), and Dept. Ex. 1.

5.7. Binkele is a registered investment advisor representative (CRD number 2394598). He has previously been registered as a General Securities Representative and a General Securities principal. He has worked in the securities industry since 1993.
Stip. Facts: No. 3 and Department Ex. 1.

5.8. Binkele referred the Clines to Todd Campbell (Campbell) to draft the documents to create the Lake Cavanaugh DST. Campbell developed the concept of using a DST and considers the mechanism his intellectual property. *Stip. Facts: No. 22 and Testimony of Todd Campbell (Testimony of Campbell).*

5.9. Campbell is a Missouri-based attorney and partner of Campbell Law – Campbell CPA, a Missouri-based law and accounting firm. *Stip. Facts: No. 6 and Dept. Ex. 1.*

5.10. Campbell has worked for over 20 years, drafting DSTs for thousands of clients. *Stip. Facts: No. 11, Testimony of Campbell, Dept. Ex. 5, and Resp. Ex. D.*

Deferred Sales Trust-

5.11. A DST is a concept designed to allow the owner of an appreciated asset to defer the payment of capital gains tax that otherwise would be due upon the sale of the appreciated asset. *Stip. Facts: No. 8, Testimony of Campbell, Dept. Exs. 5 & 28, and Resp. Ex. D.*

5.12. Generally, in a DST, the owner of the appreciated asset sells or signs over the appreciated asset to a trust, which then sells the asset to a third-party buyer, invests the proceeds from the sale, and gives the asset seller ('asset seller') a promissory note for a future stream of payments made on an installment schedule determined jointly by the asset seller and the trust trustee. *Stip. Facts: No. 9, Testimony of Campbell, Dept. Exs. 5 & 28, and Resp. Ex. D.*

5.13. The DST concept relies upon Internal Revenue Code Section 453 and a private letter ruling from the IRS, which provides income is not deemed earned on an asset sold pursuant to an installment sale – and therefore no taxes are due – until a payment is received. *Stip. Facts: No. 10, Testimony of Campbell, Dept. Exs. 5 & 28, and Ex. D.*

5.14. The promissory note and sales agreement, which accompanies a DST, legally-obligates the Trust to pay the client, in this case, the Clines. *Testimony of Campbell and Testimony of Yeaton.*

- 5.15. Campbell, as attorney for the Asset Seller, is responsible for determining how the DST will be structured, how and when the Asset Seller will be repaid, and then drafting the necessary documents to create the formation of the trust. *Stip. Facts: Nos. 12 & 16 and Resp. Ex. D.*
- 5.16. The specific schedule of payments, including the date on which payments will commence, is determined based on the mutual agreement of the trustee and the asset seller. *Stip. Facts: No. 17, Dept. Ex. 5, and Resp. Ex. D*
- 5.17. Most DST participants hold an asset that substantially appreciated in value and are seeking to defer taxation on the gains from the sale of the asset. Unless and until payments from the trust are received, the asset seller is not required to pay any tax. *Stip. Facts: No. 13, Testimony of Campbell, Dept. Exs. 5 & 28, and Resp. Ex. D.*
- 5.18. In a standard DST transaction, the asset seller sells the appreciated asset to a trust, which then sells the asset to a third-party buyer. The proceeds of the asset sale are deposited into an account owned by the trust. The trustee is empowered to invest the assets of the trust. *Stip. Facts No. 14, Dept. Exs. 5 & 28, and Resp. Ex. D.*
- 5.19. As part of a DST transaction involving a promissory note, a promissory note is issued by the trust to the asset seller, which obligates the trust to pay the asset seller in installments at an agreed-upon rate of interest, thereby spreading out the asset seller's obligation to pay taxes on the gains from the sale. *Stip. Facts: No. 15, Testimony of Campbell, Testimony of Yeaton, Dept. Ex. 5, and Resp. Ex. D.*
- 5.20. The trustee generally attempts to invest the trust assets in a way which will maximize the return on the trust's investments so that the trust makes more money than the original obligation on the note. If the trustee can generate more money from the trust assets than that necessary to pay the principal and interest owed on the promissory note, the trustee retains the excess. Conversely, if the investments perform poorly and the trust runs out of money before making full payment to the asset seller on the note, the asset seller will receive only partial payment and has no recourse against the trustee. The particular payment structure of the promissory note varies from transaction to transaction. The interest rate, length of payments, start date of payments, and degree of gradual amortization versus a balloon payment can all be customized depending on the Asset Seller's goals. *Stip. Facts: No. 18.*
- 5.21. The DST and its accompanying promissory note are not, and never have been, registered as a security in the State of Washington. *Stip. Facts: No. 19.*

[Continued]

Lake Cavanaugh Trust-

- 5.22. In July 2013, the Clines decided to utilize the Deferred Sales Trust concept for their Lake Cavanaugh property. The Clines retained Campbell as their attorney in the transaction. *Stip. Facts: Nos. 21 & 23 and Resp. Ex. D.*
- 5.23. Campbell prepared the 'Declaration of Trust', 'Option Agreement', and 'Promissory Note' in connection with the creation of the Lake Cavanaugh Trust, i.e., the trust created to fulfill the Clines' desire to utilize a DST. *Stip. Facts No. 24 and Resp. Ex. D.*
- 5.24. As a part of the DST, Prestige Investment Management (Prestige), a Nevada limited liability company, agreed to serve as both the grantor and the trustee in the Deferred Sales Trust (DST) transaction. *Stip. Facts: No. 3.*
- 5.25. Michael Mariani (Mariani), a California resident and a Certified Public Accountant, is Prestige Investment Management's (Prestige) manager. *Stip. Facts: No. 4, Testimony of Michael Mariani (Testimony of Mariani) and Dept. Exhibit 1; pg. 5.*
- 5.26. Neither Mariani nor Prestige are registered in the State of Washington as a broker-dealer or to sell securities. *Testimony of Yeaton and Stip. Facts: No. 5.*
- 5.27. Campbell, attorney for the Clines, is also the attorney for Prestige. *Stip. Facts: No. 24, Testimony of Campbell, and Resp. Ex. D.*
- 5.28. On July 23, 2013, Campbell sent the Clines an email titled 'Deferred Sales Trust', which included three attachments: (1) a 'Representation and Acknowledgement Statement' (2) a 'DST Disclosures' and (3) a 'Investment Risk Disclosure'. *Stip. Facts: No. 25, Dept. Ex. 13-17, and Resp. Ex. D-F.*
- 5.29. On August 1, 2013, the Clines executed the 'Representation and Acknowledgement Statement' and 'Disclosure and Waiver of Conflict of Interest', requested by Campbell. *Stip. Facts: No. 26, Dept. Exs. 13 & 30, and Resp. Ex. E.*
- 5.30. In executing the 'Representation and Acknowledgement Statement', the Clines represented they "agree and accept the Seller [Clines] will be paid only as scheduled under the Note as negotiated. The seller may not accelerate, defer, increase, or decrease the scheduled payments without mutual agreement by Prestige." *Stip. Facts: No. 27.*
- 5.31. On August 7, 2013, Prestige, with Mariani, as General Managing Member, serving as the 'Grantor' and 'Trustee', established the Lake Cavanaugh Trust. *Stip. Facts: No. 28, Testimony of Mariani, and Dept. Ex. 4.*
- 5.32. The Clines understood, as a part of transferring their appreciated property into the Lake Cavanaugh Trust, they would avoid capital gains tax, receive periodic installment payments, as well as any additional investment growth. The Clines would

only pay tax on the income received from the trust, in periodic installments. *Testimony of Cline and Testimony of Yeaton.*

- 5.33. The Clines wanted to defer initial installment payments to them, for the Trust to accrue interest and pay out at a higher rate later. *Testimony of Cline.*
- 5.34. Between August 7, 2013, and August 28, 2013, Campbell communicated with the Clines, via email, exchanging drafts of documents relating to the sale of the Lake Cavanaugh Property. *Stip. Facts: No. 29 Testimony of Cline, Dept. Exs. 13-18, and Resp. G-R & U-V.*
- 5.35. Campbell sent draft promissory notes to the Clines on August 7, 2013, August 13, 2013, and August 15, 2013. *Stip. Facts: No. 30, Testimony of Yeaton, Testimony of Cline, Dept. Ex. 13, and Resp. Ex. G, L & O.*
- 5.36. Numerous 'draft' copies of the promissory note were exchanged between the Clines and their attorney, Campbell. However, the Clines never signed any of proposed promissory notes. *Testimony of Cline and Testimony of Yeaton.*
- 5.37. It is 'best practice' to have a client, such as the Clines, sign the promissory note. *Testimony of Campbell.*
- 5.38. The DST is more than an installment sales agreement since a promissory note ensures the enforceability of future payments. *Testimony of Campbell.*
- 5.39. Cline acknowledges Campbell sent 'draft' promissory notes to him at least five times during the initial set-up of the Trust, but Cline never signed any of them, as requested. *Testimony of Cline.*
- 5.40. Cline expected 6% interest from the trust principal, along with the principal, in its entirety, later, via a balloon payment. *Testimony of Cline.*
- 5.41. On August 8, 2013, the Clines wrote to Campbell, in an email: "We will set up a payout from the trust to us sometime in early 2014 or at some later date as previously agreed." On October 14, 2013, the Clines sold the Lake Cavanaugh Property to the Lake Cavanaugh Trust. The Lake Cavanaugh Trust later sold that property to a third-party buyer. The sale to the third-party buyer provided that the Lake Cavanaugh Trust would receive an upfront payment of \$50,000 from the buyer, plus an additional \$188,000 to be paid over the next several years on an agreed upon payment schedule. *Stip. Facts: No. 31 and Dept. Exs. 13-18.*
- 5.42. On October 7, 2013, Campbell sent an email to the Clines, requesting a signed copy of the Real Estate Sale Agreement between the Clines and the Trust. *Resp. Ex. W.*
- 5.43. On October 16, 2013, Campbell sent an email to the Clines inquiring about the status of the promissory note, stating: "Follow up [sic] on this. Can you execute the attached and return a copy to me?" *Stip. Facts: No. 32 and Resp. Ex. X.*

- 5.44. The funding for the Lake Cavanaugh Trust came entirely from the sale of the Lake Cavanaugh Property. Prestige served as the grantor, the trustee, and the beneficiary of the Trust. Prestige retained Binkele to provide investment recommendations to the Trust. *Stip. Facts: No. 33 and Testimony of Robert Binkele (Testimony of Binkele).*
- 5.45. Binkele was responsible for managing the money, with the Trust being his client. *Testimony of Binkele.*
- 5.46. Binkele has managed the money and investment for 400-500 DST in the past. *Testimony of Binkele.*
- 5.47. Binkele's job is to ensure the investments fund the legal obligation of the promissory note and to adequately fund the Trust, based on the Trustee's (Mariani's) directions. Binkele essentially serves as an investment advisor. *Testimony of Binkele.*
- 5.48. Binkele does not ever recall a DST without a promissory note. Usually, the promissory note is a ten-year note with an agreed interest rate. *Testimony of Binkele and Dept. Ex. 11.*
- 5.49. The lack of an executed promissory note does not affect Binkele's work to ensure the trust money was invested to ensure satisfaction by the trustee (Mariani), on behalf of Prestige. *Testimony of Binkele.*
- 5.50. Mariani, Prestige's Manager, as the Trustee of the Lake Cavanaugh Trust, hired Binkele to manage the Trust money to ensure coverage of the promissory note terms and to maximize earnings. *Testimony of Binkele and Testimony of Mariani.*
- 5.51. The 'Agreement and Declaration of Trust' stated:

The Trust is created for...(i) the sale of real estate and further investment in the proceeds therefrom for profit and (ii) engaging in all activities and transactions as the Trustee may deem necessary, advisable, convenient, or incidental in connection with the investment of the proceeds from the sale of real estate.

Stip. Facts: No. 34.

- 5.52. As the trustee, Prestige was the "...arbiter of the funds." Mariani's motive was to preserve the trust's assets and to make more money than what the Trust was obligated to pay the Clines on the promissory note. *Stip. Facts: No. 35.*
- 5.53. Mariani was 'surprised' to learn no valid promissory note had been executed. *Testimony of Mariani.*
- 5.54. Without a valid promissory note in place, the trust would not be legally bound to make payments to the Clines. *Testimony of Mariani.*

- 5.55. Mariani did not become aware there was not a valid promissory note until 2017. *Testimony of Mariani.*
- 5.56. Prestige charged a yearly fee for making investments on behalf of the trust. Any investment income beyond the money obligated to pay the Clines, as per the promissory note and installment payment schedule, would be income to Prestige. The Trust anticipated accruing interest at 8%, with 6% being paid to the Clines. *Testimony of Yeaton.*
- 5.57. The same day the Lake Cavanaugh Trust was established, August 7, 2013, Campbell wrote the Clines about the terms to be included in the promissory note. The following day, the Clines responded to Campbell, stating they "were advised by both Bob Binkele and Doug Anderson of Life Directions, your agent, and our advisor...that the trust would accrue at 8%" and that they would "set up a pay out from the trust to us sometime in early 2014 or at some later date as previously agreed." The Clines went on to specify the "balloon payment should be set for 5 yrs [sic] from closing date." *Stip. Facts: No. 36.*
- 5.58. On August 15, 2013, the Clines received a draft 'real estate agreement' from Campbell involving the sale of the Lake Cavanaugh Property, to the Lake Cavanaugh Trust. This draft agreement stated the following about the sales price of the Lake Cavanaugh Property: "The total Sales Price for the Property shall be Two Hundred Thirty-Three Thousand and No/100 Dollars (\$233,000.00), payable in full in the form of a Promissory Note, a copy of which is attached hereto as Exhibit B." *Stip. Facts: No. 37.*
- 5.59. The draft promissory note, attached as 'Exhibit B' to the 'real estate agreement', specified the Clines were the 'holders' of the note and the trust was the 'obligor'. *Stip. Facts: No. 38.*
- 5.60. The promissory note further stated interest was to accrue at eight percent (8%) and that quarterly interest-only payments were to begin in 2014 with a final balloon payment of the outstanding accrued amount occurring in 2018. *Stip. Facts: No. 39.*
- 5.61. In October 2013, the Clines executed the documents necessary, including signing the Washington State Department of Revenue 'Real Estate Excise Tax Affidavits', to transfer their property into the Lake Cavanaugh Trust. *Dept. Exs. 19 & Ex. 22; pg. 6, Ex. 23; pg. 2 and Resp. Exs. AA & BB.*
- 5.62. On December 5, 2013, Campbell sent an email to Binkele and his staff indicating the need to finalize the terms of the promissory note. *Stip. Facts: No. 40, Dept. Ex. 21 and Resp. Ex. CC-FF.*

5.63. On December 17, 2013, the Clines signed an acknowledgement of 'Statement of Additional Disclosures from the Estate Planning Team and Deferred Sales Trust', authorizing the Trust to invest the funds from the sale of the Lake Cavanaugh property, and executed and submitted a 'Risk Tolerance Questionnaire' provided by the Estate Planning Team. *Stip. Facts: No. 45, Dept. Ex. 10, and Resp. Ex. GG-HH.*

5.64. The 'Risk Tolerance Questionnaire' stated:

The answer to the following questions will be provided to the Deferred Sales Trust third party trustee. The trustee and their financial advisors will use this form as a guide to choose the DST target asset allocation, the proposed DST note interest rate and the terms and conditions on the DST note. With this signed form in their possession, the Trustee and their advisors will be considering your investment goals, tolerance for risk, as well as your net worth and income. This questionnaire is one of the tools that will help the DST third party trustee and their financial advisors determine the most suitable investments to provide adequate collateral for your DST note.

Dept. Ex. 10 and Stip. Facts: No. 46.

5.65. The 'Risk Tolerance Questionnaire' filled out by the Clines indicated they were interested in long-term growth and anticipated needing the funds in six to ten years. *Dept. Ex. 10 and Stip. Facts: No. 47.*

5.66. The 'Risk Tolerance Questionnaire' served to ensure Prestige invested in a financial portfolio to ensure there was adequate earnings to satisfy the Clines' underlying note as well as to gain additional earnings. *Testimony of Campbell and Testimony of Binkele.*

5.67. Binkele communicated with the Clines to assess their investment knowledge and comfort. With Gary Cline possessing a bachelor's and master's degrees, Binkele found Gary Cline's general investment knowledge to be 'good' but limited. *Testimony of Binkele and Dept. Ex. 10.*

5.68. The Clines never approached Binkele on how to invest the Trust monies to maximize profit to ensure the Trust was adequately covered to comply with the promissory note legal obligations. *Testimony of Binkele.*

5.69. With a valid, legally executed promissory note, the Clines stood as 'creditors' with the legal power to enforce the underlying promissory note. *Testimony of Binkele.*

- 5.70. On January 14, 2014, Campbell sent another email to Binkele's staff alerting them that the promissory note was not yet finalized. *Stip. Facts: No. 41 and Dept. Ex. 22.*
- 5.71. Binkele believed the Clines understood an investment excess would go to the Trustee, not the actual Trust itself, would get the excess above the promissory note's agreed interest rate of 6%. *Testimony of Binkele.*
- 5.72. The Lake Cavanaugh Trust is the only DST Binkele has ever done in the State of Washington. *Testimony of Binkele.*
- 5.73. Attached to the January 14, 2014, email was a series of proposed payments from the Trust to the Clines. *Stip. Facts: No. 42, Dept. Ex. 22 and Resp. Ex. K & II-JJ.*
- 5.74. On January 15, 2014, Campbell sent an email to Mr. Cline titled "corrected and Updated Amortization Schedule – Trust to Clines." In his January 15, 2014, email, Campbell stated:

With regard to payments from the Lake Cavanaugh Trust to you, I have updated the attached draft. In earlier drafts, the first payment was proposed to be due to you on October 1st, but since the Closing did not occur until later this payment was not available to be made at that time. Let me know if you have any questions, or if you would like to see the draft repayment schedule modified from this draft (different payment dates or amounts?). Thanks.

Stip. Facts: No. 43 & Resp. Ex. II-JJ.

- 5.75. On January 24, 2014, Campbell sent another email to the Clines, following up on his January 15, 2014, email, stating: "Gary & Irene – I have not heard from you. I wanted to make sure that you had also received the following correspondence as well. Let me know of any questions. Thanks." *Stip. Facts: No. 44 and Resp. Ex. JJ & MM.*
- 5.76. Beginning in 2014, based on the Clines' responses to the 'Risk Tolerance Questionnaire', Prestige placed the Trust funds into various, diversified investments, including J.P. Turner, to maximum Trust income and minimize the risk of loss. *Testimony of Binkele and Resp. Ex. AAA-EEE.*
- 5.77. On December 21, 2014, the Clines received an email from Prestige. The email contained an attachment reflecting the Lake Cavanaugh Trust principal balance as of December 19, 2014. The attachment referred to Gary Cline as the 'Note Holder'. Although the Clines had previously reviewed draft versions of the promissory note, as of December 21, 2014,

no promissory note had been executed. *Stip. Facts: No. 48 and Resp. Ex. KK-LL.*

5.78. From the creation of the Lake Cavanaugh Trust until the end of 2019, no executed promissory note with a payment schedule existed. *Stip. Facts: No. 49.*

5.79. Mariani, the Principal at Prestige, thought it was very unusual for a promissory note not to be signed. *Dept. Ex. 7.*

5.80. In November 2015, the Clines contacted Binkele and Campbell to see if they could make withdrawals from the Lake Cavanaugh Trust for a vacation. Binkele responded that "...the trustee would need to approve this only if the dollar amount requested exceeded the agreed installment plan." Binkele also explained to the Clines the Trustee and the Clines must agree to amend the promissory note so the payment could occur. *Stip. Facts: No. 50, Dept. Ex. 26 and Resp. Ex. NN-PP.*

5.81. At the time of the Clines' request to withdraw money for their vacation, Binkele believed a valid promissory note existed. *Testimony of Binkele.*

5.82. Since the Clines' requested amount exceeded the Installment Plan Payment, the Installment Plan and Promissory Note would have needed to be changed, or else the Clines risked triggering federal capital gains taxation on the transaction. *Testimony of Yeaton.*

5.83. Following their conversation with Binkele, the Clines reached out to Campbell, asking "if there was a way to release some of the funds early." *Stip. Facts: No. 51, Testimony of Binkele, and Resp. Ex. NN-PP.*

5.84. Mariani did not check for a valid promissory note before making the vacation distribution, requested by the Clines. He had just assumed one was in place. *Testimony of Mariani and Dept. Ex. 7.*

5.85. Prestige and Mariani authorized the Clines' requested withdrawal. *Stip. Facts: No. 52 and Resp. Ex. NN-PP.*

5.86. Binkele is Prestige's hired financial advisor since 'we trust him'. *Testimony of Mariani.*

5.87. In 2017, Campbell sent a new, revised promissory note with a revised payment schedule and rate of interest, to the Clines, calculating the recent distribution to them for their vacation. The Clines did not sign the note. *Testimony of Campbell.*

5.88. In late 2017, the Clines' insurance agent, Kirk Wald, reviewed their holdings and expressed concern about the DST structure and the lack of a

promissory note. The Clines requested Prestige and Binkele liquidate the holdings of the Lake Cavanaugh Trust and distribute the proceeds to them. *Stip. Facts: No. 53.*

- 5.89. In 2017, Mariani and Prestige attempted to negotiate a payment schedule with the Clines, since no promissory note had been executed, outlining the Trust's installment payments to the Clines. *Stip. Facts: No. 54; Dept. Ex. 12 and Resp. Ex. QQ.*
- 5.90. In January 2018, Gary Cline emailed Michael Mariani, requesting to liquidate the Trust assets. Mariani reminded Cline the Trust controlled the assets and liquidation would result in the loss of the Clines' tax deferral. *Dept. Ex. 27.*
- 5.91. On September 26, 2019, Mariani notified the Clines of the Trust's closure, as requested by the Clines. *Resp. Ex. SS.*
- 5.92. Between 2013 to liquidation of the Trust principal in 2019, the Clines only received two distribution payments. *Testimony of Cline.*
- 5.93. During their interactions, between 2013 to 2019, the Clines and Prestige both acted as if a valid promissory note existed. *Testimony of Campbell.*

Department Investigation-

- 5.94. In July 2018, Gary Cline contacted the Department of Financial Institutions to make a complaint regarding the Lake Cavanaugh Trust transaction. The Department opened an investigation. *Testimony of Yeaton, Testimony of Cline, Dept. Ex. 31, and Resp. Ex. WW-YY.*
- 5.95. From July 20, 2018, to October 6, 2020, Department Financial Examiner Adam Yeaton investigated Clines' complaint. *Dept. Exs. 2, 8, 31 and Resp. RR & TT.*
- 5.96. Based on the Department's investigation, everyone involved with the Lake Cavanaugh Trust believed a valid promissory note had been executed. *Testimony of Yeaton and Dept. Ex. 26.*
- 5.97. According to Department records, the Respondents engaged in at least six similar DTS transactions in the State of Washington within 24 months. *Testimony of Holly Mack-Kretzler (Testimony of Mack-Kretzler).*

6. CONCLUSIONS OF LAW:

Based upon the above 'Findings of Fact', the following 'Conclusions of Law' are made:

Jurisdiction and Authority-

6.1. The Office of Administrative Hearings (OAH) has jurisdiction in the present case, based on RCW 21.20.395, Washington Administrative Code (WAC) 208-08-055.

Burden and Standard of Proof-

6.2. The Department of Financial Institutions has the burden of proof to establish the allegations, as asserted in its 'Statement of Charges', by a 'preponderance of the evidence ('more likely than not') standard of proof.

Department of Financial Institutions' Authority and Enforcement-

6.3. In the State of Washington, the Department of Financial Institutions is responsible for the implementation and enforcement of the 'Washington Securities Act' rules and regulations, codified in Chapter 21.20 RCW and Title 460 WAC.

Deferred Sales Trust (DST) Promissory Note Constitutes a 'Security'-

6.4. RCW 21.20.010 'Unlawful offers, sales, purchases' establishes, in relevant part:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:...(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

RCW 21.20.010(3).

6.5. RCW 21.20.005 'Definitions' establishes, in relevant part:

(14) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

...
(17)(a) "Security" means any **note**; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; **investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture**;...in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this subsection. This subsection applies whether or not the security is evidenced by a written document.

RCW 21.20.005(14)&(17).
(Emphasis Added).

- 6.6. In the present case, Gary Cline and Irene Cline entered into an agreement to sell their Lake Cavanaugh, Skagit County, Washington vacation home to the Lake Cavanaugh Trust, a Deferred Sales Trust (DST). The Trust would then sell the property to a third-party and invest the proceeds for the benefit of the Trust.
- 6.7. The Lake Cavanaugh DST documentation was drafted by the Clines' attorney also Prestige's attorney, Todd Campbell. The contractual relationship existed between Prestige, the promissory note 'obligor', and the Clines, as the note 'holder'. Prestige offered the DST and the Clines accepted. Binkele served only as Prestige's retained investment advisor.
- 6.8. Prestige Investment Management, on behalf of the Trust, then managed and invested the sale proceeds to maximize the likelihood of legal obligation to repay the Clines. Any excess investment profit, beyond the agreed-upon repayment terms to the Clines, benefitted the Trust.
- 6.9. The Trust would then repay the Clines, via an installment agreement over a period of time, thereby minimizing Clines' tax exposure. The installment agreement was secured by an underlying promissory note. If the Trust failed to repay the Clines, as agreed upon, the Clines, as the promissory note 'holder' would have legal recourse by suing the Trust on the note, managed by Prestige Investment Management, as the 'obligor'.
- 6.10. The Respondents argue the Lake Cavanaugh Trust does not constitute a 'security' based on *SEC v. W.J. Howey*, 328 U.S. 293 (1946). However, the Lake Cavanaugh Trust served as an investment contract, a 'security' under RCW 21.20.005(17)(a). In addition, the Clines relied on Prestige Investment Management to manage the Trust, through the financial advisement of Binkele, to not only receive future installment payments, but additional interest income as well. Based on the above-cited 'Findings of Fact', *Howey* supports the Department's contention the Trust at issue was a 'security'.
- 6.11. While the Clines' had input into the investment decisions made by the Trust, their input was 'advisory only'. Robert Binkele, financial advisor to Prestige, provided the recommendations regarding the Trust investment. The ultimate decision(s) regarding the Lake Cavanaugh Trust's financial investments were made by Michael Mariani and Prestige Investment Management.
- 6.12. The establishment of the Lake Cavanaugh Trust did not, in itself, nor the installment agreement, constitute a 'security'. However, the promissory note, ensuring the legal obligation for the Trust to repay the Clines, the original asset seller, is a 'security', as defined by RCW 21.20.010(3).

Prestige Investment Management and Mariani Offered and Sold Security-

- 6.13. RCW 21.20.140 makes it unlawful for any person to act as broker-dealer or salesperson of securities without being registered in the State of Washington under Chapter 21.20 RCW or unless otherwise exempted from such registered. It is on the person to assert such exemption from securities registration.
- 6.14. In the present case, the Lake Cavanaugh DST and its accompanying promissory note are not, and never have been, registered as a security in the State of Washington. *Findings of Fact (FF) 5.21 referencing Stip. Facts: No. 19.*
- 6.15. As a result, Prestige Investment Management and Michael Mariani offered and sold securities for which no registration is on file with the Securities Administrator, in violation of RCW 21.20.140. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.

Mariani Offered and Sold Security when not Registered-

- 6.16. RCW 21.20.040 makes it unlawful for any person to act as broker-dealer or salesperson of securities without being registered in the State of Washington under Chapter 21.20 RCW or unless otherwise exempted from such registered. It is on the person to assert such exemption from securities registration.
- 6.17. In the present case, Michael Mariani, Prestige's Manager, does not dispute he is registered in the State of Washington as a broker-dealer or to sell securities. *FF No. 5.26 citing Stip. Facts: No. 5.*
- 6.18. As a result, Michael Mariani offered and/or sold securities while not being registered as a securities salesperson or broker-dealer in the State of Washington in violation of RCW 21.20.040. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.

Department Failed to Establish Fraud-

- 6.19. In order to establish 'fraud', the Washington State Supreme Court held, the alleging party must establish: (1) A Representation of existing fact; (2) Its materiality; (3) Its falsity; (4) The speaker's knowledge of its falsity; (5) Speaker's intent it be acted upon by the person to whom it is made; (6) Ignorance of its falsity on the part of the person to whom the representation is made; (7) The latter's reliance on the truth of the representation; (8) The right to rely upon it; and (9) Consequent damage. *Elcon Constr., v. E. Wash. Univ., 174 Wn.2d 157 (2012).*
- 6.20. In the present case, each party acted as if a valid promissory note existed. Cline agrees he never signed the promissory note, despite being provided with at least 'draft' promissory notes, from his attorney, Campbell. He also testified he was not 'deceived' or 'mislead'. The Department provided no evidence establishing

Robert Binkele, Michael Mariani or Prestige Investment Management was aware of the unsigned promissory note and deliberately failed to inform Cline of such information. No party knew something the other party didn't to their own detriment.

- 6.21. Each party acted as if a valid promissory note existed and relied upon such an assumption. However, no fraud occurred. As a result, the Department's 'Statement of Charges' regarding this allegation is **DISMISSED**.

Penalty and Sanctions-

- 6.22. RCW 21.20.390 authorized the Department's Director may enter an order directing a person to cease and desist from engaging in a continuing violations of any of the rules under Chapter 21.20.

- 6.23. In the present case, the Department has established, by a 'preponderance of the evidence' Prestige Investment Management and Michael Mariani offered and sold securities in Washington, when not registered to do so, in violation of RCW 21.20.140. As a result, a 'cease and desist' order is **APPROPRIATE**.

Deny Registration-

- 6.24. RCW 21.20.110(1) authorizes the Department Director to deny, suspend, revoke, restrict, condition or limit the securities registration of any party or person until such time compliance with Chapter 21.20 RCW is achieved.

- 6.25. However, since the Department has not established fraud by Robert Binkele, a denial of registration is **NOT APPROPRIATE**.

Imposition of Fines & Costs-

- 6.26. RCW 21.20.395(1) authorizes the Department Director to fine a person or party for violation of any rule of Chapter 21.20, not to exceed ten thousand dollars for each violation, in additional to administrative investigation costs.

- 6.27. In the present case, the Department has proven, by a 'preponderance of the evidence, Prestige Investment Management and Michael Mariani violated RCW 21.20.140 and RCW 21.20.040. As a result, a ten thousand dollar fine for each Prestige and Mariani, as well as investigative costs, is **APPROPRIATE**.

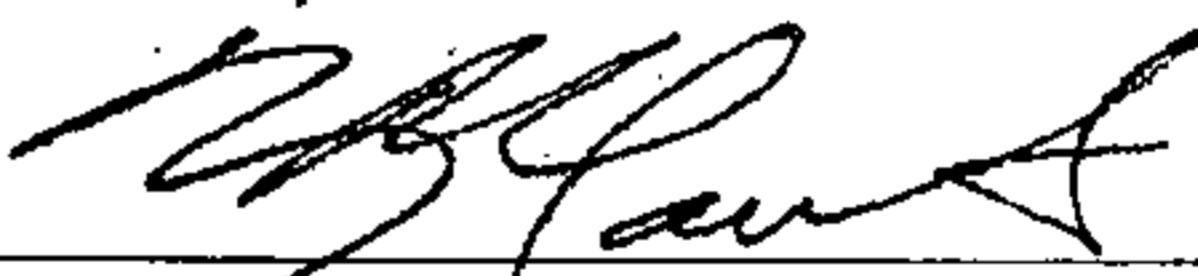
[Continued]

7. INITIAL ORDER:

THIS ADMINISTRATIVE TRIBUNAL ORDERS:

- 7.1. The Deferred Sales Trust arrangement with Gary Cline and Irene Cline constitutes the offer and/or sale of a security, as defined by RCW 21.20.005(14) & (17).
- 7.2. Prestige Investment Management and Michael Mariani offered and sold securities for which no registration is on file with the Securities Administrator, in violation of RCW 21.20.140. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.
- 7.3. Michael Mariani offered and/or sold securities while not being registered as a securities salesperson or broker-dealer in the State of Washington in violation of RCW 21.20.040. The Department's 'Statement of Charges' regarding this allegation is **AFFIRMED**.
- 7.4. Robert Binkele, Prestige Investment Management and Michael Mariani did not operate a fraud or deceit on Gary Cline and Irene Cline in violation of RCW 21.20.010(3). The Department's 'Statement of Charges' regarding this allegation is **DISMISSED**.
- 7.5. the Department of Financial Institutions' 'Statement of Charges and Notice of Intent to Enter Order to Cease and Desist, Deny Registration, Impose Fines, and Charge Costs', dated October 6, 2020, is **AFFIRMED IN PART, DISMISSED IN PART**.
- 7.6. The Department's requested penalties, sanctions, imposition of costs and fees against Prestige Investment Management and Michael Mariani are **APPROPRIATE**.
- 7.7. The Department's requested denial of registration to Robert Binkele is **NOT APPROPRIATE**.

Issued from Tacoma, Washington on the date of mailing.



TJ Martin
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED