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COMMISSIONERS OFFICE

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2016-AH-0109

DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

v.

DAN SHORT, PAIGE SHORT, and
IONX CAPITAL HOLDINGS, INC.

RESPONDENTS

COMMISSIONER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND FINAL ORDER

* * * * *

An Administrative Hearing was held in this matter on June 13, 2019, at the Department of Financial Institutions, 1025 Capital Center Drive, Frankfort, Kentucky. The Complainant, Department of Financial Institutions ("DFI" or "Department"), was represented by Catherine Falconer. The Respondents were represented by Patrick Watson, Attorney at Law. Jim Howard, Hearing Officer, Public Protection Cabinet, presided.

The subject of the hearing was DFI's February 20, 2018 Administrative Complaint against Respondents seeking fines for various violations of KRS Chapter 292, the Securities Act of Kentucky, and 808 KAR 10:225. On May 5, 2020, the Hearing Officer, having reviewed the record, including all exhibits and written submissions by the parties, issued a Recommended Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order").

For the reasons set forth herein, the Commissioner hereby enters this **Findings of Fact, Conclusions of Law, and Final Order** adopting, in part and as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer.

FINDINGS OF FACTS

Respondent Dan Short invented a product called the “Hot Dot”, an adhesive patch to be worn on a person’s body and which would change colors when the wearer becomes overheated. Respondent, IONX, which was partially owned by Respondents Dan Short and Paige Short, attempted to raise capital for the marketing of the patch with three separate offerings of securities, which were accompanied by Private Placement Memorandums (“PPMs”), dated July 21, 2009, February 4, 2010, and April 23, 2010. None of the Respondents were registered in Kentucky to sell securities in any capacity. Respondents acknowledged they were not registered to sell securities, but argued that they did not need to be registered because the offerings were exempt under 17 CFR Section 230.506 (“Regulation D”).

On July 6, 2009, prior to the first PPM, Respondent IONX entered into a “Licensing and Conditional Agreement” with Kentucky Technical Textiles Company (“KTT”), an LLC which was owned by Respondents Dan and Paige Short. Under the Agreement, the patent (pending) for the Hot Dot, which was owned by KTT, would be transferred to Respondent IONX, but would revert back to KTT if the offering did not raise \$4,000,000.00 within six months of the agreement. This arrangement was not mentioned in the PPM dated July 21, 2009.

There was also testimony at the hearing that an individual named Mike Fink had been contracted by KTT and Respondent Dan Short to market and sell securities related to Hot Dot. The relationship with Mike Fink and KTT was not disclosed in the PPMs. (Hearing Transcript, p. 21-22). Chad Harlan, then Director of Securities at DFI, testified that the relationship with Mike Fink, along with the possibility of reversion of the patent, should have been disclosed in the offerings. Failure to disclose such material facts, according to Mr. Harlan’s testimony, would invalidate a Regulation D exemption.

Hearing testimony also revealed that Respondents made three separate Regulation D filings with the Securities and Exchange Commission (“SEC”) as part of the claim of exemption. While these documents are filed with the SEC, persons seeking Regulation D exemptions are also required to provide the filings to DFI. The filings were dated July 8, 2009, July 23, 2009, and December 14, 2009. Mr. Harlan testified that DFI did not have any information about the first filing, but that the second one appeared to relate to the July 6, 2009, PPM. Harlan indicated that the second filing was filed correctly, but that it contained false information and omitted material information. The filing neglected to mention the relationship with Mike Fink or the possibility that the patent would revert back to KTT and Respondent Dan Short if certain conditions were not met.

On page 11 of the Recommended Order, the Hearing Officer concluded that “other than [the issue involving the relationship between IONX and KTT], the PPMs adequately disclosed the risk involved with the investment.” The language on page 11 of the Recommended Order is unclear as to what the Hearing Officer found to be problematic about the relationship. It should be emphasized that the Respondents should have disclosed that, unless \$4,000,000 of capital was raised within six months, the patent would revert back to KTT, which would benefit Respondents Dan and Paige Short, but would leave IONX devoid of its primary asset. This was a substantial risk that Respondents were required to disclose. Any reasonable investor would have found this information material in making an investment decision of whether to buy IONX securities in all three offerings.

After the Respondents conferred with an attorney about the initial PPM, IONX offered rescission to investors, stating in the rescission agreement that “the company failed to disclose an agreement with a third-party consultant that is material to the company”. (Hearing Exhibit 7).

Investors were given the right to a rescission of their investments or the option to convert their investments into a restructured entity.

In September 2009, Respondent Paige Short became interim CEO of IONX. On July 6, 2009, Ms. Short had signed the conditional licensing agreement between KTT and IONX. (Hearing Exhibit 8). By her own testimony, Ms. Short and Dan Short were “involved in everything together”, and Ms. Short was the primary decision maker on issues involving the patent. (Hearing Transcript, p. 136).

IONX made another offering accompanied by a PPM on February 4, 2010, but did not make a Regulation D filing at that time. Mr. Harlan indicated that the last known Regulation D filing made by IONX was in December 2009. The February 4, 2010, PPM did not disclose the Dan and Paige Short conflict of interest with regard to the patent. The 2010 PPMs also did not disclose the 2009 rescission. IONX made another offering accompanied by a PPM on April 23, 2010.

Despite the three separate offerings, IONX was unsuccessful. The patent ultimately reverted back to KTT and was subsequently sold to a company in Nebraska in August or September of 2011. (Hearing Transcript, p. 177). As indicated in the Recommended Order, IONX has been dissolved as a corporation.

CONCLUSIONS OF LAW

The Hearing Officer is correct that DFI has the burden of proof with regards to the violations alleged in the Administrative Complaint. An exception, as noted by the Hearing Officer, is the question of availability of an exemption. If a person claims an exemption from registration under the Securities Act of Kentucky, the person claiming the exemption has the burden of proving

he or she has met the requirements, pursuant to KRS 292.420(1). The Hearing Officer's finding that Respondents failed to meet the burden with respect to the July 2009 offering is hereby adopted.

The Hearing Officer's comments regarding "materiality" are rejected as contrary to law. The Hearing Officer particularly took issue with DFI's "interpretation" of materiality, insinuating that DFI's use of a reasonable person standard is vague and/or arbitrary. Specifically, the Hearing Officer took exception to Mr. Harlan saying that something is material if it is something that an investor would want to know before investing.

In *Muncy v. InterCloud Systems, Inc.*, 92 F. Supp. 3d 621 (E.D. Ky. 2015), the U.S. District Court discussed "materiality" in the federal context as well as under KRS 292.320. The Court, citing the U.S. Supreme Court, stated as follows:

"Materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). "Misrepresented or omitted facts are material only if a reasonable investor would have viewed the misrepresentation or omission as 'having significantly altered the total mix of information made available.'" *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997) quoting *Basic, Inc.*, 485 U.S. at 232, 108 S.Ct. 978).

Id., at 636.

The Hearing Officer held that the failure to disclose the conflict of interest created by Respondent Dan Short's ownership of KTT and the fact that the patent would revert back to KTT was a material fact that should have been disclosed. The Commissioner adopts this finding, but rejects the Hearing Officer's ruling that the reasonable investor standard used by DFI to determine violations of KRS 292.320 is too broad. The reasonable investor standard, as shown in the case law above, is consistent with established securities law. Accordingly, the Commissioner rejects

the Hearing Officer's finding that the failure to notify investors of the percentage to be paid to Mike Fink was not material.

As to the allegations filed against Respondent Paige Short, the Hearing Officer "found no individual violations" against her. This is contrary to the evidence. Based on her own hearing testimony, Ms. Short was actively involved in all business activities with Dan Short. She admitted to signing the licensing agreement between KTT and IONX, and described herself as the primary decision maker with regards to the patent. Finally, as part owner of KTT, she would also benefit from the conflict of interest that the Hearing Officer felt should have been disclosed. Based on the foregoing, Respondent Paige Short, along with Respondent Dan Short, violated KRS 292.320(1) by omitting to disclose facts that a reasonable investor would find material. Therefore, the Commissioner modifies the Recommended Order to find a violation of KRS 292.320(1) against Respondent Paige Short.

FINAL ORDER

THEREFORE, based upon the foregoing findings of fact and conclusions of law and pursuant to KRS 292.500 and KRS 13B.120, IT IS HEREBY **ORDERED** AS FOLLOWS:

1. Except as modified herein, the Findings of Fact, Conclusions of Law, and Recommended Order issued by the Hearing Officer on May 5, 2020, and attached hereto, are adopted in full and incorporated by reference into this Final Order;
2. Respondent, IONX, shall pay a fine of \$10,000 for violations of the statutes as described herein. Payment of the fine shall be due on or before October 1, 2020;
3. Respondent, Dan Short, shall pay a fine of \$3,000 for violations of the statutes as described herein. Payment of the fine shall be due on or before October 1, 2020; and

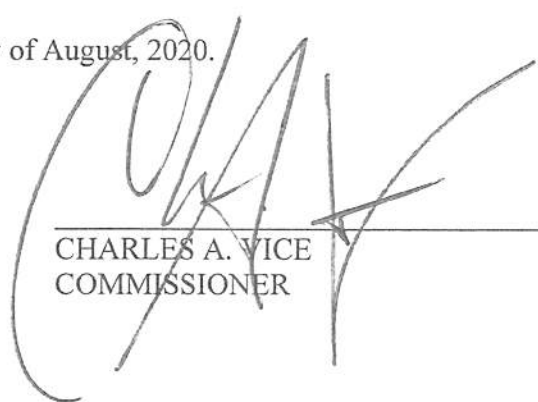
4. Respondent, Paige Short, shall pay a fine of \$3,000 for violations of the statutes as described herein. Payment of the fine shall be due on or before October 1, 2020.

This is a **FINAL AND APPEALABLE ORDER**. The **EFFECTIVE DATE** of this order shall be the date reflected on the certificate of service attached to this order.

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 292.490, you are hereby notified that any person aggrieved by this Final Order of the Commissioner may obtain a review of the Order by the Franklin Circuit Court. If you chose to appeal, you must file a written petition asking that the order be modified or set aside in whole or in part in the Franklin Circuit Court within thirty (30) days after the date reflected on the certificate of service attached to this Final Order. A copy of the petition must be served upon the Commissioner.

SO ORDERED this 19th day of August, 2020.



CHARLES A. VICE
COMMISSIONER

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Final Order** was entered by the Commissioner and sent by certified mail, return receipt requested, on this the 19th day of August, 2020, to:

Hon. Patrick Watson
525 High Street, Suite 325
Paris, KY 40361
Counsel of Record for Respondents

Ionx Capital Holdings, Inc.,
Mr. Dan Short and
Mrs. Paige Shumate Short
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And by hand-delivery to:

Hon. Catherine Falconer
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And by messenger mail to:

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