

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF SECURITIES
ADMINISTRATIVE AGENCY CASE NO. 2016-AH-00024



DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

vs.

RUSHMARKETS,
JOSHUA HARTWELL,
JOHN HENRY,
AND
TONY ROBBINS

RESPONDENTS

FINAL ORDER TO CEASE AND DESIST

Comes now the Department of Financial Institutions, Division of Securities (“DFI”), pursuant to Kentucky Revised Statute (“KRS”) 292.470, KRS 292.500 and 808 Kentucky Administrative Regulation (“KAR”) 10:225, by counsel, and hereby brings this **Final Order to Cease and Desist** against RushMarkets, Joshua Hartwell, John Henry and Tony Robbins (hereinafter, collectively, “Respondents”).

PARTIES

1. DFI is responsible for administering the provisions of KRS Chapter 292, the Securities Act of Kentucky (“the Act”), as well as any applicable rules, regulations and orders entered pursuant to the Act.
2. RushMarkets is an entity which purportedly maintained a registered business office and principal place of business within the United States at 445 Park Avenue, New York City, New York 10022. RushMarkets was not and is not registered with DFI or any national or federal

securities regulatory entity as a broker-dealer, agent, investment-adviser or investment adviser representative, nor subject to any registration exemption, pursuant to the Act.

3. RushMarkets is an entity which purportedly maintained a registered business office and principal place of business within the United Kingdom at 11 Church Road, Great Bookham, Surrey KT32 3PB.

4. Joshua Hartwell (“Hartwell”) is employed as a Senior Portfolio Manager for RushMarkets. His business address is listed as 445 Park Avenue, New York City, New York 10022. He is not registered with DFI or any national or federal securities regulatory entity as a broker-dealer, agent, investment-adviser or investment adviser representative, nor subject to any registration exemption, pursuant to the Act.

5. Tony Robbins (“Robbins”) is an employee and/or director with RushMarkets. His purported business address is 445 Park Avenue, New York City, New York 10022. He is not registered with DFI or any national or federal securities regulatory entity as a broker-dealer, agent, investment-adviser or investment adviser representative nor subject to any registration exemption, pursuant to the Act.

6. John Henry (“Henry”) is an employee and/or director with RushMarkets. His purported business address is 445 Park Avenue, New York City, New York 10022. He is not registered with DFI or any national or federal securities regulatory entity as a broker-dealer, agent, investment-adviser or investment adviser representative, nor subject to any registration exemption, pursuant to the Act.

7. Upon information and belief, and at all times relevant to this Order, the domain <https://www.RushMarkets.com> is registered to RushMarkets and is the website through which Respondents conduct business activities within the United States (hereinafter, “website”).

STATEMENTS OF FACT

8. Respondents used the Rushmarket website to promote and disseminate information to potential investors, including a Kentucky investor (hereafter “Kentucky Investor #1”), regarding certain investment opportunities and solicited investors over the Internet. Respondents used the website, electronic mail and telephone solicitations to promote and disseminate information to potential and actual investors regarding certain investment opportunities offered by RushMarkets and to collect personal and financial information from potential and actual investors.

9. On or about November 6, 2015, DFI received a Securities Consumer Complaint from a resident of the Commonwealth of Kentucky, Kentucky Investor #1. The Consumer Complaint alleged that Respondents solicited financial investments from the investor through the use of telephone and electronic mail communications. Additionally, Respondents provided information to the investor that the investment, specifically the binary option, was profitable thereby convincing Kentucky Investor #1 to make several investments with Respondents. After several months, Kentucky Investor #1 requested funds from the investment accounts but, after several requests from Kentucky Investor #1, Respondents did not allow the investor to withdraw any of the investor’s funds. Soon after these requests were made, Respondents ceased communicating with Kentucky Investor #1 completely.

10. Respondents offered and sold “binary options” to Kentucky Investor #1. A binary option is defined as a security that provides a payout contingent upon the price movement of an underlying asset. Binary options are operated through Internet-based trading platforms. The

profitability of this type of options contract depends entirely on the outcome of a “yes/no” investment proposition and, typically, relate to whether the price of a particular underlying asset will rise above or fall below a specified dollar amount. Once the option is acquired, there is no further decision for the investor to make regarding the exercise of the binary option because binary options exercise automatically.¹

11. Unlike other types of options, a binary option does not give an investor the right to buy or sell the specified underlying asset. When the binary option expires, the investor receives either a pre-determined amount or nothing at all, causing the investor to lose the entirety of the specific contract investment. Binary options are also termed as “all or nothing options” or “fixed-return options”.

12. The binary options offered by Respondents were not registered with DFI, the SEC or exempt from registration.

13. Kentucky Investor #1 was instructed by Respondents to “invest” by having the investor open an investment account with Respondents, on the website, and deposit a sum of money to buy a binary option call or payout contract.

14. Respondents acted in concert to present binary options as an investment and developed and transacted business with Kentucky Investor #1 premised on giving the investor an expectation of profits derived from the Respondents’ efforts.

15. After initially receiving the deposited money, Respondents provided routine information to Kentucky Investor #1 indicating that the deposits into the investor’s account were profitable. Respondents provided analysis and a trading plan to the investor. At all times relevant

¹ U.S. Commodity Futures Trading Commission, website: http://www.cftc.gov/ConsumerProtection/FraudAwarenessPrevention/CFTCFraudAdvisories/fraudadv_binaryoptions (accessed: March 22, 2016).

to this Order, the Respondents communicated to the investor that the investor controlled the number and the types of trades that resulted in the account becoming profitable.

16. During the time Kentucky Investor #1's account was active, Kentucky Investor #1 requested a withdrawal of funds and attempted to follow Respondents instructions in order to withdraw profits from the account. When Kentucky Investor #1 did not receive the funds requested, Kentucky Investor #1 attempted to contact Respondent. After several attempts were made, Respondents ceased all communication with Kentucky Investor #1.

17. Upon information and belief and at all times relevant to this Order, the Rushmarkets website could be viewed by anyone with Internet access, including residents of the Commonwealth of Kentucky.

18. On March 17, 2017, An Administrative Complaint was filed with the Commissioner of the Department of Financial Institutions. On the same day, individual copies of the Administrative Complaint were sent, via certified mail, to Joshua Hartwell, Rushmarkets, John Henry and Tony Robbins. In addition, a copy of the Administrative Complaint was mailed to Rushmarkets at the business address listed for the United Kingdom. As of April 6, 2017, all domestically mailed certified letters were returned to the Department of Financial Institutions marked " Attempted, Not Known return to sender". [See Exhibit 1(a)(b)] The Administrative Complaint mailed to the United Kingdom was returned to the Department of Financial Institutions on April 7, 2017 with notification that Rushmarkets was "not at this address please return to sender". [See Exhibit 2] There are no other business addresses or locations known to the Department of Financial Institutions.

19. The Administrative Complaint stated that the Respondents must file an Answer and request a hearing within twenty (20) days of receipt of the Complaint. The Administrative

Complaint states that if the Respondent did not file an Answer and request a hearing in a timely manner, the Commissioner may issue a Final Order.

20. More than twenty (20) days have passed since the mailing of the Administrative Complaint and the Respondents did not file an Answer nor request a hearing.

STATUTORY AUTHORITY

21. KRS 292.310(17) states, "The "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 to offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value. A purported gift of assessable stock is considered to involve an offer and sale. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer, of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security."

22. KRS 292.310(19) states, "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, life settlement investment, voting-trust certificate, certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest in or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

23. KRS 292.320(1) states, it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:

(a) To employ any device, scheme, or artifice to defraud;

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

24. KRS 292.330 states, in relevant part;

(1) It is unlawful for any person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration ...

(3) It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration...

(8) It is unlawful for any person to transact business in this state as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration...

(11) It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration.

25. KRS 292.340 states, it is unlawful for any person to offer or sell any security in this state, unless the security is registered under this chapter, or the security or transaction is exempt under this chapter, or the security is a covered security.

26. KRS 292.470(3) states, whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of

this chapter or any rule or order under this chapter, the commissioner may in his or her discretion bring any or all of the following remedies;

(3) Issue a final order, after notice and an opportunity for a hearing, containing findings of fact and conclusions of law, directing any person or persons found to have engaged in, or about to be engaged in, activity that constitutes a violation of this chapter or any rule or order under this chapter:

- (a) To cease and desist from the activity;
- (b) To perform any other reasonable mandates directed by the commissioner pursuant to an appropriate remedy fashioned by the commissioner and reasonably calculated to carry out the provisions of this chapter; or
- (c) To pay fines assessed under KRS 292.500(14) and costs assessed under KRS 292.500(15).

CONCLUSIONS OF LAW

27. A binary option is a security that provides a payout contingent upon the price movement of an underlying asset. The binary options offered and sold by Respondents are “investment contracts” pursuant to KRS 292.310(17) and (19). Furthermore, Respondents offered the investment of money in a common enterprise wherein the investor was given the explicit expectation of profits from underlying assets to come solely through the efforts of others.²

28. Respondents violated KRS 292.320(1) by failing to disclose material facts to Kentucky investors that the binary option investment contracts were not registered securities with

² Securities and Exchange Com'n v. W.J. Howey Co., 328 U.S. 293 (1946). The four-prong test was adopted by the court of the Commonwealth of Kentucky in Scholarship Counselors, Inc., v. Waddle, 507 S.W.2d 138, 140-141, (Ky. 1974). The “Howey” test elements, to determine if an investment contract exists, consist of 1) the presence of an investment; 2) in a common scheme or enterprise; 3) premised on a reasonable expectation of profits; 4) to be derived from the entrepreneurial or managerial efforts of others.

DFI or with the Securities and Exchange Commission. Furthermore, Respondents failed to disclose material facts to Investors, and on the Rushmarkets website, that Respondents were not registered with the Securities and Exchange Commission or any state regulatory agency.

29. Respondents violated KRS 292.330 by failing to register, or to be licensed, as a broker-dealer, agent, investment-adviser or investment adviser representative in the Commonwealth, nor were Respondents subject to an exemption from registration under the Securities Act.

30. Respondents violated KRS 292.340 by offering and selling securities that were not registered in Kentucky and were not exempt from registration.

ORDER

Based on the foregoing Findings of Facts, Statutory Authority and Conclusions of Law, the Commissioner hereby **ORDERS**, Pursuant to KRS 292.470(3)(a) – (c), as follows:

1. RUSHMARKETS, JOSHUA HARTWELL, JOHN HENRY, AND TONY ROBBINS to **CEASE AND DESIST** from committing or causing violations of the Securities Act, including but not limited to:

a. Offering for sale, soliciting offers to purchase or selling to and from Kentucky, “binary options” investment plans or any other security unless and until such securities have been registered pursuant to the provisions of the Securities Act;

b. Offering the sale, soliciting offers to purchase or selling securities unless Joshua Hartwell, John Henry and Tony Robbins and RushMarkets are registered pursuant to the provisions of the Securities Act;

c. Cease and Desist from making any untrue statement of material fact or omitting to state material facts necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading for any offering or security; and,

d. Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with offering for sale, soliciting offers to purchase or selling in and from Kentucky, "binary options", investments or any other security.

2. Pursuant to KRS 292.470(3)(b) and (c), RUSHMARKETS, JOSHUA HARTWELL, JOHN HENRY, AND TONY ROBBINS to pay restitution in the amount of Nine Thousand Four Hundred and Eighty dollars (\$9480.00) plus interest at the legal rate per annum and pay DFI's costs and attorney's fees.

3. Any other relief which may be appropriate and to which DFI is entitled.

IT IS SO ORDERED on this the 27th day of June, 2017.



Charles A. Wice
Commissioner
Department of Financial Institutions

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 292.490, you are hereby notified that you have the right to appeal this Final Order of the Commissioner. If you choose to appeal, you must file a written petition asking that the order be modified or set aside in whole or in part with the Franklin Circuit Court within thirty (30) days after entry of this Order. A copy of the petition must be served upon the Commissioner.

Certificate of Service

I hereby certify that a copy of the foregoing **FINAL ORDER TO CEASE AND DESIST** was sent by certified mail, return receipt requested, and by first class mail on this the 29 day of June, 2017, to the following:

RushMarkets
c/o RushMarkets.com
445 Park Avenue
New York City, NY 10022


Mr. Joshua Hartwell
Senior Portfolio Manager
RushMarkets
445 Park Avenue
New York, NY 10022

Mr. John Henry
Employee and/or Director
RushMarkets
445 Park Avenue,
New York City, NY 10022

Mr. Tony Robbins
Employee and/or Director
RushMarkets
445 Park Avenue
New York City, NY 10022

Hand delivered to:

Catherine Falconer, Attorney
Department of Financial Institutions
1025 Capitol Center Drive, Suite 200
Frankfort, KY 40601


KY Dept. of Financial Institutions
Name: Allison Evans
Title: Executive Staff Advisor