

**ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF SOUTH CAROLINA**

IN THE MATTER OF:

John B. Kern,

Respondent.

**ORDER TO CEASE AND DESIST
File No. 13077**

WHEREAS, the Securities Division of the Office of the Attorney General of the State of South Carolina (the “Division”) has been authorized and directed by the Securities Commissioner of South Carolina (the “Securities Commissioner”) to administer the provisions of S.C. Code Ann. § 35-1-101, *et seq.*, the South Carolina Uniform Securities Act of 2005 (the “Act”); and

WHEREAS, the Division received information regarding alleged securities-related activities of John B. Kern (“Kern” or the “Respondent”), which, if true, would constitute violations of the Act; and

WHEREAS, based on the information received, the Division decided it was necessary and appropriate to open an investigation pursuant to S.C. Code Ann. § 35-1-602 to determine whether the Respondent had violated, was violating, or was about to violate the Act; and

WHEREAS, the Division has determined that evidence exists to support the following findings of fact and conclusions of law:

I. JURISDICTION

1. The Securities Commissioner has jurisdiction over this matter pursuant to S.C. Code Ann. § 35-1-601(a).

II. RESPONDENT

2. Respondent Kern is a resident of Charleston County, South Carolina, with a last known mailing address of 3 Lockwood Drive, Suite 302A, Charleston, South Carolina 29401.

III. FINDINGS OF FACT

3. Respondent Kern is an attorney with offices in Charleston, South Carolina and the Republic of San Marino.

The Venture Funds

4. Beginning in or around 2011, Respondent Kern served as counsel to Craig Berkman (“Berkman”) and a number of entities controlled by Berkman (the “Venture Funds”).

5. The Venture Funds were allegedly in the business of seeking out and acquiring pre-initial public offering (“pre-IPO”) shares in various social media companies including Facebook and Twitter.

6. Berkman solicited numerous investors throughout the United States to invest in the Venture Funds.

7. In reality, the Venture Funds were a Ponzi scheme, in which investor funds went primarily to pay the victims of a prior securities fraud perpetrated by Berkman. With the exception of \$600,000 used to purchase an interest in a fund which actually held pre-IPO Facebook shares (the “Actual Fund”), none of the remaining \$9,900,000 raised from investors was used to purchase pre-IPO shares in any entity.

8. In order to aid the appearance of propriety in the Venture Funds, Respondent Kern, acting as “counsel” to the Venture Funds,¹ sought confirmation of the Venture Funds’ interest in the Actual Fund from a law firm representing the Actual Fund.

9. The law firm replied that the Venture Funds owned a 3.1889% interest in the Actual Fund. Subsequent to this letter, Respondent Kern, Berkman, or someone under their control and direction altered the law firm’s letter, forged the signature of a law firm attorney, and falsely claimed that the Actual Fund had allocated 497,625 shares of Facebook to the Venture Funds.

10. In March, 2012, subsequent to the Law Firm’s discovery of the forged letter, the Actual Funds terminated the Venture Funds’ investment.

11. On August 1, 2012, following numerous concerns and complaints voiced by Venture Fund investors, Respondent Kern circulated a “Memorandum to Investors,” littered with false and misleading statements and omissions, including but not limited to the following:

- a. Falsely stating that the Actual Fund represented “approximately 20% of the investment capital of [the Venture Funds]”;
- b. Falsely stating that a “counterparty” held “approximately 80%” of the Venture Funds “investment in Facebook” when it, in fact, held none at all;
- c. Falsely stating that the Venture Funds were “engaging an independent auditor to provide an accounting of [the Venture Funds’] assets”; and
- d. Falsely stating that the Venture Funds were “not a Ponzi scheme.”

¹ Kern appears to have been suspended from the practice of law in South Carolina during at least some of the time in which he acted as “counsel” to the Venture Funds. *In re Kern*, 396 S.C. 496, 722 S.E.2d 520 *reinstatement granted*, 396 S.C. 524, 722 S.E.2d 805 (2012).

Face Off Acquisitions, LLC

12. While operating the Venture Funds scheme with Respondent Kern's material aid, Berkman raised an additional \$2,600,000 from investors by selling interests in Face Off Acquisitions, LLC ("Face Off"), allegedly in order to purchase another entity which actually held pre-IPO Facebook shares (the "Actual Fund II").

13. While Berkman did have discussions with the management of the Actual Fund II, no purchase was ever imminent, as Face Off never came anywhere near possessing the \$28,000,000 asking price for the Actual Fund II.

14. This reality did not prevent Respondent Kern from materially aiding Berkman in defrauding Face Off's investors.

15. In an April 14, 2012 letter to Berkman, which was subsequently circulated to investors, Respondent Kern represented that Face Off's acquisition of the Actual Fund II was imminent, a fact which was demonstrably false.

16. Subsequent to the actual IPO of Facebook, Berkman's investors became concerned that their funds were not being returned. Shortly thereafter, various federal law enforcement agencies began to inquire into allegations of fraud directed at Berkman and Respondent Kern.

17. Berkman and Respondent Kern were each respondents in a March 19, 2013 Order Instituting Administrative Proceedings before the United States Securities and Exchange Commission (the "SEC").

18. Also on March 19, 2013, Berkman was charged by the United States Attorney for the Southern District of New York with securities and wire fraud. He pled guilty and was subsequently sentenced to six (6) years in federal prison.

19. Respondent Kern subsequently settled his administrative action with the SEC without admitting or denying the facts set forth in the SEC's order, but agreeing to disgorge the legal fees he had received from Berkman and the Venture Funds.

IV. CONCLUSIONS OF LAW

20. The South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101, *et seq.*, governs the offer and sale of securities in this State.

21. Pursuant to S.C. Code Ann. § 35-1-102(29), investment contracts, stock, and certificates of interest or participation in profit-sharing agreements, *inter alia*, constitute securities.

22. Pursuant to S.C. Code Ann. § 35-1-501, it is unlawful for a person in connection with the offer or sale of a security in this State: (1) to employ a scheme, device, or artifice to defraud; (2) to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

23. Pursuant to S.C. Code Ann. §35-1-604(a)(1), if the Securities Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the

Act or that a person has materially aided a violation of the Act or a rule adopted or order issued under the Act, the Securities Commissioner may issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with the Act.

24. Pursuant to S.C. Code Ann. § 35-1-604(b), an order issued under § 35-1-604(a) is effective on the date of issuance and must include a statement of any civil penalty or costs of investigation sought, a statement of the reasons for the order, and notice that, within fifteen (15) days after the receipt of a request in a record from a Respondent, the matter will be scheduled for a hearing.

25. The interests in the Venture Funds and in Face Off constitute securities as defined by the Act.

26. In connection with the offer and sale of interests in the Venture Funds and Face Off, the Respondent: (1) employed a scheme, device, or artifice to defraud; (2) made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and (3) engaged in an act, practice, or course of business that operated as a fraud or deceit upon another person.

27. The Respondent materially aided the offer and sale of securities by Berkman and the Venture Funds.

28. It is in the public interest, for the protection of investors, and consistent with the purposes of the Act that the Respondent be ordered to cease and desist from engaging in the

above enumerated practices which constitute violations of the Act and pay an appropriate civil penalty for his wrongdoing.

V. CEASE AND DESIST ORDER

NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a)(1), it is hereby **ORDERED** that:

- a. The Respondent and every successor, affiliate, control person, agent, servant, and employee of the Respondent, and every entity owned, operated, or indirectly or directly controlled by or on behalf of the Respondent **CEASE AND DESIST** from transacting business in this State in violation of the Act, and, in particular, § 35-1-501 thereof; and
- b. The Respondent pay a civil penalty in the amount of \$20,000 if this Order becomes effective by operation of law, or, if the Respondent seeks a hearing and any legal authority resolves this matter, pay a civil penalty in an amount not to exceed \$10,000 for each violation of the Act by the Respondent, and the actual cost of the investigation or proceeding.

IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. § 35-1-604(a)(2) and (3), any exemption from registration with the Division that the Respondent may claim to rely upon under S.C. Code Ann. §§ 35-1-201(3)(C), (7), or (8); 35-1-202; 35-1-401(b)(1)(D) or (F); or 35-1-403(b)(1)(C), has been and is **PERMANENTLY REVOKED**.

VI. REQUIREMENT OF ANSWER AND NOTICE OF OPPORTUNITY FOR HEARING

The Respondent is hereby notified that he has the right to a hearing on the matters contained herein. To schedule such a hearing, the Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina, 29211-1549, attention: Thresechia Navarro, within thirty (30) days after the date of service of this Order to Cease and Desist, a written Answer specifically requesting a hearing. If the Respondent requests a hearing, the Division, within fifteen (15) days after receipt of a request in a record from the Respondent, will schedule the hearing for the Respondent.

In the written Answer, the Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation in this Order, shall set forth specific facts on which the Respondent relies, and shall set forth concisely the matters of law and affirmative defenses upon which the Respondent relies. If the Respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation shall, he so state.

Failure by the Respondent to file a written request for a hearing in this matter within the thirty-day (30) period stated above shall be deemed a waiver by the Respondent of the right to such a hearing. Failure of the Respondent to file an Answer, including a request for a hearing, shall result in this Order, including the stated civil penalty and any assessed costs, becoming final as to the Respondent by operation of law.

This Order does not prevent the Division or any other law enforcement agency from seeking additional civil or criminal remedies as are available under the Act, including remedies related to the offers and sales of securities by the Respondent set forth above.

ENTERED, this the 31st day of October, 2014.

ALAN WILSON
SECURITIES COMMISSIONER

By: Tracy Meyers
TRACY A. MEYERS
Deputy Securities Commissioner

ISSUANCE REQUESTED BY:



IAN P. WESCHLER
Assistant Attorney General
Securities Division
Rembert C. Dennis Building
1000 Assembly Street
Columbia, S. C. 29201

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
SECURITIES DIVISION

CERTIFICATE OF SERVICE AND
AFFIDAVIT OF COMPLIANCE
File Number 13077

I hereby certify that I served upon the individual/entity listed below a copy of the document indicated below and dated October 31, 2014, by serving a copy of said document upon the Securities Commissioner of the State of South Carolina and by placing a copy of said document in the United States mail, certified mail, return receipt requested, first class postage prepaid and addressed to:

Mr. John B. Kern
3 Lockwood Drive
Suite 302A
Charleston, SC 29401

Document(s): Order to Cease and Desist

Mailed October 31, 2014 from Columbia, South Carolina.

I further hereby certify, swear and affirm that, service of the above-listed entity is in compliance with Section 35-1-611, Code of Laws of South Carolina.

By: Thresechia P. Navarro
Thresechia P. Navarro
South Carolina Attorney General's Office
Securities Division
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-4731

Subscribed and sworn to before me on
this 31st day of October, 2014.

Raymond Stotke, III
Notary Public for South Carolina

My commission expires: 3-10-18

