

STATE OF HAWAII

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

In the Matter of:) Case No. SEU-2012-005
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HAWAII CAPITAL MANAGEMENT, LLC) PRELIMINARY ORDER TO
and DAVID T. LOW,) CEASE AND DESIST; NOTICE OF
) RIGHT TO HEARING
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Respondents.)
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_____)

PRELIMINARY ORDER TO CEASE AND DESIST

I. **STATEMENT OF APPLICABLE STATUTORY LAW**

Pursuant to the authority granted by Hawaii Revised Statutes (“HRS”) Chapter 485A, the rules and orders adopted thereunder, and other applicable authority, the Commissioner of Securities of the State of Hawai‘i (“Commissioner”) has conducted a preliminary investigation into the activities of the above-named respondents to determine if they have engaged in or are about to engage in any act or practice constituting a violation of HRS Chapter 485A or any rule or order adopted thereunder.

Based on the information revealed during the investigation, the Commissioner has reasonable cause to believe that the above-named respondents have violated HRS Chapter 485A as follows:

II. **STATEMENT OF JURISDICTION**

The Commissioner has jurisdiction over this matter involving securities as defined in HRS § 485A-102.

III. PRELIMINARY FINDINGS OF FACT

1. Respondent David T. Low (“**Mr. Low**”) is an individual and was a resident of the State of Hawai‘i at all relevant times herein. Mr. Low was last registered as an agent (CRD No. 2050255) with the Office of the Securities Commissioner from October 31, 2008 to December 16, 2008 for Nationwide Securities, LLC (CRD No. 11173), which was a registered broker-dealer during that period. Mr. Low’s employment with Nationwide Securities, LLC was terminated due to corporate restructuring.

2. Respondent Hawaii Capital Management, LLC (“**HCM**”) was registered in the State of Hawai‘i as a domestic limited liability company on May 10, 2010. Mr. Low has been the sole member of HCM since the date of its organization. HCM’s last registered mailing address is 1111 Bishop Street, Suite 506, Honolulu, Hawai‘i 96813.

3. Mr. Low and HCM are referred to collectively as “Respondents.”

4. Over the course of many years, Mr. Low promoted himself in the media and on HCM’s website as an investment and fitness expert, as “Number 1 in Building Health and Wealth,” and as “Hawaii’s Fittest CEO.” Mr. Low attracted customers by networking in the community and by generating referrals from existing customers, and he built a reputation for himself as a trusted insurance representative.

5. Between February 2010 and April 2012, Investors One, Two, and Three (collectively, the “**Investors**”), who had each been referred to Respondents through a friend of Mr. Low or an existing customer of Respondents, furnished a combined total of \$257,626.18 to Respondents based on Respondents’ representations that all or a portion of their monies would be

invested into an annuity, a Roth IRA, or a “pooled” investment that would yield a valuable benefit to each investor.

Investor One

6. Specifically, on or about February 25, 2010, Mr. Low represented to Investor One that Respondents would build Investor One’s funds in a Fidelity Investments account for Investor One’s future use.

7. On April 6, 2010, in reliance on Mr. Low’s representations, Investor One furnished value to Respondents in the form of \$80,000 paid by check. Investor One believed that Respondents would create a Fidelity Investments account in Investor One’s name and deposit the check therein.

8. Instead, between about April 13, 2010 and May 10, 2010, Mr. Low deposited Investor One’s check into Mr. Low’s personal Fidelity Investments account and transferred a portion thereof to his personal account with Bank of Hawai‘i (“**BOH**”) without Investor One’s knowledge, authority, or consent. Mr. Low then misappropriated Investor One’s monies by using the funds to purchase securities for himself and for personal expenses, including payments to: Mercedes Benz; Audi Hawai‘i; the City and County of Honolulu for registration of a Ferrari; Revolution Motorsports, Momentum Multisport, and McCully Bicycle stores; The Pioneer Club; 24 Hour Fitness; Grubb & Ellis | CBI Inc. for office rent; Oceanic Time Warner; Safeway, Foodland, and CVS stores; and HSBC Card Services, among others. Some of Investor One’s monies were also withdrawn via ATM by Mr. Low. Respondents did not use any portion of Investor One’s monies to create an investment account for Investor One or otherwise “build” Investor One’s funds.

9. In an attempt to conceal Respondents' misappropriation of Investor One's monies, Respondents provided Investor One with Investor One's first and only statement on or about June 2, 2011. The statement was entitled "U.S. Cash Management Account" and provided an account number and an account balance of \$86,427.43. However, neither the account nor the account balance actually existed. Fidelity Investments did not have any such account number in its records or any account in Investor One's name.

10. Despite Investor One's repeated requests that Respondents produce an official statement of Investor One's account, Respondents did not provide any official statement, prospectus, or information.

11. In September 2011, Investor One requested that Respondents liquidate Investor One's Fidelity Investments account and return the funds.

12. Over seven months later on April 30, 2012, Respondents returned only \$12,380.22 of Investor One's \$80,000.00 initial investment by check to Investor One. This payment was taken from Investor Two's investment monies. To date, Investor One has not received any further return of Investor One's monies from Respondents.

13. To create the appearance that Investor One's \$67,639.78 loss was attributable to unsuccessful securities trading and further conceal Respondents' misappropriation of Investor One's monies, Respondents produced documents that appeared to establish (a) that Investor One requested the conversion of Investor One's account to an aggressive short-term trading account and (b) that Investor One understood the substantial risk involved with an aggressive trading account, including the risk of total loss. However, Investor One's signatures on these documents

were forged by Mr. Low. Investor One never authorized the conversion of Investor One's account to an aggressive short-term trading account.

Investor Two

14. In or around April 2012, Mr. Low represented to Investor Two that Respondents would assist Investor Two with withdrawing funds from a Masons Annuity account and investing a portion thereof in a Roth IRA.

15. On or about April 20, 2012, in reliance on Mr. Low's representations, Investor Two furnished value to Respondents in the form of \$106,626.18 paid by check. Investor Two believed that Mr. Low would use that check to invest \$20,000 in a Roth IRA for Investor Two's benefit and pay Investor Two's taxes, after which Respondents would return any remaining balance to Investor Two.

16. Instead, on April 25, 2012, unbeknownst to Investor Two, Mr. Low deposited Investor Two's \$106,626.18 check into HCM's business account with First Hawaiian Bank ("FHB"). Within just five days of the deposit, Mr. Low spent the entirety of Investor Two's monies on purchasing securities for himself and for personal expenses, including payments to: Jackson Volvo; 1103 LLC for office rent; Macy's, Safeway, and CVS stores; Verizon Wireless; McKinley Car Wash; and HSBC Card Services, among others. Some of Investor Two's monies were also withdrawn via ATM by Mr. Low, paid to Mr. Low by check, or used to pay Investor One's only return on April 30, 2012. Respondents did not use any portion of Investor Two's monies to purchase a Roth IRA or pay taxes for Investor Two.

17. On January 18, 2013, Investor Two demanded that Respondents return Investor Two's monies.

18. To date, Respondents have not returned any monies to Investor Two.

Investor Three

19. Between about February 4, 2010 and March 9, 2012, Mr. Low represented to Investor Three that Respondents would invest Investor Three's funds in an annuity or "pooled" investment.

20. In reliance on Mr. Low's representations, between February 4, 2010 and March 9, 2012, Investor Three furnished value in the form of twelve checks totaling \$71,000 to Respondents. Investor Three believed that Respondents would invest the monies into an annuity or some "pooled" investment.

21. Instead, unbeknownst to Investor Three, Mr. Low deposited Investor Three's checks into his personal Fidelity Investments account, his personal BOH account, and HCM's FHB business account. Mr. Low used Investor Three's monies to purchase securities for himself and to pay for personal expenses, including payments to: Mercedes Benz; Roy's Waikiki, Ruth's Chris Steakhouse, Verbano Ristorante Italiano and Assagio Ristorante Italiano restaurants; Tory Burch, Bebe, Chrome Hearts, BIKEFACTORY and BOCA Hawaii stores; Ward Stadium 16-Consolidated Theatres; Chevron and Shell Service gas stations; and HSBC Card Services, among others. Some of Investor Three's monies were also withdrawn via ATM by Mr. Low or paid to Mr. Low by check.

22. To conceal Respondents' misappropriation of Investor Three's monies and deceive Investor Three into believing that the monies had indeed been invested for Investor Three's benefit, Respondents provided Investor Three with a statement of the "pooled" investment. The statement was entitled "U.S. Cash Management Trust" and provided an account

number and balance. However, neither the account nor account balance actually existed. In fact, the account number provided to Investor Three was the same fictitious number used on the statement provided to Investor One.

23. To further conceal Respondents' deceptive conduct, Mr. Low assured Investor Three that the investment was gaining a 4% return and could reach the investment goal of \$100,000. Mr. Low also assured Investor Three that the account would be accessible online and that Investor Three could be refunded the monies in two days if desired.

24. Investor Three did not receive any other statement, prospectus, or information regarding Investor Three's investment or any information regarding how to access the investment account online.

25. On or about September 18, 2012, Investor Three demanded that Respondents return Investor Three's monies.

26. To date, Respondents have not returned any of the funds to Investor Three.

27. All of the Investors were induced to furnish capital into Respondents' business venture by Mr. Low's promises, guarantees, and/or representations that all or a portion of their monies would be used to purchase an annuity, Roth IRA, or "pooled" investment that would yield a valuable benefit to them.

28. All of the capital furnished by the Investors was at risk of suffering a loss if Respondents' business venture failed.

29. None of the Investors were involved in, or intended to be involved in, the management of Respondents' business, much less, actively involved in a meaningful way.

30. The interests purchased by the Investors were investment contracts, which were not registered with the Office of the Securities Commissioner.

31. Mr. Low represented HCM in effecting and attempting to effect the sale of the investment contracts to the Investors, but did not register himself as an agent of HCM with the Office of the Securities Commissioner.

32. Respondents made the following untrue statements of material fact and material omissions to the Investors in connection with the offer and sale of the investment contracts and, as a result of, but not limited to, the following misrepresentations and omissions, induced the Investors into investing with Respondents:

a. Respondents represented to Investor One that purchasing an HCM investment contract whereby Respondents would invest Investor One's monies into a Fidelity Investments account would enable Respondents to "build" Investor One's account for Investor One's future use. In fact, none of Investor One's funds were invested into a Fidelity Investments account for Investor One's benefit, and the only payment that Investor One ever received from Respondents was taken from Investor Two's investment monies.

b. Respondents also represented to Investor One that the statement they provided accurately reflected Investor One's investment and account information. However, the account did not exist. Fidelity Investments did not have any such account number in its records or any account under Investor One's name.

c. Respondents represented to Investor Two that they would deposit Investor Two's monies into a Roth IRA, use a portion of the monies to pay Investor Two's

taxes, and return the remaining balance to Investor Two. In fact, Respondents did not use Investor Two's monies as promised, and Investor Two did not receive any payment from Respondents.

d. Respondents represented to Investor Three that they would deposit Investor Three's monies into an annuity or "pooled" investment for Investor Three's benefit. Respondents also represented, after Investor Three had purchased an investment contract, that Investor Three's funds were yielding a 4% return and could reach the goal of \$100,000. None of these statements were true. Investor Three's monies were never used to purchase an annuity for Investor Three's benefit, and Investor Three did not receive any payment from Respondents.

e. Respondents also represented to Investor Three that the statement they provided accurately reflected Investor Three's investment and account information. This was not the case. The account number provided to Investor Three did not exist and was identical to the fictitious account number provided to Investor One.

f. Respondents failed to disclose to all of the Investors that their monies would not be invested as agreed upon between Respondents and each investor, but would be used to purchase securities for Mr. Low and to pay for his personal expenses, included car registration, lease, and parts payments; rent payments; gym and club membership payments; retail and grocery purchases; dining and entertainment expenses; credit card payments; payments to himself; and, in the case of Investor Two, payments to Investor One.

g. Respondents failed to disclose to the Investors that the investment contracts were required by law to be registered with the Office of the Securities Commissioner, but were not registered or otherwise exempt from registration under HRS Chapter 485A.

h. Respondents failed to disclose to the Investors that Mr. Low was required by law to be registered with the Office of the Commissioner as an agent of HCM, but was not registered or otherwise exempt from registration under HRS Chapter 485A.

33. In furtherance of the offer and/or sale of the investment contracts, Respondents employed devices, schemes, or artifices to defraud the Investors and engaged in acts, practices, or courses of business to operate as a fraud or deceit upon the Investors, as evident in the acts described hereinabove.

IV. PRELIMINARY CONCLUSIONS OF LAW

34. The facts and allegations in paragraphs 1 through 33, inclusive, are reasserted and incorporated herein as if set forth verbatim.

35. The investment contracts that Respondents sold to the Investors as described hereinabove constituted “securities” as defined by HRS § 485A-102 (“**Securities**”).

36. The Securities were required to be registered or appropriately exempted from registration with the Office of the Commissioner pursuant to HRS § 485A-301.

37. The Securities were neither registered nor exempted from being registered with the Office of the Commissioner in violation of HRS § 485A-301.

38. Mr. Low represented HCM in effecting and attempting to effect the purchase or sale of the Securities to the Investors and thus acted as an “agent” as defined by HRS § 485A-102.

39. Mr. Low was required to be registered as an agent with the Office of the Securities Commissioner pursuant to HRS § 485A-402 when he offered to sell and sold the Securities to the Investors.

40. Mr. Low was neither registered nor exempted from being registered with the Office of the Commissioner in violation of HRS § 485A-402.

41. In connection with the offer and sale of the Securities to the Investors, Respondents employed a device, scheme, or artifice to defraud the Investors in violation of HRS § 485A-501(a)(1).

42. In connection with the offer and sale of the Securities to the Investors, Respondents made untrue statements of material fact and material omissions in violation of HRS § 485A-501(a)(2).

43. In connection with the offer and sale of the Securities, Respondents engaged in acts, practices, or a course of business that operated as a fraud or deceit upon the Investors in violation of HRS § 485A-501(a)(3).

V. PRELIMINARY ORDER TO CEASE AND DESIST

NOW THEREFORE, pursuant to HRS § 485A-604, because of the foregoing findings and conclusions and/or because it appears that Respondents may engage in further acts or practices in violation of HRS Chapter 485A and/or because it is found that this action is

necessary and in the public interest for the protection of investors, IT IS HEREBY ORDERED that:

(1) Respondents shall CEASE AND DESIST from making any offer to sell, solicitation to purchase, sale of and/or transfer of the Securities or any other security within, to, or from the State of Hawai‘i;

(2) All contracts regarding the purchase or sale of the Securities by Respondents to the Investors are hereby RESCINDED effective immediately. Respondents shall REFUND to the Investors all monies or other compensation paid, plus interest at the rate of ten percent (10%) per annum from the date of the investment to the date of the refund payment until fully paid, less any monies already refunded to the Investors. This payment shall be made within thirty (30) days of the date of the Commissioner’s final order (“**Final Order**”). Proof of said payments to the investors shall be provided to the Securities Enforcement Branch within thirty (30) days of the date of the Final Order;

(3) Respondents shall each be liable to pay the State of Hawai‘i, Department of Commerce and Consumer Affairs, Business Registration Division, a PENALTY in the sum of TWO HUNDRED THOUSAND AND NO/100 DOLLARS (\$200,000.00) plus interest on the unpaid balance thereof at the rate of ten percent (10%) per annum from the date of the Final Order until finally paid. Payment of this penalty shall be made by cashier’s check or certified check made payable to the “Department of Commerce and Consumer Affairs Compliance Resolution Fund” and received by the Commissioner within thirty (30) days of the date of the Final Order;

(4) Respondents are PERMANENTLY BARRED as agents, broker-dealers, investment advisers and/or investment adviser representatives from the date of the Final Order and from applying for registration in the State of Hawai'i as agents, broker-dealers, investment advisers and/or investment adviser representatives from the date of the Final Order;

(5) Respondents shall each be subject to a penalty of not more than FIFTY THOUSAND AND NO/100 DOLLARS (\$50,000.00) per violation for each and every violation of this preliminary order ("**Preliminary Order**") or any order of the Commissioner pursuant to HRS § 485A-604 and any future violation of HRS Chapter 485A; and

(6) The imposition of this Preliminary Order shall not preclude or prevent in any way the imposition of further sanctions or other actions against Respondents or any other party for past or future violations of HRS Chapter 485A or any other successor statute.

NOTICE OF RIGHT TO HEARING

YOU ARE HEREBY NOTIFIED that you may request a hearing on this matter within thirty (30) days after the date of service of this Preliminary Order pursuant to HRS § 485A-604. Your request must be in writing and addressed to the Office of Administrative Hearings (“OAH”) at:

Office of Administrative Hearings
Department of Commerce and Consumer Affairs
State of Hawai‘i
P.O. Box 541
Honolulu, Hawai‘i 96809

A copy of your request must be simultaneously served upon the Securities Enforcement Branch at:

Securities Enforcement Branch
Department of Commerce and Consumer Affairs
State of Hawai‘i
P.O. Box 40
Honolulu, Hawai‘i 96810

If a hearing is requested, it shall be scheduled within fifteen (15) business days after your written request has been received by OAH unless extended by the Commissioner for good cause. If OAH does not receive a written request for hearing within thirty (30) days after the date of service of this Preliminary Order and none is ordered by the Commissioner, this Preliminary Order shall become a final order of the Commissioner by operation of law pursuant to HRS § 485A-604(b).

You are hereby further notified that you may move the Commissioner to reconsider a final order within ten (10) days after receiving a final order pursuant to Hawaii Administrative

Rules for Administrative Practice and Procedure § 16-201-23. Your motion shall be filed with the Commissioner and shall state specifically what points of law or facts the Commissioner has overlooked or misunderstood together with brief arguments on the points raised.

Additionally, pursuant to HRS § 485A-609, you may file an appeal with the Circuit Court of the First Circuit of the State of Hawai'i in the manner provided in HRS Chapter 91.

You have the right to retain legal counsel, at your own expense, for all stages of these proceedings.

DATED: Honolulu, Hawai'i, AUG - 6 2013 .



TUNG CHAN
Commissioner of Securities
Department of Commerce and Consumer Affairs
STATE OF HAWAII