

STATE OF ILLINOIS
SECRETARY OF STATE
SECURITIES DEPARTMENT

IN THE MATTER OF: BARRY ELKES

FILE NO. C1100456

ORDER OF PROHIBITION

TO THE RESPONDENT: BARRY ELKES (CRD# 5238048)
1130 Hilary Lane
Highland Park, Illinois 60035

BARRY ELKES (CRD# 5238048)
755 Westgate Road
Deerfield, IL 60015

BARRY ELKES (CRD# 5238048)
905 Birch Court
Deerfield, IL 60015

WHEREAS, the above-captioned matter came to be heard on April 19, 2016, pursuant to the Notice of Hearing dated September 11, 2015, filed by Petitioner Secretary of State, continued on February 23, 2016, and the record of the matter under the Illinois Securities Law of 1953 [815 ILCS 5] (the "Act") has been reviewed by the Secretary of State or his duly authorized representative.

WHEREAS, the rulings of the Hearing Officer on the admission of evidence and all motions are deemed to be proper and are hereby concurred with by the Secretary of State.

WHEREAS, the proposed Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer, Canella E. Henrichs, in the above-captioned matter have been read and examined.

WHEREAS, the proposed Findings of Fact of the Hearing Officer concerning Respondent Barry Elkes are correct in part and incorrect in part and are hereby adopted as modified as the Findings of Fact of the Secretary of State:

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1. The Illinois Securities Department (“Department”) issued the Notice of Hearing on January 12, 2016 setting the hearing for February 23, 2016, 10:00 a.m., at the offices of the Department at 69 W. Washington, Suite 1220, in Chicago Illinois.
2. The Notice of Hearing included the information required under Section 130.1102 of Subpart K of the Rules and Regulations (the “Rules”).
3. On January 12, 2016 the Notice of Hearing was duly served on Respondent Barry Elkes by certified mail, return receipt requested, at his last known addresses of 1130 Hilary Lane, Highland Park, IL 60035.
4. On January 12, 2016, Respondent Barry Elkes was also duly served by service of the Notice of Hearing on the Index Department of the Illinois Secretary of State pursuant to Section 10 of the Act and was within 10 days mailed, certified mail, return receipt requested, to Respondent Elkes at his last known address of 1130 Hilary Lane, Highland Park, IL 60035.
5. On February 25, 2016, the Scheduling Order was issued resetting the hearing date to April 19, 2016, 10:00 a.m., at the offices of the Department at 69 W. Washington, Suite 1220, in Chicago Illinois.
6. On February 25, 2016, the Scheduling Order was duly served on Respondent Elkes, by certified mail, return receipt requested, at his last known addresses of: 1130 Hilary Lane, Highland Park, IL 60035; 755 Westgate Road, Deerfield, IL 60015 and 905 Birch Court, Deerfield, IL 60015.
7. Respondent Barry Elkes failed to file a timely answer, special appearance or other responsive pleading, and accordingly Respondent Barry Elkes was found in default pursuant to Section 130.1104(b) of the Rules and Regulations.
8. On April 19, 2016 at 10:00 a.m. or thereafter neither Respondent nor an attorney on his behalf appeared at the hearing, and accordingly Respondent Barry Elkes was found in default pursuant to Section 130.1109 of the Rules and Regulations.
9. Respondent Barry Elkes (“Respondent Elkes”) is a natural person and during the relevant time period had a last known address of 905 Birch Ct., Deerfield, Illinois 60015.
10. Respondent Elkes’ application for registration was submitted on October 20, 2006 and terminated by FINRA and the State of Illinois on October 31, 2006.
11. During the relevant time period, Respondent Barry Elkes was not and is not registered to offer or sell securities or to provide investment advisory services in the State of Illinois.

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12. In July 2011, Respondent provided investment advisory services to at least one resident of the State of Illinois when not in compliance with the filing requirements of Section 8 of the Act.
13. Complainant is an Illinois resident and was so during the relevant time period.
14. On or about July 11, 2011, Respondent Elkes met and had a conversation with Complainant's son at his place of employment, a car dealership located in Gurnee, Illinois.
15. During the course of this conversation, Respondent Elkes told Complainant's son that he was a licensed stock broker, that he had made some trades in commodities, that he could provide a large monthly return on any investment, that there were no high risks and then asked if Complainant's son knew anyone who had a \$100,000.00 to invest.
16. Thereafter, Complainant's son introduced Respondent Barry Elkes to his mother, Complainant herein.
17. In or about mid-July 2011, Respondent Barry Elkes met Complainant at her residence where he solicited Complainant to enter into a partnership agreement whereby Respondent Elkes would "be responsible for trading of Futures" for the partnership.
18. During the meeting, Respondent Elkes reiterated to Complainant that he was a licensed stock broker, and that he could provide large monthly returns without high risk.
19. The Partnership Agreement was entered into on June 14, 2011 by and between Respondent Barry Elkes and Complainant. The partnership was to be known as "Midwest Trading Group" with a principal address of 905 Birch Ct., Deerfield, IL 60015 (Respondent's address).
20. The primary terms of the Partnership Agreement were:
 - a. The purpose was "Futures Trading;"
 - b. Respondent Elkes was to be the only trader;
 - c. Respondent Elkes and Complainant were to deposit \$50,000.00 each by no later than June 30, 2011;
 - d. Complainant gave \$50,000.00 to Respondent Barry Elkes in order to provide capital to Respondent "to trade futures contracts;"

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- e. a separate account was to be maintained for each partner for their capital contribution;
 - f. contributions by any investor would "not be commingled with those of any other person or entity;" and
 - g. "No partner will withdraw any portion of their capital contribution without the express written consent of the remaining Partners."
22. On or about July 18, 2011, Respondent Elkes deposited the funds he received from Complainant into Respondent's personal bank account at the Deerfield Bank & Trust.
23. On or about July 19, 2011, Respondent Elkes wired \$45,000.00 of the funds he received from Complainant into Respondent's commodity trading account at MF Global, Inc.
24. Between July 2011 and October 2011, Respondent Elkes' trading account at MF Global, Inc. produced substantial losses.
25. In addition, on August 10, 2011, August 12, 2011 and October 12, 2011, Respondent Barry Elkes transferred \$4,000.00, \$6,000.00 and \$4,752.82, respectively, (total misappropriation of \$14,752.82 + \$5,000.00 originally withheld) of the funds back into his personal bank account at Deerfield Bank Trust.
26. On or about August 14, 2011, Respondent Elkes issued a check from his personal account at the Deerfield Bank payable to Complainant in the amount of \$3,000.00, noting in the memo section "Trade," which Complainant cashed. In all probability, Respondent issued this check to Complainant to lull him/her into believing all was well with the futures trading and profits were being made, when in fact losses were being sustained.
27. Respondent misappropriated a total of \$16,752.82 from Complainant and also caused her substantial losses (approximately \$33,000.00) from his trading in futures.
28. At all relevant times, Respondent Barry Elkes failed to file an application for registration as an investment adviser with the Illinois Secretary of State pursuant to Section 8.D of the Act or to notice file pursuant to Section 8.C-5 of the Act.
29. Respondent Elkes failed to file "a complete Form U-4 for each investment adviser representative," as required by Section 130.839 of the Rules and Regulations and failed to pay the filing fee as specified in Section 130.110 of the Rules and Regulations.

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30. At all relevant times, Respondent Elkes was not registered as an investment adviser and/or investment adviser representative with the Illinois Secretary of State.
31. In soliciting Complainant to invest in commodities and futures contracts, Respondent misrepresented that he was a licensed stock broker, that he could provide a large monthly return on any investment, and that there were no high risks involved.
32. In soliciting Complainant's funds, Respondent Barry Elkes represented in the Partnership Agreement that Respondent Elkes would be responsible for trading futures contracts and that Complainant's funds would be traded in futures contracts. Additionally, Respondent Barry Elkes through the terms of the Partnership Agreement represented to Complainant that he would contribute \$50,000.00 in capital; that he would open and maintain an individual capital account for each partner and their initial capital contribution, and that no partner would withdraw any of their Capital Contribution without the express written consent of the remaining Partners. Instead, during the period August through October 2011, Respondent Barry Elkes did not contribute \$50,000.00, did not open and maintain a separate capital account in Complainant's name, did commingle Complainant's capital contribution with Respondent Elkes' funds in his personal bank account and trading account and did misappropriate \$16,752.82 of Complainant's funds for Respondent's own personal use and benefit, without the knowledge or consent of Complainant.
33. In soliciting Complainant to invest in commodities and futures contracts, Respondent misrepresented that he was a licensed stock broker, that he could provide a large monthly return on any investment, and that there were no high risks involved.
34. On or about June 14, 2011, Respondent Elkes solicited Complainant to enter into a Partnership Agreement and did, in fact, enter into a Partnership Agreement with Complainant for the stated purpose of trading futures using funds invested by Complainant. Respondent Barry Elkes through the terms of the Partnership Agreement represented to Complainant that he would contribute \$50,000.00 in capital, that he would open and maintain an individual capital account for each partner and their initial capital contribution, and that no partner would withdraw any of their Capital Contribution without the express written consent of the remaining Partners. Instead Respondent Barry Elkes violated the terms of said agreement in multiple ways including, but not limited to, failing to contribute his \$50,000.00, not maintaining a separate account for Complainant's capital contribution, commingling Complainant's funds with Respondent Elkes' funds in his personal bank account and trading account, and by misappropriating \$16,752.82 of Complainant's funds for Respondent's own personal use and benefit without knowledge or consent of Complainant.

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WHEREAS, the Secretary of State finds the proposed Conclusions of Law of the Hearing Officer to be correct in part and incorrect in part and are hereby adopted as modified, based on the law and the record in this matter, and adopts them as the Conclusions of Law of the Secretary of State:

1. The Department properly served the Notice of Hearing on Respondent.
 2. The Notice of Hearing included the information required under Section 130.1102 of 14 Ill. Adm. Code 130, Subpart K (the "Code").
 3. Section 2.1 of the Illinois Securities Law of 1953, 815 ILCS 5/1 *et seq.* ("Act"), defines "Security" as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, ... investment contract, investment fund share... in general, any interest or instrument commonly known as a 'security'"
 4. Section 130.201 of the Rules and Regulations defines the term "investment contract," as used in Section 2.1 of the Act, to include, *inter alia*:
 - a) any interest or participation in a contract, transaction, scheme, common enterprise, or profit-seeking venture whereby the investor transfers capital to the promoter or promoters thereof or invests therein and looks to the promoter or promoters for the success of the venture.
 - b) any interest as a limited partner in a limited partnership;...
- See also, SEC v. Howey*, 328 U.S. 293, 301; 66 S. Ct. 1100, 1104 (1946).
5. Whether the Partnership Agreement is construed as an "investment contract" or as a "limited partnership," the result is the same. This Partnership Agreement is a "security" as that term is defined under Section 2.1 of the Act.
 6. Pursuant to Section 130.1102 of 14 Ill Adm Code 130 Subpart K of the Rules and Regulations under the Illinois Securities Law of 1953 ("Rules and Regulations"), the Notice of Hearing was to include, *inter alia*, statements of date, time and place of the hearing and the nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and a short and plain statement of the matters alleged, as well as the relief sought.
 7. In relevant part, the Notice of Hearing alleged violations of Sections 12.A, 12.D, 12.G and 12.I; sought to permanently prohibited Respondent from offering and/or selling securities in or from the State of Illinois; and a maximum fine of \$10,000.00 for each violation, for a total of \$40,000.00.
 8. Section 11.E(3) of the Act provides, *inter alia*, that if the Secretary of State shall find that any person is acting or has acted as an investment adviser or investment advisor representative, without prior thereto and at the time thereof having

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complied with the registration or notice filing requirements of this Act, the Secretary of State may by written order prohibit or suspend the person from acting as an investment adviser or investment adviser representative, in this State.

9. Pursuant to Section 11.E.4 of the Act, a fine may be imposed for each violation of the Act, "not to exceed \$10,000 for each violation..."
10. Pursuant to Sections 130.1102(f) and 130.1103 of the Rules and Regulations, the Notice of Hearing is to be mailed to a respondent at the respondent's last known address, by registered or certified mail, return receipt requested, or by personal service.
11. The Department complied with the terms of Sections 130.1102(f) and 130.1103 of the Rules and Regulations by mailing, certified mail, return receipt requested, to Respondent's last known addresses, the Notice of Hearing and the Scheduling Order; and accordingly, did properly serve the Respondent with a copy of the Notice of Hearing and with a copy of the Scheduling Order setting the continued date for the hearing on the Notice of Hearing.
12. The Secretary of State does have jurisdiction over the subject matter hereof pursuant to the Act, and has personal jurisdiction over Respondent under the Act and the Rules and Regulations.
13. Because of Respondent's failure to file a timely answer or other responsive pleading in accordance with Section 130.1104(b) of the Rules and Regulations:
 - a. The allegations contained in the Notice of Hearing are deemed admitted;
 - b. Respondent waived the right to a hearing; and
 - c. Respondent is subject to an Order of Default.
14. Because Respondent and/or his attorney failed to appear at the time and place set for hearing, in accordance with Section 130.1109 of the Rules and Regulations, they waived the right to present evidence, argue, object or cross examine witnesses; or otherwise participate at the hearing.
15. Section 12.A of the Act states that it shall be a violation of the provisions of this Act for any person to "offer or sell any security except in accordance with the provisions of this Act."
16. Section 2.11 of the Act defines, in pertinent part, an "investment adviser" as "any person who, for compensation, engages in this State in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in ... securities"

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17. Section 2.12.b of the Act, in pertinent part, defines "investment adviser representative" as follows:

"Investment adviser representative" means with respect to an investment adviser who is required to register under this Act, any partner, officer, director of ...or other natural person employed by or associated with an investment adviser, except clerical or ministerial personnel, who in this State:

(1) makes any recommendations or otherwise renders advice regarding securities;

(2) manages accounts or portfolios of clients;

(3) determines what recommendation or advice regarding securities should be given;

* * * *

(5) solicits, refers, offers, or negotiates for the sale of, or sells, investment advisory services.

18. Section 8.A also provides, *inter alia*, that all investment advisers and investment adviser representatives, except as otherwise provided, shall be registered as such with the Illinois Secretary of State.

19. Section 8.D of the Act provides, *inter alia*, that an "application for registration as an investment adviser, executed, verified, or authenticated by or on behalf of the applicant, shall be filed with the Secretary of State, in such form as the Secretary of State may by rule or regulation prescribe"

20. Section 8.C-5 provides, *inter alia*, that "federal covered investment advisers ...shall file with the Secretary of State, such documents as have been filed with the Securities and Exchange Commission as the Secretary of State by rule or order may prescribe. The notification of a federal covered investment adviser shall be accompanied by a notification filing fee... The failure to file any such notification shall constitute a violation of subsection D of Section 12 of the Act. ..."

21. Section 12.C of the Act provides, *inter alia*, that it shall be a violation for any person to act as an investment adviser or investment adviser representative unless registered as such.

22. Section 12.D of the Act provides, *inter alia*, that it shall be a violation for any person to fail to file with the Secretary of State any application, report or document required to be filed under the provisions of the Act or any rule or regulation made by the Secretary of State pursuant to the Act.

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23. Respondent Elkes failed to file with the Secretary of State applications for registration as required by the Act. Respondent either failed to file an application for registration as an Investment Adviser pursuant to Section 8.D, or failed to notice file pursuant to Section 8.C-5 of the Act.
24. Section 130.839 of the Rules of Regulations provides, *inter alia*, that:
 - a) Effective October 1, 2002, each new applicant filing as an investment adviser or federal covered investment adviser shall file with the NASD, utilizing the IARD, a complete Form U-4 for each investment adviser representative and pay the filing fee specified in Section 130.110 of this Part.
 - b) For purposes of the annual re-registration of investment adviser representatives, each investment adviser and federal covered investment adviser shall file with the NASD, utilizing the IARD, and pay the filing fee specified in Section 130.110 of this Part.
25. Respondent Elkes failed to file a complete U-4 for each Investment Adviser Representative and to pay the filing fee as specified in Section 130.110.
26. By virtue of the foregoing Respondent Barry Elkes has violated Sections 12.A and 12.D of the Act.
27. Section 12.G of the Act states, *inter alia*, that it shall be a violation of the provisions of the Act for any person to "obtain money or property through the sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."
28. By virtue of the foregoing, Respondent has violated Section 12.G of the Act.
29. Section 12.I of the Act states that it shall be a violation of the provisions of the Act for any person to "employ any device, scheme or artifice to defraud in connection with the sale or purchase of any security, directly or indirectly."
30. By virtue of the foregoing, Respondent has violated Section 12.I of the Act.

WHEREAS, the Hearing Officer recommended that:

1. The Department's request for a Default Judgment against Respondent Barry Elkes be granted.
2. Respondent Barry Elkes be permanently prohibited from offering and/or selling securities in or from the State of Illinois.

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3. A fine in the amount of \$10,000.00 for each violation for a total of \$40,000.00 be granted.


WHEREAS, the Hearing Officer found the Respondent Barry Elkes in default and recommended that the Secretary of State PROHIBIT Respondent Barry Elkes from offering and/or selling securities in the State of Illinois; and the Department accepts the recommendation of the Hearing Officer.

WHEREAS, the Secretary of State accepts the Recommendations of the Hearing Officer and has determined based upon the Findings of Fact and Conclusions of Law that an Order shall be entered permanently PROHIBITING Respondent Barry Elkes from offering and/or selling securities in the State of Illinois.

NOW THEREFORE, IT SHALL BE AND IS HEREBY ORDERED THAT:

1. Barry Elkes is **PERMANENTLY PROHIBITED** from offering and/or selling securities in the State of Illinois;
2. Barry Elkes is **FINED** in the amount of \$40,000.00.

ENTERED: This 16th day of November 2016.


JESSE WHITE
Secretary of State
State of Illinois

Date of Mailing: 17th day of November 2016

NOTICE: Failure to comply with the terms of this Order shall be a violation of Section 12.D of the Illinois Securities Law of 1953, as amended, 815 ILCS 5/1 et seq. (the "Act"). Any person or entity who fails to comply with the terms of this Order of the Secretary of State, having knowledge of the existence of this Order, shall be guilty of a Class 4 felony.

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This is a Final Order subject to judicial review pursuant to the Administrative Review Law, 735 ILCS 5/3-101 et seq., and the Rules and Regulations of the Act (14 Ill. Admin. Code, Ch. I, Sec. 130.1123. Any action for judicial review must be commenced within thirty-five (35) days from the date a copy of this Order is served upon the party seeking review. Mailing of this Order to the Respondent or representative of record constitutes service of the Order.

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