THE SUPREME COURT OF NEW HAMPSHIRE

Bureau of Securities Regulation
Case No. 2024-0720
Citation: Appeal of Advent Med. Prods., Inc., 2026 N.H. 30

APPEAL OF ADVENT MEDICAL PRODUCTS, INC. & a.
(New Hampshire Bureau of Securities Regulation)

Argued: April 7, 2026
Opinion Issued: July 31, 2026

John M. Formella, attorney general, and Anthony J. Galdieri, solicitor general (James H. Holl, attorney, on the brief and orally), for the New Hampshire Bureau of Securities Regulation.

Orr & Reno, P.A., of Concord (Lisa Snow Wade and Meredith Farrell Goldstein on the brief, and Lisa Snow Wade orally), for Advent Medical Products, Inc. and Randall Finke.

Cleveland, Waters and Bass, P.A., of Concord (Jeffrey C. Christensen on the brief), and Dylan White, of Washington, D.C., associate general counsel, on the brief, for North American Securities Administrators Association, Inc., as amicus curiae.

DONOVAN, J.

[¶1] Advent Medical Products, Inc. (Advent) and Randall Fincke (Fincke), the respondents in the underlying administrative proceeding, appeal orders of the director of the New Hampshire Bureau of Securities Regulation (Bureau) holding them liable for violations of RSA chapter 421-B, New Hampshire's Uniform Securities Act (Act), in connection with securities sales to thirteen investors. See RSA 421-B:3, I(b) (Supp. 2015) (repealed and reenacted 2015); RSA 421-B:11, I (2006) (repealed and reenacted 2015); RSA 421-B:1-101 (2022); RSA 421-B:5-501(a)(2) (2022).[1] Following a hearing, the director ordered the respondents to pay monetary penalties, rescind the challenged securities sales, and permanently cease and desist from offering or selling securities in New Hampshire. We affirm in part, reverse in part, vacate in part, and remand.

I. Facts

[¶2] The director found, or the record otherwise supports, the following facts. Fincke founded Advent in 2004 to develop and manufacture manual defibrillators and automatic external defibrillators (AEDs). Advent is headquartered in Massachusetts, where Fincke resided at all relevant times.

[¶3] Before marketing a defibrillator, a manufacturer must seek clearance from the United States Food and Drug Administration (FDA) under the applicable regulatory process. Accordingly, in 2010, Advent secured clearance for various products under the FDA's 510(k) process.

[¶4] The company thereafter began soliciting investors. From around 2012 to 2017, Fincke's brother, Gary Fincke, led these efforts in New Hampshire. A New Hampshire resident, Gary often worked from his home office. He met with several investors in person and corresponded with others by phone and email. Apart from one investor who said he could not recall the exact instruments he signed, the investors who testified at the hearing before the director each bought three securities: a promissory note, a call option, and a put option. Although Advent sold several securities in New Hampshire, the company did not register them with the Bureau as generally required under the Act. See RSA 421-B:11, I.

[¶5] Meanwhile, Advent suffered a spate of delays in selling its products. First, in February 2015, the FDA began mandating that AEDs receive clearance

[1] In 2015, the legislature renumbered and reenacted the Act's provisions. Nevertheless, "[t]he predecessor act exclusively governs all actions or proceedings that . . . may be instituted on the basis of conduct occurring before the effective date of" the 2015 revision. RSA 421-B:7-701(a) (2022). Because the respondents sold securities before and after the Act's revision, this case implicates provisions in both its predecessor and current versions.

under its more stringent Premarket Approval (PMA) process, rather than the previously applicable 510(k) process. Although Advent remained able to sell its non-AED products, the FDA's mandate required the company to receive PMA clearance before selling any AEDs. As of the hearing in August 2024, Advent had completed a preliminary submission in the PMA process but had yet to obtain FDA approval for its AEDs.

[¶6] Separately, in late 2016, Fincke discovered a defect in the defibrillators' lithium-ion batteries, which took him two years to resolve. A securities enforcement proceeding against Advent in Massachusetts and the COVID-19 pandemic further stalled the company's product development.

[¶7] In 2023, the Bureau filed a staff petition for relief alleging that the respondents had violated the Act and listing thirteen investors whose purchases of Advent securities the Bureau sought to rescind.[2] Specifically, the Bureau's petition claimed that between October 2010 and April 2016, the respondents unlawfully sold unregistered securities and misrepresented material facts to investors.

[¶8] The respondents requested a hearing and later moved to dismiss. After a four-day administrative hearing, the Bureau's director issued a final order denying the respondents' motion to dismiss and determining that they illegally sold unregistered securities and made misrepresentations to investors. The director ordered the respondents, jointly and severally, to: (1) pay a $345,000 fine for 138 violations of the Act; (2) rescind the challenged investments, which totaled $480,000; (3) pay $60,000 to the Bureau for investigative and enforcement costs; and (4) cease and desist from violating the Act.

[¶9] The Bureau moved to reconsider the "cease and desist" portion of the director's order. The director granted the Bureau's motion, ordering the respondents to permanently cease and desist from offering or selling securities in New Hampshire. The respondents then moved to reconsider both the director's final order and his subsequent order granting the Bureau's motion. The director denied the respondents' motion to reconsider. This appeal followed.

II. Analysis

[¶10] In an administrative hearing before a presiding officer of the Bureau, the officer's "decisions shall be reached upon the basis of a preponderance of the evidence." RSA 421-B:6-613(v) (2022). Meanwhile, RSA 541:13 (2021) sets forth our standard of review of the officer's decision. See

[2] Three of the thirteen investors listed in the Bureau's petition are couples who invested jointly in Advent while married. The petition treats each of these couples as a single "investor."

Appeal of Town of Salem, 168 N.H. 572, 580 (2016); RSA 421-B:6-609 (2022) (providing that agency's "[f]inal orders . . . under this chapter are subject to judicial review in accordance with RSA 541"). We will not set aside or vacate the presiding officer's decision "except for errors of law, unless [we are] satisfied, by a clear preponderance of the evidence before [us], that such order is unjust or unreasonable." RSA 541:13. "The presiding officer's findings of fact are deemed prima facie lawful and reasonable." Appeal of Town of Salem, 168 N.H. at 580; see RSA 541:13.

[¶11] Resolving the respondents' appeal requires us to construe various provisions of the Act. "Statutory interpretation is a question of law, which we review de novo." Appeal of Town of Salem, 168 N.H. at 577. "We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Boucher v. Town of Moultonborough, 176 N.H. 271, 274 (2023); RSA 21:2 (2020). "We give effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Boucher, 176 N.H. at 274. "We also construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. "However, we do not construe statutes in isolation; instead, we attempt to construe them in harmony with the overall statutory scheme." Id.

A. Misrepresentations

[¶12] We first address the respondents' challenge to the director's determination that they unlawfully misrepresented material facts while soliciting investments. The director found that the respondents misrepresented facts by: (1) not divulging to any investors that Fincke was found liable in two lawsuits for stealing trade secrets and committing securities fraud, respectively; and (2) telling three investors that Advent's defibrillators were close to going to market. See RSA 421-B:3, I(b); RSA 421-B:5-501(a)(2).

[¶13] The respondents' alleged misrepresentations occurred before and after the legislature's revision of the Act in 2015. The operative provisions in the current and predecessor Acts, RSA 421-B:5-501(a)(2) and RSA 421-B:3, I(b), are nearly identical and do not differ substantively. Therefore, for ease of reference, we cite only to the current provision, RSA 421-B:5-501(a)(2). This provision states:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to: . . . (2) make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading . . . .

RSA 421-B:5-501(a) (2022).

i. Fincke's Prior Litigation

[¶14] The director found that the respondents' failure to disclose two lawsuits involving Fincke rendered materially misleading the information they did give investors regarding "Fincke's biography and history in the defibrillation market." On appeal, the respondents assert that their nondisclosure did not make the professional history they supplied to investors "misleading."

[¶15] RSA 421-B:3, I(b) and RSA 421-B:5-501(a)(2) duplicate the text of Securities and Exchange Commission (SEC) Rule 10b-5(b). Compare RSA 421-B:3, I(b), and RSA 421-B:5-501(a)(2), with 17 C.F.R. § 240.10b-5(b). As such, federal courts' construction of Rule 10b-5(b) can be instructive.[3] The United States Supreme Court has clarified that Rule 10b-5(b)'s language proscribing omissions of material fact requires only "disclosure of information necessary to ensure that statements already made are clear and complete." Macquarie Infrastructure Corp. v. Moab Partners, L. P., 601 U.S. 257, 264 (2024). "This Rule therefore covers half-truths, not pure omissions." Id.

[¶16] Half-truths penalizable under Rule 10b-5(b) "are representations that state the truth only so far as it goes, while omitting critical qualifying information." Id. at 263 (quotation omitted). In short, "once a company speaks on an issue or topic, it must tell the whole truth." Gimpel v. The Hain Celestial Group, Inc., 156 F.4th 121, 139 (2d Cir. 2025) (quotations omitted), petition for cert. filed (U.S. May 1, 2026) (No. 25-1255). However, "[w]hen making a voluntary disclosure, a company that reveals one fact is not required to reveal all others that, too, would be interesting, market-wise; instead, it is required only to reveal the facts necessary to make the existing statement not so incomplete as to mislead." Zhou v. Desktop Metal, Inc., 120 F.4th 278, 294 (1st Cir. 2024) (quotations omitted). "To render a statement misleading, the omission must be within the scope of the disclosure." Id. at 296 (quotation omitted). Further, "a statement cannot be misleading when the words spoken and the facts omitted operate on different levels of generality." Newtyn Partners v. Alliance Data Systems Corp., 165 F.4th 947, 963 (6th Cir. 2026) (quotation omitted).

[¶17] In the first lawsuit at issue, Fincke's former employer, Zoll Medical Corporation (Zoll), sued Fincke and a company he founded, Cadent Medical Corporation (Cadent). A jury found in 2000 that Fincke stole Zoll's trade secrets. Because Fincke had separately sued Zoll, the parties settled their dispute after trial. In the second matter, a bankruptcy court ruled in 2009

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[3] See Quest Medical, Inc. v. Apprill, 90 F.3d 1080, 1091 n.16 (5th Cir. 1996) (explaining that "Texas courts look to decisions of the federal courts to aid in the interpretation of" state securities law); State v. Bates, No. 2019-0396 (non-precedential order at 5), 2020 WL 6779377 (N.H. Nov. 18, 2020) ("rely[ing] upon federal law in determining whether the State presented sufficient evidence to prove that the defendant's untrue statements were material" in appeal of securities fraud conviction under Act).

that Fincke illegally made a false statement of material fact while soliciting investors for another company he founded, Access Cardiosystems (Access). In re Access Cardiosystems, Inc., 404 B.R. 593, 666 (Bankr. D. Mass. 2009), aff'd, 488 B.R. 1 (D. Mass. 2012), aff'd, 776 F.3d 30 (1st Cir. 2015).

[¶18] Meanwhile, the only information provided to investors that the director's final order cites is a one-paragraph biography of Fincke that investors received together with other materials about Advent. The paragraph notes Fincke's "over 25 years of marketing and technology management experience in the medical device industry, including several patents," and includes three sentences in total addressing his work for Zoll, Cadent, and Access.

[¶19] The Bureau and amicus curiae posit that because this biography "touted" Fincke's experience developing medical devices, the respondents told "half-truths" by failing to divulge the lawsuits, which were connected to this experience. However, the biography's overview of Fincke's decades-long career is markedly more general than any facts that would have been disclosed regarding the lawsuits. See Newtyn Partners, 165 F.4th at 963. Further, although the paragraph mentions Zoll, Cadent, and Access, the results of corporate lawsuits do not fall "within the scope of" the one-paragraph biography. Zhou, 120 F.4th at 296. Indeed, an investor would not typically expect a cursory professional summary to comprehensively recount past legal disputes. See Barilli v. Sky Solar Holdings, Ltd., 389 F. Supp. 3d 232, 251-52 (S.D.N.Y. 2019) (explaining that company's statements about founder's previous projects did not "affirmatively represent[] that [he] did not engage in past improper transactions . . . , nor would the statements lead a reasonable investor to conclude as much," and rejecting argument that company had to disclose adverse legal judgments against him).

[¶20] Finally, the cases cited by the Bureau and amicus curiae finding liability for "omissions of prior legal, regulatory, and similar troubles" are inapposite. For instance, in Securities and Exchange Commission v. Westhead, a corporate principal's undisclosed, pending state enforcement actions bore directly on the accuracy of the company's alleged statements to investors that its "offerings comply with the securities laws" and that its investor memoranda contained all relevant information. S.E.C. v. Westhead, 733 F. Supp. 3d 1284, 1299 (S.D. Fla. 2024). Meanwhile, the court in United States Securities and Exchange Commission v. Melton penalized an executive's nondisclosure of "his securities disciplinary history" to his financial advisees under Rule 10b-5's other prongs, by which liability can attach for "an omission of material fact by a party with a duty to disclose" it. U.S. Sec. & Exch. Comm. v. Melton, No. 1:23-CV-434, 2025 WL 1135180, at *4 (M.D.N.C. Apr. 17, 2025). In contrast, RSA 421-B:3, I (Supp. 2015) (repealed and reenacted 2015) and RSA 421-B:5-501(a) lack language penalizing omissions on the basis of a preexisting duty.

[¶21] We therefore agree with the respondents that because their nondisclosure of the lawsuits did not render the biography "so incomplete as to mislead," Zhou, 120 F.4th at 294, it was a permissible "pure omission," Macquarie Infrastructure Corp., 601 U.S. at 264. The director thus erred by levying penalties for the respondents' failure to disclose information relating to the lawsuits. See RSA 421-B:3, I(b); RSA 421-B:5-501(a)(2).

ii. Time to Enter Market

[¶22] The director also ruled that the respondents made "an untrue statement of material fact" by telling investors D.I., S.M., and K.K. that Advent was close to selling its defibrillators. See RSA 421-B:3, I(b); RSA 421-B:5-501(a)(2). The director found these statements to be false because, when the respondents made them in 2015 and early 2016, Advent had yet to apply for PMA clearance — which the FDA had begun requiring for AEDs in early 2015. On appeal, the respondents argue that they told the truth, as their comments pertained to Advent's defibrillators generally, not solely its AEDs. They maintain that despite the company's later, unforeseen delays, its non-AED products — which remained FDA-compliant — were close to entering the market in 2015 and early 2016.

[¶23] Again, we draw guidance from federal courts' analysis of the nearly identical text of SEC Rule 10b-5(b). Multiple courts have noted that a "violation of . . . Rule 10b-5 premised on misstatements cannot occur unless an alleged material misstatement was false at the time it was made." Gluck v. Hecla Min. Co., 657 F. Supp. 3d 471, 488 (S.D.N.Y. 2023) (emphasis added); see Shushany v. Allwaste, Inc., 992 F.2d 517, 524 (5th Cir. 1993) ("Statements that are predictive in nature are actionable only if they were false when made." (emphasis added)). "The truth (or falsity) of defendants' statements, and their materiality, must be assessed at the time the statements are made, and not in the light of hindsight." Pommer v. Medtest Corp., 961 F.2d 620, 625 (7th Cir. 1992). Thus, a "statement believed to be true when made, but later shown to be false, is insufficient." Gluck, 657 F. Supp. 3d at 489.

[¶24] Additionally, we have previously construed the phrase "untrue statement of a material fact" as it appears in RSA 356-B:65, I (2022), which proscribes such statements made when selling an interest in a condominium. Thompson v. The H.W.G. Group, 139 N.H. 698, 699-700 (1995). In doing so, we explained that although "a promise can imply a statement of material fact about the promisor's intention and capacity to honor the promise," such a promise "will only give rise to a claim of misrepresentation if, at the time it was made, the defendant had no intention to fulfill the promise." Id. at 700-01 (emphasis added).

[¶25] As explained below, we hold that the director unreasonably concluded that the respondents made false representations about the timeline for marketing their defibrillators. See RSA 541:13. We first note that the director found, consistent with the record, that the FDA's adoption of a heightened PMA clearance requirement for AEDs did not alter Advent's previously secured 510(k) clearance for its manual defibrillators. Neither Fincke's nor the three investors' testimony supports the Bureau's contention that, in 2015 and 2016, the respondents were soliciting funds specifically for Advent's AEDs. Rather, Fincke testified that the respondents told investors they wanted to sell their AEDs as well as other products. He also stated that from 2015 to early 2016, it was accurate to represent that Advent's products were close to going to market. Fincke further discussed, at length, Advent's work developing both its manual and automatic devices around this period.

[¶26] All three investors testified in line with Fincke's claim that Advent's representations regarding its progress concerned its "product line" generally, not only its AEDs. Indeed, none of the investors mentioned AEDs. For example, D.I. stated only that before his final investment on January 16, 2015, "the argument that was made [by the respondents] was, you know, we're on the cusp of getting this out there, and we just need an additional push at this point to move us forward and to get to market." S.M. similarly testified that on one occasion in December 2015, Gary "indicated that they were . . . in the latter stages of product development. . . . [T]hey were, like, nearing production." S.M. added: "[T]o be clear, he didn't give a timeline, but it wasn't at its infancy." Finally, upon being asked what the respondents were "saying about the marketability and commercialization" when he invested in April 2016, K.K. testified merely that he was told something to the effect of, "Just, you know, it looks good. That's all."

[¶27] Because the three investors did not mention hearing specifically about AEDs, the FDA's PMA requirement does not alone render the respondents' representations about time to market "false when made."[4] Shushany, 992 F.2d at 524. The director did not make any other findings, nor has the Bureau proffered any evidence, suggesting that in 2015 and early 2016, the respondents expected their products to face delays or did not intend to sell them quickly. See Thompson, 139 N.H. at 701; Gluck, 657 F. Supp. 3d at 489. To the contrary, the record demonstrates that delays first occurred in late 2016.

[¶28] As the record does not indicate any circumstance existing in 2015 or early 2016 that made the respondents' comments an "untrue statement of a material fact," the director's imposition of liability for the respondents'

[4] Further, given that D.I. made his final investment on January 16, 2015, any relevant representation to him that Advent was "on the cusp" of selling its products would have preceded the FDA's definitive announcement of the new PMA requirement for AEDs. See Effective Date of Requirement for Premarket Approval for Automated External Defibrillator Systems; Republication, 80 Fed. Reg. 5674, 5683 (Feb. 3, 2015) (codified at 21 C.F.R. pt. 870) (stating that FDA published final order promulgating rule on January 29, 2015).

representations that their products were close to market was unreasonable. RSA 421-B:3, I(b); see RSA 421-B:5-501(a)(2). Because we reverse the finding of liability under RSA 421-B:3, I(b) and RSA 421-B:5-501(a)(2), we need not reach the respondents' argument that these two provisions are unconstitutionally vague. Nor need we address their claim that the Bureau's penalty for K.K.'s investment violated the Act's jurisdictional provisions and the dormant Commerce Clause of the United States Constitution.

B. Registration

[¶29] Next, the respondents challenge the director's determination that they unlawfully failed to register various securities sold in New Hampshire before the current Act became effective. Under RSA 421-B:11, I, "[i]t is unlawful for any person to offer or sell any security in this state unless it is registered" with the Bureau or an exception applies. RSA 421-B:17 (Supp. 2015) (repealed and reenacted 2015) exempts various securities from compulsory registration.

[¶30] The respondents assert that several of their sales were exempt under: (1) the isolated sale exemption in RSA 421-B:17, II(a)(2); or (2) the existing security holder exemption in RSA 421-B:17, II(p). They also argue that the sale to investor C.C., which occurred outside New Hampshire, was exempt. Finally, they contend that the director erred by fining them for each unregistered security sold, rather than merely for each transaction.

i. Isolated Sale Exemption

[¶31] The respondents first submit that RSA 421-B:17, II(a)(2) exempted the purchase by investor F.H. and the first purchase by investor couple N.S./T.W. from registration. They challenge the director's determination that the number of purchasers of Advent securities at the time of these investments exceeded the numerical thresholds in RSA 421-B:17, II(a)(2)(A). RSA 421-B:17, II(a)(2) provides an exemption for:

> Any sale of securities by an issuer, if:
>
> (A) The number of purchasers of securities of the issuer, in all jurisdictions combined, does not in consequence of the sale, exceed 10 in number during any 12 consecutive months and 25 in number during the issuer's existence.
>
> (B) The securities sold in reliance on this subparagraph have not been offered to the public by any form of general solicitation or general advertisement.

> (C) A commission or remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this chapter or an agent registered under this chapter for soliciting a prospective purchaser.
>
> (D) Except for sales of securities registered under the Securities Act of 1933 or exempted by section 3(b) of that act, the seller reasonably believes that all buyers are purchasing for investment.

(Emphasis added.) The legislature's use of the phrase "in reliance on this subparagraph" in RSA 421-B:17, II(a)(2)(B) indicates that the requirements listed under (A) to (D) should be read together, so that a sale must meet all four requirements to qualify for this registration exemption.

[¶32] The director found, and no party contests, that the Bureau's exhibit listing Advent's securities sales establishes the dates and numbers of sales necessary to determine whether the Act's registration exemptions applied. This exhibit reflects that Advent made its first sale on March 26, 2008, to an out-of-state investor. F.H. invested on October 12, 2010, and N.S./T.W. first invested on February 17, 2012.

[¶33] The director ruled that the exemption in RSA 421-B:17, II(a)(2) did not cover any of Advent's transactions because "during the twelve month period from March 26, 2010 to March 26, 2011, Advent and Randall Fincke sold Advent securities to twelve investors, and from March 26, 2008 to December 31, 2015, Advent and Randall Fincke sold securities to 71 investors." The respondents posit that the director erred by considering sales subsequent to each investor's first purchase in determining that the isolated sale exemption did not apply.

[¶34] We agree with the respondents. In setting numerical thresholds for the exemption, RSA 421-B:17, II(a)(2)(A) looks to "[t]he number of purchasers . . . in consequence of the sale." As relevant here, "consequence" is defined as a "result that follows as an effect of something that came before." <u>Black's Law Dictionary</u> 383 (12th ed. 2024). The statute therefore considers the number of purchasers <u>up until</u> the time of the sale, plus the purchaser whose sale is at issue. It does not, however, take into account purchases <u>after</u> the sale at issue. A subsequent increase in "[t]he number of purchasers" that arises by way of later transactions does not occur "in consequence of the sale." RSA 421-B:17, II(a)(2)(A). Counting subsequent sales to determine whether the exemption covers a particular purchaser's investment thus distorts the statute's plain text. <u>See</u> <u>id</u>.; <u>Boucher</u>, 176 N.H. at 274 (noting that we construe statutory language "according to its plain and ordinary meaning"); RSA 21:2. Further, and as the respondents note, the director's interpretation yields the "absurd or unjust result" that a sale initially exempt from registration may thereafter become illegal due to later, unforeseen sales. Boucher, 176 N.H. at 274.

[¶35] Advent had sold securities to fourteen purchasers in total upon F.H.'s investment, and to a total of twenty-four purchasers upon N.S./T.W.'s first investment — fewer than the limit of twenty-five purchasers "during the issuer's existence." RSA 421-B:17, II(a)(2)(A). As for the twelve-month threshold, the statute specifies that "[t]he number of purchasers . . . in consequence of the sale, [may] not exceed 10 in number during any 12 consecutive months." Id. (emphasis added). This language indicates that the sale at issue may not directly cause "[t]he number of purchasers" to exceed ten during a twelve-month period. Id. Accordingly, we consider the twelve-month period immediately leading up to and including the date of each sale. Advent sold securities to only nine investors between October 12, 2009 and F.H.'s purchase on October 12, 2010, and to only five investors between February 17, 2011 and N.S./T.W.'s first purchase on February 17, 2012. Both investments thus fell within the numerical thresholds set forth in RSA 421-B:17, II(a)(2)(A).

[¶36] The director did not, however, make sufficient factual findings to ascertain whether the sale to F.H. and first sale to N.S./T.W. satisfy the other requirements for the isolated sale exemption, which are listed in RSA 421-B:17, II(a)(2)(B) to (D). We therefore reverse the director's conclusion as to the numerical thresholds in RSA 421-B:17, II(a)(2)(A) and remand for a determination as to whether these sales otherwise qualify for the isolated sale exemption.

ii. Existing Security Holder Exemption

[¶37] The respondents also contend that RSA 421-B:17, II(p) exempted N.S./T.W.'s second investment, D.I.'s second and third investments, and all investors' call and put options. In relevant part, RSA 421-B:17, II(p) provides an exemption for:

> Any transaction pursuant to an offer to existing security holders of the issuer, where the securities held by such existing security holders were issued by the issuers for value . . . if:
>
> (1) No commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this state, or
>
> (2) The issuer first files a notice specifying the terms of the offer and the secretary of state does not by order disallow the exemption within the next 10 full business days.

The director found, and the respondents do not refute, that the respondents did not file any record regarding a registration exemption with the Bureau. See RSA 421-B:17, II(p)(2). The parties do, however, dispute whether the respondents can satisfy the requirement in RSA 421-B:17, II(p)(1). Specifically, the Bureau argues that "the record is clear that Gary Fincke was compensated for his role in soliciting investors." The respondents counter that apart from reimbursement for Gary's business expenses and loans to Advent, "his compensation was deferred for the benefit of investors because there were insufficient funds to pay him."

[¶38] The director made no findings as to whether Gary received "commission[s] or other remuneration," however. RSA 421-B:17, II(p)(1). Consequently, we vacate the director's conclusion that none of the respondents' pre-2016 sales were exempt under RSA 421-B:17 and remand for factual findings sufficient to determine whether the respondents could claim the existing security holder exemption in RSA 421-B:17, II(p) for any investments.

iii. Extraterritorial Sale to Investor C.C.

[¶39] The respondents also maintain that they did not need to register the securities bought by C.C. because she purchased them outside New Hampshire. C.C. bought securities in March 2012. RSA 421-B:30, I (2006) (repealed and reenacted 2015) provided that the registration requirement in RSA 421-B:11, I, "appl[ies] to persons who sell or offer to sell when: (a) An offer to sell is made in this state, or (b) An offer to buy is made and accepted in this state." In addition:

> [A]n offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:
>
> (a) Originates from this state, or
>
> (b) Is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

RSA 421-B:30, III (2006) (repealed and reenacted 2015). "'Offer' or 'offer to sell' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." RSA 421-B:2, XIX(b) (2006) (repealed and reenacted 2015).

[¶40] At all relevant times, C.C. resided in Maine. She learned about Advent from a friend during a visit to Florida. Later, while in Maine, C.C. communicated with Gary by phone and email before mailing a check and signed documents to Advent's office in Massachusetts. C.C. did not meet in person with Gary or anyone else from Advent before she invested. The director nonetheless found that the "cumulative evidence" presented at the hearing showed that Gary's offer to sell securities to C.C. "originate[d] from" New Hampshire because: (1) Gary lived in New Hampshire, of which C.C. was aware; and (2) he emailed C.C. to solicit her investment.

[¶41] Under the plain text of RSA 421-B:30, III, however, C.C.'s knowledge of Gary's New Hampshire residence is inadequate to establish that his offer was made in New Hampshire. Nor is the Bureau's contention that C.C.'s investment was sufficiently "[t]ethered to New Hampshire" to justify the Act's application correct. (Bolding omitted.) Rather, given that C.C. did not execute the investment documents in or mail them to New Hampshire, the director had to find that an element of Gary's offer to her "[o]riginate[d] from this state." RSA 421-B:30, III(a). Under the applicable preponderance of the evidence standard, this determination required proof that Gary more likely than not communicated with C.C. by phone or email from New Hampshire before she invested. See RSA 421-B:6-613(v); Appeal of Rockingham County Sheriff's Dep't, 144 N.H. 194, 197 (1999) (discussing "preponderance of the evidence" standard).

[¶42] The hearing testimony establishes, at most, only one email and one phone call between Gary and C.C. before she invested. When they testified, neither Gary nor C.C. recalled where he was when emailing or phoning her. Instead, Gary testified only that, over the five years he led Advent's marketing efforts, he "probably" conducted most business calls from New Hampshire and used his home office as his primary worksite. Gary also stated, however, that he "sen[t] emails from a lot of places" and often worked while in transit or from Advent's office in Massachusetts. Gary's generalizations about having worked primarily from his New Hampshire home office do not suffice to prove that any element of his offer to C.C. more likely than not "[o]riginate[d] from this state." RSA 421-B:30, III(a).

[¶43] As such, the director's finding that the Act applied to C.C.'s purchase of securities was unreasonable. See RSA 421-B:30, I, III(a). We therefore determine that the respondents did not need to register the securities that C.C. purchased. Having so concluded, we need not assess whether the Bureau's penalty for C.C.'s unregistered investment violated the dormant Commerce Clause.

iv. Number of Fines

[¶44] In addition to their argument that RSA 421-B:17, II(p) exempted each investor's call and put options from registration, the respondents assert that the director wrongfully fined them $2,500 for each of the three securities sold to investors. Observing that each set of three securities — a promissory note and call and put options — was sold in a unified transaction, they argue that each transaction only amounts to one violation of the Act.

[¶45] Because the respondents' sales of unregistered securities occurred before the current Act's enactment, we consider various provisions of the predecessor Act. See RSA 421-B:7-701(a) (2022). "Any person who, either knowingly or negligently, violates any provisions of this chapter may . . . be subject to," inter alia, "an administrative fine not to exceed $2,500." RSA 421-B:26, III (2006) (repealed and reenacted 2015). "Each of the acts specified shall constitute a separate violation." Id. The provision's two preceding paragraphs make clear that the maximum fine is "for each violation." RSA 421-B:26, I, II (2006) (repealed and reenacted 2015).

[¶46] Given that RSA 421-B:11, I, makes it "unlawful for any person to offer or sell any security in this state unless it is registered," the respondents' relevant acts or violations were their sales of unregistered securities. "'Sale' or 'sell' includes every contract of sale of, contract to sell, or disposition of, a security," RSA 421-B:2, XIX(a) (2006) (repealed and reenacted 2015), while "'[s]ecurity' shall include any note; . . . [or] any put, call, straddle, [or] option," RSA 421-B:2, XX(a) (Supp. 2015) (repealed and reenacted 2015). The director concluded that each promissory note, call option, and put option sold was a security and, by levying a fine for each instrument, effectively determined that the sale of each unregistered security constituted a violation. This finding accords with the Act. See RSA 421-B:2, XIX(a), XX(a); RSA 421-B:11, I.

[¶47] As discussed above, the director should assess on remand whether RSA 421-B:17, II(p) exempts each investor's call and put options from the registration requirement. However, if that exemption does not apply, the Act poses no bar to imposing a fine for each security sold.[5]

C. Fincke's Liability

[¶48] The respondents next submit that the director could not hold Fincke jointly and severally liable with Advent. They contend that in an administrative proceeding under the Act, the Bureau may not "impose joint and several liability on corporate officers like Mr. Fincke for the actions of the corporation." We disagree.

[¶49] As the final order states, Fincke and Advent both fall within the Act's definition of "[p]erson": "an individual, corporation, . . . or any other entity." RSA 421-B:2, XVI (2006) (repealed and reenacted 2015); see also RSA

[5] The respondents also assert that the director made an arithmetic error when tabulating the number of registration violations. On remand — upon determining whether RSA 421-B:17, II(p), exempted any investments from registration, and taking into account our conclusions that F.H. and C.C.'s investments were exempt — the director should re-calculate the number of violations.

421-B:1-102(39) (2022). Under the predecessor Act, which pertains to the respondents' registration violations, "[a]ny person" violating the Act may face administrative liability. RSA 421-B:26, III. Such liability may also extend to "[e]very person who directly or indirectly controls" such a person and "every employee of such person who materially aids in . . . the violation," among others. RSA 421-B:26, III-a (2006) (repealed and reenacted 2015).[6] The Act thus plainly permits the Bureau to sanction more than one "person" found to have committed the same statutory violation.

[¶50] Although the director's order denying the respondents' motion to reconsider states that Fincke "exercised control over and was responsible for the conduct of Advent . . . as its President," the director also explained that Fincke "materially aided Advent's conduct" and "sold securities to investors." Indeed, the hearing testimony reflects that Fincke personally planned Advent's sales and marketing efforts, drafted updates to investors, and spoke with investors and with regulatory counsel. The director could thus fairly conclude that Fincke bore personal responsibility for Advent's New Hampshire sales of unregistered securities. See RSA 421-B:11, I. Therefore, the respondents' suggestion that the Bureau imposed vicarious liability on Fincke solely in his capacity as Advent's "control person" misses the mark. So does their argument that penalizing Fincke violated constitutional due process mandates because the Bureau's staff petition did not specifically plead a vicarious liability claim against him. We accordingly affirm the Bureau's imposition of joint and several liability against the respondents.

D. Constitutionality of Penalty

[¶51] Next, the respondents argue that the director's fines, rescission of the respondents' New Hampshire securities sales, and permanent injunction against offering or selling securities in New Hampshire amounted to an unduly excessive penalty under the State and Federal Constitutions. Although we normally review a decision regarding a sentence or penalty for an unsustainable exercise of discretion, we review a party's claim that a sentencing decision violated constitutional rights de novo. See State v. Burgess, 156 N.H. 746, 752 (2008).

[¶52] We first address the respondents' claim under the State Constitution and rely upon federal law only to aid our analysis. State v. Ball, 124 N.H. 226, 231-32 (1983). To violate Part I, Article 33 of the New Hampshire Constitution, "a sentence must be grossly disproportionate to the crime," such that there is a "great imbalance between the gravity of the offense

[6] As the Bureau observes, the current Act's provision pertaining to administrative enforcement likewise stipulates that "every such person who is subject to such civil penalty" may also "be subject to such suspension, revocation, or denial of any registration or license." RSA 421-B:6-604(d) (2022) (emphasis added).

and the harshness of the fines." State v. Enderson, 148 N.H. 252, 259 (2002) (brackets omitted). "[A]n abuse of sentencing discretion will also occur if the [authority] fails to consider all the relevant factors necessary to the exercise of its discretion." Id. Nevertheless, the sentencing authority is "vested with broad discretionary powers," id., including "broad discretion to choose the sources and types of evidence upon which to rely in imposing [a] sentence," Burgess, 156 N.H. at 751.

[¶53] The respondents raise several arguments to support their overarching challenge to the penalties' constitutionality. They first argue that the director overlooked that: (1) their violation of RSA 421-B:11 was inadvertent, as their counsel did not advise them that registration was necessary; and (2) penalizing their pre-2016 sales serves no deterrent purpose, because the current Act would exempt all these sales if it applied. The respondents also posit that rescinding Advent's securities sales may oppose some investors' desires. Lastly, they assert that the director lacked evidence supporting his statement, in his supplemental order permanently enjoining the respondents from offering or selling securities statewide, that their "acts demonstrate a pattern of deceptive practices and non-compliance with securities laws."

[¶54] In examining the director's orders, we do not find that he ignored "factors necessary to the exercise of [his] discretion," Enderson, 148 N.H. at 259 (emphasis added), or that he exceeded the broad discretion accorded in sentencing by considering improper evidence. See Burgess, 156 N.H. at 751. Nonetheless, our reversal of the director's rulings that the respondents misrepresented facts in violation of RSA 421-B:3, I(b) and RSA 421-B:5-501(a)(2) significantly alters the calculus as to the severity of punishment appropriate to balance "the gravity of the offense" at hand. Enderson, 148 N.H. at 259. We therefore vacate the imposed fines, rescission of sales, and injunction and remand for the director to determine, in the first instance, the appropriate penalties in light of this opinion.

[¶55] The State Constitution provides at least as much protection as the Federal Constitution under these circumstances. Id. at 258. Thus, we reach the same result under the Federal Constitution as we do under the State Constitution.

E. Award of Costs

[¶56] Finally, the respondents challenge the director's award of $60,000 in investigative and enforcement costs to the Bureau. We first consider the respondents' charge that RSA 421-B:6-604(g) (2022) authorizes an award of costs, not attorney's fees — which the Bureau included in its submission to the director documenting its accrued expenses.[7]

[¶57] RSA 421-B:6-604(g) provides: "In a final order, the secretary of state may charge the actual cost of an investigation or proceeding for a violation of this chapter or an order issued under this chapter." As the Act does not define "investigation" or "proceeding," see RSA 421-B:1-102 (Supp. 2025), "we look to [these terms'] common usage, using the dictionary for guidance." Appeal of Port City Air Leasing, Inc., 177 N.H. 149, 153 (2024), 2024 N.H. 71, ¶10; see Boucher, 176 N.H. at 274 (noting that we construe statutory language by its "plain and ordinary meaning"); RSA 21:2. As relevant here, "investigation" means "[t]he activity of trying to find out the truth about something," especially "an authoritative inquiry into certain facts." Black's Law Dictionary 987 (12th ed. 2024). "Proceeding" means "[a]ny procedural means for seeking redress from a tribunal or agency" or "[t]he business conducted by a court or other official body; a hearing." Black's Law Dictionary 1459 (12th ed. 2024). Because the Act includes the actual costs associated with "an authoritative inquiry into certain facts" and the "procedural means for seeking redress" at a "hearing" before an "official body," these definitions contemplate the "Attorney's Fees" the Bureau requested. As the Bureau's itemized submission reflects, the Bureau incurred these actual costs in litigating its allegations against the respondents and preparing for the hearing.

[¶58] The respondents also argue that the Bureau's failure to file "a post-hearing motion for allowance of costs" deprived them of due process. They additionally contend that because the Bureau only submitted proof of its costs after the director's final order, the director improperly granted the Bureau's requested $60,000 figure without proof. However, the Bureau requested $60,000 in costs in its 2023 staff petition, at the outset of the proceedings — affording the respondents ample opportunity to dispute this request. Further, given that the Bureau ultimately supplied evidence supporting its request, any error in awarding these costs "did not affect the outcome below." Kessler v. Gleich, 156 N.H. 488, 494 (2007). We accordingly affirm the award of costs.

III. Conclusion

[¶59] In sum, we reverse the director's conclusion that the respondents misrepresented material facts to investors in violation of RSA 421-B:3, I(b) and RSA 421-B:5-501(a)(2). We also reverse his rulings that: (1) F.H. and N.S./T.W.'s investments fell outside the numerical thresholds for an isolated sale exemption under RSA 421-B:17, II(a)(2)(A); and (2) the respondents illegally failed to register C.C.'s investment, which occurred outside New

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[7] As no party argues that RSA 421-B:6-604(g) (2022) should not apply to the Bureau's costs to investigate and enforce violations of the predecessor Act, we assume, without deciding, that this provision applies.

Hampshire. We further vacate the director's determination that none of the respondents' sales qualified for an exemption under RSA 421-B:17. Finally, we vacate the portions of the director's orders specifying the fines, rescission of sales, and injunction imposed. We otherwise affirm the director's orders and remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part; vacated in part; and remanded.

COUNTWAY and WILL, JJ., concurred.