

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

RECEIVED

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

Plaintiff,

CIVIL ACTION

v.

: FILE NO.

04C 5437

UPSHAW AND ASSOCIATES, L.L.C., and
JAMES E. UPSHAW, SR.,

Defendants.

MACISTIZA "E" JUDGE

COMPLAINT

Plaintiff Securities and Exchange Commission ("SEC" or "Commission") for its
Complaint, states as follows:

NATURE OF THE ACTION

1. This matter involves the fraudulent and ongoing offering of investment promissory notes by Defendants James E. Upshaw, Sr. ("Upshaw") and Upshaw and Associates, L.L.C. ("Upshaw and Associates"). From at least October 2000 to the present, the Defendants have sold high return promissory notes to at least 137 investors in eight states, raising at least \$6.1 million. Upshaw's investment scheme targeted the African-American community, including African-American churches and their members. Upshaw lured individuals into his scheme by promising guaranteed returns of up to 10% per month, which returns supposedly were generated by trading in blue chip stocks, Treasury instruments, and commercial paper. Yet, rather than investing the investors' money as he promised, Upshaw used it to, among other things, pay returns to other investors, fund business ventures for himself, his wife, and his

friends, and to line his own pockets by purchasing a luxury home in Oakbrook, Illinois and two luxury automobiles. He never invested the money in a way that could generate the level of returns he had guaranteed.

2. Upshaw's scheme to defraud investors has now collapsed. He recently reported to the SEC that he has little more than \$600 in cash on hand to repay the vast sums of money he still owes to investors. Upshaw's admission of his precarious financial state reveals his "guarantee" of high returns to investors as a complete sham.

3. Upshaw's fraudulent scheme continues. In response to investor questions about bounced checks and missed deadlines, Upshaw has recently told investors that their funds are protected by an "attorney trust" being overseen by the SEC. Upshaw may have contemplated such an arrangement, but it never came to pass. Upshaw's claim that there exists an "attorney trust" overseen by the SEC has the effect of giving investors false comfort.

4. Emergency relief is warranted in this case. Upshaw has shown a talent for raising funds from unsuspecting investors, and he urgently needs cash to maintain the illusion that his investment scheme is viable. Upshaw's accounting to the SEC shows that he raised significant funds, but does not account for the use of those funds. There is a significant risk that Upshaw will continue to dissipate investor funds. Further, although Upshaw has provided the SEC with documents and, through his attorneys, with information concerning his scheme, he has refused to speak directly with the SEC. Although the SEC has had only days to investigate Upshaw's scheme, it is apparent that emergency injunctive relief, an asset freeze and other equitable relief are warranted. Such relief will put an end to Upshaw's deception and preserve what assets remain.

5. By making false and misleading statements to actual and potential investors, Upshaw and Upshaw and Associates have violated Sections 5(a), 5(c), 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule I Ob-5 thereunder. There is a reasonable likelihood that the Defendants will, unless enjoined, continue to engage in the transactions, acts, practices and courses of business set forth in this Complaint, and transactions, acts, practices and courses of business of similar purport and object.

6. The SEC brings this action to restrain and enjoin such transactions, acts, practices, and courses of business pursuant to Section 20(b) of the Securities Act [15 U.S.C. §77t(b)] and Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§78u(d) and 78u(e)].

JURISDICTION

7. The Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. §77v(a)] and Section 27 of the Exchange Act [15 U.S.C. §78aa].

8. The Defendants, directly and indirectly, have made, and are making, use of the mails, and of the means and instrumentalities of interstate commerce, in connection with the transactions, acts, practices and courses of business alleged in this Complaint.

THE DEFENDANTS

9. Upshaw and Associates, L.L.C. ("Upshaw and Associates") is an Illinois limited liability company headquartered in Westchester, Illinois. Upshaw and Associates is the issuer of the promissory notes offered and sold to investors in this scheme.

10. James E. Upshaw, Sr. ("Upshaw") is 47 years old and a resident of Oak Brook, Illinois.

THE FACTS

THE DEFENDANTS' OFFERING OF PROMISSORY NOTES TO INVESTORS

11. Since at least October 2000, Upshaw has directed the sale of promissory notes to investors and the use of proceeds from the sale of such notes. The promissory notes that Upshaw has offered and sold to investors are issued by Upshaw and Associates, an entity controlled by Upshaw. The Defendants' have raised at least \$6.1 million from at least 137 investors in eight states, through their offering of promissory notes (the "note offering").

12. Upshaw's offering is an "affinity fraud" in that Upshaw based his appeal to potential investors on their shared cultural heritage and religious affiliation. Upshaw personally solicited individuals and churches to invest in the notes. He told at least one investor that God had called upon him to help people by investing their money. Many of the investors in Upshaw's offering are fellow African-Americans who are members of Christian churches. The majority of investors in the note offering reside in the Chicago area, Ohio, and California, with other investors residing in at least five more states.

13. Upshaw gave potential investors offering materials to review in deciding whether to invest. The offering materials included a brochure, a fact sheet, and a promissory note agreement.

14. The brochure that Upshaw provided investors touts his experience and claims that Upshaw and Associates' "financial tools are second to none."

15. The fact sheet Upshaw gave to investors is a one-page document explaining what he intended to do with investor funds. In his "fact sheet," Upshaw told investors that he would invest their funds in large-cap U.S. stocks, Treasury bills and commercial paper.

16. According to Upshaw, investor money would then be sent to a company in New York and invested as described in the preceding paragraph.

17. In the promissory note agreement Upshaw gave to investors, he guaranteed the returns on the promissory note and stated that investors' actual returns may be higher.

18. Upshaw further enticed investors by claiming he had a \$1 million insurance policy to cover investments.

**UPSHAW MISREPRESENTED THE USE OF INVESTOR FUNDS
AND THE SAFETY OF THE INVESTMENTS**

19. Contrary to the representations Upshaw made to investors, Upshaw invested little, if any, investor proceeds in the manner promised. Rather, Upshaw used investor proceeds to, among other things,:

- a) Pay the returns of other investors;
- b) Pay Upshaw & Associates' operations costs;
- c) Pay a salary to Upshaw's wife;
- d) Pay commissions to others soliciting investors in the promissory notes;
- e) Purchase mutual fund shares through a bank;
- f) Make gold bullion investments through a company called Monex Credit Company;
- g) Lend money to various real estate investors;
- h) Fund family's and friends' businesses and other ventures, including:
 - i. Upshaw's "incubator business," which apparently sold office space;
 - ii. Upshaw's wife's collection agency;
 - iii. Giving \$30,000 to a church friend writing a book; and
 - iv. Spending \$5,000 funding his own book, which was never written;

- j) "Loan" himself \$200,000 to purchase a \$1.1 million home;
- k) Purchase a Mercedes and BMW; and
- l) Pay personal income taxes.

20. Likewise, Upshaw had no basis for guaranteeing returns. In fact, Upshaw's and Upshaw & Associates' bank accounts retain little more than \$600 out of the more than \$6 million he raised through his scheme.

21. Upshaw recently has made additional misrepresentations to lull angry investors. For instance, Upshaw recently blamed his inability to pay the guaranteed returns on banking errors, and even Patriot Act restrictions. Upshaw also recently misrepresented to investors that their funds are protected in an "attorney trust" being overseen by the SEC.

22. The facts that Upshaw misrepresented to investors go to the heart of the decision to invest in the note offering. A reasonable investor would consider it important to know that Upshaw did not use investor proceeds in the manner he represented and that an investment in the note offering was not as safe as Upshaw represented.

23. No registration statement has been filed or is in effect with the Commission in connection with the securities offered or sold by Upshaw and Upshaw and Associates.

COUNT I
Violations of Section 17(a)(1) of the Securities Act [15 U.S.C. §77q(a)(1)]

24. Paragraphs I through 23 are hereby realleged and incorporated by reference herein.

25. From at least October 2000 through the present, Upshaw and Upshaw and Associates, in the offer and sale of securities in the form of promissory notes, by the use of the means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly, have employed and are employing devices, schemes and artifices to defraud.

26. Upshaw and Upshaw and Associates knew or were reckless in not knowing the facts and circumstances described in Paragraphs 1 through - above.

27. By reason of the foregoing, Upshaw and Upshaw and Associates have violated and are violating Section 17(a)(1) of the Securities Act.

COUNT II
Violations of Section 17(a)(2) and 17(a)(3)
of the Securities Act [15 U.S.C. § 77q(a)(2) and § 77q(a)(3)]

28. Paragraphs 1 through 27 are hereby realleged and incorporated by reference herein.

29. From at least October 2000 through the present, Upshaw and Upshaw and Associates, in the offer and sale of securities in the form of promissory notes, by the use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, have obtained and are obtaining money and property by means of untrue statements of material fact and have omitted and are omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and have engaged and are engaging in transactions, practices and courses of business which

have operated and will operate as a fraud and deceit upon purchasers and prospective purchasers of the promissory notes issued by Upshaw and Associates.

30. By reason of foregoing, Upshaw and Upshaw and Associates have violated and are violating Sections 17(a)(2) and 17(a)(3) of the Securities Act.

COUNT III
**Violations of Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)]
and Rule 10b-5 [17 C.F.R. 240.10b-5] thereunder**

31. Paragraphs I through 30 are hereby realleged and incorporated by reference herein.

32. From at least October 2000 through the present, Upshaw and Upshaw and Associates, in connection with the purchase and sale of securities in the form of promissory notes, by the use of the means and instrumentalities of interstate commerce and of the mails, directly and indirectly, have employed and are employing devices, schemes and artifices to defraud; have made and are making untrue statements of material fact and have omitted and are omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and have engaged and are engaging in acts, practices and courses of business which operated and will operate as a fraud and deceit upon purchasers and sellers of such securities.

33. Upshaw and Upshaw and Associates knew or were reckless in not knowing of the activities described in Paragraphs 1 through 32 above.

34. By reason of foregoing, Upshaw and Upshaw and Associates have violated and are violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

COUNT IV

Violations of Section 5(a) and (c) of the Securities Act [15 U.S.C. § 77e(a) and (c)]

35. Paragraphs 1 through 34 above are realleged and incorporated herein by reference.

36. From at least October 2000 to the present, Upshaw and Upshaw and Associates, directly and indirectly, and notwithstanding that there was no applicable exemption: (i) made use of means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of a prospectus or otherwise, securities in the form of promissory notes as to which no registration statement was in effect; (ii) for the purpose of sale or delivery after sale, carried and/or caused to be carried through the mails or in interstate commerce, by means or instruments of transportation, securities as to which no registration statement was in effect; and (iii) made use of means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of a prospectus or otherwise, securities as to which no registration statement had been filed.

37. No valid registration statement was filed with the Commission in connection with Upshaw and Upshaw and Associates' sales of, and offers to sell, promissory notes.

38. By reason of the foregoing, Upshaw and Upshaw and Associates have violated and are violating Sections 5(a) and (c) of the Securities Act [15 U.S.C. § 77e(a) and (c)].

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that the Court:

A. Enter an order, in forms consistent with Rule 65(d) of the Federal Rules of Civil Procedure, restraining and enjoining:

(a) Upshaw and Upshaw and Associates, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of the order, by personal service or otherwise, from directly or indirectly engaging in the acts, practices or courses of business described above, or in conduct of a similar purport and object from violating Sections 5(a) and (c) of the Securities Act [15 U.S.C. § 77e(a) and (c)];

(b) Upshaw and Upshaw and Associates, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of the order, by personal service or otherwise, from directly or indirectly engaging in the acts, practices or courses of business described above, or in conduct of a similar purport and object, in violation of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)];

(c) Upshaw and Upshaw and Associates, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with him who receive actual notice of the order, by personal service or otherwise, from directly or indirectly engaging in acts practices or courses of business described above, or in conduct of a similar purport and object, in violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 [17 C.F.R. § 240.10b-5], thereunder.

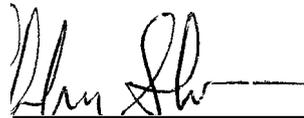
B. Order Upshaw and Upshaw and Associates to disgorge any and all ill-gotten gains, plus prejudgment interest.

C. Impose civil penalties against Upshaw and Upshaw and Associates pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)].

D. Grant such other and further relief as may be necessary and appropriate.

E. Retain jurisdiction over this action to implement and carry out the terms of all orders and decrees that may hereby be entered, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Sikora, Jr.", is written over a solid horizontal line.

Dated: August 18, 2004

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