

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18831

In the Matter of

SHAWN K. DICKEN,

Respondent.

DECLARATION OF JOHN E. BIRKENHEIER

John E. Birkenheier declares under penalty of perjury as follows:

1. I am employed as a Supervisory Trial Counsel in the Division of Enforcement in the Chicago Regional Office of the Commission. I am counsel for the Division in this matter. I am over eighteen years of age and competent to testify to the matters set forth in this declaration.

2. In response to the Order Requesting Additional Briefing, issued on August 12, 2020, the Division obtained a copy of the transcript of the jury trial and sentencing hearings in the Michigan State criminal prosecution of *People v. Shawn Kristi Dicken*, Case No. 2013-005531-FH (Cir. Ct., Midland County, Michigan). The Division was able to obtain a paper copy of the transcript through the cooperation of the Circuit Court for Midland County, Michigan. I reviewed the transcript. Based on my review, I submit this declaration.

The Trial

3. The trial of the case lasted eight days. Between them, the prosecution and defense called nineteen witnesses. The witnesses included investor-victims, employees of Diversified,

investigators, an expert, and the defendant. The parties also introduced approximately eighty-one exhibits, including checks, bank statements, offering documents, subscription agreements, and summary exhibits.

Victim Testimony

4. The victims who testified at the trial testified to several facts: The victims were almost all senior citizens and retired or nearing retirement. One victim was an [REDACTED] adult for whom a relative had been given a power of attorney. The victims almost all had known Dicken for several years, because she had previously served as their financial advisor at a local branch of a national bank. In her position with that bank, Dicken assisted almost all the victims with their retirement accounts. They trusted Dicken. At least one considered Dicken to be a friend.

5. Prior to the Diversified offering, Dicken was terminated by the bank because of what the Court, at the sentencing, labelled churning of customer accounts to increase her income. After her termination by the bank, Dicken began her association with Diversified.

6. The victims testified that after leaving the bank and joining Diversified, Dicken contacted them and solicited them to invest in Diversified. As part of her solicitation Dicken visited each of the victims on more than one occasion at their homes. At the time Dicken solicited one victim, the victim was undergoing [REDACTED] and [REDACTED], for which she was taking [REDACTED]. Dicken also solicited the [REDACTED] adult victim without notifying the relative who held that victim's power of attorney.

7. The victims were elderly and unsophisticated and did not understand the investments Dicken offered and sold to them. The investments involved bonds, limited

partnerships, and/or stock. Dicken described the business of Diversified as buying old houses, rehabbing the properties, and then either reselling or renting them.

8. According to the victims, several told Dicken that they did not want to put their principle at risk. Dicken told victims that there was no risk to principle, the investment would earn ten percent annually, and the principle could be withdrawn on demand. Dicken told at least one of the victims that the Diversified investments were as safe as U.S. savings bonds.

9. The victims also testified that Dicken did not disclose to them that their principle would be tied up for a long period of time and that the principle could be lost.

10. Victims testified that Dicken did not give them offering documents, but instead drew graphs, purporting to show expected returns, on a pad of paper.

11. Dicken's fraud against one of the victim-witnesses ("Investor A") formed the basis for Count Ten of the Indictment—fraudulent sale of securities. (See ¶ 23, below.)

12. Investor A testified that he was 66 years old and had known Dicken from when she worked for the bank. Dicken had advised Investor A about retirement investments. A year or two later, Dicken contacted Investor A "out of the blue" and said she wanted to come to Investor A's house to talk about investments. Dicken did come to his house "numerous times" and discussed a single investment opportunity. She brought a big pad of paper and drew lines to illustrate the returns Investor A would receive. Investor A's [REDACTED], and his [REDACTED]. He could not say what he had invested in, but he did recall that his investment related to real estate and Diversified. Dicken told Investor A his investment was safe. She did not tell him there was a risk of losing all his money. Dicken said the return on the investment would be ten percent. Investor A decided to invest \$30,000 in a Diversified limited partnership. Dicken would bring Investor A papers to sign. He does not recall going over the papers, just

Dicken indicating where he should sign. He did not remember whether Dicken showed him Diversified offering documents.

13. While Dicken worked at Diversified, she also sold Investor A a \$100,000 Jackson National Life variable annuity. Dicken sold this investment to Investor A before she solicited him to invest in Diversified. The final time Dicken came to Investor A's house was in February 2012, when she wanted him to move \$100,000 from his annuity into Diversified.

14. The victims who testified said they invested amounts ranging from \$25,000 to \$100,000. These funds comprised all or some of each victim's retirement savings. At least one victim, a retiree, liquidated shares of stock from his former employer, to invest in Diversified through Dicken.

15. The victims testified about offers and sales of Diversified investments in approximately 2010 and 2011 and at least one offer as late as February 2012.

Expert and Investigator Testimony

16. The expert called by the prosecution explained the definition of securities and the regulation and duties of associated persons such as Dicken. The expert opined that Dicken had not performed any due diligence on the investments she offered and sold to the investors. The expert also opined that Dicken had sold investments that were unsuitable for her elderly, unsophisticated victims who, at Dicken's suggestion, liquidated safer holdings in order to invest in Diversified. The expert testified that the enterprise was a Ponzi scheme.

17. The expert also explained that Dicken received a ten percent commission from her sale of Diversified investments.

18. An investigator called by the State testified that the money invested by Dicken's victims was commingled with money received from other sources by Diversified. No track was

kept of the specific limited partnership in which any given victim was purportedly investing. Commingled funds were then paid out for various purposes, without regard to the source of the money, or the particular limited partnership for which the investor's money was purportedly received. The investigator described the enterprise as a Ponzi scheme.

The Investigator Interview Report

19. During the prosecution's case in chief, it came to light that a few weeks before the trial a prosecution investigator interviewed a defense witness and the prosecution had not turned the report of the interview over to the defense counsel. The prosecution's position on the issue was that the interview was related to different criminal charges than those at issue in the trial. The prosecution turned over the interview report to the defense and the Court when the issue arose during the trial.

20. The Defense moved for a mistrial.

21. After reviewing the report, the Court asked for briefs on the motion for the mistrial and decided to proceed with the trial in the meantime.

Jury Instructions

22. At the conclusion of the evidence, the Court instructed the jury.

23. In his instructions, the Court stated that Count Ten of the indictment charged Dicken with the fraudulent sale of securities to Investor A. With regard to this Count, the Court instructed the jury, among other things, that before the trial the prosecution had failed to promptly turn over to the defense an investigator's report regarding the alteration of documents related to Diversified. The Court stated that the failure did not appear to bear on the question of guilt or innocence, but instructed the jury that if they thought it appropriate, they could consider possible harm to the defense in preparing its case caused by the delay in deciding whether the

prosecution had proved Count Ten—the fraudulent sale of securities—beyond a reasonable doubt.

The Verdict

24. The jury convicted Dicken on Count One (conducting a criminal enterprise), Counts Two through Eight (obtaining more than \$1,000 through false pretenses), and Count Nine (embezzling more than \$50,000 from a vulnerable adult).

25. The jury, however, found Dicken not guilty on Count Ten (fraudulent sale of securities). The record provides no explanation for this verdict of not guilty.

The Court's Findings at the Sentencing Hearing

26. After the trial, the Court received victim impact statements from additional victims. In total, the Court received trial testimony or victim impact statements from over twenty victims.

27. At the sentencing hearing, the Court heard argument from counsel and testimony from several victims.

28. The Court then made the following findings:

- a. Dicken was terminated by her previous employer because she had “churned” customer accounts for her benefit; as part of her termination, Dicken agreed not to contact her clients; this term was intended to protect Dicken’s clients; but Dicken disregarded her promise and contacted her clients anyway;
- b. Her conduct showed that Dicken cannot be trusted to follow orders not to return to this line of work;
- c. Dicken exploited her position of trust as a licensed financial advisor;
- d. Dicken exploited the trust her clients placed in her;

- e. Dicken showed no real remorse; she claimed she believed the Diversified investments were legitimate; but if she really believed that, she would not have lied to her clients about what was being done with their money;
- f. The Diversified investments were not legitimate; the enterprise was in fact a Ponzi scheme;
- g. Dicken lied to her victims, repeatedly and face-to-face, about the risks and safety of the Diversified investments, for the purpose of getting them to invest;
- h. The evidence showed the Diversified investments were not appropriate for senior citizens;
- i. Dickens's victims lost their life savings, suffered substantially lowered standards of living, and some no longer could afford to live in their own homes;
- j. Restitution against Dicken should be set at \$780,700.
- k. An upward departure from the sentencing guidelines was appropriate because some victims suffered psychological injury as a result of Dicken's fraud, because of her past violations, and because she took her victims' life savings;

29. Based on his findings, the Court sentenced Dicken to 140 months to 20 years on Count One, 23 months to 5 years on Counts Two to Eight, and 71 months to 15 years on Count Nine, to be served concurrently.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2020

s/John E. Birkenheier
John E. Birkenheier