

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 8744 / September 27, 2006

SECURITIES EXCHANGE ACT OF 1934

Release No. 54524 / September 27, 2006

ADMINISTRATIVE PROCEEDING

File No. 3-12440

In the Matter of

**VESTIN CAPITAL, INC.,
VESTIN MORTGAGE, INC.
and MICHAEL V. SHUSTEK,**

Respondents.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933 AND 15(b)
OF THE SECURITIES EXCHANGE ACT OF
1934**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate in the public interest that cease-and-desist proceedings be, and hereby are, instituted against Vestin Mortgage, Inc. (“Vestin Mortgage”) pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Vestin Capital, Inc. (“Vestin Capital”) and Michael V. Shustek (“Shustek”) (collectively with Vestin Capital and Shustek, “Respondents”) pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934 (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offer, the Commission finds that:

Respondents

1. Vestin Mortgage is a Nevada corporation headquartered in Las Vegas, Nevada. It is the manager of real estate investment funds, including Vestin Fund II, LLC ("Fund II") and Vestin Fund III, LLC ("Fund III"). In this capacity, it arranges and services commercial loans held by the Funds and manages the Funds' day-to-day operations.

2. Vestin Capital is a Nevada corporation headquartered in Las Vegas, Nevada, and is registered with the Commission as a broker-dealer. Vestin Capital sells units of the Funds to members of the public. It was the only broker-dealer selling the Funds' securities and does not sell any other securities.

3. Shustek, age 47, resides in Las Vegas, Nevada. He is the founder, principal owner, and controlling person of Vestin Capital and Vestin Mortgage. Shustek holds NASD Series 7, 22, 24, 39, and 63 licenses.

Background

4. These proceedings relate to the Respondents' use of certain sales materials from July 2002 through August 2003 and from November 2003 through December 2004 in the offer and sale of securities of Fund II and Fund III, in which the Respondents negligently provided misleading information regarding the prior investment returns of certain Vestin funds.

5. Since September 2000, Respondents have raised approximately \$560 million from investors through the offer and sale of securities registered on Forms S-11 in three funds—Vestin Fund I, LLC ("Fund I"), Fund II, and Fund III. Fund I's offering raised \$100 million from September 2000 through June 2001; Fund II's offering raised approximately \$432 million from June 2001 through June 2004; and Fund III's offering has raised approximately \$28 million since November 2003. Each of the offerings was sold at an initial price of \$10 per unit ("Unit Value").

6. Vestin Mortgage manages the Funds' day-to-day operations, including making their investment decisions, determining the amounts of distributions to their investors, keeping their books and records, and preparing their periodic filings. Shustek was intimately involved in operating the Funds. Vestin Mortgage has generally invested the Funds in short-term commercial real estate loans that it arranged and serviced.

7. Pursuant to the terms of the Funds' operating agreements, Vestin Mortgage generally caused each Fund to make monthly distributions to investors based upon that Fund's anticipated cash flow. These distributions were not calculated based on the Fund's reported net income according to Generally Accepted Accounting Principles ("GAAP") (hereafter "GAAP Net Income").

8. Fund I and Fund II initially generated sufficient cash flow and net income to pay investors monthly cash distributions at an annualized rate of 11% to 13%. During this period, the amount that Vestin Mortgage actually distributed to investors (“Cash Distribution Rate”) closely approximated the GAAP Net Income.

9. After about two years, however, the GAAP Net Income began to decline for Fund I and Fund II, in part because of an increasing amount of non-performing loans and foreclosures. At the same time, both Fund I and Fund II continued to pay monthly cash distributions based upon anticipated cash flow, which in certain quarterly time periods exceeded the Funds’ GAAP Net Income. Thus, in those quarters, when Fund I’s and Fund II’s cash distributions exceeded GAAP Net Income, they caused the particular Fund’s Unit Value to decline with a corresponding decrease in each investor’s equity account, as determined in accordance with GAAP.

The Respondents’ Offer and Sale of Fund II and Fund III Securities

10. Respondents sold units in Funds II and III through several hundred seminars nationwide during the relevant time period. Shustek conducted the seminars. At the seminars, Shustek used slide presentations that he created. In addition, at each seminar, Respondents provided investors with the relevant Fund’s most recent prospectus and periodic filing with the Securities and Exchange Commission, which included the Fund’s financial statements and reported GAAP Net Income.

11. The slide presentations featured information about Fund I’s and Fund II’s Cash Distribution Rate, which was typically expressed in percentage form. The slides that were used prior to December 1, 2004, presented a table of the Funds’ Cash Distribution Rate. The slides, however, contained a footnote stating that the percentages represented the Funds’ “yield” as calculated based upon the Funds’ “net income” or “accumulated earnings,” which created the misleading impression that they were referring to the GAAP Net Income instead of the Cash Distribution Rate. The slides failed to disclose the GAAP Net Income, which was otherwise disclosed in the Funds’ financial statements filed on Forms 10-Q and 10-K.

12. At seminars from July 2002 through August 2003 and from November 2003 through November 2004, the Cash Distribution Rates set forth in the slides for certain periods were materially higher than the corresponding GAAP Net Income. The slides also failed to disclose that the Cash Distribution Rate in certain periods caused a particular fund’s Unit Value to decline and that there would be a corresponding decrease in each investor’s equity account, as determined in accordance with GAAP.

13. After December 1, 2004, the slides were changed to include a footnote stating that distributions were paid from “cash flow from operations,” which “may exceed net income as calculated in accordance with GAAP.”

14. From July 2002 through August 2003, Fund II raised approximately \$172.7 million from investors. From November 2003 through November 2004, Fund III raised approximately \$23.6 million from investors.

Legal Discussion

15. As a result of the conduct described above, Respondents willfully¹ violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Under these provisions, the misrepresentations and omissions in the offer or sale of securities must be material. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976). A statement or omission is considered material “if there is a substantial likelihood that a reasonable shareholder would consider it important.” Id. There is no scienter requirement for violations of Sections 17(a)(2) and 17(a)(3); negligent conduct is sufficient to establish liability. Aaron v. SEC, 446 U.S. 680, 697 (1980); SEC v. Scott, 565 F. Supp. 1513, 1525 (S.D.N.Y. 1983) (Commission can establish violation by showing “defendants *negligently* caused those misrepresentations or omissions”).

16. In the slide presentations for the Fund II and Fund III seminars, Respondents featured Fund I’s and Fund II’s prior performance. From July 2002 through August 2003 and from October 2003 through December 2004, Respondents negligently misrepresented that the Funds’ Cash Distribution Rates were based upon GAAP Net Income, when in fact they were not. From July 2002 through August 2003 and from November 2003 through November 2004, Respondents also negligently omitted to disclose that the Cash Distribution Rates caused the particular fund’s Unit Value to decline and that there would be a corresponding decrease in each investor’s equity account, as determined in accordance with GAAP.

17. Respondents’ misstatements were material in that they related to the Funds’ purported net income and past investment returns, which a reasonable investor would find important to a decision to invest in the Funds.

Undertakings

Respondent Vestin Capital undertakes to:

18. For as long as Vestin Capital is operating as a broker or dealer or is registered with the Commission as a broker-dealer, but not to exceed two years from the date of this Order, retain, at its own expense, an independent consultant not unacceptable to the Commission’s staff to review all sales materials provided or made available to investors in connection with any offering of securities by Vestin Capital to ensure compliance with the federal securities law. Vestin Capital shall require the independent consultant to enter into an agreement that provides that, for the period of the engagement and for a period of two years from completion of the engagement, the independent consultant shall not enter into any employment, consultant, attorney-client, auditing, or other professional relationship with any Vestin entity or with any of its present or former officers, directors, affiliates, employees or agents, or any entity owned or

¹ “Willfully” as used in this Order means intentionally committing the act which constitutes the violation, Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor also be aware that he is violating one of the Rules or Acts.

controlled, directly or indirectly, by Shustek. The agreement will also provide that the Independent Consultant will require that any firm with which the Independent Consultant is affiliated or of which the Independent Consultant is a member, and any person engaged to assist the Independent Consultant in performance of its duties under this Order shall not, without prior written consent of the Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with any Vestin entity or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such, or entity owned or controlled, directly or indirectly, by Shustek, for the period of the engagement and for a period of two years after the engagement. For the same period of time, the independent consultant shall not invest or participate in any Vestin entity or with any entities affiliated with present or former officers, directors, affiliates, employees or agents of Vestin or its entities.

Respondent Vestin Mortgage undertakes to:

19. Devise and implement procedures, and a system for applying such procedures, reasonably designed to ensure that it provides investors with true and accurate past performance data in any sales material or in any communications to investors.

Respondent Shustek undertakes to:

20. Provide to the Commission, within ten days after the end of the six month suspension period described below, an affidavit in a form to be mutually agreed upon that he has complied fully with the sanctions in Section IV below.

IV.

In view of the foregoing, the Commission deems it appropriate in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondents cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

B. Respondent Shustek be, and hereby is, suspended from association with any broker or dealer for a period of six months, effective on the second Monday following the entry of this Order.

C. IT IS FURTHER ORDERED that Respondent Shustek shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of \$100,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Shustek as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or

check shall be sent to Briane Nelson Mitchell, Associate Regional Director, Pacific Regional Office, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Floor, Los Angeles, CA 90036.

D. Respondents shall comply with the undertakings enumerated in Paragraphs 18 through 20 above.

By the Commission.

Nancy M. Morris
Secretary