

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.:

SECURITIES AND EXCHANGE COMMISSION, :
 :
 Plaintiff, :
 :
 v. :
 :
 GAETON S. DELLA PENNA, :
 :
 Defendant, and :
 :
 GAETON CAPITAL ADVISORS, LLC, :
 :
 Relief Defendant. :

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Securities and Exchange Commission alleges:

I. INTRODUCTION

1. From 2008 through 2013, Defendant Gaeton S. Della Penna defrauded investors in three companies he controlled. Della Penna solicited individuals to purchase notes in these companies on the representation the companies would use the money to trade in securities, in which Della Penna claimed to have been engaging in successfully. In fact, Della Penna lost almost all of the money through a combination of unsuccessful investments, use of investor money to pay Della Penna's personal expenses, including mortgage payments and payments to his girlfriend, and, in Ponzi-scheme fashion, use of later investors' money to pay fake "returns" to prior investors. Della Penna covered up his fraud by sending investors documents falsely showing positive returns at a time when they were losing money. Della Penna also solicited money from other investors on the representation he would use their money to invest in small

companies, but he stole most of that money as well. In total, of the approximately \$3.8 million Della Penna raised, he pocketed \$1.1 million and used \$1.4 million to pay prior investors.

2. By engaging in this conduct, Della Penna violated, and unless enjoined, is reasonably likely to continue to violate, Section 17(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77q(a); Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5; and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”), 15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4), and Advisers Act Rule 206(4)-8(a), 17 C.F.R. § 275.206(4)-8(a).

3. The Commission respectfully requests that the Court enter: (a) a permanent injunction restraining and enjoining Della Penna from violating the federal securities laws; (b) an order directing Della Penna and his company Gaeton Capital Advisors, LLC (“Gaeton Capital”) to pay disgorgement with prejudgment interest; and (c) an order directing Della Penna to pay civil money penalties.

II. DEFENDANT AND RELIEF DEFENDANT

A. Defendant

4. Della Penna, 61, resides in Sarasota, Florida. Della Penna formed and is the managing member of the following Florida Limited Liability Companies: A-G Hedge Group, LLC (“A-G”), The Contrarian Fund, LLC (“Contrarian”), and The New Economy Fund, LLC (“New Economy,” and, collectively with A-G and Contrarian, the “Funds”).

B. Relief Defendant

5. Gaeton Capital is a Florida Limited Liability Company formed by Della Penna in 2000 with its registered address in North Port, Florida.

III. JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1), and 22(a) of the Securities Act, 15 U.S.C. §§ 77t(b), 77t(d)(1), and 77v(a); Sections 21(d), 21(e), and 27 of the Exchange Act, 15 U.S.C. §§ 78u(d), 78u(e), and 78aa; and Sections 209(d) and 214 of the Advisers Act, 15 U.S.C. §§ 80b-9(d) and 80b-14.

7. This Court has personal jurisdiction over the Defendants, and venue is proper in the Middle District of Florida, because many of the acts and transactions constituting violations of the Securities Act, the Exchange Act, and the Advisers Act occurred in the Middle District of Florida. In addition, Della Penna's residence and Gaeton Capital's principal place of business were both located in the Middle District of Florida.

8. In connection with the conduct alleged in this Complaint, Della Penna, directly and indirectly, made use of the means and instrumentalities of interstate commerce, the means and instruments of transportation and communication in interstate commerce, and the mails.

IV. DELLA PENNA'S ACTS IN VIOLATION OF THE SECURITIES LAWS

A. Investments in the Funds

9. From November 2008 through October 2013, Della Penna solicited investors to purchase promissory notes in the Funds, which would mature in 18 months. Most investors were personal acquaintances of Della Penna, many of whom he met through his church.

A-G

10. Between 2008 and 2010, Della Penna distributed to prospective purchasers of A-G notes a private offering memorandum, which represented:

- a. A-G would use the net proceeds of money raised through the sale of notes to engage in securities trading;
- b. noteholders would receive:

- i. an annual return of 5%, payable quarterly;
 - ii. repayment of principal at the end of the 18-month term; and
 - iii. 75% of any trading profits, up to a maximum of 100% of the investor's original investment;
- c. A-G would provide periodic reports setting forth A-G's return on investment and expenses; and
- d. expenses associated with A-G would consist of the following:
- i. 25% of the trading profits, to be split between Della Penna and A-G's other member;
 - ii. reimbursement of legal fees, which totaled \$7500;
 - iii. reimbursement of costs and expenses incurred in the organization of A-G and the private offering;
 - iv. an "organizational fee" of 2% of the proceeds of the sale of the notes;
 - v. an annual management fee (to be split between Della Penna and A-G's other member) equal to 3% of the market value of A-G's investments as of the end of the calendar year; and
 - vi. fees of up to 5% to persons obtaining buyers for the notes.

11. Between November 2008 and June 2009, Della Penna sold to three separate investors A-G notes totaling \$745,000. By December 31, 2009, all but \$125 of these funds had been depleted, either lost through trading or used by Della Penna for personal expenses far in excess of any amount to which he was entitled under the terms of the offering memorandum, including payments to his girlfriend and payments on the mortgage on the 10,000 square foot house where he and his girlfriend resided.

12. On or about January 5, 2010, the individual who had invested in June 2009 purchased an additional \$400,000 in A-G notes. Della Penna did not disclose to this individual A-G's insolvency and its need for investor money to fund payments to prior investors and to

support Della Penna's spending. A-G ultimately depleted the January 2010 investment as well due to trading losses and payments to Della Penna, and A-G's noteholders suffered significant losses.

Contrarian

13. Della Penna solicited investors to purchase Contrarian notes, distributing between August 2010 and October 2013 a private offering memorandum in which Della Penna represented:

- a. Contrarian would use the net proceeds of monies raised through the sale of notes to engage in securities trading;
- b. noteholders would receive the following:
 - i. an annual return of 5%, payable quarterly;
 - ii. return of principal at the end of the 18 month term; and
 - iii. 80% of any trading profits, up to a maximum of 100% of the investor's original investment;
- c. Contrarian would provide periodic reports setting forth Contrarian's return on investment and expenses; and
- d. expenses associated with Contrarian would consist of the following:
 - i. 20% of the trading profits, to be split between Della Penna and Contrarian's other member;
 - ii. reimbursement of legal fees in the approximate amount of \$12,500;
 - iii. reimbursement of costs and expenses incurred in the organization of Contrarian and the private offering;
 - iv. an "organizational fee" of 3% of the proceeds of the sale of the notes;
 - v. an annual management fee (to be split between Della Penna and Contrarian's other member) equal to 3% of the market value of Contrarian's investments as of the end of the calendar year; and

- vi. fees of up to 5% to Della Penna or Contrarian's other member for obtaining buyers for the notes.

14. In or about August 2010, Della Penna falsely told a prospective investor he had a formula for successful trading, when in fact Contrarian had not yet done any trading and A-G had consistently suffered trading losses. In September 2010, this individual purchased \$215,000 in Contrarian notes. After the 18-month term of the notes expired, Della Penna told this individual he was extending the term but did not disclose Contrarian's insolvency. In October 2012, Della Penna sent this individual a letter falsely stating his investment was now worth \$257,513.50. In fact, at the time, Contrarian had approximately \$1 million in debt and less than \$5,000 in assets.

15. In September 2010, Della Penna sold an investor \$50,000 in Contrarian notes. By October 31, 2010, Contrarian had depleted through trading losses all but \$5,000 of the \$265,000 invested by the two initial note buyers.

16. Between November 2010 and October 2013, Della Penna continued to sell Contrarian notes, never disclosing Contrarian's insolvency and its continued dissipation of investor money due to trading losses, payments to Della Penna, and payments to earlier investors.

17. In or about March 2011, Della Penna told a prospective investor to expect an annual return on Contrarian notes of 20% to 30%. Della Penna provided this individual a document purporting to show profitable trading by an unidentified person during a two-month period in 2007 without disclosing the more recent trading losses suffered by A-G and Contrarian. This individual purchased \$250,000 in Contrarian notes, received quarterly interest payments, and, on or about July 22, 2013, cashed out, receiving \$289,531.28. The payout was funded from monies raised through the sale of New Economy notes. On October 10, 2013—a time when

Contrarian had at least \$1 million in debt and only \$10,000 in assets—Della Penna again asked this individual to invest, and he agreed, purchasing \$250,000 in Contrarian notes. Della Penna failed to disclose to the investor (a) the source of the July 2013 payment, (b) the state of Contrarian’s finances, and (c) Della Penna’s need for new investor money to keep the scheme afloat.

18. Della Penna sold \$1,625,000 worth of Contrarian notes to approximately 10 investors, who suffered significant losses.

New Economy

19. Della Penna sold New Economy notes to two investor groups, both of whom received private offering memoranda, in which Della Penna represented:

- a. New Economy would use the net proceeds of monies raised through the sale of notes to engage in securities trading;
- b. noteholders would receive the following:
 - i. an annual return of 5%, payable quarterly;
 - ii. return of principal at the end of the 18 month term; and
 - iii. 80% of any trading profits, up to a maximum of 100% of the investor’s original investment;
- c. New Economy would provide periodic reports setting forth New Economy’s return on investment and expenses; and
- d. expenses associated with New Economy would consist of the following, all payable to Della Penna or New Economy’s Co-Managing Member:
 - i. “placement fees” of 5% of the proceeds of the sale of notes
 - ii. an “organizational fee” of 3% of the proceeds of the sale of the notes;
 - iii. an annual management fee equal to 3% of the market value of the New Economy’s investments as of the end of the calendar year; and

iv. 20% of the trading profits.

20. The first investor group consisted of members of a family and the family's trust entities. In or about Fall 2012, Della Penna told one of the family members he planned on doubling investors' profits by trading options on exchange traded funds. Della Penna did not disclose A-G and Contrarian's recent history of unsuccessful trading. The family invested as follows:

DATE	AMOUNT
January 14, 2013	\$100,000
April 30, 2013	\$350,000
August 22, 2013	\$50,000

At the time of the family's initial investment, Della Penna failed to disclose he was already in the middle of Ponzi schemes involving A-G and Contrarian. With respect to the latter two investments, Della Penna also failed to disclose New Economy's insolvency. Specifically, as of April 30, 2013, New Economy had \$100,000 in debt and approximately \$11,000 in assets. As of August 22, 2013, New Economy had \$450,000 in debt and less than \$85,000 in assets. With respect to the last investment, Della Penna additionally failed to disclose that in July 2013, he had used approximately \$290,000 of New Economy's funds to make a payment to a Contrarian investor, as described in paragraph 17 of this Complaint.

21. The second group was an engaged couple. In or about September 2013, Della Penna told them to expect an annual return of 7%, and he provided them with a document dated September 3, 2013 showing that New Economy had generated trading profits totaling \$1,325,041.56 between January 30, 2013 and June 28, 2013. Della Penna failed to disclose that as of September 3, 2013, all those profits had been lost, New Economy was insolvent, with debt of \$500,000 and assets of less than \$85,000, and Della Penna needed the couple's money to keep the scheme going.

22. On September 26, 2013, the couple jointly purchased \$30,000 in New Economy notes.

23. Both groups of New Economy note purchasers suffered significant losses.

B. Other Investments

24. In addition to soliciting investors to purchase notes of the Funds, between January 2011 and March 2013, Della Penna solicited individuals to give him money for the purpose of investing in small private companies. Della Penna promised investors a 10% return on their investment. Della Penna failed to disclose to these investors the losses the Funds had been suffering, the insolvency of those Funds, and his intent to use a significant portion of the invested funds to keep his Ponzi schemes afloat.

25. Della Penna raised approximately \$532,000 from five investors through these solicitations, depositing the funds in bank accounts in the name of Gaeton Capital. Della Penna used only \$40,000 of these funds for investment purposes, spending the balance on payments to earlier investors and for personal expenses.

26. Of the approximately \$3.8 million Della Penna raised in total from investors, he converted \$1.1 million to his own use and paid \$1.4 million to earlier investors.

V. CLAIMS FOR RELIEF

COUNT 1

Section 17(a)(1) of the Securities Act

27. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

28. Della Penna, in the offer or sale of securities by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly employed devices, schemes, or artifices to defraud.

29. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate, Section 17(a)(1) of the Securities Act, 15 U.S.C. § 77q(a)(1).

COUNT 2

Section 17(a)(2) of the Securities Act

30. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

31. Della Penna, in the offer or sale of securities by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly obtained money or property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

32. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate, Section 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2).

COUNT 3

Section 17(a)(3) of the Securities Act

33. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

34. Della Penna, in the offer or sale of securities by use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly engaged in transactions, practices, or courses of business which operated or would have operated as a fraud or deceit upon the purchasers.

35. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate, Section 17(a)(3) of the Securities Act, 15 U.S.C. § 77q(a)(3).

COUNT 4

Section 10(b) and Rule 10b-5(a) of the Exchange Act

36. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

37. Della Penna, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud in connection with the purchase or sale of securities.

38. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5(a), 17 C.F.R. § 240.10b-5(a).

COUNT 5

Section 10(b) and Rule 10b-5(b) of the Exchange Act

39. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

40. Della Penna, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

41. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b).

COUNT 6

Section 10(b) and Rule 10b-5(c) of the Exchange Act

42. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

43. Della Penna, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, engaged in acts, practices, and courses of business which have operated, are now operating and will operate as a fraud upon the purchasers of such securities.

44. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5(c), 17 C.F.R. § 240.10b-5(c).

COUNT 7

Section 206(1) of the Advisers Act

45. The Commission adopts by reference paragraphs 1 through 26 of this Complaint.

46. Della Penna, for compensation, engaged in the business of directly advising the Funds as to the value of securities or as to the advisability of investing in, purchasing, or selling securities. Della Penna was therefore an “investment adviser” within the meaning of Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11).

47. Della Penna, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly employed a device, scheme, or artifice to defraud the Funds.

48. By reason of the foregoing, Della Penna directly or indirectly violated and, unless enjoined, is reasonably likely to continue to violate, Section 206(1) of the Advisers Act, 15 U.S.C. § 80b-6(1).

COUNT 8

Section 206(2) of the Advisers Act

49. The Commission adopts by reference paragraphs 1 through 26 and 46 of this Complaint.

50. Della Penna, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly engaged in transactions, practices, or courses of business which operated as a fraud or deceit upon the Funds.

51. By reason of the foregoing, Della Penna directly or indirectly violated and, unless enjoined, is reasonably likely to continue to violate, Section 206(2) of the Advisers Act, 15 U.S.C. § 80b-6(2).

COUNT 9

Section 206(4) and Rule 206(4)-8(a)(1) of the Advisers Act

52. The Commission adopts by reference paragraphs 1 through 26 and 46 of this Complaint.

53. The Funds were “pooled investment vehicles” within the meaning of Rule 206(4)-8(b) of the Advisers Act.

54. Della Penna made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, to investors or prospective investors in the Funds.

55. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate Section 206(4) of the Advisers Act, 15 U.S.C. § 80b-6(4), and Advisers Act Rule 206(4)-8(a)(1), 17 C.F.R. § 275.206(4)-8(a)(1).

COUNT 10

Section 206(4) and Rule 206(4)-8(a)(2) of the Advisers Act

56. The Commission adopts by reference paragraphs 1 through 26, 46, and 53 of this Complaint.

57. Della Penna engaged in acts, practices, or course of business that were fraudulent, deceptive, or manipulative with respect to investors or prospective investors in the Funds.

58. By reason of the foregoing, Della Penna directly or indirectly violated, and, unless enjoined, is reasonably likely to continue to violate Section 206(4) of the Advisers Act, 15 U.S.C. § 80b-6(4), and Advisers Act Rule 206(4)-8(a)(2), 17 C.F.R. § 275.206(4)-8(a)(2).

VI. RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests the Court:

Declaratory Relief

Declare, determine and find that Della Penna committed the violations of the federal securities laws alleged in this complaint.

Permanent Injunction

Issue a Permanent Injunction, restraining and enjoining Della Penna, his agents, servants, employees, attorneys, and representatives, and all persons in active concert or participation with them, and each of them, from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10(b) and Rule 10b-5 of the Exchange Act, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5, and Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8(a) of the Advisers Act, 15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4), and 17 C.F.R. § 275.206(4)-8(a).

Disgorgement

Issue an Order directing Della Penna and Gaeton Capital to disgorge all ill-gotten gains, including prejudgment interest, resulting from the acts and/or courses of conduct alleged in this Complaint.

Penalty

Issue an Order directing Della Penna to pay a civil money penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), and Section 209(e) of the Advisers Act, 15 U.S.C. § 80b-9(e).

Further Relief

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

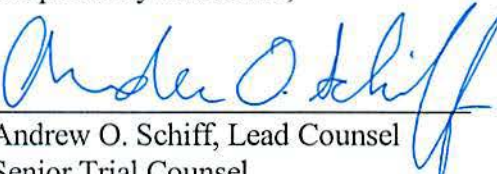
Retention of Jurisdiction

Further, the Commission respectfully requests the Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that it may enter, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

May 21, 2014

Respectfully submitted,

By:



Andrew O. Schiff, Lead Counsel
Senior Trial Counsel

Direct Dial: (305) 982-6390

Facsimile (305) 536-4154

E-mail: schiffa@sec.gov

Attorney for Plaintiff

Securities and Exchange Commission

801 Brickell Avenue, Suite 1800

Miami, FL 33131