

**STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
First National Center, Suite 860
120 North Robinson
Oklahoma City, Oklahoma 73102**

In the Matter of:

Southmark of Tulsa, Inc.,
Wendell D. Belden, and
Gertrude M. Edwards,

Respondents,

File No. ODS 01-150

**MOTION FOR APPROVAL OF WAIVER AND APPROVAL OF LICENSE
RENEWAL AND
RESPONSE TO NOTICE OF OPPORTUNITY FOR HEARING**

I. YEAR 2000 APPLICATION HAS BEEN APPROVED.

On May 27, 2001 Southmark of Tulsa Inc., filed its renewal application and the renewal for Mr. Belden and Ms. Edwards along with the required fees late due to a misfiling in the files.

On April 12, 2001 Southmark filed an appropriate request to waive enforcement of the late filing pursuant to 660:2-13-1.

Having no response from the Administrator, the motions are granted by operation of law.

To rule otherwise would permit the Administrator to deny due process and appeals process by merely refusing to respond.

II. Slander and Libel

The Administrator's office continues to allege that Southmark of Tulsa, Inc. is not a registered investment adviser both verbally and by written denial on its website.

III. Admissions and Denials

State's Findings of Fact

1. STI was initially registered under the Act as an investment adviser on August 5, 1991. STI registration under the Act lapsed on December 31, 2000, when the Company failed to renew its investment adviser registration.

Answer: Registration is admitted. The lapse is irrelevant since it was renewed and enforcement waived.

2. Since 1983 Belden was affiliated with entities that have transacted business as a broker-dealer and/or investment adviser in and/or from the State of Oklahoma (the "Belden Entities"). Belden is currently the Chairman of the Board and the sole shareholder of STI. Belden was initially registered under the Act as an investment adviser representative of STI on August 5th, 1991. Belden's registration as an investment adviser representative of STI lapsed on December 31, 2000 when his investment adviser representative registration under the act was not renewed.

Answer: Registration is admitted. Mr. Belden has been registered since 1983 except for a brief lapse prior to 1991 when he was not in a business requiring registration. The lapse in 1990 is irrelevant since it was renewed and enforcement waived.

3. Edwards was initially registered under the Act as an investment adviser representative of STI on August 12, 1993. Edwards registration as an investment adviser representative of STI lapsed on December 31, 2000 when her adviser representative registration under the Act was not renewed.

Answer: Registration is admitted. The lapse is irrelevant since it was renewed and enforcement waived.

4. On February 2, 2001, Wayne Wilson, the then President of STI, was advised by an employee of the Oklahoma Department of Securities (Department) that an application for renewal of STI's investment adviser registration for calendar year 2001 was not received by the Department.

Answer: Admitted. Mr. Wilson immediately completed the renewal form with Mr. Belden, a check was written and it went to the accounts payable file.

When the file was later found, the state was immediately notified and the filing sent.

5. On April 2, 2001. STI submitted a new application for its registration as an investment adviser and new applications to register Belden and Edwards as an investment adviser representative.

Answer: STI's records indicate filings were made on March 30, 2001 with appropriate fees paid. The request for waiver of enforcement was also filed along with the proper fee.

6. After December 31, 2000, STI and Belden represented to its clients and or prospective clients that STI was a registered investment adviser when it was not.

Answer: The question is not relevant to the inquiry since the renewal and motion to waive were granted by operation of law.

7. Although their registrations has lapsed, STI, Belden and Edwards continued to provide investment advisory in this state. STI generated or earned investment advisory fees of approximately \$654,610.00 between January 1, 2001 and September 30, 2001.

Answer: See Answer 6 above.

8. Respondents prepared and/or distributed sales literature describing STI's managed account program that uses timing signals provided by New Century Financial Group LLC in connection with investments in the Potomac Funds (Sales Literature).

Answer: Admitted

9. The Sales Literature contained backtested performance results for a hypothetical \$100,000 investment in the Potomac Small Cap Plus made on December 31, 1995. The Sales Literature purportedly compares the performance result of an unmanaged investment account to the performance results of a managed investment account as of the end of calendar years 1996 to 2000.

Answer: Admitted

10. The Sales Literature does not prominently disclose the following: (a) that the performance results do not represent the results of actual trading using client assets; and (b) that the Potomac Small Cap Fund did not originate

until February 19, 1999, and did not exist as of December 31, 1995, December 31, 1996, December 31, 1997, or December 31, 1998.

Answer: The reader is referred to the Prospectus that clearly discloses the existence period of the fund. Full disclosures are made on the literature that is set in a boxed inset to stand out.

11. The Sales Literature does not disclose:

(a) that STI did not "manage" accounts that invested in the Potomac Funds until February or March 2000, and that STI did not have a relationship, affiliation or other association with the Potomac Funds as of December 31, 1995, December 31, 1996, December 31, 1997, December 31, 1998, or December 31, 1999;

Answer: Admitted. Such statement would be confusing and irrelevant.

(b) that prior to March of 2001, STI relied on timing signals produced by Four Seasons Assets Management, Inc;

Answer: Same answer as 11 above.

(c) that it was not until March of 2001 that STI began using the timing signals produced by New Century Financial Group, LL;

Answer: Same answer as 11 above.

(d) Whether the described performance results are for an investment in the Broker Class, Advisor Class or Investor Class shares of the Potomac Small Cap Plus Fund; and

Answer: Admitted

(e) the origin or basis for the figures reflected.

Answer: The question is unclear.

12. The Sales Literature describes STI's managed account program as a "personalized management service" and states that the results of each client may differ due to the client's individual investment decisions."

Answer: Clients may investment different proportions of their investable funds to the program and other investments. Changes to other programs may occur.

Clients may make additions and withdrawals affecting their balances. Often clients investment plan may include using annuities in their portfolio mix.

13. The Sales Literature also contains the following representation :
“Southmark (STI) utilizes a market timing signal produced by New Century Financial Group LLC, the consulting firm. Although New Century Financial Group, LLC is an SEC-Registered Investment adviser, the sole investment advisor for this program shall be Southmark (STI). As such, Southmark (STI) is responsible for the investment’s management and implementation.

Answer: Admitted.

14. The agreement by which an investor contracts with STI for it’s account services (the “Client Agreement”) states in pertinent part as follows:
“Southmark (STI) agrees to monitor your investments on a daily basis...to keep your investments in the best possible combination of security first and return second.

Answer: Admitted

15. In reality, Respondents uniformly move clients in and out of the same two mutual fund portfolios based on identical asset allocations in total reliance on the timing signals produced by a third-party timing service and without regard to each client’s investment objectives, risk tolerance and financial condition.

Answer: Deny. The objectives, tolerance and financial condition are taken into account by Southmark, Inc., the broker/dealer at the point of the initial sale and it receives a 4% broker’s fee that is common to the industry. Most of STI’s customers’ investable funds are invested in certificates of deposit through other sources. Those funds deemed suitable for the program are switched on a daily basis between cash and a more active fund. That plan is continuously monitored for suitability to STI’s customers’ needs.

16. Respondents do not exercise any independent judgment in connection with their investment advisory recommendations or make investment recommendations based on each client’s particular investment objectives, risk tolerance and financial condition.

Answer: Deny. Respondents make initial valuations and then make continuing choices of whether to keep the customers in the program. Each account is individually reviewed annually.

17. According to the client agreement, STI receives a one percent per quarter investment advisor or management fee or an annual fee of four percent per year. The four percent fee exceeds the advisory fee customarily charged in the securities industry for services similar to those provided by STI.

Answer: To be precise, STI does receive one percent per quarter, not 4 percent per year. STI is of the opinion that it gives better personal service and produces better returns consistently to its customers. Its charges are fully disclosed.

18. Respondents do not disclose to their investment advisory clients that the four percent investment advisory or management fee per year is substantially higher than the fee customarily charged in the industry and/or that services similar to those provided by respondents are available from other investment advisers at other rates.

Answer: Respondents deny that other advisers charging less provide comparable service.

19. On February 24, 2000, Southmark, Inc., a broker-dealer owned and operated by Belden, entered into an agreement with Rafferty Capital Markets, Inc., the principal underwriter in connection with the distribution of the mutual funds shares of Potomac Funds (Dealer Agreement). The Dealer Agreement authorized Southmark, Inc. to offer and sell shares of certain designated mutual fund shares of the Potomac Funds.

Answer: Admitted

20. The Potomac Funds use aggressive investment techniques and are designed principally for experienced investors who intend to follow an asset allocation strategy.

Answer: Deny

21. The Potomac Funds consist primarily of pairs of funds with each pair consisting of "plus" fund and one "short" fund, i.e., the Potomac OTC Plus Fund and the Potomac OTC/Short Fund; the Potomac Small Cap Plus Fund and the Potomac Small/Cap Short Fund; the Potomac Internet Plus Fund; and the Potomac Internet/Short Fund; the Potomac U.S. Plus Fund and the Potomac U.S. Short Fund. Each of the Potomac Plus Funds invests significantly in futures contracts on stock indexes, options on futures contracts and financial instruments such as futures options on securities and stock index options. Each "plus" fund is designed to provide a return that is greater than the return provided by its target index when the value of the target index rises. Each "short" fund is designed to provide investment results that are opposite of the return of its target index.

Answer: The question appears to apply to advisers engaged in a buy and hold strategy. STI does not hold them through their normal cycles.

22. The Potomac funds also offer the Potomac U.S. Government Money Market Fund (Money Market Fund), a money market fund that is designed to provide stability of principal, liquidity and current income.

Answer: Admit

23. As part of the Client Agreement, the investment advisory clients routinely executed a limited power of attorney appointing Belden, or in the alternative, the President of Southmark, as their "attorney-in-fact" with the power to hire, manage, and/or change the investment managers on their accounts; to hire and/or change the custodians on their accounts; and to change the mutual funds and/or variable annuities in their accounts.

Answer: Admit

24. During the period between January 1, 2001, and June 30, 2001, Respondents recommended the shares of the Money Market Fund and the Potomac Small Cap Plus Fund (Small Cap Plus Fund) by their mutual funds clients.

Answer: Admit. During a substantial period of that time period.

25. Relying totally on the timing signals provided by the third-party timing service, Respondents periodically switched their advisory clients between the Money Market Fund and the Small Cap Plus Fund.

Answer: The initial entrance into the program and continued participation by the customer and by STI was a continuing evaluation process. Within the plan changes were triggered by sell, buy and hold signals.

26. Shares of the Small Cap Plus Fund and the Money Market Fund are offered and sold through three separate classes: the Broker Class, the Advisor Class and the Investor Class. Each class charges different fees and expenses.

Answer: Admit

27. In connection with the purchase of Broker Class Shares, the investor will not pay a front-end sales charge at the time of purchase but if shares are sold within six years of purchase, the investment is subject to a contingent deferred sales charge (CDSC) of five percent in the first year after purchase, four percent in the second year, three percent in the third and fourth years, two percent in the fifth year, one percent in the sixth year, and none thereafter.

Answer: Admit that this is the routine charge, but there may be exceptions made.

28. The Broker Class shares automatically convert into Investor Class shares at no cost to the investor after holding the Broker Class shares for eight years. The Broker Class shares are available exclusively through a participating broker or dealer.

Answer: Admit .

29. The Advisor Class shares are available exclusively through an investment adviser, bank, trust company or authorized representative. An investor will not pay a front-end sales charge at the time of purchase or a deferred sales charge at the time of sale.

Answer: Admit

30. The Investor Class shares are available directly from the Potomac Funds or through participating brokers or dealers. An investor will not pay a front end sales charge at the time of purchase or a deferred sales charge at the time of sale.

Answer: Investor Class shares are designed for market to Investors not using the advice of professionals and are frequently sold through the internet.

31. The Broker Class Shares, Advisor Class Shares and Investor Class Shares are subject to ongoing distribution and service fees (Rule 12b-1 fees). The 12b-1 fees for the Investor Class are significantly lower than the 12b-1 fees for the Broker and Advisor Class shares.

Answer: Deny. They were never significantly different and now are the same.

32. The Dealer Agreement sets forth the following schedule of the compensation (Commissions) to be paid to Southmark, Inc. for the sale of mutual fund shares of the Potomac Funds:

- i. on the initial sale of the Broker Class shares, an amount equal to four percent of the aggregate sales by Southmark, Inc. in a given month (Initial Sales Charge) plus 2.08 basis points (.0208%) per month on the average assets in the Broker Class shares held by Southmark, Inc. or its clients for such month (Continued Compensation);
- ii. on the sale of Advisor Class shares, an amount equal to 8.33 basis points (.0833%) per month on the

- average assets in the Advisor Class shares held by Southmark for such month; and
- iii. on the sale of Investor Class shares, Southmark, Inc. receives no compensation.

Answer: Admit

33. Respondents recommended and directed the purchase of the Broker Class shares for most of their investment advisory clients who invested in mutual funds.

Answer: Admit. Over the long term, continuing fees are more advantageous to the customer.

34. On December 6, 2000, Belden opened a Potomac Funds individual retirement account on behalf of G. Robb, an Oklahoma resident and advisory client of STI. At the time the account was opened, Mr. Robb was 80 years of age.

Answer: Deny. This was a transfer from another account at STI originally purchased in 1991.

35. On the recommendation of STI and Belden, Mr. Robb purchased Broker Class shares of the money market fund in the amount of \$86,192.13 on December 21, 2000. An additional purchase of \$1,543.44 was made on January 2, 2001. The money in Mr. Robb's account was periodically switched between the Broker Class shares of the Money Market Fund and the Small Cap Plus Fund.

Answer: Deny the alleged additional purchase. Mr. Robb had transferred his funds from Van Kampen to the Potomac funds at Southmark's recommendation and incurred a CDSC charge of \$1,543.44. As stated in Southmark's agreement, Southmark reimburses CDSC losses caused by its recommendation. Similarly, if regularly recommendation customer withdrawals cause them to exceed permissible limits and a CDSC charge is incurred, Southmark reimburses the cost.

36. Following his death, Mr. Robb's account was liquidated on June 15, 2001. The balance in Mr. Robb's account was reduced by a deferred sales charge of \$4,386.77 since the broker class shares were redeemed within one year of purchase.

Answer: Deny. CDCS are not charged on death and would have been refunded by the new broker.

37. During the period of time that Mr. Robb's account was active, STI received investment advisory fees of \$921.56.

Answer: Fees due at the time of death were assessed.

38. In connection with Mr. Robb's purchases, Southmark, Inc. received the four percent initial sales charge and Continued Compensation.

Answer: Irrelevant to the customer. If the subsequent broker reimbursed as necessary, the customer paid out no funds.

39. Had STI and Belden recommended the purchase of Advisor Class Funds and/or Investor Class Funds, Mr. Robb would not have a deferred sales charge and the account's closing balance would have been at least \$4,386.77.

Answer: Deny. See #36 above.

40. The recommendation by STI and Belden to purchase the Broker Class shares subjected Mr. Robb's account to the deferred sales charge and resulted in higher Commissions paid to Southmark, Inc. than would have been paid had the investments been made in the Advisor Class or Investor Class shares.

Answer: Admit

41. On July 31st, 2000, Belden opened a Potomac Funds account on behalf of R. Adams and J. Adams as joint tenants (Adams Account). J. Adams is the son of R. Adams. At the time the account was opened, R. Adams was 90 years of age. R Adams currently lives in a nursing home.

Answer: Ruth Adams account was initially opened in December of 1990 with her son as the joint tenant. Investments varied over the years. She would have been approximately 80 at that time.

42. On the recommendation of STI and Belden Broker Class shares of the Money Market shares of the funds in the amount of \$33,815 were purchased in the Adams account on August 7, 2000. The money in the Adams account was periodically switched between the Broker Class shares of the Money Market Fund and the Small Cap Plus Fund.

Answer: Admit

43. In connection with the purchase in the Adams Account, Southmark, inc. received the four percent initial sales charge and Continued Compensation.

Answer: Admit

44. Shares valued at \$660.08 were redeemed in the Adams Account on January 23, 2001, to defray nursing home expenses, causing the account to incur a deferred sales charge of \$33.00 since the Broker Class shares were redeemed within one year of purchase.

Answer: Ms. Adams had been with STI for over 10 years.

45. During the time that the Adams account was active, STI received investment advisory fees of at least \$299.54.

Answer: Admitted

46. Had STI and Belden Recommended the purchase of Advisor Class Shares and or Investor Class shares, the Adams account would not have incurred a deferred sales charge.

Answer: The question assumes no other changes and is purely hypothetical.

47. The recommendation by STI and Belden to purchase the Broker class shares subjected the Adams Account to the deferred sales charge and resulted in more commissions to paid to Southmark, Inc. than would have been paid had the investment been made in Advisor Class or Investment Class.

Answer: Admitted.

48. On January 17, 2000, Belden opened a Potomac funds account on behalf of T. J. Christmas (Christmas Account). At the time the account was opened, T. J. Christmas was 73 years old.

Answer: Denied. The customer has been with STI at least since 1995.

49. On the recommendation of STI and Belden, broker class shares on the Monney Market Fund in the amount of \$19,787.72 were purchased in the Christmas Account on January 24, 2001. The money I the Christmas Account was periodically switched between the Broker Class shares of the Money Market fund and the Small Cap Plus Fund..

Answer: Admitted

50. In connection with the purchase in the Christmas account, Southmark, Inc. received the four percent initial sales charge.

Answer: Admitted

51. Shares valued at \$3,170.52 were redeemed in the Christmas Account on April 5, 2001 causing the account to incur a deferred sales charge of \$158.52 since the Broker Class shares were redeemed within one year of purchase.

Answer: Admitted

52. Shares valued at \$14,395.58 were redeemed in the Christmas account on September 21, 2001 causing the account to incur a deferred sales charge of \$719.77 since the Broker class shares were redeemed within one year of purchase.

Answer: Denied

53. During the time the Christmas Account was active, STI received investment advisory fees of at least \$466.48.

Answer: Admitted

54. Had STI and Belden recommended the purchase of Advisor Class shares and/or investor Class shares, the Christmas Account would not have incurred the deferred sales charges and there would have been an additional \$878.29 available to T.J Christmas on redemption of the Broker Class shares.

Answer: The question assumes no other changes and is purely hypothetical.

55. The recommendation by STI and Belden to purchase the Broker Class shares subjected the Christmas account to the deferred sales charge and resulted in more commissions being paid to Southmark, Inc. than would have been paid had the investment been made in the Adviser Class or Investor Class shares.

Answer: Admitted

56. Respondent's rationale for recommending the purchase of Broker Class shares was to maximize the commissions Southmark, Inc. would earn and not to maximize the return on their advisory clients' investments.

Answer: Deny

57. Respondents did not disclose to their investment advisory clients that respondents' total reliance on market timing signals were provided by a third party restricts the client's investment opportunities to the portfolios of a very limited number of mutual funds when a multitude of mutual funds are available from other sources that could be more suitable and/or provide a great return for such clients.

Answer: Admitted. Neither does any other Broker make such limitation disclosure. Nor or they required to do so. Southmark limits their choices to a product that gives a reasonable volatility and a reasonable return to work best with its program.

58. Transactions dictated by the timing signals were effected through Southmark, Inc., the broker-dealer owned and operated by Belden. Respondents did not their investment advisory clients of their ability to seek executions of transactions through other broker-dealer firms or directly through Potomac.

Answer: Admitted

59. By including the following provisions in the client agreement, STI attempts to shift certain of its responsibilities as an investment adviser to its advisory clients and to absolve itself of its responsibility.
- a. "Client agrees to request any information necessary to keep them fully informed about any investment Southmark (STI) is using for them..."; and
 - b. "Client(s) agrees that all investments chosen for them by Southmark (STI) are suitable for them..."

Answer: Denied. STI asks its clients to keep it informed on the products and suitability for them individually. Nothing here attempts to alleviate STI's responsibility.

60. On August 13, 2001, the Administrator issued a subpoena duces tecum (subpoena) to Belden in accordance with Section 405 of the act. On August 13, 2001 the subpoena was personally served on Belden.

Answer: The subpoena was appealed to the Securities Commission. No result has yet been heard.

61-63 See answer to 60 above.

64. According to the records of the Central Registration Depository system (CRD) on September 27, 1993 the National Association of Securities Dealers, Inc., (NASD) entered an order of censure and a \$25,000 fine against Belden for advertising, operating, and effecting securities transactions through a non-registered broker-dealer and for providing the public with unapproved and misleading sales literature.

Answer: Denied. The findings were that some written material had not been formally approved in writing.

65. According to the records of the CRD, on February 14, 2001, the NASD Regulation, Inc. initiated an action against Belden. The NASDR alleged that Belden recommended and effected sales of Class B mutual fund shares to a public customer without having reasonable grounds for believing the recommendations and resultant transactions were suitable on the basis of the customer's financial situation and needs and that the recommendations of Class B shares, rather than Class A shares resulted in higher commissions. The hearing panel determined that Belden made unsuitable recommendations to the customer. The hearing panel ordered that Belden be fined \$40,000, suspended in all capacities for 90 days, ordered to pay restitution of \$55,567.03 plus interest, ordered to requalify by examination, and ordered to pay assessed costs.

Answer: The hearing originally instigated by former business associates has been appealed.

66. On at least two previous occasions, the Belden entities failed to apply for the renewal of their investment adviser registrations as required by the act.

Answer: No knowledge and require more detail.

67. On at least three other occasions, the Belden Entities operated through individuals requiring to be registered as investment advisers or investment adviser representatives under the act but were not so registered.

Answer: No knowledge and require more detail.

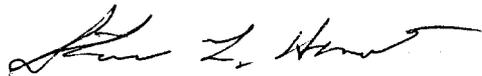
68. The previous violations of the Act Belden and or the Belden Entities were handled informally or by written agreement. In such agreement, Belden and/or the Belden entities agreed to comply in the future with the Act and the Rules of the Oklahoma Securities and the Administrator of the Department of Securities (Rules).

Answer: It has always been the intentions of the Respondents to comply with all rules and regulations. If there are particular requirements of a specific document, please provide it to the Respondents.

69. Based upon the foregoing, it is in the public interest to deny the effectiveness of the registrations of STI, Belden and Edwards under the act.

Answer: The foregoing in its entirety is exaggeration and mischaracterization. This is about people in this business most of their lives, being late with a filing. The rest is an attack on the way this business runs. While it does run differently from many other brokerages, if there is something wrong, why are there no legitimate complaints?

Respectfully,



Steven L. Hunt
Attorney for the Respondents
5510 South Yale, Suite 100
Tulsa, Oklahoma 74135
918-492-5541