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ARKANSAS SECURITIES DEPT.

BEFORE THE ARKANSAS SECURITIES COMMISSIONER

CASE NO. S-11-0394

ORDER NO. S-11-0394-13-OR03

IN THE MATTER OF:

**R. D. MYERS DEVELOPMENT, INC.
AND RODNEY MYERS**

RESPONDENTS

CEASE AND DESIST ORDER

On February 21, 2013, the Staff of the Arkansas Securities Department (“Staff”) filed its Request for Cease and Desist Order (“Request”). In its Request, the Staff states that it has certain information and evidence indicating that R. D. Myers Development, Inc. and Rodney Myers (collectively “Respondents”) have violated provisions of the Arkansas Securities Act (“Act”), Ark. Code Ann. §§ 23-42-101 through 23-42-509. The Arkansas Securities Commissioner (“Commissioner”) has reviewed the Request and based upon the representations made therein finds that:

FINDINGS OF FACT

The Request contains the following representations of fact:

1. R. D. Myers Development, Inc. (“Myers Development”) is an Arkansas corporation with its principal place of business located at 154 Cornerstone, Suite B, Hot Springs, Arkansas 71913. Myers Development has never been registered with the Arkansas Securities Department (“Department”) in any capacity pursuant to the Act.

2. Rodney Myers (“Myers”) is an Arkansas resident currently living in Hot Springs, Arkansas. According to records on file with the Arkansas Secretary of State, Myers serves as the

president and registered agent of Myers Development. Myers has never been registered with the Department in any capacity pursuant to the Act.

3. Myers is a real estate developer who claims over twenty-five years of experience in the industry. Myers formed Myers Development in 2005 as a company through which he could conduct his business operations.

4. Myers has a criminal history related to his past real estate development dealings. In 2005, Myers faced a twenty-two count federal indictment for defrauding the U.S. Department of Housing and Urban Development ("HUD") in the development of an apartment complex in Hot Springs, Arkansas. The indictment charged Myers with skimming, money laundering, concealment of assets, suborning perjury, and perjury in conjunction with what the federal government described as a scheme and artifice to defraud HUD and obtain money by means of false pretenses, representations, and promises. Myers eventually pleaded guilty to one count each of concealment of assets, money laundering, and perjury. Myers was sentenced to fifteen months in federal prison and three years of probation. He was also ordered to pay \$120,000.00 in restitution. One condition of Myers' probation prevented him from incurring any new debt without prior approval from his probation officer. A copy of the criminal judgment entered against Myers by the United States District Court for the Western District of Arkansas is attached as Exhibit "A" to the Request.

5. On January 15, 2010, Myers Development entered into a Partnership Agreement (the "Agreement") with AR1, an Arkansas limited liability company. The Agreement related to an under-construction residential housing project in Hot Springs, Arkansas being developed by Myers Development. Under the terms of the Agreement, AR1 was to invest \$50,000.00 with Myers Development. In exchange, Myers Development would pay AR1 a total of \$6,000.00 for

each lot sold on the development until a total return of \$100,000.00 was paid on the initial investment. Myers Development would also pay a 6 ½ percent return on the initial investment until such time as the \$100,000.00 return was paid in full, representing the interest payment due on a bank loan taken out by AR1 to capitalize the initial investment. Myers executed the Agreement on behalf of Myers Development but signed his wife's name in place of his own. A copy of the Agreement entered into between the Respondents and AR1 is attached as Exhibit "B" to the Request.

6. AR1 was induced into investing with Myers Development based on representations and promises made by Myers. AR2 and AR3 are husband and wife and are the sole members in AR1. Myers knew AR2 and AR3 through his dealings in an unrelated real estate development project. Myers solicited AR2 and AR3 on the premise that he was constructing a residential development and was in need of an infusion of capital to finish the housing units on several of the lots. Myers represented that he needed the additional capital to perform sundry tasks necessary to prepare the units for sale, including painting, wiring, and landscaping. In exchange for an infusion of capital, Myers promised AR2 and AR3 that he would double the amount of their principle investment plus make the interest payments on the loan they received to make the investment. Myers ensured that no effort would be required on the part of AR2 and AR3 to receive the promised return on their original investment.

7. During his negotiations with AR2 and AR3, Myers failed to disclose the material fact that he had been charged previously with twenty-two counts of criminal misconduct related to an alleged scheme to defraud HUD, and that he had subsequently pleaded guilty to charges of concealment of assets, money laundering, and perjury. Myers further failed to disclose the material fact that the terms of his probation barred him from incurring any new debt without

prior approval of his probation officer. Instead, Myers signed his wife's name to the Agreement in effort to avoid any legal ramifications for his dealings with AR1. Myers Development never disclosed Myers' criminal history to AR1 prior to the parties entering into the Agreement.

8. AR1 has not received any return on its principal investment. While Myers represented that AR1's investment under the Agreement was to be used in preparing housing units for sale, Myers converted the vast majority of the funds for his personal use. Among other things, Myers used AR1's investment funds to make large cash withdrawals and cover payments on various loan obligations.

9. With regard to the subject investment transaction described herein, a search of Department records by the Staff revealed no registration or proof of exemption in accordance with the Act and no notice filing pursuant to federal law in connection with a covered security.

CONCLUSIONS OF LAW

10. The Act was promulgated to protect investors and utilizes a broad and flexible definition of a security to determine which transactions fall under the Act's jurisdiction. *Carder v. Burrow*, 327 Ark. 545, 549 (1997). Whether the subject transactions constituted securities transactions under the Act depends not upon labels or titles, but upon consideration of all relevant facts. See *Grand Prairie Sav. And Loan Ass'n, Stuttgart v. Worthen Bank and Trust Co.*, 298 Ark. 542, 545 (1989) (quoting *Shultz v. Rector-Phillips-Morse, Inc.*, 261 Ark. 769, 777 (1977)).

11. Ark. Code Ann. § 23-42-102(15)(A)(xi) includes investment contracts under the Act's definition of a security.

12. A security in the form of an investment contract exists when a transaction is an investment in the risk capital of a venture with an expectation of benefits but with a lack of

control on the part of the investor. See *Smith v. State*, 266 Ark. 861, 865 (Ark. App. 1979); *Carder*, 327 Ark. at 549; see also *Securities and Exchange Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (“[A]n investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . .”).

13. In *Grand Prairie Sav. and Loan Ass'n*, 298 Ark. at 545, the Arkansas Supreme Court noted that the Arkansas test for a security as established in *Smith* is substantially the same test used in the federal courts and set forth in *Howey*. However, in *Schultz*, the Arkansas Supreme Court rejected an express adoption of the *Howey* test in favor of a more flexible case-by-case analysis. The Court held that the definition of a security under the Act should not be given narrow construction (as in *Howey*) but that “it is better to determine in each instance from a review of all the facts, whether an investment scheme or plan constitutes an investment contract . . . within the scope of the statute.” *Schultz*, 261 Ark. at 781.

14. Ark. Code Ann. § 23-42-102(9) defines an issuer as any person who issues any security.

15. Ark. Code Ann. § 23-402-301(a) provides that it is unlawful for any person to transact business as an agent of an issuer of securities without first being registered as such pursuant to the Act.

16. Ark. Code Ann. § 23-42-501 provides that it is unlawful for any person to offer or sell any security unless it is registered, exempt, or a covered security.

17. Ark. Code Ann. § 23-42-507(2) makes it unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to make any untrue

statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

18. The subject investment transaction whereby AR1 invested money and was set to receive an investment return based solely on the efforts of Myers Development is an investment contract under Ark. Code Ann. § 23-42-102(15)(A)(xi). Under the risk capital test set forth in *Smith and Howey*, the transaction was promoted, offered, and sold on the premise that the investor would receive an economic benefit in the form of a return of double the amount of the original investment. The investor contributed to the risk capital of the venture. The money invested was always subject to the risk that the Respondents would not fulfill promises and pay the return as advertised. The investor had no control over the collection process necessary to generate returns on the investment. There is no other set of laws or regulations which offer protection to investors other than the applicable securities laws. When considering all relevant facts under *Schultz and Grand Prairie Sav. and Loan Ass'n*, the transaction was modeled, promoted, offered, and sold as the type of investment that the Act is intended to govern, based on many of the same reasons set forth above. Therefore, under any applicable analysis, the subject transaction is classified as investment contracts pursuant to Ark. Code Ann. § 23-42-102(15)(A)(xi).

19. The security offered and sold by Myers Development and Myers was not registered with the Department, exempt from registration with the Department, or a covered security under federal law. Therefore, Myers Development and Myers violated Ark. Code Ann. § 23-42-501 when they offered and sold a security to AR1.

20. Myers Development is defined as an issuer pursuant to Ark. Code Ann. § 23-42-201(9). The facts set out above demonstrate that Myers represented Myers Development in

effecting or attempting to effect the purchase or sale of a security to AR1. Therefore, Myers acted as an unregistered agent of an issuer in violation of Ark. Code Ann. §23-42-301(a).

21. Myers Development and Myers committed securities fraud in violation of Ark. Code Ann. § 23-42-507(2) by omitting to inform AR1 that Myers had been charged previously with twenty-two counts of criminal misconduct related to an alleged scheme to defraud HUD, and that he had subsequently pleaded guilty to charges of concealment of assets, money laundering, and perjury. Myers further violated Ark. Code Ann. § 23-42-507(2) by representing to AR2 and AR3 that their investment in Myers Development would be used to finish and prepare housing units in a residential real estate development for sale, when in fact the majority of AR1's principal investment was used for various and improper personal purposes.

ORDER

22. Respondents shall immediately cease and desist from further violations of Ark. Code Ann. § 23-42-501, by ceasing to solicit, offer, and/or sell securities in Arkansas unless the securities are properly registered pursuant to the Act, exempt from such registration, or a covered security.

23. Respondent Myers shall immediately cease and desist from further violations of Ark. Code Ann. § 23-42-301, and refrain from acting as an agent of the issuer until such time as he is properly registered or shown to be exempt from registration pursuant to the Act.

24. Respondents shall immediately cease and desist from further violations of Ark. Code Ann. § 23-42-507(2), and refrain from committing fraud or deceit in connection with the offer or sale of any securities in Arkansas.

25. A hearing on this Cease and Desist Order shall be held if requested by either of the Respondents in writing within thirty days of the date of the entry of this Order or if otherwise

ordered by the Commissioner. Ark. Code Ann. § 23-42-209(a)(2)(A). Such request should be addressed to the Commissioner and submitted to the following address:

Arkansas Securities Commissioner
201 East Markham, Suite 300
Little Rock, Arkansas 72201

26. If no hearing is requested and none is ordered by the Commissioner, this Cease and Desist Order will remain in effect until it is modified or vacated by the Commissioner. Ark. Code Ann. § 23-42-209(a)(2)(B).

Dated this 25th day of February, 2013


A. Heath Abshire
Arkansas Securities Commissioner