

BEFORE THE ARKANSAS SECURITIES COMMISSIONER
CASE NUMBER S-16-0022
ORDER NUMBER S-16-0022-17-OR05

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ARKANSAS SECURITIES DEPT.

IN THE MATTER OF:

MARIAN BARTOSIEWICZ,
AND PANOPTIC TARGETED SCIENCES, LLC

RESPONDENTS

ORDER

On July 1, 2016, the Staff of the Arkansas Securities Department ("Department") filed a Request for Cease and Desist Order alleging that Marian Bartosiewicz ("Bartosiewicz") and Panoptic Targeted Sciences, LLC ("Panoptic") have violated provisions of the Arkansas Securities Act ("Act"), Arkansas Code Annotated §§ 23-42-101 through 23-42-509.

On July 1, 2016, Arkansas Securities Commissioner, B. Edmond Waters, issued a Cease and Desist Order finding that Bartosiewicz and Panoptic violated the Act by acting as an unregistered agent of an issuer, offering and selling unregistered securities and disseminating false or misleading information in connection with the sale of a security and in conjunction with that finding, ordered Bartosiewicz and Panoptic to cease and desist all such activities in the State of Arkansas.

On August 14, 2017, Arkansas Securities Commissioner, B. Edmond Waters, issued an Order Appointing Hearing Officer and Notice of Hearing appointing J. Michael Helms as the hearing officer, delegating the authority to J. Michael Helms to enter dispositive orders concerning all matters in relation to the Cease and Desist Order entered in the matter and setting the matter for a hearing on October 11, 2017, at 9:00 a.m. at the Department.

On October 11, 2017, a hearing on the Cease and Desist Order was held at the

Department before me. Counsel for the Department, Robert M. Cossio and Campbell McLaurin, appeared as well as counsel for the Respondents, Keith I. Billingsley. At the conclusion of the hearing I held the record open for the submission of additional evidence and post-trial briefs and upon submission of both, I closed the record.

The following findings are based upon the documentary evidence, witness testimony and all other things properly before me:

FINDINGS OF FACT

1. Bartosiewicz is a Connecticut resident currently living in Avon, Connecticut. At all times relevant hereto, Bartosiewicz was an owner and an executive officer of Panoptic. At all times relevant hereto Bartosiewicz was not registered with the Arkansas Securities Department in any capacity pursuant to the Act.
2. Panoptic was a limited liability company organized and existing under the laws of the State of Delaware. Panoptic was created to bring together a team to develop and test a treatment for the Ebola virus. At all times relevant hereto, Panoptic was not registered with the Department in any capacity pursuant to the Act and has since been dissolved as a Delaware limited liability company.
3. Lisa McDonald ("McDonald") and John Criss ("Criss") are both residents of the State of Arkansas.
4. The transaction at the heart of this case occurred on December 12, 2014. Bartosiewicz, on behalf of Panoptic, executed a Promissory Note ("Note") in favor of McDonald in the amount of \$98,000. The Note was payable in full within sixty (60) days and bore an annual interest rate of 0.0%. The Note was not secured by any collateral. The "fill in the blanks note form" was initially provided

by Bartosiewicz to McDonald. Bartosiewicz executed the note but left the terms of the Note blank. McDonald filled in the terms of the Note, executed it and returned the Note to Bartosiewicz. Criss was not a party to the Note. The Department avers that this Note was a security within the definition of a security in the Act.

5. McDonald and Criss wired money to Panoptic's Santander bank account on December 12, 2014 in the amounts of \$64,000.00 and \$34,000.00 respectively.
6. Criss worked for Bartosiewicz as a medical sales rep in 2012 and part of 2013. Criss' resume reflects fourteen (14) years of pharmaceutical experience and broad experience setting up clinical trials. Criss has owned a few different corporations or LLCs other than the property management company he currently owns in Hot Springs. Criss could not remember if he signed the Note or if McDonald was the only one to sign the Note. Criss was unsure if he received information about Panoptic from McDonald or Bartosiewicz.
7. McDonald met Bartosiewicz when Criss was working for Bartosiewicz. Prior to the Note being executed, McDonald and Bartosiewicz had looked at business opportunities together other than Panoptic. McDonald, Bartosiewicz and Perkins flew to Dallas in March of 2013 to look at one of the potential opportunities, the purchase of a laboratory.
8. McDonald introduced Bartosiewicz to attorney, Fred Perkins ("Perkins"). Perkins owns an equity interest in McDonald's company, Reach Diagnostic Partners ("Reach"), and was involved with McDonald and Bartosiewicz in looking at other business opportunities prior to the execution of the Note. Perkins was hired by

Bartosiewicz to organize and create Panoptic and to draft and file the necessary documents to legally obtain investors in Panoptic.

9. McDonald and Criss stated that they did not rely on the Panoptic documents, draft or otherwise, to provide the \$98,000.00 to Bartosiewicz. McDonald was unsure if she had seen them prior to providing her \$64,000.00 and Criss stated he did not recall if he had ever seen the Panoptic documents.
10. Throughout McDonald's testimony, she repeatedly referred to the Note as a loan and the 5% interest she and Criss were to receive in Panoptic as a separate transaction. Perkins stated that Bartosiewicz had always had the ownership of Panoptic reflecting five percent (5%) ownership going to McDonald and Criss and Perkins did not believe that the Note and the five percent (5%) interest in Panoptic were connected. The Panoptic documents drafted by Perkins reflects McDonald and Criss as principals in Panoptic.
11. Perkins testified to the following:

"Q: (By Mr. Cossio) Can you please tell the Court what a Form D is.

A: Yeah. We file that as a federal exemption. And then we have state notice filings, which I had informed her (Bartosiewicz) that, as we went to various states -- I didn't know where she was going -- we would file notice filings with various states, which I -- we do regularly on behalf of our clients and try to do it right for them.

Q: Do you know if she registered with any other state?

A: I do not know.

Q: Do you know if she registered in Arkansas?

A: I don't believe we ever sent a notice exemption, because I don't know -- I was never advised that we raised any money in Arkansas."

12. Perkins stated he was aware of the "fill in the blank note form" sent from Bartosiewicz. McDonald asked Perkins if she should include her five percent (5%) ownership in Panoptic in the terms of the Note. Perkins told McDonald that if she was going to loan money to Bartosiewicz that the transaction would be between them. He had not been asked by Panoptic or Bartosiewicz to represent the company or her in a loan.
13. Perkins further stated that he was not engaged to help Panoptic raise money through a loan process and questioned the legality of giving equity in a company for a promissory note. Perkins told Bartosiewicz that he would help her create Panoptic but that she would have to do it right, all he had in the community was his reputation.
14. Like the previous two companies that McDonald and Bartosiewicz had looked into, Panoptic never became a going concern and was eventually dissolved.
15. Panoptic defaulted on the repayment of the Note. McDonald wrote Bartosiewicz a notice of default and a demand for payment of the defaulted Note on or about June 30, 2015. McDonald and Criss sued Bartosiewicz in civil court to collect the defaulted Note. The law suit has been settled and the Note has been paid in full.

APPLICABLE LAW

16. The Act's definition of a security includes notes. A.C.A. § 23-42-102 (17)(A)(i).
Further, the definition of a security under the Act should not be construed narrowly, but should be determined in each instance from a review of all the facts

in any given transaction. *Schultz v. Rector-Phillips-Morse, Inc.*, 552 S.W.2d 4 at 8 (Ark. 1977). The most recent case the Arkansas Supreme Court has taken up on the issue of promissory notes being a security under the Act was in *Waters v. Millsap*, 465 S.W. 3d 851, (Ark., 2015). In *Waters*, the Court confirmed that the factors contained in the “*Smith*” test were instructive but were not used exclusively and further declined to adopt the “Family Resemblance Test” or “*Reves* Test.” “We find the all-inclusive *Schultz* test is better suited to the purposes of the Act. The Act is clearly remedial and is intended to prevent fraudulent practices and activities from becoming a burden upon unsophisticated investors and the general public” *Id.* at 858-859 (citations omitted).

17. Arkansas Code Annotated § 23-42-102(10) defines issuer as any person who issues or proposes to issue any security, with some noted exceptions.

18. Arkansas Code Annotated § 23-42-301(a) provides it is unlawful for a person to transact business in this state as a broker-dealer or agent unless he or she is registered under this chapter.

19. Arkansas Code Annotated § 23-42-501 provides that it is unlawful for any person to offer or sell any security in this state unless it is registered, exempt or a covered security.

20. Arkansas Code Annotated § 23-42-507(2) provides that it is unlawful for any person, in connection with the sale, or purchase of any security, directly or indirectly, to make any untrue statement or 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.

CONCLUSIONS ON LAW

21. Following the *Schultz* test and looking at all of the factors surrounding the transaction in question, the following factors lead me to believe that the Note in question was not a security as contemplated by the Act. As the Court in *Waters* stated, "The Act is intended to prevent fraudulent practices and activities from becoming a burden upon unsophisticated investors and the general public."

22. To begin with, Criss, McDonald, Perkins and Bartosiewicz were not unsophisticated investors as contemplated by the Act. They each have set up, owned, worked for, started, and/or organized companies like Panoptic. McDonald and Perkins currently own Reach together, Reach offers laboratory outreach testing services. Criss owns his own property management company in Hot Springs, has fourteen (14) years of pharmaceutical experience and his resume reflects broad experience setting up clinical trials. Perkins has extensive experience in securities law and has practiced law in Arkansas for twenty-five (25) years.

23. McDonald and Bartosiewicz had a prior personal relationship and had been actively seeking out business ventures together prior to the transaction at issue here. McDonald had recommended and introduced her attorney and business partner, Perkins, to Bartosiewicz to organize Panoptic and prepare the necessary documents and filings to allow Panoptic to seek investors. Perkins was consulted and involved in at least two prior failed business start-ups / acquisitions with McDonald and Bartosiewicz.

24. Perkins opened his "Panoptic file" in his office in October of 2014, created the

entity "Panoptic" as a Delaware LLC, and was in the process of drafting / revising the necessary paperwork to allow Panoptic to seek investors. Perkins was aware of the Note prior to the Note's execution and the terms being filled out. Perkins told McDonald that if she was going to loan the money to Bartosiewicz / Panoptic, that the transaction would be between them. Perkins told McDonald that he had not been engaged by Panoptic or Bartosiewicz to represent Panoptic on a loan. Perkins found out later that the terms of the Note had been filled out and executed by both McDonald and Bartosiewicz.

25. One of the most heavily weighted factors was Perkins testified that Bartosiewicz had always directed the ownership of Panoptic to reflect five percent (5%) ownership going to McDonald and Criss and that from his perspective, as the attorney directly involved in creating Panoptic and preparing the company to legally seek investors, the Note and the five percent (5%) were not connected.
26. An attorney with Perkins' law firm, R. Aaron Brooks, filed a Form D in March of the 2015. When Perkins was asked by the Department if "she" (Bartosiewicz) was aware "she" needed to register with the Securities Department. Perkins stated: "I told her we would need to." When asked by the Department if "she" (Bartosiewicz) had registered in Arkansas, Perkins responded "I don't believe we ever sent a notice exemption . . . because I was never advised that we raised any money in Arkansas. It is telling that when Perkins, as the attorney for Panoptic, was asked by the Department if Bartosiewicz had performed certain legal steps necessary to seek investors in Panoptic, he responded with ownership of the responsibility of performing those legal steps on behalf of his

client by using "we" instead of "she," as the Department phrased the questions. I believe that if Panoptic has progressed to the point of seeking and obtaining investors in any state, Perkins, as the attorney for Panoptic, would have filed the necessary documents to make those transactions legal.

27. In accordance with the *Schultz* test and after reviewing all of the circumstances surrounding the transaction at issue here, I do not find that the Note was a security contemplated by the Act.

28. Having found that the Note in question is not a security as contemplated by the Act, I find that Bartosiewicz could not have acted as an unregistered agent of an issuer in violation of Arkansas Code Annotated §23-42-301.

29. Having found that the Note in question is not a security as contemplated by the Act, I find that Bartosiewicz / Panoptic did not violate Arkansas Code Annotated § 23-42-501.

30. Having found that the Note in question is not a security as contemplated by the Act, I find that Bartosiewicz / Panoptic did not violate Arkansas Code Annotated § 23-42-507.

ORDER

Based upon the documentary evidence presented by the Department and Respondents, witness testimony and all other matters properly before me, it is ordered that the Cease and Desist Order dated July 1, 2016, against Marian Bartosiewicz and Panoptic Targeted Science, LLC should be and hereby is vacated

and dismissed with prejudice.

IT IS SO ORDERED.



J. Michael Helms
Hearing Officer

12/20/17
Date
