

MIKE HUCKABEE
GOVERNOR

MAC DODSON
COMMISSIONER



HERITAGE WEST BUILDING, SUITE 300
201 EAST MARKHAM STREET
LITTLE ROCK, ARKANSAS 72201-1692
TELEPHONE: (501) 324-9260
FACSIMILE: (501) 324-9268

ARKANSAS SECURITIES DEPARTMENT

Theodore Holder
Direct Dial: 501/324-8678
Email: ted.holder@mail.state.ar.us

11 December 2000

Mr. Steve Whitehead
Whitehead Forestry Service, Inc.
460 Columbia 43
Post Office Box 2341
Magnolia, Arkansas 71754-2341

Re: Issuance of shares of stock constituting memberships in
Blind Hog Hunting Club
No Action Letter No. 00-14

Dear Mr. Whitehead:

We are in receipt of your letter dated November 30, 2000 in which you ask for guidance concerning the issuance of shares of stock in the Blind Hog Hunting Club (the Club), each of which will constitute a membership in the Club. You implicitly ask that the staff of the Arkansas Securities Department (the Staff) adopt a no action position on the issuance of these shares because they do not fit the definition of stock found at Ark. Code Ann. § 23-42-(15)(A)(ii) (Supp. 1999).

From your letter and the accompanying by-laws of the Club, the following facts concerning this matter can be gleaned. From the letter, we see that the Club will consist of approximately 1,800 acres in LaFayette County, Arkansas that will be developed into a hunting club for use by its members. The by-laws reflect that the Club anticipates issuing forty shares of stock, and your letter states that you anticipate selling ten to fifteen shares initially for \$60,000 per share. According to the by-laws, each share represents a membership in the Club.

As per the by-laws, members of the Club will be permitted to hunt on the Club's land and use its facilities. Members will be permitted to lease a lot on Club property on which to construct a house or cabin. However, members will have no proprietary interest in any asset or property of the Club and will be subject to assessments for improvements to Club property. Members will pay dues that will be set at the annual meeting of shareholders in the Club.

As with most organizations, the affairs of the Club will be managed by a board of directors. However, such things as the amount of membership dues, assessments and major

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debts to be incurred by the Club are reserved for the vote of all the shareholders/members.

Members may sell their stock, but the Club and its other shareholders/members have a right of first refusal. According to the by-laws, if any shareholder receives a bona fide offer to purchase his share, the proposed contract or agreement to purchase the stock must be sent to the Club. The Club will then have thirty days to accept the terms of the bona fide offer to purchase the stock. If the Club does not opt to purchase the stock within that time, other shareholders are next given a right to purchase the stock on the terms offered. If more than one shareholder wishes to buy the stock, sealed bids from the shareholders will be submitted and the stock sold to the highest bidder.

Significantly, the stated purposes of the corporation include maintaining a club for the "promotion of fellowship, recreation, hunting, fishing and similar sports among Shareholders", striving "to conserve and be active in the conservation of available game and fish," and maintaining "facilities, properties and resources for the benefit of" shareholders/members in the Club. Making a profit is not mentioned as a purpose of the Club. Although the by-laws stated that the board of directors may declare and pay a dividend on Club shares, it is also stated quite clearly that, "It is unlikely, however, that the [Club] will ever pay dividends."

Normally, stock is a security. However, it has been held in regard to the definition of a security in federal law that legal formalisms and the form of an instrument should be disregarded for economic reality when determining whether the instrument is a security. *Reves v. Ernst & Young*, 494 U.S. 56 (1990). The definition of security found at § 23-42-102(15) is virtually identical to that under federal law. *Casali v. Schultz*, 292 Ark. 602, 732 S.W.2d 836 (1987); *Hogg v. Jerry*, 299 Ark. 283, 773 S.W.2d 84 (1989). Merely naming an instrument stock has also been held not to be determinative in Arkansas law. See *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991). Five significant factors inherent in securities under the Act have been identified:

- 1) the investment of money or money's worth, 2) investment in a venture, 3) the expectation of some benefit to the investor as a result of the investment, 4) contribution towards the risk capital of the venture, and 5) the absence of direct control over the investment or policy decisions concerning the venture

Cook v. Wills, supra, 305 Ark. at 447, citing *Smith v. State*, 266 Ark. 861, 587 S.W.2d 50 (1979), and *Schultz v. Rector, Phillips, Morris, Inc.*, 261 Ark. 769, 552 S.W.2d 4 (1977).

According to your letter and the by-laws attached thereto, there is no investment of money in a venture here with the expectation of profits. Rather, the price of a share is more akin to an initiation fee, and the expectations of members are not of profits, but of the use of the Club

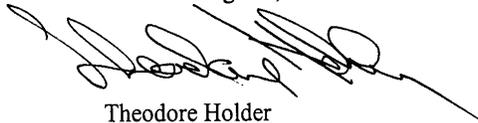
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facilities and participation in activities to further the Club's purposes, which one would expect each member/shareholder to share. What is shown is not a profitable business, but a cooperative association of sportsmen interested solely in recreation. If any economic benefit should accrue to any shareholder, it would be purely incidental.

Accordingly, the Staff will recommend that the Arkansas Securities Commissioner take no enforcement action against the Club for not registering its stock or filing a proof of exemption for it if the facts remain as stated in your letter.

Please note that the position of the Staff is based solely upon the representations made to us in your letter and the attached by-laws and applies only to the facts set out therein. Different facts or circumstances might and often would require a different response. The position expressed deals only with anticipated enforcement action by the Department and does not purport to be a legal opinion. Lastly, it is important to note that this position applies only to sales in Arkansas. If you are planning on selling shares to persons in other states, it is recommended that you obtain a similar no action letter from the securities regulatory agency in that state or seek a legal opinion from counsel in that state.

With best regards,

A handwritten signature in black ink, appearing to read 'Theodore Holder', written over a horizontal line.

Theodore Holder
ASSISTANT SECURITIES COMMISSIONER