

BEFORE THE ARKANSAS SECURITIES COMMISSIONER

CASE NO. S-13-0041

ORDER NO. S-13-0041-14-OR02

RECEIVED

14 MAR 27 PM 12:26

ARKANSAS SECURITIES DEPT.

IN THE MATTER OF:

A.J.S., LLC

AND JOHN SCOTT VISE

RESPONDENTS

CEASE AND DESIST ORDER

On March 24, 2014, 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 A.J.S., LLC and John Scott Vise (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. A.J.S., LLC (“AJS”) is an Arkansas limited liability company with its principal place of business located at 250 San Carlos Point, Hot Springs, Arkansas 71913. AJS has never been registered with the Arkansas Securities Department (“Department”) in any capacity pursuant to the Act.
2. John Scott Vise (“Vise”) is an Arkansas resident currently living in Hot Springs, Arkansas. Vise serves as the managing member of AJS. Vise has never been registered with the Department in any capacity pursuant to the Act.
3. 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.

4. 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.

5. Myers Development and Myers previously were named Respondents to a Cease and Desist Order (Order No. S-11-0394-13-OR03) entered by the Arkansas Securities Commissioner on February 25, 2013, which ordered the parties to cease and desist from soliciting, offering, and/or selling securities in Arkansas unless the securities were properly registered pursuant to the Act, exempt from registration, or qualified as covered securities. As such, Myers Development and Myers are not named Respondents to this action.

6. Shady Heights Duplexes (“Shady Heights”) is a residential housing project in Hot Springs, Arkansas, being developed by Myers Development. Shady Heights is owned and operated by Shady Heights Duplexes, LLC (“SHD, LLC”), which was at one time equally owned by AJS and Myers Development.

7. As the managing member of AJS, Vise approached Arkansas Resident One (“AR1”) with an opportunity to invest in Shady Heights. Vise told AR1 that an investment in Shady Heights would yield an ownership interest in SHD, LLC, and a percentage of any income derived from the business. However, AR1 would not receive any active management or decision-making responsibilities in Shady Heights as part of the investment.

8. After approaching AR1 with a general proposal, Vise authored and issued a Letter of Intent placing the specific terms of the investment in writing. Under the investment

agreement, AR1 was to invest \$110,000.00 for a 25% total ownership interest in SHD, LLC. The total 25% ownership interest in SHD, LLC was to be derived from AJS and Myers Development each selling and assigning to AR1 a 12.5% ownership interest in the company. The Letter of Intent was made contingent on SHD, LLC acquiring 24 new duplexes on or before February 1, 2010. A copy of the Letter of Intent issued by Vise is attached as Exhibit "A" to the Request.

9. Per the terms of the proposed investment, AR1 tendered to Vise a total of \$110,000.00 for investment in Shady Heights. On February 1, 2010, Vise executed an Assignment while acting as the operating/managing member of AJS which granted AR1 a 12.5% ownership interest in SHD, LLC. Also, on February 1, 2010, Myers executed an Assignment while acting as the President of Myers Development which granted AR1 a further 12.5% ownership interest in SHD, LLC. Copies of the Assignments issued by AJS and Myers Development have been attached as composite Exhibit "B" to the Request.

10. 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

11. 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)).

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

13. 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 . . .”).

14. 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.

15. 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.

16. The subject investment transaction whereby AR1 invested money and was set to receive an investment return based solely on the efforts of other parties 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 an income stream derived from being a passive business investor. 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).

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

ORDER

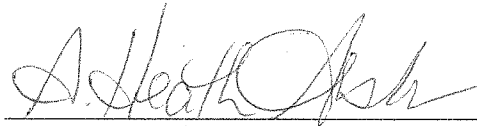
18. Respondents shall immediately cease and desist from further violations of Ark. Code Ann. § 23-42-501, by ceasing to solicit, offer, and/or sell securities in Arkansas unless the securities are properly registered pursuant to the Act, exempt from such registration, or a covered security.

19. 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

20. 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 27th day of March, 2014.



A. Heath Abshire
Arkansas Securities Commissioner