

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION

Before the Commissioner of the Office of Financial and Insurance Regulation

In the matter of:

Enforcement Case 10-11143

American Benefit Concepts, Inc.

Pinnacle Capital Fund, LLC

Pinnacle Portfolio Lending, Inc.

Dale Hamill

Jason Juberg

Matt Harper

Respondents.

ORDER TO CEASE AND DESIST

Issued and entered
this 10th day of February 2011
by Ken Ross
Commissioner

The Commissioner of the Office of Financial and Insurance Regulation ("OFIR"), pursuant to his statutory authority and responsibility to administer and enforce the Michigan Uniform Securities Act, 1964 PA 265, MCL 451.501 *et seq.*, as repealed and replaced by the Michigan Uniform Securities Act of 2002, 2008 PA 551, MCL 451.2101, *et seq.* ("MUSA") hereby orders **AMERICAN BENEFIT CONCEPTS, INC., PINNACLE CAPITAL FUND, LLC, PINNACLE PORTFOLIO LENDING, INC., DALE HAMILL, JASON JUBERG, AND MATT HARPER** ("Respondents") to immediately **CEASE AND DESIST** from: (1) engaging in the offer and sale of unregistered securities; (2) engaging in activities as unregistered broker dealers, investment advisers, investment adviser representatives and/or securities agents; and, (3) from making untrue statements of material fact in connection with the offer, sale and purchase of a security in the State of Michigan. Respondents are also notified that they are entitled under the Michigan Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 *et seq.*, to request a hearing in this enforcement case.

I.
BACKGROUND AND FINDINGS OF FACT

1. Respondent Pinnacle Capital Fund, LLC, (the “Fund”) is a Michigan limited liability company with a principal office located at 1960 28th St. SE, Grand Rapids, MI 49508. The Fund holds itself out to the public as private equity pool and a company that is “dedicated to increasing wealth” by “finding the very best investment opportunities for your assets.” The Fund has never been registered with OFIR as an investment adviser, nor has it ever been associated with an investment adviser firm that is registered with OFIR. The Fund’s securities are not registered with OFIR, nor are its offerings.
2. Respondent Pinnacle Portfolio Lending, Inc., (“Pinnacle Portfolio”) is a Michigan corporation with a principal office located at 1960 28th St. SE, Grand Rapids, MI 49508. According to the Fund’s website, www.pinnicapfund.com, Pinnacle Portfolio is the management company that manages the Fund. Pinnacle Portfolio has never been registered with OFIR as an investment adviser or broker-dealer, nor has it ever been associated with an investment adviser or broker-dealer firm that is registered with OFIR.
3. Respondent Dale R. Hamill (“Hamill”) is a Michigan resident. Hamill is the Chief Executive Officer, President and Secretary of Pinnacle Portfolio.
4. Respondent American Benefit Concepts, Inc., (“ABC”) is a Michigan corporation with its principal place of business located in Kalamazoo. ABC also conducts business under the assumed names of ABC Solution and New Fidelity. ABC holds itself out to be in the business of offering and distributing an array of investment and insurance products. ABC has never been registered with OFIR as an investment adviser or broker-dealer or as being associated with an investment adviser or broker-dealer firm that is registered with OFIR.
5. Jason Juberg (“Juberg”) is a Michigan resident and serves as President of ABC. Juberg was previously registered as a securities agent, CRD:3117846. During the relevant period of the subject transactions, he was not registered with OFIR as an investment adviser or securities agent, or as being associated with an investment adviser firm or broker-dealer that is registered with OFIR.
6. Matt Harper (“Harper”) is a Michigan resident and serves as Vice President of ABC. Harper has never been registered with OFIR as an investment adviser or securities agent, or as being associated with an investment adviser firm or broker-dealer that is registered with OFIR.
7. In or about 2008, the Fund began general solicitations to solicit investors via its Private Placement Memorandum (“PPM”), internet websites, and nonsecurities licensed insurance agents.
8. According to the Fund’s PPM, the Fund accepts minimum investments of \$25,000 from investors to be placed into the Fund’s main mortgage fund bank account; in exchange, the investors receive an investment contract and become members of the Fund. The investors have the option of receiving monthly distributions or reinvesting distributions in the Fund. The Fund claims to use the proceeds to fund commercial and residential loans. The

investors do not participate in the management of the Fund, and they are not involved in the decisions regarding the Fund's loan programs.

9. In addition to the Fund's PPM, information about the Fund and its securities can be found online at www.pinnicapfund.com. The Fund makes several representations regarding the merits of the securities it offers by claiming that the current payout to investors ranges from 12% (twelve percent) to 13% (thirteen percent) annually. It also claims that the Fund's investment is more liquid than CDs, that money can be withdrawn at any time, and that there are no termination fees.
10. The website also represents that the Fund is registered with the Securities and Exchange Commission ("SEC"). A search of the SEC's EDGAR database shows that on 10/14/2008, 11/24/2009 and 9/15/2010 the Fund filed a Form D to be exempt from registration. Neither the Fund nor its securities are registered with the SEC.
11. The website also represents that the Fund is regulated by the Michigan Department of Financial Institutions Securities Division who conducts annual exams and requires audited financials of the Fund. No such entity exists within the State of Michigan regulatory structure.
12. The website also directs prospective investors to www.michigan.gov/dleg to view the Fund's registration. No such registration exists. The investor is directed to a webpage that allows the investor to utilize various look up tools offered by the Department of Energy, Labor and Economic Growth. More specifically, an investor could do a name search for the Fund and would be able to view the Fund's corporate filing documents as a limited liability company.
13. Neither the Fund nor its securities are registered with OFIR. OFIR does not require the Fund to submit audited financials, and has not examined the Fund's books and records.
14. Sometime in 2008, the Fund associated with ABC, and its principals Juberg and Harper. ABC and its insurance agents operated as the Fund's broker-dealer and solicited its old and new insurance clients to purchase the Fund's securities. The insurance agents solicited investments in all dollar amounts. ABC and the agents were paid commissions for their sales.
15. ABC agents solicited investors who were neither accredited nor sophisticated within the meaning of state and federal regulations. Upon information and belief, ABC agents solicited 38 investors, all of which were over the age of 60 and lacked the sophistication and ability to evaluate the merits and risks of the investment.
16. ABC and its agents solicited investors through in-home presentations and cold calling. Based on representations that the Fund was a good investment with a 12-13% return, investors purchased the Fund's securities. Many investors were advised to surrender stocks, liquidate retirement accounts and savings, and/or use home equity to fund the purchase of the Fund's securities.

17. In the Fund's most recent Form D filing with the SEC, dated 9/15/2010, in paragraph 13 it states the total amount of securities sold to date is \$4,128,000.
18. OFIR's investigation of ABC's business activities showed that in 2008 and 2009, ABC and its agents sold the Fund's securities to more than 30 Michigan residents. Sales totaled approximately \$2,163,773, more than half of the total sales.
19. Hamill, acting on behalf of himself, Pinnacle Portfolio and the Fund, made or caused to be made the offer and sale of securities by general solicitation of the Fund's securities.
20. ABC, its principals and nonsecurities licensed insurance agents, made or caused to be made the offer and sale of securities by general solicitation of the Fund's securities.
21. None of the Respondents were registered securities agents, broker-dealers or investment advisers at the time. None of the securities offered and sold were registered with OFIR.

II. CONCLUSIONS OF LAW

A. Violations of Section 301 of MUSA, MCL 451.2301.

1. A security is defined in Section 102c(c) of MUSA, MCL 451.2102c, to mean:

[A] note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; *investment contract*... or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. All of the following apply to the term security:

(i) The term includes a contractual or quasi contractual arrangement that meets all of the following:

(A) A person furnishes capital, other than services, to an issuer under the arrangement.

(B) A portion of the capital furnished under sub-subparagraph (A) is subjected to the risks of the issuer's enterprise.

(C) The furnishing of capital under sub-subparagraph (A) is induced by representations made by an issuer, promoter, or the issuer's or promoter's affiliates which give rise to a reasonable understanding that a valuable tangible benefit will accrue to the person furnishing the capital as a result of the operation of the enterprise.

(D) The person furnishing the capital under sub-subparagraph (A) does not intend to be actively involved in the management of the enterprise in a meaningful way.

(E) At the time the capital is furnished, a promoter or its affiliates anticipate that financial gain may be realized as a result of the furnishing.

* * *

2. Pursuant to *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), an investment contract exists if there is present "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. An investment contract is a security under Section 102c(c) of MUSA, MCL 451.2102c, the offer or sale of which must be registered or exempt pursuant to Section 301 of MUSA, MCL 451.2301.
3. The investments offered by the Respondents meet the definition of an investment contract as set forth in Section 102c(c) and in *Howey*. Members of the public invested money in the schemes promoted, recommended and offered by the Fund with the expectation of profit generation through the efforts of others. Notwithstanding the representations of 12-13% returns, the investors bore 100% of the risk of loss each time they invested money. The investors were entirely passive with respect to realizing a profit on their investments. The investors had no connection to the issuer of the securities, or any authorization to exercise any powers and authority over investor funds to pursue each entity's business purposes, or the use and allocation of the funds.
4. Neither the Fund nor its securities are registered with OFIR.
5. As a result of the conduct described above, the Respondents violated Section 301 of MUSA, MCL 451.2301 which states it is unlawful for any person to offer or sell any security in this state unless the security is registered or exempt.

B. Violations of Section 401, MCL 451.2401(1), of MUSA.

6. Section 401(1) of MUSA, MCL 451.2401(1), provides a person shall not transact business in this state as a broker dealer unless registered or exempt under MUSA. Section 102(d) of MUSA defines a broker-dealer to mean any person engaged in the business of effecting transactions in securities for the account of others or for his own account. Section 102b(c) of MUSA, MCL 451.2102b(c) defines a person to include an individual and a corporation.
7. ABC, its principals and agents engaged in the business of effecting transactions in securities by facilitating the receipt, transfer and exchange of investment proceeds and agreements for the Fund's securities with the general public.
8. ABC, its principals and agents played an active part in the sales process of the Fund's securities by facilitating monetary incentives to its agents to target ABC insurance clients

and the general public for the purpose of promoting the securities and soliciting prospective investors.

9. ABC, its principals and agents also played an active part in the sales process of the Fund's securities by soliciting investors for the purpose of promoting the securities to prospective investors.
10. ABC, its principals and agents participated in the negotiations between the Fund and the investors when it made valuations as to the merits of the investments and/or gave advice regarding the investments, and methods used to fund the purchase of the securities.
11. ABC, its principals and agents received compensation from the Fund in the form of commissions.
12. OFIR staff conducted a search of its records and the Financial Industry Regulatory Authority, Inc.'s database for any broker-dealer registrations associated with ABC, its principals and agents. No such records were found.
13. Based on the foregoing, ABC, its principals and agents violated Section 401(1) of MUSA by playing an active role in the promoting, marketing, subscribing, and collection of investment proceeds with respect to the Fund's securities, without being registered as broker-dealers.

C. Violations of Section 403 of MUSA, MCL 451.2403.

14. Section 403(1) of MUSA, MCL 451.2403(1), provides that a person shall not transact business in this state as an investment adviser unless registered under the MUSA. Section 102a(e) of the Act, MCL 451.2102(a), defines investment adviser to mean:

[A] person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. MCL 451.2102a.

Section 102b(c) of MUSA, MCL 451.2102b(c), defines a person to include an individual and a corporation.

15. Beginning in 2008, the Respondents, directly or indirectly, individually or in concert, engaged in the business of advising others in transactions involving securities by advising members of the public to invest in the Fund's securities.

16. Respondents, directly or indirectly, individually or in concert, substantially engaged in investment advising when they made valuations as to the merits of the investment contracts and/or gave advice regarding the investment returns, and methods of funding the purchase of the Fund's investments.
17. Respondents, directly or indirectly, individually or in concert, received commissions and other compensation from investor proceeds as compensation for their service.
18. OFIR staff conducted a search of its records and the Financial Industry Regulatory Authority, Inc.'s database for any investment adviser registrations associated with the Respondents. No such records were found.
19. Based on the foregoing, Respondents violated Section 403(1) of MUSA, MCL 451.2403(1), by engaging in the business of advising others, directly or indirectly, through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, for consideration, and as a part of their regular business, without being registered as investment advisers.

D. Violations of Section 501 of MUSA, MCL 451.2501.

20. Section 501 of MUSA, MCL 451.2501, provides it is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
 - to employ any device, scheme, or artifice to defraud,
 - to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading,
 - to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
21. Respondents Hamill, Pinnacle Portfolio and the Fund, directly or indirectly, individually or in concert, brought about the sale of securities in a way that misled Michigan investors.
22. Respondents Hamill, Pinnacle Portfolio and the Fund, made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
23. More specifically, the Fund's website represents that the Fund is registered with the Securities and Exchange Commission ("SEC"). This is an untrue statement. Neither the Fund nor its securities are registered with the SEC.
24. The website also represents that the Fund is regulated by the Michigan Department of Financial Institutions Securities Division and that such a regulatory entity conducts annual exams and requires audited financials of the Fund. This is an untrue statement. No such entity exists within the State of Michigan regulatory structure.

25. The website also directs prospective investors to www.michigan.gov/dleg to view the Fund's registration. This is a misleading statement, if not false. No such securities registration exists.
26. Furthermore, OFIR has not examined the books and records of the Fund or required the Fund to submit annual financials.
27. Based on the foregoing, Respondents Hamill, Pinnacle Portfolio and the Fund violated Section 501 of MUSA, MCL 451.2501, by making untrue statements on the Fund's website regarding the status of the Fund's securities being registered with the SEC and OFIR.

WHEREAS, Section 604 of MUSA, MCL 451.2604, provides that whenever it appears to the Administrator (Commissioner of the Office of Financial and Insurance Regulation) that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of MUSA or any rule or order hereunder, he may, in his discretion, issue a cease and desist order or bring an action in a circuit court to enjoin the acts or practices and to enforce compliance with MUSA or any rule or order hereunder; and

WHEREAS, the Administrator finds that this Order is necessary and appropriate in the public interest, for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of MUSA; and

WHEREAS, the Administrator retains the right to pursue further administrative action against Respondents should the Administrator determine that such action is necessary and appropriate in the public interest, for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of MUSA, and may include but not be limited to bringing an action in circuit court to enjoin the acts and practices of the Respondents, and upon proper showing seek an order to require an accounting or disgorgement of ill-gotten gains; and

WHEREAS, based on the foregoing, OFIR Staff recommends that the Administrator find that Respondents have engaged in acts and practices that violate Sections 301, 401(1), 403(1) and 501 of MUSA, MCL's 451.2301, 451.2401(1), 451.2403(1), and 451.2501.

III. ORDER

IT IS THEREFORE ORDERED, that, pursuant to Section 604 of MUSA, MCL 451.2604:

1. Respondents shall immediately **CEASE AND DESIST** from offering and selling unregistered securities, and from engaging in activities as unregistered investment advisers, investment adviser representatives, broker-dealers, and from making untrue statements regarding the sale of a security in violation of MUSA. MCL 451.2604(1)(a).
2. Respondents shall each **PAY** a civil penalty, pursuant to Section 604(4)(a), in the amount of \$380,000.00 directly to the State of Michigan if this Order becomes effective by operation of law. If any Respondent seeks a hearing and a hearing officer or any

other legal authority resolves this matter, such Respondent shall **PAY** a civil penalty in an amount not to exceed \$10,000 for a single violation or \$500,000 for multiple violations of Section 604(4)(a) of MUSA and the actual cost of the investigation or proceeding, pursuant to Section 604(4)(c) of MUSA.

3. Respondents shall also each **PAY** a civil penalty in addition to paragraph 2, pursuant to Section 604(4)(b)(i) and/or (ii), in the amount of \$380,000 directly to the State of Michigan if this Order becomes effective by operation of law. If any Respondent seeks a hearing and a hearing officer or any other legal authority resolves this matter, and finds that one or more investors were either age 60 or older, or unable to protect their financial interests due to disability, illiteracy or an inability to understand the language of the agreement presented to them, such Respondent shall **PAY** a civil penalty in an amount not to exceed \$10,000 for a single violation or \$500,000 for multiple violations of Section 604(4)(b)(i) and/or (ii) of MUSA
4. Willful violation of this Order constitutes a felony punishable by imprisonment for not more than 10 years, or a fine of not more than \$500,000.00 for each violation, or both. MCL 451.2604(6).

IV. NOTICE OF OPPORTUNITY FOR HEARING

Pursuant to Section 604(2) of MUSA, MCL 451.2604(2) a person who has been ordered to cease and desist may file with the administrator, within **30 days** after service on him or her of the order, a request for a hearing. If a person subject to the order does not request a hearing, the order, including any civil fine imposed or requirement for payment of the costs of investigation sought in a statement in that order, becomes final as to that person by operation of law. If a hearing is requested, the administrator will schedule the hearing within 15 days after receipt of a written request. If a hearing is requested or ordered, the hearing shall be held in accordance with the Sections 24.201 to 24.328 of the APA, MCL 24.201 to 24.328, and shall have all the powers granted thereunder. The administrator shall issue a decision sustaining, modifying, or dismissing the original order.

Pursuant to Section 503(1) of MUSA, MCL 451.2503(1) a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the exemption, exception, preemption, or exclusion.

If Respondents wish to request a hearing relating to the Order to Cease and Desist, the request for a hearing must be addressed to:

Elizabeth Bolden, Staff Attorney
Office of Financial and Insurance Regulation
Ottawa State Office Building, Third Floor
611 West Ottawa Street, Lansing, Michigan 48933

Please be advised that any statements made are voluntary and may be used in any proceeding that may be held. If a hearing is requested, Respondents have the right, at their expense,

to legal representation at the hearing. A licensed attorney must represent Respondents that are corporations or limited liability companies.

The Commissioner retains the right to pursue further administrative action against the Respondents should the Commissioner determine that such action is necessary and appropriate in the public interest, for the protection of consumers, and consistent with the purposes fairly intended by the policy and provisions of MUSA.

Any other communication regarding this Order should be addressed to the Office of Financial and Insurance Regulation, Attention: Elizabeth V. Bolden, P.O. Box 30220, Lansing, Michigan 48909, Telephone: 877-999-6442.

**OFFICE OF FINANCIAL AND
INSURANCE REGULATION**

A handwritten signature in black ink, appearing to read 'K. Ross', is written over a horizontal line.

Ken Ross
Commissioner