STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

ORLENE HAWKS
DIRECTOR

In the matters of:

LA DEVELOPERS, LLC
Unregistered

Docket No. 17-023786 - RMD
Complaint No. 328426

and

DAVID BYKER
Unregistered

Complaint No. 328388

Respondents.
______________________________________/

FINAL ORDER

1. These matters came before the Department of Licensing and Regulatory Affairs under the Michigan Uniform Securities Act (2002), MCL 451.2101 *et seq.* (the "Act").

2. The Interim Director of the Corporations, Securities & Commercial Licensing Bureau, who is the Administrator of the Act (the "Administrator"), received the Proposed Final Decision After Remand (the "PFD"), Exceptions to the PFD filed by Respondent, Response to Exceptions on behalf of the Department, and the entire hearing record in accordance with MCL 451.2604 and the Administrative Procedures Act of 1969, MCL 24.201 *et seq*.

3. The Administrator considered the Findings of Fact and Conclusions of Law in the PFD of Peter L. Plummer, Administrative Law Judge, dated December 26, 2019, the Exceptions to PFD, the Response to Exceptions, and the complete hearing record.

4. The PFD is incorporated by reference.

5. Respondent was found in violation of the Act and/or its associated administrative rules.

THEREFORE, IT IS ORDERED that the following penalties authorized by section 604 of the Act, MCL 451.2604, are imposed:

A. Respondent LA Developers, LLC must pay a FINE in the amount of Thirty Thousand Dollars and 00/100 Cents ($30,000.00). The fine must be paid by cashier's check or money order, with Complaint No. 328426 clearly indicated on the cashier's check or money order.

B. Respondent David Byker must pay a FINE in the amount of Thirty Thousand Dollars and 00/100 Cents ($30,000.00). The fine must be paid by cashier's check or money order, with Complaint No. 328388 clearly indicated on the cashier's check or money order.

C. Both fines must be made payable to the State of Michigan and be sent to the Department of Licensing and Regulatory Affairs, Corporations, Securities & Commercial Licensing Bureau, Final Order Monitoring – Securities & Audit Division, P.O. Box 30018, Lansing, Michigan 48909 within sixty (60) days from the mailing date of this Final Order.

D. Respondents must continue to Cease and Desist from violating the Act, according to the cease and desist orders issued in these matters on October 26, 2016.

E. Failure to comply with this Order may subject Respondents to additional administrative or criminal sanctions, fines, and penalties. Under MCL 451.2508, a person that willfully violates the Act, or an order issued under the Act, is guilty of 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. An individual convicted of violating a rule or order under the Act may be fined but shall not be imprisoned if the individual did not have knowledge of the rule or order.

F. No application for a permit, registration, licensure, relicensure, reinstatement, or renewal submitted by Respondents under the Act will be considered or granted by the Department until all final orders of the Department are fully complied with.

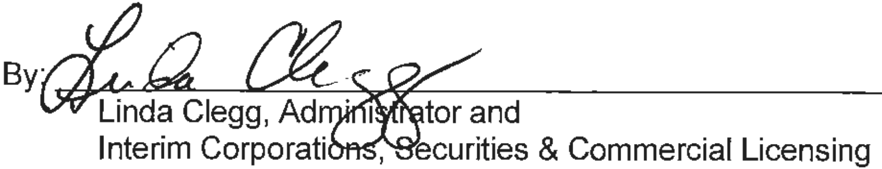
G. If applicable, Respondents must submit in writing to the Department proof of compliance with each and every requirement of this Final Order in a form acceptable to the Department.

H. Failure to pay the civil fines within six months after the fines becomes overdue may result in the referral of the fines to the Michigan Department of Treasury for collection action against Respondents.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this 3rd day of March 2020.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS



By: ______________________________

Linda Clegg, Administrator and
Interim Corporations, Securities & Commercial Licensing Bureau Director

Date mailed: March 6, 2020

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:	**Docket No.: 17-023786-RMD**
Corporations, Securities & Commercial Licensing Bureau, Petitioner	**Case No.: 328388 / 328426**
v	**Agency: Corp. Securities Commercial Licensing Bureau**
David Byker and LA Developers, Respondent	**Case Type: Cease and Desist**
	Filing Type: Cease and Desist

______________________________/

Issued and entered
this 26th day of December 2019
by: Peter L. Plummer
Administrative Law Judge

PROPOSED FINAL DECISION AFTER REMAND

This matter arises from two Cease and Desist Orders signed by the Corporations, Securities & Commercial Licensing Bureau ("CSCLB" or "Bureau") Director Julia Dale, on October 26, 2016, pursuant to the Michigan Uniform Securities Act (2002) ("MUSA" or "Act"), 2008 PA 551, as amended, MCL 451.2101, specifically section 604 and MCL 451.2102c(c) & MCL 451.2501. On October 18, 2017 the Michigan Administrative Hearing System (MAHS)[1] received a request to schedule this matter for a contested case hearing pursuant to the Administrative Procedures Act (APA) of 1969, 1969 PA 306, as amended, being MCL 24.201 *et seq*.

On October 26, 2016, The CSCLB issued Notices and Orders in Agency No. 328388 to Respondents David Byker (Byker) and in Agency No. 328426, his company, LA Developers, LLC (LAD) to Cease and Desist from;

> "...omitting to state material facts necessary to make other statements made not misleading in connection with the offer and sale of securities, contrary to the Securities Act."

[1] Pursuant to Executive Order 2019-06, effective April 22, 2019, the Michigan Administrative Hearing System (MAHS) was abolished, the Michigan Office of Administrative Hearings and Rules (MOAHR) was created, and the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

> "...omitting to state material facts necessary to make other statements made not misleading in connection with the offer and sale of securities, contrary to the Securities Act."
> (Exh. 31 and Ex. 32)[2]

The Bureau alleges that Respondents have violated §501 of the Act, MCL 451.2501.

> ... Respondents violated Michigan Securities Act by: 1) failing to disclose the risk that Respondents might not be able to produce a profit sufficient to pay the premium or the rate of return, 2) failing to disclose the risk that Respondents may lack liquidity at the note's maturity, which might hinder Respondents' ability to pay the note, as promised, and 3) failing to provide those issued the notes with any financial statements necessary to assess whether respondents have the ability to pay the note.
> Petitioner's Post Hearing Brief p 2.

MAHS issued its Proposed Order Granting Respondent's Motion for Summary Disposition on May 23, 2018.[3] After a review of the record evidence, the Administrator under the Michigan Uniform Securities Act (2002), MCL §451.2101 *et seq* (Act)[4] made the following Findings of Fact and Conclusions of Law:

a) The administrative rules governing procedure of MAHS cases under the Act are currently the Department of Consumer and Industry Services Director's Office Procedural Rules, provided for through Executive Reorganization Order No. 1996-2, MCL 445.2001, found at 1983 AACS, R 451.2101 et seq.

b) MCL 451.2608(2)(b) authorizes the Administrator to apply federal policy when interpreting the Act. For purposes of this case, the Administrator adopts the national standard — adapted from *Reyes v Ernst & Young,* 494 US 456 (1990) and since adopted by all federal circuits — to analyze whether a disputed document is a "security" under the Act.

c) The procedural posture of this case is a motion for summary disposition.

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[2] Administrators Interim Order Remanding for Findings of Fact required the parties to create a joint appendix containing any and all documents that the parties agreed to admit into the official record. Those numbered documents will be considered as Joint Exhibits and referred to by number, as in this citation as Ex. 32.
[3] *See May 23, 2018 Proposed Order Granting Respondent's Motion for Summary Disposition for additional procedural history prior to May 23,2018.*
[4] As well as the Administrative Procedures Act of 1969, as amended, MCL §24.201 *et seq*, and the procedural rules at 1983 AACS, R 451.2101 *et seq.*

d) The only evidence in the record at this time are the exhibits attached to Respondents' motion for summary disposition.

e) Michigan law provides that "summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp,* 469 Mich 177, 183 (2003).

f) The record contained a December 7, 2010 "offer letter" issued by Respondents.

g) The parties contested the meaning of the offer letter's terms in their respective briefs.

h) There were no affidavits or testimony offered to interpret the contested terms.

i) Apparently based on the parties' arguments and not on record evidence, the PFD made specific findings regarding the contested terms. Those findings include, but are not limited to, the following:

    i) "I find that any references to 'investment,' financial projection,' return on investment,' or 'investor' in the above letter is a reference to the original investment as 'Preferred Investors' which is not at issue in this matter." PFD, p 6.

    ii) "I find that the 'offer' made in the above letter (R. Mot. Ex. 8) is an offer that includes, in part, a promissory note as shown in R Mot. Ex. F.7." PFD, p 6.

j) The PFD's findings of fact were premature and improper at the summary disposition stage.

THEREFORE, IT IS ORDERED that this matter be REMANDED TO THE ADMINISTRATIVE LAW JUDGE with instructions to conduct A FULL EVIDENTIARY HEARING with the following instructions:

A. The hearing date (or if necessary, dates) shall be set with agreement by the parties and with enough time for the parties to serve any necessary subpoenas;

B. Regarding documentary evidence, the parties are instructed to create a joint appendix containing any and all documents that the parties agree to admit into the official record. The joint appendix shall be made available to the ALJ and to

all witnesses on the day of the hearing. All references to documentary evidence at the hearing and in any following briefs or orders shall refer to documents by their reference number in the joint appendix.

C. After the parties close their proofs and the record is complete, the ALJ shall issue a new **PFD** addressing the following questions:

a. Whether the transaction at issue in this case is a "security" under the Act, applying the analysis from *Reves v Ernst & Young,* 494 US 56 (1990), making proposed findings of fact regarding each of the *Reves* elements, and considering *Roves'* presumption that every "note" is a security.

b. Regardless of whether the PFD concludes the transaction is a "security" under the Act, an analysis of whether Respondents' failure to disclose that its lack of liquidity at the note's maturity may compromise the promised return on investment was an omission of material fact under MCL 451.2501(b), as discussed in the Notices to Cease and Desist in this matter.

A request for Hearing on Remand was filed by Attorney General Dana Nessel, by Assistant Attorney General James E. Long on January 7, 2019. The matter was heard on May 13, 2019, after proper notice and opportunity for counsel to seek subpoenas and create a joint appendix containing any and all documents that the parties agreed to admit into the official record. During the hearing, the parties stipulated to the following:

> During the period January 1, 2006, through March 15, 2018, the parties were under a mutually mistaken belief that the "[redacted] nterest" in Project 5 CR, LLC, in its entirety, was held by th[redacted] rust.

The record was closed August 27, 2019.

On remand, the firm Smith Haughey Rice & Roegge, by Attorneys E. Thomas McCarthy, Esq. and John R. Oostema, Esq., appeared on behalf of Respondent. Dana Nessel, Attorney General, by Assistant Attorney General James E. Long, Esq., appeared on behalf of Petitioner CSCLB.

This action is brought pursuant to the Michigan Uniform Securities Act (2002) ("MUSA" or "Act"), 2008 PA 551, as amended, MCL 451.2101. Sec. 501 of the Act which states as follows:

451.2501 Unlawful conduct; fraud.

It is unlawful for a person, in connection with the offer, sale, or purchase of **a security** or the organization or operation of a Michigan investment market under article 4A, to directly or indirectly do any of the following:

(a) Employ a device, scheme, or artifice to defraud.

(b) Make an 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 were made, not misleading.**

(c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit on another person.

[Emphasis added].

Joint Exhibit Appendix

Ex 1 [redacted] Email, 11/14/05
Ex 2 [redacted] Email, 11/18/05
Ex 3 [redacted] Email, 12/08/05
Ex 4 [redacted] Purchase of Interest
Ex 5 [redacted] Email, 1/10/06
Ex 6 [redacted] Email, 4/10/06
Ex 7 [redacted] and Byker Exchange about Return
Ex 8 [redacted] Document Production, 2/7/07
Ex 9 Chart Produced by [redacted]
Ex 10 [redacted] and [redacted] Email Exchange
Ex 11 2006 Tax Return with K-1 for Ms. [redacted]
Ex 12 Blank Tab
Ex 13 2007 Project 5 Schedule K-1 for Trust
Ex 14 2008 Project 5 Schedule K-1 for Trust
Ex 15 2009 Project 5 Schedule K-1 for Trust
Ex 16 LAD Purchased Trust's Interest
Ex 17 2010 Project 5 Schedule K-1 for Trust
Ex 18 Metadata for 2/8/07 Investor Chart
Ex 19 [redacted] Affidavit, 5/26/16
Ex 20 Email Between Ms. [redacted] and Ms. [redacted]
Ex 21 [redacted] Email, 4/21/15
Ex 22 Blank Tab

Ex 23 [redacted] and [redacted] Email, 10/24/07
Ex 24 [redacted] and [redacted] Email, 7/07/08
Ex 25 Transcript of 3/6/17 Evidentiary Hearing
Ex 26 Transcript of 4/13/17 Evidentiary Hearing
Ex 27 Settlement Agree/Mutual Release, 3/2018
Ex 28 Declaration of Ms. [redacted] 8/31/17
Ex 29 Proposed Order on Motion
Ex 30 Interim Order Remanding, 12/17/18
Ex 31 Notice and Order to Cease and Desist
Ex 32 Notice and Order to Cease and Desist

Witnesses

Witnesses for Petitioner

Witnesses for Respondents
David G. Byker

Findings of Fact

The undersigned ALJ, based upon the entire record including exhibits and the testimony of witnesses, finds by a preponderance of evidence as follows:

1. The parties have stipulated as follows; "During the period January 1, 2006, through March 15, 2018, the parties were under a mutually mistaken belief that the "[redacted] Interest" in Project 5 CR, LLC, in its entirety, was held by the [redacted] Trust."[5]

2. [redacted] worked as a part-time certified public accountant for Dave Byker and his many businesses beginning in 1995 until approximately 2013 or 2014. ([redacted] Tr. 30).

3. For purposes of this decision it will be taken that the [redacted] Trust was the Preferred Equity Member for the period January 1, 2006, through January 1, 2011.

[5] No evidence has been offered that a court of competent jurisdiction has exercised its equitable powers to rescind or void the transaction herein. Administrative Law Judges have no equitable powers and, therefore, the issue of "mutual mistake," a principal found in equity, will not be discussed or decided in this Proposal for Decision.

4. Ms. [redacted] to Mr. [redacted] and asked that [redacted] interest be transferred to the [redacted] Trust, which she believed he did. ([redacted] Tr. 36).

5. Ex. 11 is a tax year 2006 schedule K-1, Form 1065, listing the $200,000 investment in the name of [redacted] Trust. ([redacted] Tr. 38).

6. Ex. 11 lists a total of 20 investors with varying amounts invested for a total of $6,000,000.[6]

7. Project 5 was designed and intended to be a 17-story building with 108 units. However, there was no interest in additional condominium housing in the town of Jaco, Costa Rica in 2010, or thereafter. (Byker, Tr. 150).

8. On or near December 7, 2010, Mr. David Byker personally handed Ex. 16B to [redacted] at the Grandville, Michigan offices of Byker and Associates. ([redacted] Tr. 41-42).

9. Ex. 16B states:

> [redacted]
>
> Because this project has already taken much longer than we had expected or hoped, we are presenting Preferred Investors with an opportunity to sell their membership interests back to us. There are several reasons we are making this offer at this time.
>
> Uncertainty as to the availability of financing is the main reason. As you know, Phase 1 is substantially complete and much of the design, engineering and site work has been completed for Phase 2. However, due to the worldwide financial crisis we have not been able to arrange financing for Phase 2, nor can we predict when financing will become available. Please be assured that we have searched the world for a source of financing and continue to pursue each and every lead. At present, we have several active leads but no commitments.

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[6] However, [redacted] did testify that her husband, [redacted] purchased the "preferred equity" interest in Project 5 for $200,000 in late 2005-early 2006. Ex. 4b. Tr. 34. The check from their joint checking account for $200,000 was signed by [redacted] and dated 12.23.2005 and made payable to Daystar Properties. Ex. 4c. The [redacted] then met with their attorney where it was decided to reallocate their holdings. ([redacted] Tr. 35).

Another consideration for an acquisition proposal at this time is the low 15% maximum tax rate on long-term capital gains. Those choosing to sell their membership interests in Project 5 CR, LLC (as described below) will have a long-term capital gain in 2010.

We understand that many Preferred Investors would like to have a financial projection to assist in this decision. However, the current uncertainty in the financial markets makes it impossible for us to prepare a meaningful financial projection.

Our proposal to purchase your Preferred Investor membership interest is:

1. Purchase price equal to your original investment of $200,000 plus 40% ($80,000) for a total of $280,000.
2. Terms:
• 5% down payment ($14,000) paid December 31, 2010.
• 5% annual interest rate.
• Interest-only payments paid annually.
• Principal paid December 31, 2015.

While we believe that a better return on investment may be achieved by retaining your membership interest, there are no guarantees. We really cannot predict if it is better to retain your membership interest or to accept this proposal. Each investor will need to make a decision based on individual beliefs and circumstances.

If you wish to proceed with the proposal, please send the attached response form to [redacted] by December 20, 2010.

Note: the 5% down payment will be sufficient to pay the federal long – term capital gains tax, should you decide to pay all the tax on the gain in 2010.

Very Truly Yours,

Dave Byker, [redacted] *and* [redacted][7]

10. There have been no distributions to any Project 5 investors. (Byker, Tr. 149).
11. The initial payment and four annual interest payments on the 12/31/2010 Promissory Note were paid as agreed. ([redacted] Tr. 54-55).
12. [redacted] believed that all the payments were coming from Dave [Byker] ([redacted] Tr. 55).
13. Three large investors were paid back their interest or negotiated separate notes leaving 17 investors in Project 5 at the time of the above offer to purchase. (Byker, Tr.154-155). (List of investors remaining, see Ex. 16A p2).
14. To the best of her knowledge and belief, Ms. [redacted] testified that the other 16 remaining Project 5 Preferred Equity Members were given and accepted the same or similar offer as did the Trust. ([redacted] Tr. 53-54).
15. At the time [redacted] submitted her acceptance of the "Project 5 Acquisition Proposal," December 8, 2010, she had no idea and saw no documents indicating that LA Developers had any part to play in the purchase of the Trust's interest. ([redacted] Tr. 49).
16. The [redacted] Trust, through [redacted] believed that Dave Byker was personally making the offer to purchase the Trust's interest and would personally pay the amounts when due under the loan executed as part of the purchase of the [redacted] Trust's "Preferred Equity Membership" interest in Project 5. ([redacted], Tr. 47-48).
17. The [redacted] decided to accept the offer to purchase as a family investment that fit their need:

    a. "it appeared as a quicker way to get a return on our investment. We liked the fact that it was gonna pay off in 2015. We have triplets. They're

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[7] [redacted] is the person "on the ground" on Costa Rico. [redacted] is a minority partner with Dave Byker in "Global Asset Management." All three were managers in LA Developers. (Byker, Tr. 151-152).

going-they were going to be finishing 8th grade in 2015. And we thought that money would be in a timely manner for college." (Tr. 48).

18. The lump sum "balloon" payment of $252,000, due in December 31, 2015 was not paid. (Tr. 55).

19. No financial documents regarding LA Developers was ever provided to the Trust, or . (Tr.56).

20. testified that she wasn't worried about getting her money back, because, no matter the name on the documents Dave Byker would pay, and she trusted him to do just that. (, Tr.57-58).

Conclusions of Law

QUESTIONS PRESENTED BY ADMINISTRATOR ON REMAND

A. Whether the transaction at issue in this case is a "security" under the Act, applying the analysis from Reves v Ernst & Young, 494 US 56 (1990)[8], making proposed findings of fact regarding each of the Reves elements, and considering Reves' presumption that every "note" is a security.

The Act defines a security at MCL 451.2102c.

> **451.2102c Definitions; S.**
> Sec. 102c.
> As used in this act, unless the context otherwise requires:
> * * *
>
> c) "**Security" means 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; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of that put, call, straddle, option, or privilege on that security, certificate of deposit, or group or index of securities; put, call, straddle,

[8] *Reves* v *Ernst & Young*, 494 US 56 110 S. Ct. 945, 108 L. Ed. 2d 4 (1990).

option, or privilege entered into on a national securities exchange relating to foreign currency; an investment in a viatical or life settlement agreement; 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.

(ii) The term includes both a certificated and an uncertificated security.

(iii) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

> (iv) The term does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974.
>
> (v) The term includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. As used in this subparagraph, a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.
>
> (vi) The term may include, as an investment contract, an interest in a limited partnership, a limited liability company, or a limited liability partnership.

The Bureau has adopted the analysis as to what is a security in *Reves* v *Ernst & Young,* 494 US 56, 110 S Ct 945, 108 L Ed 2d 47, (1990).

Justice Marshall, writing for the majority, stated that the first issue in *Reves* was to decide whether the note in that case was a security under the Securities Exchange Act of 1934, 15 U.S.C.A. § 78a et seq. at Section 3(a)(10).

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." 48 Stat. 884, as

amended, 15 U.S.C. § 78c(a)(10).

The Justice observed that,

> In defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," *SEC v. W.J. Howey Co.,* 328 U.S. 293, 299, 66 S. Ct. 1100, 1103, 90 L. Ed. 1244 (1946), and determined that the best way to achieve its goal of protecting investors was "**to define 'the term "security" in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.'** " *Forman, supra,* 421 U.S., at 847–848, 95 S. Ct., at 2058–2059 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933)). Congress therefore did not attempt precisely to cabin the scope of the Securities Acts.[1] Rather, **it enacted a definition of "security" sufficiently broad to encompass virtually any instrument that might be sold as an investment**.[Emphasis added].
> *Reves, supra,* at 60-61.

The *Reves* court chose to apply the "family resemblance" test in determining if a note was a security under the Act, taking on the analysis of the Second Circuit. As in the Second Circuit, the US Supreme Court identified certain notes that are clearly not securities. Those notes are:

a) a note delivered in consumer financing;
b) a note secured by a mortgage on a home;
c) a short-term note secured by an assignment of accounts receivable;
d) a note evidencing a "character" loan to a bank customer;
e) a note which simply formalizes an open – account debt incurred in the ordinary course of business.

Reves, supra, at 65.

The US Supreme Court accepted that the family resemblance approach begins with the presumption that *any* note with a term of more than nine months is a "security"

citing, *Exchange Nat. Bank of Chicago v Touche Ross & Co.,* 544 F 2d 1126, 1137 (CA2 1976).

The court went on to further describe the family resemblance test.

> Accordingly, the "family resemblance" test permits an issuer to rebut the presumption that a note is a security if it can show that the note in question "bear[s] a strong family resemblance" to an item on the judicially crafted list of exceptions, *id.,* at 1137–1138, or convinces the court to add a new instrument to the list, see, *e.g., Chemical Bank v. Arthur Andersen & Co.,* 726 F.2d 930, 939 (CA2 1984).
> *Reves, supra,* at 64-65.

The court articulated the four types of transactions that can rebut the presumption that a note is a security:

> First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security." See, *e.g., Forman,* 421 U.S., at 851, 95 S. Ct., at 2060 (share of "stock" carrying a right to subsidized housing not a security because "the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit").
>
> Second, we examine the "plan of distribution" of the instrument, *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 353, 64 S. Ct. 120, 124, 88 L. Ed. 88 (1943), to determine whether it is an instrument in which there is "common trading for speculation or investment," *id.,* at 351, 64 S. Ct., at 123.
>
> Third, we examine the reasonable expectations of the investing public: The Court will consider instruments to be

> "securities" on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not "securities" as used in that transaction. Compare *Landreth Timber,* 471 U.S., at 687, 693, 105 S. Ct., at 2302, 2305 (relying on public expectations in holding that common stock is always a security), with *id.,* at 697–700, 105 S. Ct., at 2307–2308 (STEVENS, J., dissenting) (arguing that sale of business to single informed purchaser through stock is not within the purview of the Acts under the economic reality test). See also *Forman, supra,* at 851, 95 S. Ct., at 2060.
>
> Finally, we examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary. See, *e.g., Marine Bank,* 455 U.S., at 557–559, and n. 7, 102 S.Ct., at 1224–1225, and n. 7.
>
> We conclude, then, that in determining whether an instrument denominated a "note" is a "security," courts are to apply the version of the "family resemblance" test that we have articulated here: A note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument. If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors.
> *Reves, supra, at 66-67.*

The first test in this instant case suggests that the note issued by LAD is a security. LAD was interested in delaying pressure from his investors to move forward to develop Project 5. Mr. Byker testified that he hoped that, by buying up the investments made in Project 5, the "worldwide" market slump would rebound, and he could then move on with a different source of financing. He testified that he did not believe that the depressed lending market would last so long. In the other side, the [redacted] Trust, according to [redacted], was interested in the profit the "investment" would generate to assist in sending her triplets through college.

The second test for family resemblance is "plan of distribution" of the instrument. There is no record evidence that the note signed by LAD on December 31, 2010, was intended to be distributed for resale. There does not appear to be any plan for common trading for speculation or investment. However, there was no prohibition against resale in the document. The second test tends against the instrument being considered a security.

The third option for a family resemblance is the reasonable expectations of the investing public: The Court will consider instruments to be "securities" on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not "securities" as used in that transaction. The [redacted] Trust is a member of the investing public. [redacted] was a member of the investing public when he first purchased the $200,000 interest to become a "Preferred Equity Member." His (believed) transfer made the trust a member of the investing public. *Reves* does not suggest that there must be a particular number of investors considering the sale to be the "investing public." The term merely suggests that the transaction must be viewed as the public interested in investing would view it. The testimony of [redacted] Trustee supports a finding that the "investing public" thought it was exchanging one investment for another. She believed that, no matter what was said on paper, Dave Byker would make good on the note which terms better fit the future plans of the [redacted] Trust. The investing public considered the exchange of its "Preferred Equity Membership" for a note backed by Dave Byker a much better investment and, therefore the Note signed by Dave Byker as manager is a security.

Finally, there is no other regulatory scheme that reduces the risk in this instrument, thereby rendering application of the Securities Act unnecessary. The ability to sue is not a regulatory scheme. There are no other agencies with an obligation to protect investors like the [redacted] Trust and ensure that they are fully informed before they make an investment decision.

For the reasons stated above, the undersigned finds that the Promissory Note dated December 31, 2010, signed by Dave Byker, its manager, is a security as defined by MCL 451.2102c(c) under the Michigan Uniform Securities Act (MUSA).

B. Regardless of whether the PFD concludes the transaction is a "security" under the Act, an analysis of whether Respondents' failure to disclose that its lack of liquidity at the note's maturity may compromise the promised return on investment was an omission of material fact under MCL 451.2501(b), as discussed in the Notices to Cease and Desist in this matter.

It is important in this case to recall the conditions existing at the time of the December 7, 2010 letter ("letter"). For good or ill, the Trust held an interest in Project 5 CR, LLC. In the potential transaction surrounding the letter, the Trust was offered to sell its Preferred Investor Membership interest, a security by almost any definition. had obviously come to have great faith in Dave Byker as an investor. Throughout her testimony, appears to be somewhat naïve about investments but had absolute faith in Mr. Byker. It is obvious that she chose to invest in Project 5, LLC because it was one of Dave Byker's many projects. She didn't know a thing about LA Developers. It is clear and should have been clear to Dave Byker that he was the sole reason that the and then the Trust invested in Project 5, LLC. When David Byker personally handed her Exhibit 16B, the letter dated December 7, 2010, that personal act further confirmed to that the proposed transaction was effectively underwritten by Dave Byker.

The cease-and-desist orders in this matter required that Dave Byker and LA Developers, must refrain from "omitting to state material facts necessary to make other statements made not misleading in connection with the offer and sale of securities, contrary to the Securities Act." At the time as trustee, was approached by Dave Byker with an offer to purchase her interest in Project 5, it was apparent that through her observations, experiences and relationship with Dave Byker, held an erroneous belief that Dave Byker would make good on the December 31, 2010, promissory note no matter what. The document she was offered on December 7, 2010, was signed by Dave Byker (and his minority interest holders) and made no mention of LA Developers. Mr. Byker knew or should have known that he needed to provide material facts to trustee, to ensure that she was not misled into believing that this transaction was "insured" by Dave Byker. Nowhere in the December 7, 2010, letter does it affirmatively state that the obligor would be LAD, and that Dave Byker would have no personal obligation under the promissory note that was signed December 31, 2010. Dave Byker and LAD, under the circumstances that existed at the time, had an obligation to provide material facts, explaining that the source of payment on the note was the same source that was apparently nearly worthless: Project 5. None of Dave Byker's actions or words suggested to trustee, that he, basically had no role in the transaction proposed. Instead, ustee, continued to hold onto the belief that the December 7, 2010, proposal was protected from failure by Dave Byker. She trusted Dave Byker.

Because the transaction as presented in the December 7, 2010, letter, including the promissory note signed December 31, 2010, by Dave Byker as the manager of LA Developers was a security under the *Reves* analysis, both Dave Byker and LA Developers were obliged to comply with Michigan's Uniform Securities Act. Respondents failed to disclose the risk that LA Developers might not be able to produce

a profit sufficient to comply with their obligations under the promissory note of December 31, 2010. LA Developers was a stranger to the [redacted] Trust, and it was incumbent on Respondents to provide financial statements regarding the history and current condition of that entity. Respondents were obligated to provide The [redacted] Trust with sufficient financial and operating information so that the Trust, potential purchaser of the note, could make a well-founded assessment of the risks involved in accepting the offer made in the December 7, 2010, letter. Respondents failed to provide any projections on the financial future of LA Developers. Respondents may be tempted to argue that there were no "other statements made." There is an old saying that "actions speak louder than words", and that is true in this case. Respondents failed to inform the [redacted] Trust before the trustee signed the "acceptance of Project 5 acquisition proposal" on December 8, 2010, that LA Developers was going to be solely obligated under the suggested note and that neither Dave Byker nor any of his other companies besides LA Developers would be responsible for repayment of the note. Respondents failed to provide material facts to show that LA Developers would have the liquidity to repay the balloon payment due at the end of the five-year promissory note. The words and actions of Respondents omitted to state material facts necessary to make other statements made not misleading in connection with the offer and sale of securities, contrary to the Securities Act. That Is a violation of the Securities Act and the cease-and-desist orders earlier issued by the Bureau. Petitioner has shown by a preponderance of evidence that Respondents **have violated MCL §451.2501(b) by ... omitting to state a material fact necessary in order to make the statements made, <u>in the light of the circumstances under which they were made</u>, not misleading.**

Petitioner has shown by a preponderance of evidence assisted by the presumption that all notes are securities (except the few listed above) that Respondents issued a security. Respondents has failed to show that it has complied with the Act and the orders to cease and desist.[9]

IT IS PROPOSED that the Corporation, Securities, and Commercial Licensing Bureau, adopt these findings of facts and conclusions of law and find respondents in violation of the Michigan Uniform Securities Act and the Cease and Desist Orders issued October 26, 2016 by the Bureau.

Peter L. Plummer
Administrative Law Judge

[9] See 1983 AACS R 451.2505(4).

EXCEPTIONS

R 451.3202 Proposal for decision; exceptions; written arguments; forfeiture of right.
Rule 1202. A party filing exceptions and presenting written arguments pursuant to section 81 of the act shall do so within 30 days after service of a proposal for decision or shall forfeit the right to do so. For good cause, a presiding officer may establish a different time period for filing exceptions and presenting written arguments in a particular case. Written argument in support of an exception shall specify the facts and the law upon which the party relies. Factual assertions shall be supported by specific page references or other appropriate references to the record.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys to their last-known address in the manner specified below, this 26th day of December, 2019.

D. Hagar
Michigan Office of Administrative Hearings and Rules

Via First Class Mail:
E. Thomas McCarthy and John R. Oostema
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503

John R. Oostema
Smith, Haughey, Rice & Roegge
100 Monroe Street NW
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Via Inter-Departmental Mail:
Kimberly Breitmeyer
Regulatory Compliance Division Director, Corporations, Securities & Commercial Licensing
2501 Woodlake Circle
P.O. Box 30018
Okemos, MI 48864

Matthew K. Payok
Department of Attorney General
Corporate Oversight Division
525 West Ottawa, 6th Floor
Lansing, MI 48913

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
CORPORATIONS, SECURITIES & COMMERICAL LICENSING BUREAU

In the matter of: Agency No. 328388

DAVID BYKER
Unregistered

Respondent.
______________________________/

Issued and entered
This 26th day of October, 2016

NOTICE AND ORDER TO CEASE AND DESIST

Julia Dale, the Director of the Corporations, Securities & Commercial Licensing Bureau (the "Administrator"), pursuant to her statutory authority and responsibility to administer and enforce the Michigan Uniform Securities Act (2002), 2008 PA 551, as amended, MCL 451.2101 *et seq* ("Securities Act"), hereby orders David Byker ("Respondent") to cease and desist from misstating material facts or omitting to state material facts necessary in order to make other statements made not misleading in connection with the offer and sale of securities, contrary to the Securities Act. Respondent is notified of the opportunity to request a hearing in this matter.

I. BACKGROUND

A. The Respondent

1. Respondent David Byker is a resident of the State of Michigan, as well as an owner and/or officer of LA Developers, LLC. Respondent is not registered in any capacity under the Securities Act.

C. Findings of Fact

1. The Bureau received a consumer complaint regarding Respondent, and as a result, opened an investigation of Respondent's activities under the Securities Act.

2. The investigation developed evidence that Respondent, through various entities that he owned and operated, offered and sold multiple securities through multiple issuers to a Michigan resident, PM, between 2003 and 2007.[1] PM was employed by Respondent from in or around 1998 until in or around 2013.

3. One of the securities offerings sold to PM was a limited liability company membership interest in an entity called Project 5 CR, LLC, which related to a condominium project in Costa Rica. The LLC interest was sold to PM in or around December of 2005 for $200,000.

4. In or around December of 2010, Respondent, through LA Developers, LLC reached out to PM with an offer to buy back the Project 5 CR, LLC interest in exchange for a promissory note. (Exhibit 1 – Promissory Note Offering Letter). The correspondence was signed by Respondent and two other promoters of the investment. (Exhibit 1).

5. PM accepted the proposal and purchased an LA Developers, LLC promissory note in exchange for the Project 5 CR, LLC membership interest. (Exhibit 2 – PM Promissory Note).

6. The promissory note was offered to PM and others as an investment alternative to the LLC interest because of Project 5 CR, LLC's failure to make the progress expected by Byker and the entity's other promoters. The note's terms included:

    a. The note was valued at the purchase price of the Project 5 CR, LLC membership interest ($200,000) plus 40% of that value ($80,000) for a total face value on the note of $280,000.

    b. The note had a 5% down payment of $14,000 would be paid by December 31 2010.

    c. The note would carry an annual interest rate of 5%.

    d. Interest-only payments would be made annually on the note, with the principal to be paid on December 31, 2015.

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[1] Section 703 of the Securities Act, MCL 451.2703, identifies that transactions occurring prior to October 1, 2009 are governed by the predecessor Uniform Securities Act. Section 408(e) of the predecessor Uniform Securities Act, MCL 451.808(e), stated, "The administrator shall not commence any action or proceeding under this act more than 6 years after the violation." As a result, no administrative action was investigated or initiated as a result of the transactions governed by the predecessor Uniform Securities Act.

7. PM's intent in accepting the offer of the promissory note from LA Developers, LLC was to seek an investment return, and the proposal identified the recipients of the correspondence as "investors". (Exhibit 1, page 2).

8. The promissory note solicitation was distributed to at least 17 holders of membership interests in Project 5 CR, LLC, offering the sale of the notes in exchange for the LLC interests.

9. An investor in the note may have reasonably expected it to be a security because Respondent and other promoters, through LA Developers, LLC, compared the return on the note to the potential return from the Project 5 CR, LLC membership interests as follows: "While we believe that a *better return on investment* may be achieved by retaining your membership interest, there are no guarantees..." (Exhibit 1, page 2).

10. The offer and sale of the note was not otherwise subject to regulations reasonably designed to protect consumers.

11. The note issued to PM is now in default, as payment of principal was not made on December 31, 2015, and still has not been paid.[2]

12. Respondent represented to PM that the note would pay a 40% premium on the original LLC investment in addition to an annual 5% return for the term of the note. Respondent did not disclose to PM the risk that LA Developers, LLC may not be able to produce a profit sufficient to pay the premium or the rate of return.

13. Respondent represented to PM that the note would pay a 40% premium on the original LLC investment in addition to an annual 5% return for the term of the note. Respondent did not disclose to PM the risk that the entity may lack liquidity at the note's maturity, which might hinder its ability to pay the note as promised.

14. Respondent represented to PM that the note would pay a 40% premium on the original LLC investment in addition to an annual 5% return for the term of the note. Respondent did not provide PM any financial statements necessary to allow PM to assess the entity's ability to repay the investment.

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[2] PM is pursuing the matter civilly.

II. RELEVANT STATUTORY PROVISIONS

1. Section 102c(c) of the Securities Act defines "Security", in part, as:

> a note[3]; 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; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of that put, call, straddle, option, or privilege on that security, certificate of deposit, or group or index of securities, put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, an investment in a viatical or life settlement agreement; 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...

2. Section 501 of the Securities Act, MCL 451.2501, states:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security or the organization or operation of a Michigan investment market under article 4A, to directly or indirectly do any of the following:...
>
>> (b) Make an untrue statement of a material[4] 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 were made, not misleading...

[3 A promissory note is presumed to be a security under the "Family Resemblance Test" adopted by the Supreme Court in *Reves v Ernst & Young*, 494 US 56, 64-67 (1990) (Attachment 3). The presumption may be rebutted by analyzing four factors. Those factors as applied here support the fact that the note is a security: (1) The notes were sold to purchasers, such as PM, with the intent that they act as an investment in lieu of a different investment, the Project 5 CR, LLC membership interests; (2) the plan of distribution of the instrument was to 17 people who had been investors in another business venture involving Respondent; (3) the investors would reasonably expect the notes to be securities, as the notes were described as investments and were sold as a replacement for a prior investment; (4) no other regulatory scheme exists to provide a safeguard for investors in these notes. Id. All four factors weigh in favor of defining these notes as securities.]

[4 A "material" fact is one that a reasonable investor might consider important to his or her investment decision. *People v Cook*, 89 Mich App 72 (1979).]

3. Section 503(1) of the Securities Act, MCL 451.2503(1), states:

   In a civil action or administrative proceeding under this act, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the exemption, exception, preemption, or exclusions.

III. CONCLUSIONS OF LAW

1. Respondent David Byker, through LA Development, LLC, promised PM, a Michigan investor, a 40% premium on a prior investment, along with a 5% annual return on a security, but failed to disclose that the issuer may not have the ability to produce profits sufficient to fund the return on investment. A reasonable investor might consider it important that an issuer may be unable to produce profits necessary to fund the return on the investment, making the omission material. The statement was material, necessary to make the statement regarding the promised return not misleading, and was omitted, contrary to section 501 of the Securities Act, MCL 451.2501.

2. Respondent David Byker, through LA Development, LLC, promised PM, a Michigan investor, a 40% premium on a prior investment, along with a 5% annual return on a security, but failed to disclose that the issuer may lack liquidity at the maturity of the note which would be sufficient to pay the obligation when due. A reasonable investor might consider it important that the issuer may lack liquidity necessary to pay the obligation at maturity. The statement was material, necessary to make the statement regarding the promised return not misleading, and was omitted, contrary to section 501 of the Securities Act, MCL 451.2501.

3. Respondent David Byker, through LA Development, LLC, promised PM, a Michigan investor, a 40% premium on a prior investment, along with a 5% annual return on a security, but failed to provide the investor with financial statements, tax returns, or other documents evidencing the issuer's ability to perform the obligations identified. A reasonable investor might consider it important to view the company's financial statements in light of the return promised in the note. The statement was material, necessary to make the statement regarding the promised return not misleading, and was omitted, contrary to section 501 of the Securities Act, MCL 451.2501

IV. ORDER

IT IS THEREFORE ORDERED, pursuant to section 604 of the Securities Act, MCL 451.2604, that:

A. Respondent shall immediately CEASE AND DESIST from omitting material facts necessary to make other statements made not misleading in the offer and sale of securities, contrary to the Securities Act.

B. Pursuant to section 604(2) of the Securities Act, this Notice and Order to Cease and Desist is IMMEDIATELY EFFECTIVE.

C. In her Final Order, the Administrator, under section 604(4) of the Securities Act, MCL 451.2604(4), intends to impose a civil fine of $30,000.00 against Respondent.

D. Pursuant to section 508 of the Securities Act, MCL 451.2508, a person that willfully violates the Securities Act, or an order issued under the Securities Act, is guilty of 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. An individual convicted of violating a rule or order under this act may be fined, but shall not be imprisoned, if the individual did not have knowledge of the rule or order.

V. NOTICE OF OPPORTUNITY FOR HEARING

Section 604 of the Securities Act, MCL 451.2604, provides that Respondent has 30 days beginning with the first day after the date of service of this Notice and Order to Cease and Desist to submit a written request to the Administrator asking that this matter be scheduled for a hearing. If the Administrator receives a written request in a timely manner, the Administrator shall schedule a hearing within 15 days after receipt of the request. The written request for a hearing must be addressed to:

Corporations, Securities & Commercial Licensing Bureau
Regulatory Compliance Division
P.O. Box 30018
Lansing, MI 48909

VI. ORDER FINAL ABSENT HEARING REQUEST

A. Under section 604 of the Securities Act, MCL 451.2604, the Respondent's failure to submit a written request for a hearing to the Administrator within 30 days after the service date of this **NOTICE AND ORDER TO CEASE AND DESIST** shall result in this order becoming a **FINAL ORDER** by operation of law. The **FINAL ORDER** includes the imposition of the fines cited described in section IV.C., and the fine amounts set forth below will become due and payable to the Administrator within sixty (60) days after the date this order becomes final:

$30,000.00 – David Byker, under section 604 of the Securities Act, MCL 451.2604.

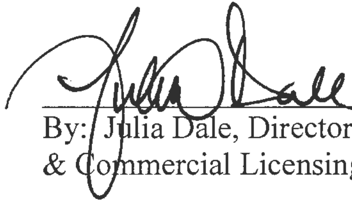
B. CIVIL FINE payments should be payable to the STATE OF MICHIGAN and contain identifying information (e.g., names and complaint numbers) and mailed to the following address:

Corporations, Securities & Commercial Licensing Bureau
Final Order Monitoring
P.O. Box 30018
Lansing, MI 48909

C. Failure to comply with the terms of this Order within the time frames specified may result in additional administrative penalties, including the summary suspension or continued suspension of all registrations held by Respondent under the Securities Act, the denial of any registration renewal, and/or the denial of any future applications for registration, until full compliance is made. Respondent may voluntarily surrender or withdraw a registration under the Securities Act; however, the surrender or withdrawal will not negate the summary suspension or continued suspension of the relevant registrations or any additional administrative proceedings if a violation of this Order or the Securities Act occurred.

D. Failure to pay the civil fines within six (6) months after this Order becomes final may result in the referral of the civil fines to the Michigan Department of Treasury for collection action against Respondents.

CORPORATIONS, SECURITIES & COMMERCIAL LICENSING BUREAU



By: Julia Dale, Director, Corporations, Securities & Commercial Licensing Bureau

10/26/16
Date