

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

In the Matter of:

Complaint No. 328025

CUNNINGHAM ENERGY, LLC
Unregistered

Respondent.

_____ /

Issued and entered
This 31 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 Cunningham Energy, LLC ("Respondent") to cease and desist from employing or associating with an unregistered agent; and, from making untrue statements of fact or omitting to state material facts necessary to make other statements made not misleading in connection with the offer or sale of securities, contrary to the Securities Act. Respondent is also notified of the opportunity to request a hearing in this matter.

I. BACKGROUND

A. The Respondent

1. Cunningham Energy, LLC is a West Virginia limited liability company, organized in or around March of 2008 by its organizer and manager, Ryan Cunningham. It has not filed a certificate of authority to do business in Michigan.
2. Cunningham Energy, LLC is not registered in any capacity pursuant to the Securities Act in Michigan, nor has it registered any securities offerings pursuant to the Securities Act in Michigan.

B. Findings of Fact

1. The Bureau conducted an investigation of Respondent's Activities.
2. The investigation developed evidence that Respondent offered or sold securities to a Michigan investor, CS, in the form of investment contracts in Michigan in or around 2010 and 2011. The securities were not registered pursuant to the Securities Act; however, Respondent claimed reliance on SEC Rule 506, 17 CFR 230.506 ("Rule 506"), a federal safe harbor exemption from registration which preempts state securities registration laws if an issuer complies with the Rule 506 requirements.
3. The investigation developed evidence that Respondent associated with and paid to Jeremy Yowell a commission that was either 10% or 20% depending upon Yowell's level of success in selling the securities. (Exhibit 1 – Yowell Contract).
4. Jeremy Yowell is not registered or exempt from registration as an agent pursuant to the Securities Act in Michigan. (See Exhibit 2, Notice & Order to Cease and Desist to Jeremy Yowell, CN 329219).
5. Respondent represented in its offering documents that Yowell was the "Director of Business Development" for the entity (Exhibit 3 – Offering Document Excerpt); however, Yowell was not a director or an employee of Respondent, but was an independent contractor who was compensated solely with commissions of 10% or 20% depending on the success of his sales attempts, and had a financial incentive to sell as many securities on Respondent's behalf as possible. (Exhibit 1). A reasonable investor might consider it important to his investment decision that the person offering or selling him a security is not an employee of the company, but is merely a third party salesperson with an incentive to sell as many securities as possible due to the commissioned nature of his compensation.

II. RELEVANT STATUTORY PROVISIONS

1. Section 102c(c) of the Securities Act, MCL 451.2102c(c) defines "Security", in part, as:

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, 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...

(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...

2. Section 402(4) of the Securities Act, MCL 451.2402(1), states:

A broker-dealer, or an issuer engaged in offering, selling, or purchasing securities in this state, shall not employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection (1) or exempt from registration under subsection (2).

3. 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 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...

4. A “material” fact is a fact that a reasonable investor might have considered important in making an investment decision. *People v Cook*, 89 Mich App 72, 83; 279 NW2d 579, 585 (1979) (*Citing Mills v Electric Auto-Lite Co*, 396 US 375, 384 (1970)).

5. 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 exclusion.

III. CONCLUSIONS OF LAW

1. Respondent Cunningham Energy, LLC associated with or employed an unregistered and non-exempt agent in the offer and sale of its securities, in violation of section 402(4) of the Securities Act, MCL 451.2402(4). Jeremy Yowell was paid a commission to sell Respondent's securities. Jason Yowell was not registered or exempt from registration as an agent under the Securities Act in Michigan (See Exhibits 1 and 2), and was associated with or employed by Respondent, in violation of section 402(4) of the Securities Act, MCL 451.2402(4).
2. Respondent Cunningham Energy, LLC misstated a material fact in connection with the offer or sale of securities when it represented to investor CS in its offering documents that Jeremy Yowell was its "Director of Business Development", when in fact, Yowell was an independent contractor paid on a commission basis, and was not a traditional salaried employee. The misstatement was material because a reasonable investor might consider it important that the issuer's sales person was not an employee of the issuer, but an unregistered, non-exempt individual who would only make money if he earned 10% or 20% commissions for selling securities on the issuer's behalf, and therefore the statement was made in violation of section 501(b) of the Securities Act, MCL 451.2501(b).

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 offering or selling unregistered securities, associating with or employing an unregistered agent, and misstating material facts, 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 \$20,000.00 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:

\$20,000.00 – Cunningham Energy, LLC, under section 604
of the Securities Act, MCL 451.2604.

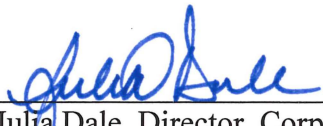
- B. CIVIL FINE payments should be payable to the STATE OF MICHIGAN and contain identifying information (e.g., names and complaint numbers) and mailed to the following address:

Notice & Order to Cease & Desist
Cunningham Energy, LLC (CN 328025)

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



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

10/31/16
Date