STATE OF MICHIGAN

RICK SNYDER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

SHELLY EDGERTON
DIRECTOR

Complaint No. 327185

ROBERT BYRKIT MORLEY, JR.
CRD#854544
Unregistered

FINE PAYMENT INSTRUCTIONS

The FINE must be received by the Department on or before JULY 5, 2017. The FINE must be paid by cashier's check or money order, with the Complaint No. clearly indicated on the check or money order, made payable to the State of Michigan, and sent to the address indicated below. Payment cannot be made by credit card.

Once the FINE has been overdue for at least six months, it will be referred to the Michigan Department of Treasury for collection. Questions may be directed to Final Order Monitoring staff at (517) 241-9180.

To ensure the proper posting of the payment to your account, please mail the Fine Payment Processing Stub with your payment to:

Michigan Department of Licensing and Regulatory Affairs
CORPORATIONS, SECURITIES & COMMERCIAL LICENSING BUREAU
Final Order Monitoring – Securities & Audit Division
P.O. Box 30018 – Lansing, MI 48909

FINE PAYMENT PROCESSING STUB

Please return this with your payment.

Make your check or money order drawn from a U.S. financial institution payable to the STATE OF MICHIGAN.
Do not send cash. Payment cannot be made by credit card.

Agency C3 ACCOUNT Code
10117

Complaint No.: 327185		**Due: JULY 5, 2017**
		Total Amount Due: $80,000.00

In the matters of:

Docket No. 16-015739

ROBERT BYRKIT MORLEY, JR.
CRD#854544
Unregistered

Complaint Nos. 327185 & 327186

and

CREATIVE WEALTH STRATEGIES, INC.
Unregistered

Respondents.
_____/

FINAL ORDER

1. This matter came before the Department of Licensing and Regulatory Affairs, Corporations, Securities & Commercial Licensing Bureau ("Bureau") under the Michigan Uniform Securities Act (2002), MCL 451.2101 *et seq.* (the "Act"), and associated administrative rules.

2. The Director of the Bureau, who is the Administrator of the Act (the "Administrator"), received the Proposal for Decision (the "PFD") 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 Thomas A. Halick, Administrative Law Judge, dated April 4, 2017, Respondents' Exceptions, dated April 25, 2017, and the Bureau's Post-Hearing Brief and Reply Brief filed on January 27, 2017, and February 10, 2017, respectively.

4. The Administrator makes the following Findings of Fact and Conclusions of Law:

    a. Respondents offered and sold Creative Wealth Strategies, Inc. securities, in the form of investment contracts to two Michigan investors, a husband and wife over the age of 60 who were also investment advisory clients in Michigan, when the securities were not registered under the Act, contrary to MCL 451.2301.

b. The investment contracts were "securities," within the meaning of MCL 451.2102c(c)(v).

c. Respondent, Robert Byrkit Morley, Jr., represented on the Form ADV for Robert Byrkit Morley, Jr.'s (IARD# 134443) investment adviser firm application[1] that he would not sell to investment advisory clients any securities in which he held a proprietary interest. He was the President of Creative Wealth Strategies, Inc. Notwithstanding the representation on the Form ADV, he sold Creative Wealth Strategies, Inc. securities to two Michigan investors, making the statement material and misleading, contrary to MCL 451.2501(b).

d. Respondents did not meet their burden of proving the applicability of an exemption to the Act's registration requirements as to the securities they sold to the two Michigan investors in Michigan.

5. The PFD also found Respondents in violation of the Act. To the extent that the Findings of Fact and Conclusions of Law in the PFD do not conflict with the above, the PFD is incorporated by reference.

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

A. Respondent, Robert Byrkit Morley, Jr., must pay a FINE in the amount of Eighty Thousand Dollars and 00/100 Cents ($80,000.00). Respondent, Creative Wealth Strategies, Inc., must pay a separate FINE in the amount of Forty Thousand Dollars and 00/100 Cents ($40,000.00) for a total fine of **One Hundred Twenty Thousand Dollars ($120,000.00).** The fines are payable to the State of Michigan within sixty (60) days from the mailing date of this Final Order. Complaint Nos. 327185 & 327186 must be clearly indicated on the cashier's check(s) or money order(s), and the payment(s) sent to the Department via the Corporations, Securities & Commercial Licensing Bureau, Final Order Monitoring – Securities & Audit Division, P.O. Box 30018, Lansing, Michigan 48909.

B. Respondents must continue to cease and desist from violating the Act, according to the Notices and Orders to Cease and Desist issued and entered in this matter on February 4, 2016.

C. Failure to comply with this Order may subject Respondents to additional administrative or criminal sanctions, fines, and/or 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.

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[1] The Administrator simultaneously issued a separate Final Order denying the investment adviser firm's application in connection with Agency No. 328464.

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.

D. 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 Bureau are fully complied with.

This Final Order is effective immediately upon its mailing.

Given under my hand at Okemos, Michigan, this 4th day of May, 2017.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

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

Date mailed: May 5, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:	**Docket No.:**	**16-015739**
Corporations, Securities & Commercial Licensing Bureau, Petitioner	**Case No.:**	**327185**
	Agency:	**Corp. Securities Commercial Licensing Bureau**
v		
Robert Byrkit Morley, Jr., and Creative Wealth Strategies, Inc., Respondent	**Case Type:**	**Security Division**
	Filing Type:	**Summary Suspension**

_____/

Issued and entered
this 4th day of April, 2017
by: Thomas A. Halick
Administrative Law Judge

PROPOSAL FOR DECISION

BACKGROUND

On February 4, 2015, the Corporations, Securities & Commercial Licensing Bureau (CSCLB) issued a Notice and Order to Cease and Desist to Robert Byrkit Morley, Jr (Complaint No. 327185) and a separate Notice and Order to Cease and Desist to Creative Wealth Strategies, Inc., (Complaint No. 327186), under MCL 451.2604.

On May 31, 2016, the parties requested a hearing on the Orders. A notice of hearing was issued on June 2, 2016, scheduling a hearing for August 22, 2016.

On July 28, 2016, Respondent's counsel filed a motion to withdraw as counsel and to adjourn the hearing, which was granted by an Order entered August 8, 2016, and the hearing was rescheduled for October 20, 2016, by an Order entered August 16, 2016.

On October 19, 2016, Respondent filed a written request to adjourn the hearing due to a death in the family which required Mr. Morley to travel out of state. Petitioner opposed the adjournment. Respondents' request was granted by an Order entered October 20, 2016, and the hearing was rescheduled for December 8, 2016.

On December 8, 2016, Respondent appeared for the hearing with counsel, whom he had retained the day before, and moved to adjourn the hearing to allow addition time to

prepare for the hearing.[1] The motion to adjourn was denied on the record and the hearing proceeded as scheduled after a brief prehearing conference.

The hearing convened under MCL 24.271 *et seq.* on December 8, 2016. Matthew K. Payok, Assistant Attorney General, represented the Corporations, Securities & Commercial Licensing Bureau. Byron P. Gallagher, Jr. appeared and represented Respondents.

Mr. Payok introduced four exhibits and offered testimony from Steven Brey, a CSCLB investigator, to describe the reason for the cease and desist order. Mr. Morley also provided sworn testimony.

FINDINGS OF FACT

Respondent, Robert Byrkit Morley, Jr., an individual, was registered as a sole proprietor investment adviser in Michigan from August 13, 2007, until the license lapsed on December 31, 2014, after it was not renewed. Thereafter, Mr. Morley filed a new application for registration as a sole proprietor investment adviser, which application was pending as of the date of the hearing.

Respondent, Creative Wealth Strategies, Inc., ("CWS") was a Michigan corporation that dissolved in July of 2015. CWS was not registered under the Securities Act in Michigan and did not have any securities registered under the Securities Act.

Mr. Morley was formerly employed by Cigna Financial Services from 1977 to 1993, providing financial services to entrepreneurs throughout the Midwest. In 1993 he went into business as a sole proprietor. In 2001, he incorporated Creative Wealth Strategies, Inc. The corporation was never registered, and Mr. Morley handled any broker-dealer activities under his sole proprietorship.

MJM and PLM, husband and wife, were long-time clients of Mr. Morley. Mr. Morley was introduced to MJM and PLM in the late 1990's, by their nephew, [redacted] (the complainant in this case). In 1998, Mr. Morley first met MJM and PLM at their home in Jackson, Michigan, and assisted them with estate planning, including an irrevocable trust, a revocable living trust, and life insurance. At that time, MJM and PLM had a net worth of approximately $6 million in investable assets.

In 2009, Mr. Morley began providing investment advice to MJM and PLM. Mr. Morley testified that he "managed their wealth." Mr. Morley met with MJM and PLM on a monthly basis regarding their investments. In 2010, 2011, and 2012, when MJM and

[1] A prehearing conference was held by telephone on October 19, 2016, at which time Mr. Morley stated he intended to retain new counsel. He was advised by the ALJ to do so sufficiently in advance of the hearing so that he and his attorney would be prepared for the hearing.

PLM were in their late 80's, Mr. Morley would meet with them approximately every ten days. Mr. Morley developed a close relationship with them, and considered them to be like an aunt and uncle.

According to Mr. Morley, there came a time in 2011 when CWS "borrowed" money from MJM and PLM. CWS and Mr. Morley were having a difficult time financially, and needed money to keep the cash flow of his business going.[2] Mr. Morley met with PLM and MJM, and claims that he asked to "borrow" an unspecified amount of money from them over a six month period, with an agreed upon return of 10%. This occurred while MJM and PLM were his investment clients. [Tr. 1:50:13.] These transactions, which Mr. Morley characterizes as direct loans, are memorialized by two documents, each entitled "Investment Agreement." [Pet. Exh. 1 and 2]. Each transaction was embodied in a separate "Investment Agreement," signed by PLM and MLM, respectively. [Pet. Exh. 1 and 2]. The contents of the documents state as follows:

> I have agreed to make a series of investments for a period of 6 months in Creative Wealth Strategies, Inc. Payments, at the end of the 6 months, will be made directly into my Fidelity account at a rate of 10% from the date of investment.

Exhibit 1 was signed by "MJM" and Exhibit 2 was signed by "PLM" but were not dated.

Exhibit 1 includes the following language written by the hand of Mr. Morley, and signed by him:

> On February 6, 2012 I deposited a check into your fidelity account in the amount of $72,000. That amount is based on a series of investments over the past 6 months with a return of 10%. (Signed by Robert B. Morley).

Exhibit 2 also includes Mr. Morley's signature and handwritten language that is identical to Exhibit 1, except that the amount deposited into PLM's Fidelity account was stated to be $71,000.

When asked at the hearing why he titled the documents as "investment agreements," Mr. Morley answered that he did remember and did not know. [Tr. 2:21:26].

Mr. Morley testified that the total amount received was $130,000 ($65,000 each from PLM and MJM). Mr. Morley says he repaid $72,000 to MJM, which is more than a 10% return. [$65,000 x 1.10 = $71,500]. He testified that he paid $71,000 to PLM, which is less than a 10% return. However, the sum of the two amounts claimed to be invested

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[2] Use of the terms "loan" or "borrow" does not constitute a Finding of Fact that the transaction was a loan. This determination is a legal question that is addressed in the Conclusions of Law section of this Proposal for Decision.

was $130,000, and the total amount paid was $143,000, which equals a 10% return on the combined amount invested by MJM and PLM. [$130,000 x 1.10 = $143,000]. Mr. Morley used the $130,000 to operate his business, Creative Wealth Strategies, Inc.

MJM and PLM passed away in the summer of 2012.

There came a time when Petitioner attempted to contact Mr. Morley with regard to a complaint filed against him. During this time period Mr. Morley claims that he was in Florida for 11 or 12 months taking care of a sick relative. He claims that he did not receive mail during this time. Petitioner mailed several letters to him regarding the transactions with MJM and PLM.

On March 16, 2016, Mr. Morley admits that he received the Cease and Desist Orders. Within ten days of receipt of the orders, he notified the state that he was no longer acting as a registered investment advisor, and that he had not been involved in investment work since his license expired on December 31, 2014.

On cross-examination, Mr. Morley, was questioned regarding a document authored by Mr. Morley in 2013 or 2014, entitled "M*** Family Update," which was prepared at the request of [redacted] [Pet. Exh. 4]. This document lists various investments that Mr. Morley arranged for MJM and PLM (through various trusts created by them). The investments included REITS, real estate, and private placement, totaling $763,900. The Family Update memorandum is not dated, but it refers to "the pending increase in the Federal Funds rate in 2010 and 2011" and also refers to "returns during the first half of 2013" which were "eliminated during the following 6 months." [Pet. Exh. 4]. Mr. Morley testified that these investments were ongoing (as of the hearing date). [Tr 1:54:00]. Mr. Morley testified that he still holds investments for MJM and PLM.

[redacted] filed a complaint with the Financial Industry Regulatory Authority (FINRA). FINRA oversees brokers and their agents. In response to that complaint, Mr. Morley disclosed that Creative Wealth Strategies, Inc. was an "other business activity" (insurance sales).

Petitioner's Exhibit 3 is a "Form ADV Uniform Application for Investment Adviser Registration," filed by Robert Byrkit Morley Jr. (Sole Proprietorship). On the Form ADV, Mr. Morley answered "No" to a question asking "Do you or any *related person* . . . recommend securities (or other investment products) to advisory *clients* in which you or any *related person* has some other proprietary (ownership) interest (other than those mentioned in Items 8.A(1) or (2))?" [Pet. Exh. 3, p 11. Emphasis original.]

Stephen Brey is a Departmental Analyst who investigated the complaint in this case. In the course of his investigation, he learned that [redacted] was the successor trustee of the estate of MJM and PLM. Mr. [redacted] had discovered that money was missing

from the estate, resulting in the filing of this complaint. Mr. Brey searched the securities products data base and determined that the "Investment Agreements" (Pet. Exh. 1 and 2) were not registered. Mr. Brey mailed at least three letters to the address of record associated with Mr. Morley, which were returned as undeliverable. The letters asked Mr. Morley to identify any applicable exemption, preemption, or exclusion that would excuse registration under the securities act, but Mr. Morley did not do so.

EXHIBITS

Petitioner's Exhibit 1 – Investment Agreement (MJM).

Petitioner's Exhibit 2 – Investment Agreement (PLM).

Petitioner's Exhibit 3 – Form ADV – Uniform Application for Investment Adviser Registration.

Petitioner's Exhibit 4 – "M" Family Update

Respondent offered no Exhibits.

APPLICABLE LAW

MCL 451.2301 reads:

> A person shall not offer or sell a security in this state unless 1 or more of the following are met:
>
> (a) The security is a federal covered security.
>
> (b) The security, transaction, or offer is exempted from registration under sections 201 to 203.
>
> (c) The security is registered under this act.

MCL 451.2604 reads:

> (1) If the administrator determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the administrator may do 1 or more of the following:
> (a) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this act.
>
> (b) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under section 401(2)(a)(iv) or (vi) or an investment adviser under section 403(2)(a)(iii).
>
> (c) Issue an order under section 204.
>
> (2) An order under subsection (1) is effective on the date of issuance. Upon issuance of the order, the administrator shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement of any civil fine or costs of the investigation the administrator will seek, a statement of the reasons for the order, and notice that the matter will be scheduled for a hearing within 15 days after receipt of a request in a record from the person. If a person subject to the order does not request a hearing and none is ordered by the administrator within 30 days after the date of service of the order, 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 or ordered, the administrator, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(3) If a hearing is requested or ordered pursuant to subsection (2), the hearing shall be held pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. A final order shall not be issued unless the administrator makes findings of fact and conclusions of law on the record pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The final order may make final, vacate, or modify the order issued under subsection (1).

(4) In a final order issued under this section, the administrator may do any of the following:
(a) Impose a civil fine of not more than $10,000.00 for a single violation of this act or a rule adopted or order issued under this act or $500,000.00 for multiple violations.

(b) In addition to a civil fine imposed under subdivision (a), if the violation or violations of this act or a rule adopted or order issued under this act includes an act, practice, or course of business directed at, or that resulted in damage to, any of the following, the administrator may impose a civil fine of not more than $10,000.00 for a single violation or $500,000.00 for multiple violations:

(i) One or more individuals who are 60 years of age or older.

(ii) One or more individuals who the administrator determines were unable to protect their financial interests due to disability or illiteracy or an inability to understand the language of an agreement presented to them.

(c) Charge the actual cost of an investigation or proceeding for a violation of this act or a rule adopted or order issued under this act.

(5) If a petition for judicial review of a final order is not filed in accordance with section 609, the administrator may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The filed order shall have the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

> (6) If a person fails to comply with an order under this section, the administrator may petition a court of competent jurisdiction to enforce the order. The court shall not require the administrator to post a bond. If the court finds, after service and opportunity for hearing, that the person is not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose an additional civil fine against the person for contempt in an amount not less than $10,000.00 or more than $500,000.00 for each violation and may grant any other relief the court determines is just and proper in the circumstances.

CONCLUSIONS OF LAW

Petitioner's Exhibits 1 and 2 represent an investment under MCL 451.2102c, because PLM and MLM made investments in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. [Tr. 50:05]. Each Investment Agreement is an "investment contract" and thus a "security." MCL 451.2102c(c).

For purposes of analysis, the language of the Investment Agreements are set forth below:

> I have agreed to make a series of investments for a period of 6 months in Creative Wealth Strategies, Inc. Payments, at the end of the 6 months, will be made directly into my Fidelity account at a rate of 10% from the date of investment.

Exhibit 1 was signed by "MJM" and Exhibit 2 was signed by "PLM" but were not dated. Exhibit 1 includes the following language written by the hand of Mr. Morley, and signed by him:

> On February 6, 2012 I deposited a check into your fidelity account in the amount of $72,000. That amount is based on a series of investments over the past 6 months with a return of 10%. (Signed by Robert B. Morley).

The Investment Agreements are written in the first person, although Mr. Morley drafted them and they are signed by MJM and PLM, respectively. There is no evidence of the mental state or capacity of MJM or PLM at the time of signing. The date that they were signed is indeterminate, because the signatures are not dated. Mr. Morley testified that they were signed approximately six months before he states that he deposited checks into his client's fidelity account. If this is true, which cannot be accepted at face value, the date of signing was August 6, 2011. Based on this record, it cannot be determined

with any reasonable precision when the Agreements were entered. Nor, can it be known from the documents how many investments were made or in what amount(s). According to the Agreements, each investor agreed to make a "series of investments" – in an amount that was to be determined, over six months. Mr. Morley's handwritten notes on Exhibits 1 and 2 state that the money he deposited into the account was "based upon a series of investments over the past 6 months with a return of 10%." This contradicts Mr. Morley's testimony that he received a single payment of $65,000 from each investor six months prior to February 6, 2012. A single payment of $65,000 is not a "series of investments."

The "rate of 10%" was to be calculated "from the date of investment." The Investments Agreements do not use the term "interest," "interest rate," or describe the method of calculating an interest rate.

It is apparent that Mr. Morley wanted to present these transactions to his clients as *investments* and not loans. Mr. Morley presented as an educated, experienced, and sophisticated professional investment advisor, but he is not a credible witness. He deliberately chose to title each document as an "Investment Agreement." He used the word "investment(s)" two more times in the original documents, and once more in his handwritten note. Now, in the interest of his defense to the Cease and Desist Orders, Mr. Morley, the drafter, claims that each Investment Agreement represents a direct loan to his investment clients. However, as drafted, there was no agreement as to how much money would be paid to Mr. Morley (on behalf of CWS), or when payments would be made during the six month period. Further, there is no verifiable way of knowing how long Mr. Morley actually held the money, because the original Investment Agreements are not dated. It is not credible that Mr. Morley simply overlooked important details, such as properly titling the document as a promissory note, dating it, and identifying a principal sum. Instead, he led his clients to believe that they would agree to invest an unspecified amount, made in a series of payments, over a six month period. As Petitioner's counsel points out, the document does not contain a promise by MJM or PLM that could be legally enforced. They each had no obligation to do anything more than to make two, nominal investments in order to literally perform the agreement to "make a series of investments."

MJM and PLM were in their late eighties when they made the investments. Although the date is not in the record, there came a time in 2012 when MJM broke her hip and was admitted to an assisted living facility, where she was living there at the time of her death. There is also testimony that MJM suffered from Alzheimer's disease. On July 10, 2012, PLM shot and killed his wife (MJM) at her nursing home, then killed himself. They died four months after Mr. Morley paid off the Investment Agreements. This was less than a year after the couple paid Mr. Morley $130,000. This is very concerning.

There is no significant dispute over the material facts of this case. Respondents state

their defense to the Orders as follows:

> "Respondents assert as an absolute defense that each "Investment Agreement" is simply a loan with a maturity of 6 months and thus not a Security, as a matter of law, under [sec.] 3(a)(3) of the Securities Act of 1933 . . . and *Reves v Ernst & Young*, 110 S Ct 945 (1990) . . . which state that a promissory note that matures in less than 9 months is not a Security." Post Hearing Brief of Respondents, p 2.

The parties agree that this case turns upon whether the Investment Agreements are securities as defined under the act and case law. If not, there was no obligation to register them and the Cease and Desist Orders, which order Respondents to stop "selling unregistered securities" are based on a false premise and the Orders would be invalid. Likewise, if the Investment Agreements are actually promissory notes, Respondent Morley did not falsely represent on the form ADV that he did not sell a security in which he had an ownership interest to his investment clients, as alleged in the Notice and Order to Cease and Desist issue against him.

The analysis begins with an examination of Michigan statutory law. The Uniform Securities Act, 2008 PA 551, ("the Act") provides the following definition of "security."

> (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, 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 . . . . MCL 451.2102c(c).

Most notably, the Act defines a "security" to include an "investment contract." As a professional investment advisor, Mr. Morley is charged with this knowledge. He titled the subject documents "Investment Agreements." He cannot easily disown his choice of words. The statutory definition is intended to be broad, and encompasses many types of instruments for the protection of the public.

The purpose of the Act is to prevent "promoters from perpetrating frauds and impositions on unsuspecting investors in hazardous undertakings and to protect credulous and incompetent persons from their own inclinations to speculate in hazardous enterprises." *People v Breckenridge*, 81 Mich App 14-15; 263 NW2d 922 (1978), lv den 402 Mich 915 (1978).

In 2011, Mr. Morley asked his clients to invest money in his business, Creative Wealth Strategies, Inc., at a time when "CWS was having cash flow problems . . . ." Brief of Respondent, page 8.

The statutory definition of security is not limited to stock or an equity interest in a business enterprise, but includes a promise to pay or repay money in the form of a "note . . . bond . . . evidence of indebtedness." MCL 451.2102c(c). These terms include a promissory note evidencing a loan. Therefore, even if Mr. Morley is to be believed, his attempt to re-characterize the Investment Agreements as direct loans does not remove them from the definition of a security. In any event, the Investment Agreements are not loans. It is concluded that the under a plain reading of the applicable Michigan statute, the Investment Agreements are in fact "investment contracts," and therefore, they are "securities" under section 102c of the Code.

Citing federal law, Respondents argue that "a promissory note that matures in less than 9 months is not a Security." Brief of Respondents, p 11. Having concluded herein that the Investment Agreements are securities and not promissory notes, Respondent's argument cannot stand.

During the hearing, Respondents' counsel questioned Mr. Brey about "substance over form" doctrine. Here, there is no reason to invoke substance over form in order to rule in accordance with the intent of the Act. This doctrine is generally applied in order avoid an unjust result, such as where a person denominates a transaction a certain way in order to avoid negative consequences of an alternate, but substantively accurate title or characterization. Michigan jurisprudence has recognized the "substance over form doctrine" in other contexts. "It is the substance of a transaction rather than the terms applied by the parties which determines how to characterize the payment for tax purposes." *Stratton-Cheeseman Mgt Co v Dep't of Treasury*, 159 Mich App 719; 407 NW2d 398 (1987), citing *Central Discount Co v Dep't of Revenue*, 355 Mich 463, 467, 94 NW2d 805 (1959). However, in our case, there is no reason to resort to the substance over form doctrine, where the drafter would have gained no apparent advantage by intentionally mischaracterizing a loan as an investment agreement. To the contrary, it is apparent that Mr. Morley deliberately presented the offer as an investment opportunity, rather than a loan, as an inducement to his investment clients. It is concluded that the document is what it says it is. This Tribunal declines to apply the substance over form doctrine to allow the drafter to avoid the natural consequences of his choice of words. When asked why he called a loan an investment agreement, Mr.

Morley answered that he did not know. Other than his self-serving testimony, there is no support for Respondents' premise that the Investment Agreements constitute loans. Respondents' legal argument simply asserts the premise that the Investment Agreements were loans and then moves on to argue from case law that certain loans are not securities.

Again, Respondents' argument starts with the unsupported premise that the Investment Agreements represent loans, citing no law or analysis on this point. The main authority cited is *Reves v Ernst & Young*, 110 S Ct 945 (1990). However, the issue in that case is distinguishable from our case. In *Reves*, there was no dispute that the instruments in question were "demand notes issued by the Farmers Cooperative of Arkansas." *Id*, p 947. As stated by the U.S. Supreme Court, "to support its general; business operations, the Co-Op sold promissory notes payable on demand by the holder." *Id*, p 948. The Court further stated that the "notes were uncollateralized and uninsured, they paid a variable rate of interest that was adjusted monthly . . . . The Co-Op offered the notes to both members and nonmembers, marketing the scheme as an "Investment Program." When the Co-Op filed for bankruptcy, the holders of the notes filed suit alleging violations of the anti-fraud provisions of the 1934 Securities Act and the Arkansas securities act, claiming that the Co-Op failed to follow accepted accounting practices in disclosing its financial condition. The Co-Op defended by arguing that the notes, which were admittedly notes, were nevertheless not "securities" as defined by the Act. This is an important distinction. *Reves* discusses how an instrument that is without question a "note," may not be a security. The case does not resolve the issue in our case as to whether a document that on its face is an investment contract is in substance a promissory note of a type that is not subject to Michigan's Act. The various legal tests discussed in *Reves* are not designed to solve the issue in our case. In *Reves*, the Court adopted the "family resemblance test," which includes six factors, all of which presume that the instrument being tested is a "note," which are applied to determine whether the note is also a security under federal law.

Respondents also rely upon a federal statutory provision that excludes from the definition of security a promissory note that matures in nine months or less. However, this provision is not found in Michigan's Securities Act. See 15 USC sec. 78c(a)(10) and MCL 451.2012c(c). Respondents' reliance on this provision is misplaced.

Reves does not support Respondents' case, but rather contains law supporting Petitioner. The Court held that Congress "enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be *sold as an investment*." *Id*, p 949 [Emphasis added]. In our case, the instruments were "sold as an investment" because they were plainly denominated as such, and there is no reason to believe that the investors considered them to be anything other than what they purported to be.

The Court further noted that the Co-Op sold the notes in an effort to raise capital for its

general business operations, and purchasers bought them in order to earn a profit in the form of interest." *Id*, p 952. In *Reves*, the notes plainly stated an interest rate. This is analogous to our case where CWS issued the investment contracts (not notes) to finance its business operations and where the investors sought to earn a profit; however, the subject Investment Agreements to not specifically state an *interest* rate. The fact that the Investment Agreements stated "payments . . . at a rate of 10%" and "with a return of 10%" does not transform them into interest-bearing, promissory notes. A terms "rate" or "return" used in the Investment Agreements are not synonymous with the term "interest." In fact, the term "interest" does not appear in the Investment Agreements.

In *Reves*, the court also found it relevant that "The advertisements for the notes here characterized them as 'investments,' . . . and there were no countervailing factors that would have led a reasonable person to question this characterization. In these circumstances it would have been reasonable for a prospective purchaser to take the Co-Op at its word." *Id*, p 953. Likewise, in our case, the drafter's use of the title "Investment Agreement" would lead the investors to take that language at face value.

Petitioner cites on-point, Michigan case law to support its positon that the Investment Agreements are not promissory notes. Most significantly, a promissory note must include "an unconditional promise" to pay "a fixed sum of money . . . ." *Parker v Baldwin*, 216 Mich 472, 474 (1921). As discussed above, there is no "unconditional promise" because the investors merely agreed to "make a series of investments," which is too vague for judicial enforcement. Assuming arguendo that there is an unconditional promise to invest a nominal amount of money (a penny would do), there is clearly no "fixed sum of money." Petitioner's Reply Brief is replete with additional authorities supporting this proposition.

In summary on the first point of law, the Investment Agreements at issue are securities as defined under MCL 451.2102(c) that were not registered under the Act, or exempt from registration, the sale of which constitutes a violation of MCL 451.2301. These violations apply to the activity of Respondent Creative Wealth Strategies, Inc., described in the Notice and Order to Cease and Desist, Complaint No. 327186, issued February 4, 2016; and to the activity of Respondent Robert Byrkit Morley, described in the Notice and Order to Cease and Desist, Complaint No. 327185, issued February 4, 2016.

The Cease and Desist Order (Complaint No. 327185) issued against Respondent Morley in his individual capacity, also alleges that he violated MCL 451.2501(b), when he made a materially false representation in his form ADV investment advisor application that he would not sell to investment advisory clients any securities in which he held a proprietary interest. Petitioner has proven that Respondent Morley sold two CWS securities (Investment Agreements) to his investment advisory clients PLM and MLM, and that his representation to the contrary on the form ADV was material and

misleading, in violation of section 501(b) of the Act. [Pet. Exh. 3].

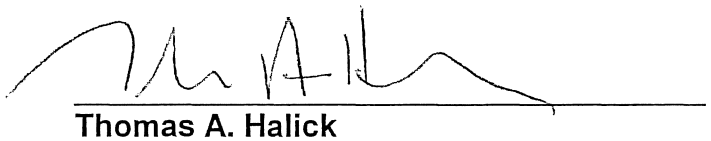
Based upon the foregoing Findings of Fact and Conclusions of Law, it is determined that the allegations and conclusions of law in the Cease and Desist Orders are adopted. The state of Michigan is authorized to issue an order under MCL 451.2604(1)(a).

PROPOSED ORDER

The February 4, 2016 Notice and Order to Cease and Desist (Complaint No. 327185) issued against Respondent Robert Byrkit Morley, Jr., including fines, is final.

The February 4, 2016 Notice and Order to Cease and Desist (Complaint No. 327186) issued against Respondent Creative Wealth Strategies, Inc., including fines, is final.

The state of Michigan is authorized to issue an order under MCL 451.2604(1)(a).



Thomas A. Halick
Administrative Law Judge

EXCEPTIONS

Pursuant to MCL 24.281 and 2015 AACS R 792.10132, the parties may file exceptions to this proposal for decision within 21 days after the proposal for decision is issued and entered. An opposing party may file a response to exceptions within 14 days after exceptions are filed. All exceptions and responses must be filed with the Michigan Administrative Hearing System, P.O. Box 30695, Lansing, Michigan 48909-8195, and served on all parties to the proceeding.

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

In the Matter of: Complaint No. 327185

ROBERT BYRKIT MORLEY, JR. (CN 327185)
CRD#854544
IARD#134443

Respondent.
_____/

Issued and entered
This 4th day of February, 2016

NOTICE AND ORDER TO CEASE AND DESIST

Julia Dale, the Acting 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 Robert Byrkit Morley, Jr. ("Respondent") to cease and desist from selling unregistered securities, and to cease and desist from continuing to directly or indirectly make any untrue statements of material fact, or omit 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, 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. Robert Byrkit Morley, Jr. is an individual who was registered as a sole proprietor investment adviser (IARD#134443) in Michigan from August 13, 2007 until on or around December 31, 2014, when his sole proprietor investment adviser firm failed to renew its registration. Mr. Morley filed a new application for registration as a sole proprietor investment adviser on or

around November 3, 2015; the application remains pending. Mr. Morley was registered as an investment adviser representative of his sole proprietor investment adviser from September 14, 2010 until December 31, 2014. Mr. Morley was also previously registered as a securities agent (CRD#854544) in Michigan with various broker-dealers from 1978 until 2007.

B. Findings of Fact

1. The Bureau conducted an investigation of the activities of Respondent.

2. The investigation developed evidence that Respondent sold securities in the form of investment contracts to two Michigan investors, Investor 1 and Investor 2. The investment contracts were not registered pursuant to the Securities Act.

3. Respondent has not identified any exemptions, exceptions, preemptions, or exclusions from the Securities Act applicable to the sales of the investment contracts to the Michigan investors.

4. Respondent represented in his Form ADV that he would not sell to investment advisory clients any securities in which he or a related person had a proprietary interest.

5. Respondent incorporated Creative Wealth Strategies, Inc. on or around January 24, 2001.

6. Respondent sold Creative Wealth Strategies, Inc. securities to two Michigan investors who were also investment advisory clients, notwithstanding the fact that Mr. Morley had represented in his Form ADV that he would not sell securities in which he had a proprietary interest to investment advisory clients.

7. The two Michigan investors who purchased securities from Respondents were more than sixty years old at the times of the transactions.

II. RELEVANT STATUTORY PROVISIONS

1. Section 102c(c) of the Securities Act 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 301 of the Securities Act, MCL 451.2301, states:

A person shall not offer or sell a security in this state unless 1 or more of the following are met:
(a) The security is a federal covered security.
(b) The security, transaction, or offer is exempted from registration under section 201 to 203.
(c) The security is registered under this act.

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.

4. 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…

III. CONCLUSIONS OF LAW

1. Respondent offered and sold a security to Investor 1 in the State of Michigan which was not federally covered, exempt from registration, or registered, in violation of section 301 of the Securities Act, MCL 451.2301.

2. Respondent offered and sold a security to Investor 2 in the State of Michigan which was not federally covered, exempt from registration, or registered, in violation of section 301 of the Securities Act, MCL 451.2301.

3. Respondent represented in his Form ADV investment adviser application that he would not sell to investment advisory clients any securities in which he held a proprietary interest; notwithstanding the representation, Mr. Morley sold a Creative Wealth Strategies, Inc. security to Investor 1. The statement regarding sales to advisory clients of securities in which Mr. Morley held a proprietary interest was material, and misleading, in violation of section 501(b) of the Securities Act, MCL 451.2501(b).

4. Respondent represented in his Form ADV investment adviser application that he would not sell to investment advisory clients any securities in which he held a proprietary interest; notwithstanding the representation, Mr. Morley sold a Creative Wealth Strategies, Inc. security to Investor 2. The statement regarding sales to advisory clients of securities in which Mr. Morley held a proprietary interest was material, and misleading, 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 selling unregistered securities and continuing to directly or indirectly make any untrue statement of a material fact or omit to state material facts necessary in order to make other statements made, in the light of the circumstances under which they were made, not misleading, 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 $80,000.00 against Robert Byrkit Morley, Jr.

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:

$80,000.00 – Robert Byrkit Morley, Jr., 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 Respondents 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. Respondents 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

J Dale — 2/4/16

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

Date