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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. **ART INTELLECT, INC., a Utah corporation, d/b/a Mason Hill and Virtual MG, PATRICK MERRILL BRODY, LAURA A. ROSER, and GREGORY D. WOOD,** Defendants.	**DEFENDANT PATRICK M. BRODY AND DEFENDANT LAURA A. ROSER'S PETITION FOR PERMISSION TO APPEAL PRELIMINARY INJUNCTION ORDER (DOC 134) AND CIVIL CONTEMPT ORDER (DOC 142)** Case No.: 2:11-cv-00357 Judge Tena Campbell

Pursuant to Rule 5, Federal Rules of Appellate Procedure, Defendants request permission to appeal the Preliminary Injunction Order (Doc 134) entered on October 20, 2011, and the Civil Contempt Order (Doc 142) entered on November 15, 2011. This petition for permission to appeal is timely given the court's Order Granting Extension of Time to File for Permission to Appeal (Doc. 140) entered on November 9, 2011.

Defendants seek leave to appeal the Preliminary Injunction and Civil Contempt Order for the following reasons:

I. FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED:

Pursuant to Rule 5(b)(1)(A), the following is a list of facts necessary to understand the question presented:

1. The Security and Exchange Commission (hereafter "Plaintiff" or "Commission") initiated this action on April 18, 2011, by filing a Complaint against defendants Art Intellect Inc., Patrick M. Brody, and Laura A. Roser. (Doc. 1, Complaint).
2. The Complaint alleges the court has subject matter jurisdiction by authority of Sections 20 and 22 of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. §§ 77t and 77v] and Sections 21 and 27 of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. §§ 78u and 78aa]. (Doc. 1, ¶ 6).
3. Also on April 18, 2011, the Commission filed a Motion for Temporary Restraining Order against Defendants on the basis that Defendant Patrick Brody was "soliciting investments in unregistered, non-exempt transactions" which the Commission characterized as "investment contracts." (Doc. 3, Memorandum in Support of Motion for TRO, page 3).
4. The basis for the TRO and subsequent Preliminary Injunction Order (Doc 134) is that Mason Hill sold securities. (Doc. 3, Doc. 64, Memorandum in Support of Motion for Preliminary Injunction, page 14).
5. Mason Hill is a d/b/a of Defendant Art Intellect, Inc., a Utah corporation. (Doc. 1, ¶10).

6. Defendant Laura A. Roser is the founder and president of Art Intellect, Inc., and the CEO of Mason Hill. (Doc. 1, ¶12).

7. Defendant Patrick M. Brody controlled the operations of Mason Hill. (Doc. 1, ¶11).

8. Defendants Roser and Brody are husband and wife. Id.

9. Mason Hill has operated since approximately April, 2009. (Doc. 1, ¶14).

10. Mason Hill was in the business of buying real property, rehabilitating the property and selling the property to an interested real estate investor for a profit. (Transcript of Preliminary Injunction Hearing ("Tr.") at pages 35:2-8; 49:12-50:7; 79:24-25; 91:3-13; and 125:12-127:10).

11. Interested real estate investors would contract Mason Hill to purchase real property by entering into a "Reservation Agreement." (Doc 64-10, page 8).

12. The Reservation Agreement provides that the interested real estate investor would pay a non-refundable "reservation payment" toward the purchase price of qualifying real property. Id.

13. The Reservation Agreement provides, at paragraph 1.a.:

> *The Reservation Payment is not a deposit, but is payment toward the purchase of qualifying real property. Buyer acknowledges the Reservation Payment is not refundable. Upon payment of the Reservation Payment, Buyer has purchased the real property described herein or the right to purchase a qualifying real property with the characteristics described herein.*

Id.

14. Interested real estate investors paid the reservation payment to Mason Hill with the intention to purchase real property. (Tr.52:6-21; Tr.135:20-22).

15. Interested real estate investors contracted to buy real property from Mason Hill, not invest in Mason Hill. (Tr.136:7-8).

16. Interested real estate investors expected to make returns on their investment from rental income received from the properties purchased from Mason Hill and through appreciation or increase in value of the real estate purchased from Mason Hill. (Tr.30:16-22; Tr.52:11-21; Tr.55:4-6; Tr.135:2-12).

17. Through separate affiliated companies, Mason Hill offered property management services to its clients as part of a "turnkey" real estate investment model. (Doc. 70-2, page 11; Doc. No. 70-3, page 6) (Tr.29:20-24; Tr.32:13-19; Tr.69:16-23).

18. Property management services were not required as part of the real estate transaction. Mason Hill clients could forego property management, retain their own property management company or retain Mason Hill to provide property management services. Id. See also (Tr.51:5-52:5; Tr.69:16-23; Tr.136:10-22; Tr.151:24-153:22).

19. Individuals who contracted with Mason Hill were, for the most part, sophisticated real estate investors. (Tr.30:22-25; Tr.137:10-12).

20. One witness testified he owns three rental property homes, four rental condominiums, six to eight industrial properties and "one or two others that are in process." (Tr.31:1-5).

21. Another witness testified that, in addition to the 16 rental units he purchased from Mason Hill, he owns four to six commercial properties, plus one rental with a storage unit. (Tr.39:24-40:11).

22. Gregg Wood, President of Mason Hill at the time of the SEC Complaint, testified that most (about half) of Mason Hills clients were sophisticated real estate investors (Tr.137:10-12). Most were people with their own money. (Tr.137:13-14). Most had other real estate holdings (about half) (Tr.135:15-16). Most had a decent understanding of the real estate market and understood market risk and how real estate made returns. (Tr.135:17-23).

23. Mason Hill clients did not rely on Mason Hill or its managers or owners to make them a profit. (Tr.136:23-137:6).

24. Mason Hill was a real estate business. (Tr.79:24-25).

II. THE QUESTION PRESENTED ON APPEAL:

Whether the trial court erred in finding an "investment contract" and therefore a security being sold by Mason Hill to its customers, such that it and its principals became subject to the Securities Exchange Act.

III. THE RELIEF SOUGHT:

The question presented raises the fundamental question of subject matter jurisdiction of this court. Plaintiff, the SEC, has asserted that Defendants are liable for the unauthorized offering and sale of a security. Defendants seek a ruling on appeal that the real estate business conducted by Mason Hill was not a security. Pursuant to the elements required under *SEC v. Howey*, 328 U.S. 293 301, 66 S.Ct. at 1104 (1946), and its interpretive cases, the elements required for a security in the form of an "investment contract" do not exist in the business model used by Mason Hill in its business practices.

IV. THE REASONS WHY THE APPEAL SHOULD BE ALLOWED AND IS AUTHORIZED BY STATUTE OR RULE:

This appeal should be allowed because the findings and conclusions of the trial court are contrary to nationally accepted legal principles that a real estate contract is not a security. See *SEC v. Howey*, 328 U.S. 293 301, 66 S.Ct. at 1104 (1946). The business model used by Mason Hill is used by hundreds, if not thousands, of businesses throughout the United States. It relies on the basic principle of finding a property that is priced low or in distress, put a minimal amount of work into improving the property and resell the property at a higher price. Mason Hill used its expertise in the real estate market to undertake the task to identify properties that could be purchased at a low price, rehabilitated and sold at a higher price.

The business model does not run afoul of the securities laws. *Woodward v. Terracor*, 574 F.2d 1023, 1025 (10th Cir. 1978) (holding a contractual agreement to purchase real estate without more does not give rise to an investment contract). Mason Hill marketed its business model to interested individuals who were looking for real estate investments. The reason for investing in real estate are as varied and diverse and the people purchasing real property. Some hold for long term gains, some buy and hold for monthly rental income, some buy and hold for only a short time relying on volume sales to generate returns. Mason Hill was a facilitator for those real estate investors. It did not market a security. Mason Hill put an interested real estate investor into a contract to purchase a parcel of real property.

The manner in which Mason Hill conducted its business was not the offer or sale of securities. Under the seminal securities case involving non-traditional investments, to prove the existence of an "investment contract" in a real estate transaction, the following three elements of the Howey test must be met.

> The three elements of the *Howey* test must all be present for a land sale contract to constitute a security: (i) an investment of money (ii) in a common enterprise (iii) with profits to be derived solely from the efforts of others.

Revak v. SEC Realty Corp., 18 F.3d 81 at ¶ 36 (2nd Cir. 1994).

The lack of a common enterprise and the fact that profits to the investor are not to be derived solely from the efforts of others means that the Howey elements cannot be met.

Defendants believe that the findings and conclusion of this court should be reviewed on appeal before the rights and protections owed to Defendants are lost.

CONCLUSION

For the reasons stated herein, Defendants request permission to appeal the court's orders on preliminary injunction and contempt to the 10th Circuit Court of Appeals.

Dated this 15th day of December, 2011.

/s/ Steven R. Paul
Steven R. Paul
Attorney for Defendants