DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES
Protecting Investors; Promoting Commerce

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February 25, 1999

Michael E. Long
Attorney at Law
Blumenfeld, Kaplan & Sandweiss, P.C.
168 North Meramec Ave.
St. Louis, MO 63105-3763

Re: Cattle Program File # 006-6840-84/B00112437

Dear Mr. Long:

The Utah Division of Securities (the "Division") is responding to your February 18, 1999 request for a no-action letter, pursuant to authority granted by § 61-1-25(5) and § 61-1-24 of the Utah Uniform Securities Act and Utah Administrative Code ("UAC") R164-25-5. You have made the following representations:

> Our client ("Manager") proposes to offer a cattle management program ("Program") to manage and care for a specified number of cattle through the pre-conditioning and growing phases and, when necessary, through the fattening phase. The purpose is to offer the Program to those cattle ranchers or farmers ("Participant") currently in operation who either may not have the capability to appropriately service their cattle or who wish to increase the number of head of cattle in their herd without significantly expanding their current operations. In order to participate in the Program, each Participant will enter into a cattle management agreement ("Agreement") with Manager. In order to be eligible to enter into the Agreement, Participant must be a resident of the State and engaged in the business of farming and/or ranching. Participant will own the cattle placed in the Program prior to entry into and at all times during the Program. It will be Participant's decision as to when to sell its cattle (although part of the Manager's responsibility will be to advise Participant regarding the optimal time of sale).
>
> Participant will turn over custody of its cattle to Manager during the time the cattle are in the Program. Participant will also grant Manager a limited Power of Attorney in order to effectively care for and manage the cattle. Participant will be required to turn over a minimum number of cattle, each group having a value of at least $5,000. The total number of cattle to be serviced by the Manager will be determined based upon the facilities available. Manager will, at no time, claim ownership or obtain ownership of the cattle. All cattle will be marked so that their owner can be identified.
>
> The services to be provided by the Manager include the following:
>
> i. Arranging, where applicable, financing through a

third party for the cattle and the expenses of the Program.

ii. Caring for the cattle through the pre-conditioning and growing phase.

iii. Placing the cattle on commercial feed lots, when appropriate.

iv. Providing risk management assistance for Participants.

v. Providing marketing and sales assistance.

In addition to turning over custody of a minimum number of cattle to the Manager, the Participant will be obligated to pay a fixed management fee to Manager and to reimburse Manager for all expenses related to Participant's cattle which are placed under the management and control of Manager. The management fee will be based upon the number of head of cattle placed in the Program and will be a flat fee per head.

Manager will not share in any profits or losses realized by a Participant upon the sale of its cattle. However, the proceeds obtained from the sale will be applied to any funds owed by the Participant pursuant to any loan arrangements or for any expenses incurred by the Manager. If the proceeds from the sale of the cattle are not sufficient to cover the outstanding loan balance or expenses, Participant will be liable for the full amount of repayment. Ultimately, Participant will not be relieved of any obligations to Manager or a third party lender in the event that the sale of Participant's cattle does not result in a profit to Participant. Likewise, Manager will only receive its stated fees and will not share in any profits realized by Participant due to favorable market conditions.

Based on the facts presented in your request, the Staff of the Utah Division of Securities ("Division") will not recommend any enforcement or administrative action should the transaction proceed as outlined in your request.

This response does not purport to express any legal conclusions regarding the applicability of statutory or regulatory provisions of federal or state securities laws to the questions presented. It merely expresses the opinion of the Division Staff on enforcement or other administrative actions.

As this recommendation is based upon the representations made to the Division, any different facts or conditions of a material nature might require a different conclusion. Furthermore, this No-Action Letter relates only to the transaction described above and will have no value for future similar transactions and does not absolve any party involved from complying with the anti-fraud provisions contained in § 61-1-1 of the Act.

Respectfully,

David H.T. Wayment
Senior Legal Counsel

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February 11, 1999

Utah Department of Commerce
Division of Securities
160 East 300 South
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Salt Lake City, UT 84145-0808

Re: "No Action" Opinion Relating to Proposed Offering

Ladies and Gentlemen:

We are writing to request that you provide an opinion relating to the characterization of a proposed offering that our client is contemplating. We are making this request on behalf of our client because at this time, for business considerations, it does not wish to reveal its identity. Although we believe that there is no investment contract present in our client's program, we are asking for this opinion because our review of the applicable law leaves us uncertain as to whether the program our client proposes to offer falls within your State's definition of a security.

We have made similar requests in thirteen states including Colorado, Nebraska, Wyoming, and Nevada. All of these states, which have laws similar to Utah, have issued opinions that our client's proposed program does not constitute a security subject to their Blue Sky Laws. I am attaching copies of the responses from each of the referenced states.

The following is a thorough explanation of the facts surrounding our client's program.

Our client ("Manager") proposes to offer a cattle management program ("Program") to manage and care for a specified number of cattle through the pre-conditioning and growing phases and, when necessary, through the fattening phase. The purpose is to offer the Program to those cattle ranchers or farmers ("Participant") currently in operation who either may not have the capability to appropriately service their cattle or who wish to increase the number of head of cattle in their herd without significantly expanding their current operations.

In order to participate in the Program, each Participant will enter into a cattle management agreement ("Agreement") with Manager. In order to be eligible to enter into the Agreement, Participant must be a resident of the State and engaged in the business of farming and/or ranching. Participant will own the cattle placed in the Program prior to entry into and at all times during the Program. It will be Participant's decision as to when to sell its cattle (although part of the Manager's responsibility will be to advise Participant regarding the optimal time of sale).

Participant will turn over custody of its cattle to Manager during the time the cattle are in the Program. Participant will also grant Manager a limited Power of Attorney in order to effectively care for and manage the cattle. Participant will be required to turn over a minimum number of cattle, each group having a value of at least $5,000. The total number of cattle to be serviced by the Manager will be determined based upon the facilities available. Manager will, at no time, claim ownership or obtain ownership of the cattle. All cattle will be marked so that their owner can be identified.

The services to be provided by the Manager include the following:

i. Arranging, where applicable, financing through a third party for the cattle and the expenses of the Program.

ii. Caring for the cattle through the pre-conditioning and growing phase.

iii. Placing the cattle on commercial feed lots, when appropriate.

iv. Providing risk management assistance for Participants.

v. Providing marketing and sales assistance.

In addition to turning over custody of a minimum number of cattle to the Manager, the Participant will be obligated to pay a fixed management fee to Manager and to reimburse Manager for all expenses related to Participant's cattle which are placed under the management and control of Manager. The management fee will be based upon the number of head of cattle placed in the Program and will be a flat fee per head.

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Participant's cattle does not result in a profit to Participant. Likewise, Manager will only receive its stated fees and will not share in any profits realized by Participant due to favorable market conditions.

It is our belief that this particular Program does not constitute a security under your State's Blue Sky Laws and, therefore, does not require registration. However, we feel that it is essential for us to know if your State might characterize this proposed Program as an "investment contract". In Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946), the Supreme Court defined an investment contract as:

> [A] contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party.

Id. at 298-299. The four components of the "Howey" test are:

1. The investment of money;

2. The expectation of a profit;

3. To come solely through the efforts of others; and

4. A common enterprise.

Clearly, Participant and Manager will enter into this endeavor with the expectation of a profit. They are conducting a common enterprise to the extent that the means to reach their goals are intertwined. However, Manager seeks profit by having many Participants utilize its services, whereas, Participant seeks profit by selling its cattle at a favorable price. Our main questions arise in relation to the other two requirements regarding the "investment of money" and the profit "to come solely through the efforts of others."

As regards the investment of money, Manager will not offer to sell the Participant the cattle which will be placed in the Program. Manager will merely take custody of cattle which are already owned by the Participant. While the Manager may assist in finding financing to help Participant purchase cattle, the only monies which the Participant will be required to pay to the Manager are the management fee and the expenses related to its own cattle. While a Participant will relinquish custody of its cattle to the Manager, Manager will not have any ownership rights in the cattle and will clearly mark each animal so that its owner can be readily identified. We believe that Manager is offering a service to those persons already engaged in cattle ranching or farming who may not have the facilities to economically raise the number of head of cattle which they desire. Based on these facts, we believe that the first component of the "Howey" test is not met.

The proposed arrangement would not produce a profit "solely through the efforts of others." Granted, Manager would have responsibility for the day-to-day management of the cattle. However, Participant would have the discretion to determine what type of nutrition would be provided to its cattle and have sole discretion in the decision as to when its cattle should be sold. If it is necessary or desirable for the cattle to be placed in a feed lot, the Participant, in its discretion, can choose the particular feed lot where its cattle would be kept. The choice of feed lot, of course, will be limited to those which are approved by Manager, and the number of choices will depend upon space availability. Therefore, although Participant will not have responsibility for the day-to-day management of its cattle, it will have significant discretion regarding the management of its cattle. For these reasons we believe that the third element of the "Howey" test is not met.

Please review the facts of the proposed Program and let us know your opinion as to whether such Program would constitute a security under your State's Blue Sky Laws. If you believe that it does constitute a security, but have suggestions as to how to avoid this characterization, please let us know how we may modify the proposed Program in order to avoid registration.

Thank you for your attention to this matter. Please call if you have any questions.

Very truly yours,

Michael E. Long

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Attachments