

BEFORE THE STATE AUDITOR AND THE COMMISSIONER OF SECURITIES,  
HELENA, MONTANA

IN THE MATTER OF: )  
 )  
FOUNDATION CAPITAL CORP. ) CASE NO.: SEC-2008-49  
6163 6<sup>TH</sup> St SE ) (07-25-08-277 I)  
Calgary, Alberta, Canada, T2H 1L9 )  
 )  
LEE DAVIS, individually and in his )  
capacity acting as a broker-dealer )  
salesperson, )  
 )  
Respondents. )

CONSENT AGREEMENT

---

Consent Agreement dated this 17<sup>th</sup> day of October 2008, between  
the Montana Securities Department (“Department”), acting pursuant to the authority of the  
Securities Act of Montana, § 30-10-101 *et seq.* MCA, and § 2-4-603 Montana Code Annotated;  
and Respondents LEE DAVIS (Davis) and FOUNDATION CAPITAL CORPORATION  
(Foundation.)

**RECITALS**

WHEREAS, the Department investigated allegations of behavior by Davis and  
Foundation that is in violation of the Securities Act with respect to offering and selling  
unregistered securities while not properly registered to conduct securities business in Montana,  
and engaging in acts of securities fraud;

WHEREAS, the Department, Davis and Foundation have investigated the matter as it  
related to advertising in a Montana newspaper and information provided through the  
Department’s requests to Davis and Foundation; and

WHEREAS, the Department, Davis and Foundation agree that the best interests of the public would be served by entering into the agreements and undertakings specified herein.

NOW THEREFORE, in consideration of the mutual undertakings herein contained, the Department, Davis and Foundation hereby agree to resolve their differences and settle these matters pursuant to the following terms and conditions:

**I. ALLEGATIONS**

1. Foundation Capital Corporation (Foundation) is apparently a Canadian investment firm. Foundation is not registered with the Alberta Securities Department and it is currently the subject of an investigation in that jurisdiction. Foundation is not now nor has it ever been registered with the Department.

2. On its website, Foundation states it uses syndication to put together real estate opportunities for investors as follows: “Syndication is the act of a group of investors coming together to create a company with initial working capital. In the case of land development, the working capital is used to cover the expenses related to the procurement, and subsequent development, of a parcel of land. This approach allows an individual investor to participate in land development deals that would otherwise be outside of his/her financial capacity.”

3. This case was opened as the result of a newspaper advertisement in the Shelby Promoter. The advertisement was purchased by Lee Davis (Davis,) an independent real estate agent residing in Shelby, Montana and it invited prospective investors to a breakfast buffet at Ringside Ribs in Shelby where they would be provided information on “cross border investing.” Davis is not now nor has he ever been registered with the Montana Securities Department.

4. The Department sent Davis a letter dated May 29, 2008 putting him on notice of the requirements of the Montana Securities Act, instructing him to cease offering and selling securities from Montana if he was doing so, and requiring him to provide certain information.

5. The Department received Davis' response on or about June 12, 2008. In his cover letter, Davis indicated that he had "marketed the private offerings of Canadian based Foundation Capital Corporation on a very limited basis." He indicated the investment products were offered through "a well established real-estate investment company from Alberta Canada called Foundation Capital Corporation." Davis went on to indicate Foundation had a 14 year track record in the investment industry and that he was personally acquainted with some of the key individuals associated with Foundation. Davis stated the offerings were in compliance with Rule 506 of Regulation D<sup>1</sup>. Davis stated he had only consummated sales with two individuals whom

---

<sup>1</sup> Rule 506 of Regulation D is considered a "safe harbor" for the private offering exemption of Section 4(2) of the Securities Act. Companies using the Rule 506 exemption can raise an unlimited amount of money. A company can be assured it is within the Section 4(2) exemption by satisfying the following standards:

- the company cannot use general solicitation or advertising to market the securities;
- The company may sell its securities to an unlimited number of "accredited investors" and up to 35 other purchases. Unlike Rule 505, all non-accredited investors, either alone or with a purchaser representative, must be sophisticated—that is, they must have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment;
- Companies must decide what information to give to accredited investors, so long as it does not violate the antifraud prohibitions of the federal securities laws. But companies must give non-accredited investors disclosure documents that are generally the same as those used in registered offerings. If a company provides information to accredited investors, it must make this information available to non-accredited investors as well;
- The company must be available to answer questions by prospective purchasers;
- Financial statement requirements are the same as for Rule 505; and
- Purchasers receive "restricted" securities, meaning that the securities cannot be sold for at least a year without registering them.

While companies using the Rule 506 exemption do not have to register their securities and usually do not have to file reports with the SEC, they must file what is known as a "Form D"

he claimed were accredited<sup>2</sup>. He further stated he had not yet been compensated because the investments were still in the process of being legally closed.

6. Two Montana investors identified herein as Investor 1 and Investor 2 purchased 200 Spruce Ridge Capital, Inc. bonds on April 29, 2008 from Davis. These bonds were purchase for the amount of \$20,000 Canadian ( $\$20,000 \text{ CD}^3 \times 1.0114 \text{ conversion rate} = \$20,228 \text{ US a/o } 7/25/2008$ ). These same investors also purchased 1,000 shares of Spruce Ridge Estates on April 29, 2008 at \$10.00/share CD for an investment of \$10,000 CD ( $\$10,000 \text{ CD} \times 1.0114 \text{ conversion rate} = \$10,114 \text{ AD a/o } 7/25/2008$ ).

7. Another Montana investor identified herein as Investor 3 purchased 100 Spruce Ridge Capital bonds on March 24, 2008 for \$10,000 CD ( $\$10,000 \text{ CD} \times 1.0114 \text{ conversion rate} = \$10,114 \text{ AD a/o } 7/25/2008$ .) Investor 3 also purchased 500 shares of Spruce Ridge Estates, Inc. for \$5.00/share CD ( $\$2,500 \times 1.0114 \text{ conversion rate} = \$2,528.50 \text{ AD a/o } 7/25/2008$ ); 100 bonds of Railside Capital Inc. for \$10,000 CD ( $\$10,000 \text{ CD} \times 1.0114 \text{ conversion rate} = \$10,114$

---

after they first sell their securities. Form D is a brief notice that includes the names and addresses of the company's owners and stock promoters, but contains little other information about the company.

<sup>2</sup> An accredited investor is a person or institution that the Securities and Exchange Commission (SEC) defines as being qualified to invest in unregistered securities, such as privately held corporations, private equity investments, and hedge funds.

The qualification is based on the value of the investor's assets, or in the case of an individual, annual income.

Specifically, to be an accredited investor you must have a net worth of at least \$1 million or a current annual income of at least \$200,000 with the anticipation you'll earn at least that much next year. If you're married, that amount is increased to \$300,000.

Institutions are required to have assets worth \$5 million to qualify as accredited investors. The underlying principle is that investors with these assets have the sophistication to understand the risks involved in the investment and can afford to lose the money should the investment fail.

<sup>3</sup> CD is shorthand for Canadian Dollars.

a/o 7/25/2008); and 100 shares of Railside Industrial Park Inc. for \$10.00/share CD (\$1,000 CD x 1.0114 conversion rate = \$1,011 a/o 7/25/2008).

8. Davis provided subscription agreements for each of these purchases. The subscription agreements indicate the offerings are being conducted pursuant to Rule 904 of Regulation S<sup>4</sup> under the United States Securities Act, rather than Rule 506 of Regulation D. In each case, the investors have initialed that they were “accredited investors.”

9. Davis also provided an offering memorandum for each of the issuers. The memorandums do not cite to an exemption from state securities laws.

---

<sup>4</sup> **Regulation S** under the Securities Act of 1933, as amended (the “Securities Act”) is a safe harbor rule that defines when an offering of securities would be deemed to come to rest abroad so as not to be subject to the registration obligations imposed under Section 5 of the *Securities Act*. The General Statement to **Regulation S** applies a territorial approach to *Securities Act* registration by providing that offers and sales subject to Section 5 include offers and sales that occur within the United States and do not include offers and sales that occur outside the United States. **Rule 904** provides a *safe harbor* for certain resale transactions by persons other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of such office), or any person acting on their behalf. They are subject to the following conditions:

1. All permitted sellers are subject to the *general conditions*.
2. In the case of a seller who is a dealer or a person receiving any remuneration, a resale cannot be knowingly made to a *U.S. Person* prior to the end of the relevant *distribution compliance period*. A confirmation stating the applicable securities law restrictions must be sent to any other dealer or person receiving selling compensation person.
3. No special compensation can be paid if the seller is an officer or director of the issuer.
4. The safe harbour is not available to “*affiliates*” of the issuer, except where affiliation arises solely from the status of the seller as an officer or director. An “*affiliate*” is any person controlling, controlled by or under common *control* with the issuer. “*Control*” for this purpose means *de facto control*. A strong inference of control based upon voting influence often arises at the 10% threshold, although other factors may demonstrate or point away from *control*.
5. Transactions must be effected through a “*designated offshore securities market*” in a transaction not pre-arranged with a *U.S. Person* or in a transaction involving a buyer outside of the United States at the time the buy order is originated.
6. Care must be taken to ensure that the transaction does not involve a scheme to evade the *Securities Act* registration requirements, including for the purpose of *washing off* transfer restrictions

10. It does not appear this offering meets the criteria of Rule 506 of Regulation D because general advertising was used to obtain investors. It does not appear this offering meets the criteria of Rule 904 of Regulation S in that the offers and sales occurred in Montana and they were not re-sales.

Based on the foregoing allegations, the Department submits the following:

## **II. CONCLUSIONS OF LAW**

1. The State Auditor is the Commissioner of Securities (Commissioner) pursuant to § 30-10-107, MCA.

2. The administration of the Securities Act of Montana, Title 30, Chapter 10, Parts 1 through 3, MCA, is under the supervision and control of the Securities Commissioner pursuant to § 30-10-107, MCA.

3. The Securities Act of Montana shall be construed to protect investors, persons engaged in securities transactions, and the public interest according to § 30-10-102, MCA.

4. Foundation offered and sold through its agent, Davis, unregistered securities to at least three Montana investors without proper registration to conduct securities broker-dealer business in Montana, in violation of § 30-10-201, MCA.

5. Foundation offered and sold through its agent, Davis, unregistered securities to at least three Montana investors in violation of § 30-10-202, MCA.

6. Davis offered and sold unregistered securities to at least three Montana investors without proper registration to conduct securities salesperson business in Montana, in violation of § 30-10-201, MCA.

7. Davis offered and sold unregistered securities to at least three Montana investors, in violation of § 30-10-202, MCA.

8. Foundation offered and sold through its agent, Davis, unregistered securities to at least three Montana investors while omitting the material fact that Foundation was not properly registered to conduct securities broker-dealer business in Montana, in violation of § 30-10-301, MCA.

9. Foundation offered and sold through its agent, Davis, unregistered securities to at least three Montana investors using the material misrepresentation that that the securities Foundation was offering and selling were exempt from Montana's registration requirements, in violation of § 30-10-301, MCA.

10. Davis offered and sold through unregistered securities to at least three Montana investors while omitting the material fact that Davis was not properly registered to conduct securities salesperson business in Montana, in violation of § 30-10-301, MCA.

11. Davis offered and sold unregistered securities to at least three Montana investors using the material misrepresentation that that the securities Davis was offering and selling were exempt from Montana's registration requirements, in violation of § 30-10-301, MCA.

### **III. STIPULATIONS AND CONSENTS**

A. Without admitting or denying any of the allegations contained herein, Davis and Foundation stipulate and consent:

1. To pay restitution in the form of a return to all Montana investors all money the Montana investors provided to Davis and Foundation. Additionally, Davis and Foundation shall pay 10% interest on the money returned to Montana investors, with the interest running from the date the Montana investor gave the money to Davis and/or Foundation to the date of this consent agreement.

2. To permanently refrain from offering or selling investments or investment opportunities to Montana investors without first becoming properly licensed and registered to conduct securities business.

3. To comply with the terms and conditions of this Consent Agreement and with the securities laws and regulations of Montana.

3. The applicable Statute of Limitation, § 30-10-305, MCA, is tolled for actions or proceedings by the Department for two (2) years from the date of execution of this Consent Agreement with regard to the allegations set forth above. In the event either Davis or Foundation materially violates the terms of this Consent Agreement at any time during the two-year tolling period the State Auditor's Office reserves the right to seek a fine of \$75,000 from the offending party and to seek a permanent ban on registration or filings by the offending party.

B. Pursuant to the stipulations, agreements and consents of Davis and Foundation, the Department, under the authority of the Montana Securities Act and § 2-4-603, Montana Code Annotated, hereby agree that:

1. The Department shall refrain from filing a civil or administrative action against Davis and/or Foundation. The Department shall refrain from referring this matter for criminal prosecution of Davis and/or Foundation.

C. All parties to this Consent Agreement agree and acknowledge:

1. This Consent Agreement constitutes the entire agreement between the parties, there being no other promises or agreements, either express or implied. Under authority of the Securities Act, the Department hereby agrees that it will not initiate any civil or administrative actions or refer for criminal prosecution against Davis and/or Foundation regarding or related to the allegations set forth above. Davis and Foundation fully and forever releases and discharges



the Office of the State Auditor, the elected State Auditor and all State Auditor employees from any and all actions, claims, causes of action, demands, or expenses for damages or injuries that may arise from the allegations underlying this Consent Agreement, whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising out of the Action.

DATED this 17<sup>th</sup> day of October, 2008.

MONTANA SECURITIES DEPARTMENT

By: [Signature]  
Lynne Egan  
Deputy Securities Commissioner

SUBSCRIBED AND SWORN to before me this 17<sup>th</sup> day of October 2008.

[Signature]  
Michelle Huftel  
Notary Public for the State of Montana  
Residing at Helena, Montana  
My commission expires March 29, 2012

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

Foundation Capital Corporation  
By: [Signature]  
Chief Executive Officer

SUBSCRIBED AND SWORN to before me this 15 day of October 2008.


[Signature]  
Signature  
D. L. BAXTER  
Printed name  
Notary Public for the Province of Alberta  
Residing at: Calgary  
My commission expires NOT

///

DATED this 14 day of October 2008.

  
\_\_\_\_\_  
Lee Davis

SUBSCRIBED AND SWORN to before me this 14 day of  
October 2008.

  
\_\_\_\_\_  
Signature  
Jamie F. Brownell  
\_\_\_\_\_  
Printed name  
Notary Public for the State of Montana  
\_\_\_\_\_  
Residing at: Conrad  
\_\_\_\_\_  
My commission expires 1-21-2010  
\_\_\_\_\_.