

STATE ATTORNEY'S OFFICE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA

INTERDEPARTMENTAL MEMORANDUM

TO: FDLE-SARASOTA
 ATTENTION: LAW: RECORDS/CID
 FROM: GUY A. FLOWERS
 RE: MARK BRIVIK
 CHARGE: SCHEME TO DEFRAUD (\$50,000 OR MORE)
 SCHEME TO DEFRAUD (\$50,000 OR MORE)
 FRAUDULENT SECURITIES TRANSACTIONS / OMISSION OF FACT
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 SALE OF UNREGISTERED SECURITIES
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 AGENCY #: 10-052421 ARREST DATE: 07/19/2010

CLERK #: 2010CF008859NC

CASE #: 10CF012773AS

This office has made the following decision concerning the charges against the above-named defendant:

(X) No Action will be taken on the charge(s) listed above.
(see comments below)

COMMENT SECTION: This office reviewed criminal charges involving a possible scheme to defraud and the improper sale of securities against this Defendant. The defendant was the manager of a land-investment company formed with the alleged

victims, who were experienced businessmen. As part of our investigation, this office reviewed the investigative reports from the Florida Department of Law Enforcement and voluminous documents including deposition transcripts and exhibits from the civil litigation that arose from the same facts. We also conferred with the investigating agent numerous times and with an attorney from Florida Department of Financial Regulation who specializes in securities regulation and the alleged victims and documents they provided. Additionally, a lengthy pre-trial bond hearing raised several substantial issues that were also evaluated.

The securities-related counts are declined. In order to show that this transaction qualified as a "security," The State must show that the investors were "passive investors" as defined under the law. This office interviewed the investors individually and reviewed their prior, sworn deposition testimony from the civil litigation. In the pre-file interviews, each investor disclosed that he took undertook an affirmative, active role as a member of the corporation in an effort to seek a return on his investment. Therefore, the State cannot prove the securities allegations beyond a reasonable doubt.

The State must show the Defendant possessed the requisite criminal intent to commit a scheme to defraud. The Defendant allegedly misrepresented an "option property" to entice the victims to invest their money. The Defendant in fact had a "right of first refusal" to buy the property and not a legal option. The alleged victims acknowledged the Defendant did not specifically state the terms of an alleged option e.g., price, term of the alleged option, and the price of the property secured by the option. And one stated in a sworn deposition that the "option" would allow the company to buy the property at


a later date, but no fixed price was discussed. The agreement regarding the option property is reduced to writing in the joint venture agreement and the operating agreement.

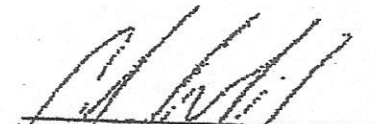
The joint venture agreement identifies the land acquisition phases; phase one identified land already acquired; phase two included other property; and the alleged "option" property is identified in "phase three." The property in question in phase three is identified by the "proposed purchase price." The memorandum of agreement also contains a map of the overall development, and never identified the property as an "option." The agreement is signed by the investors and the map page bears the investors initials.

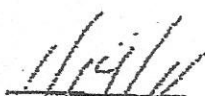
In October 2005, the Defendant sought the services of a local attorney who drafted the operating agreement between the Defendant and the investors. The word "option" is never mentioned in the agreement and the attorney stated during his pre-file interview that the Defendant did not mention a legal property option. On October 31, 2005, the investors some of whom were represented by counsel, reviewed the documents and signed them to include the "right of first refusal" on the property.

One alleged victim testified in the civil deposition that in 2007 since there was no fixed price for the "option" property the investors had hoped to negotiate a good price as he testified that land prices in the area peaked in 2005-2006. The knowledge by the victims of no fixed price for the option at the time of the transaction is important because there was no legal option to buy, but, merely a "choice" to buy the property as the third and final phase of the development ("phase 3 proposed purchase price."). Further, the deposition testimony indicated that the investors wisely sought to take advantage of the real estate market changes to exercise the "option" to buy

the property at a lower price as indicated by the Defendant. As noted above, the State must prove the Defendant's criminal intent. The testimonial and documentary evidence shows the "option" to buy the proposed property was a choice to purchase the property later, at a proposed, but negotiable price. In view of the fact that a lack of fixed terms cannot legally constitute an option contract, there was, necessarily no real option. Since the "option" in fact only gave the defendant "a right of first refusal" and because the victims were determined to be active investors who are also deemed to have knowledge of the terms of the contract they signed, the State is unable to establish a willful misrepresentation of a future act (exercising the alleged option) necessary under these facts to prove Scheme to Defraud.


 GUY A. FLOWERS
 Assistant State Attorney


 CRAIG SCHAEFFER
 Division Chief


 Date

should there be any questions concerning this matter, please contact the Assistant State Attorney named in the "FROM" portion of this memorandum.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

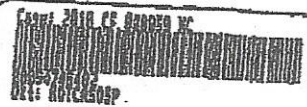
vs.

E-Mail Balance List 1/18/11

MARK BRIVIK,
Defendant.

NOTICE OF CASE ACTION

Clerk No.: 2010CF008859NC
Agency No.: FDLE- SARA SA-11-0031; 10-052421
Case No.: 10CF012773A8
Arrest Date: 07/19/2010



Arrest Charge(s): SCHEME TO DEFRAUD (\$50,000 OR MORE); SCHEME TO
DEFRAUD (\$50,000 OR MORE); FRAUDULENT SECURITIES TRANSACTIONS /
OMISSION OF FACT; FRAUDULENT SECURITIES TRANSACTIONS / OMISSION
OF FACT; FRAUDULENT SECURITIES TRANSACTIONS / OMISSION OF FACT;
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FRAUDULENT SECURITIES TRANSACTIONS / OMISSION OF FACT;
UNREGISTERED SECURITIES; SALE OF UNREGISTERED SECURITIES; SALE
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SECURITIES; SALE OF UNREGISTERED SECURITIES; SALE OF SECURITY BY
UNREGISTERED DEALER; SALE OF SECURITY BY UNREGISTERED DEALER;
SALE OF SECURITY BY UNREGISTERED DEALER; SALE OF SECURITY BY
UNREGISTERED DEALER; SALE OF SECURITY BY UNREGISTERED DEALER;
SALE OF SECURITY BY UNREGISTERED DEALER; SALE OF SECURITY BY
UNREGISTERED DEALER

STATE FILING CHARGE(S): X NO

CHARGE: SCHEME TO DEFRAUD (\$50,000 OR MORE)
ACTION TAKEN: Declined, no further action will be taken.

CHARGE: SCHEME TO DEFRAUD (\$50,000 OR MORE)
ACTION TAKEN: Declined, no further action will be taken.

CHARGE: FRAUDULENT SECURITIES TRANSACTIONS / OMISSION OF
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ACTION TAKEN: Declined, no further action will be taken.

FILED TO THE CLERK
SARASOTA COUNTY
FLORIDA
JUN 10 2011
CLERK OF COURT

CHARGE: SALE OF SECURITY BY UNREGISTERED DEALER
ACTION TAKEN: Declined, no further action will be taken.


This document has been provided to the Clerk of the Court and all proper authorities.

This Notice of Case Action applies only to the offense(s) listed for the arrest date stated above.

This action is taken without prejudice to the right of the State of Florida to resume prosecution on this matter at a future date.

ENTERED this 14th day of January, 2011.

EARL MORELAND
STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

BY: 
GUY A. FLOWERS
Assistant State Attorney
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Sarasota, FL 34232
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Florida Bar #0695631

cc: C RODOLFO CELIS (Defense Attorney)

RECEIVED
JAN 14 2011
10:01 AM
CLERK OF COURT