IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

WATKINS DEVELOPMENT, LLC and DAVID WATKINS, SR.

Petitioners

v.

Case No. G2014-512 W/4

C. DELBERT HOSEMANN (in his Official Capacity as MISSISSIPPI SECRETARY OF STATE)

Respondent

PETITION FOR REVIEW AND REVERSAL OF FINAL ADMINISTRATIVE ORDER IN SECRETARY OF STATE ADMINISTRATIVE PROCEEDING NO. LS-13-0608

Watkins Development LLC and David Watkins, Sr. (hereafter, "Watkins")[1], pursuant to *Mississippi Code Ann.* § 75-71-609(a), hereby petition the Chancery Court of the First Judicial District of Hinds County, Mississippi, to review the Final Order by the Mississippi Secretary of State (hereafter, "the Secretary") in the above-styled proceeding and, upon consideration of the absence of either evidence or legal authority supporting the relief ordered therein, to modify and set aside in its entirety the findings, legal conclusions and relief contained and ordered therein, and to stay the operation of that relief pending such consideration by this Court.

[1]The conduct of the individual W. David Watkins, Sr., one of the two Respondents in the administrative proceeding below and thus a Petitioner here, also served during the relevant time as Manager (and one of two members and owners) of the legally separate entity Watkins Development LLC, which is the other Petitioner here. The relevant conduct of W. David Watkins Sr. was attributed throughout the proceeding below to the entity Watkins Development LLC, such that for clarity purposes the two parties will be referred to together hereafter as "Watkins".

In support thereof, the same parties assert that the Final Order entered in that administrative proceeding on March 24, 2014, is legally defective for reasons of law including the following (and for the further reasons to be set forth in a supporting Memorandum of Law herein in accordance with any schedule therefor to be authorized by the Court herein):

I. The Secretary's Legal Authority

1. The only relevant legal authority granted to the Mississippi Secretary of State in securities enforcement matters of the kind involved in this case is limited to enforcement of the terms of the only "general fraud" statute addressed by the Final Order herein, namely *Mississippi Code Ann.* § 75-71-501, the entirety of which reads as follows (to which the italicized emphasis below has been added):

> It is unlawful for a person, *in connection with the offer, sale, or purchase of a security*, directly or indirectly:
> (1) To employ a device, scheme, or artifice to *defraud;*
> (2) To make an *untrue statement* of a *material* fact or to 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*; or
> (3) To engage in an act, practice, or course of business that operates or would operate as a *fraud or deceit* upon another person.

II. The Secretary's Disregard of Statutory Terms
(and the Limits they Place on the Secretary's Legal Authority)

2. The one and only "offer, sale, or purchase of a security" involved in this case took place entirely on April 12, 2011, when private bonds, issued in amounts totaling $5,195,000 by the Mississippi Business Finance Corporation ("MBFC"), were all bought

by an investment banking firm named Duncan-Williams, Inc.[2]

3. The parties to that bond sale entered on that same date a series of agreements under which all of the principal and interest on all of the bonds sold to Duncan-Williams Inc.was to be paid indirectly as a result of lease payments to be made by the City of Jackson, Mississippi, for the leasing of improved office space in a substantial part of the Metrocenter Mall property owned by an entity named Retro Metro LLC. David Watkins Sr. was the Manager of, and Watkins Development LLC was the development company engaged by, Retro Metro LLC.

4. Disregarding (rather than enforcing) the statutory terms quoted above, the Secretary "adopted" and "incorporated" into his Final Order in this case a legally incorrect premise that "*there exists no applicable statutory requirement that fraud be proven at all*" under that statute. (Exhibit ("Ex.") 1 hereto at Page ("Pg.") 2, adopting Ex. 2 at Pgs. 17 & 19; emphasis added). The Secretary then used that legally false premise to decide this case, finding that the Respondents violated the same statute in three different respects, none of which is supported by any specific false representation allegedly made by Watkins in connection with the April 12, 2011 bond sale. (Ex. 2 at 19).

5. The Final Order also disregards (rather then enforces) the same statute's requirement that a covered fraud be committed "*in connection with the offer, sale, or purchase of a security.*" A transaction, statement or state-of-mind which *has not yet*

---

[2]The bonds in question involved entirely private funds. There has never been an allegation in this case that any public funds or tax dollars were involved in any such transaction.

occurred at the time of, and does not coincide in time with, the date of a securities sale, cannot have happened "in connection with" that sale, and is therefore not within the legal authority of the Secretary of State to regulate.[3]

6. The same Final Order also disregards (rather than enforces) the same statute's limit on the Secretary's authority over fraud committed "in connection with" a securities sale by finding that Watkins violated the statute "by employing misleading and deceptive actions in connection with the *use* of bond proceeds" through transactions which had not even occurred, and were not even contemplated, at the time of the one bond sale involved in this case. (Ex. 2 at Pg. 19; emphasis on *use* added).

7. The same Final Order also disregards (rather than enforces) the governing legal authorities defining the critical statutory term "material," and disregards all evidence about what all of the private market securities professionals involved in the bond sale regarded at the time of that sale as material to their own decision to buy and price the bonds, substituting instead a government regulator's after-the-fact speculation about that private market decision.

III. The Secretary's "Findings" of "Violations" which were Never Alleged in Any Pre-Hearing Notice to Watkins.

[3]As will be demonstrated in further detail through a supporting Brief to be submitted in accordance with the Court's directive, attorneys for all parties in this case have conceded that the governing meaning of "in connection with" is provided by the United States Supreme Court in *S.E.C. v. Zandford*, 535 U.S. 813 (2002), interpreting identical language in the principal federal securities fraud statute. It is both necessary and sufficient that for a "scheme to defraud" or other actionable fraud to be committed "in connection with" a securities sale (and thus actionable under such securities fraud statutes), "the scheme to defraud and the sale of securities *coincide*." *Id.* at 822 (emphasis added).

8. The administrative proceeding which resulted in the Final Order was launched by the Secretary's Securities Division through a "Notice of Intent" dated July 30, 2013, representing to the Respondents that such Notice "details the result of our investigation and our intended action based on the investigation." (Exs. 3 and 4 hereto). The Respondents filed a Request for Hearing in order to challenge the contents of that Notice and the Secretary's legal authority to proceed thereunder. (Ex. 5). That "Notice" was itself substantially "amended" by the Secretary only six days before the commencement of the two-day hearing held herein. (Ex. 6).

9. Neither in that original Notice, nor in that Amended Notice, nor in any other document or statement communicated prior to the administrative hearing conducted herein during October of 2013, did the Secretary or his Securities Division inform Watkins that there was any allegation against Watkins that it was an act of "fraud" for the for-profit entity known as Retro Metro LLC *to disburse any "partner distribution" at any time to the members and owners of that limited liability company.* Nevertheless, and without providing Watkins with any pre-hearing notice or any opportunity to be heard on any such allegation, the Secretary as a basis of finding "fraud" by Watkins herein cited such a partner distribution to those LLC's owners, and "incorporated" into that Final Order a finding by the Hearing Officer who heard the testimony in this case that such "partner distribution" was "not authorized" by the terms of the securities closing

documents.[4] (Ex. 1, at Pgs. 2-3; Ex. 2, at Pg. 6; Ex. 4 (Notice of Intent, making no mention of partnership distribution, and Ex. 6 (Amended Notice of Intent, making no mention of partnership distribution)).

10. Likewise, neither the Secretary nor his Securities Division ever gave Watkins notice, prior to the evidentiary hearing held herein, that there was any allegation against Watkins that the contents of the post-sale "requisition" forms (used to draw down increments of bond proceeds after the bond closing) contained any aspect of "fraud" of any kind. Nevertheless, and in further violation of the Respondents' fundamental procedural rights under the Due Process Clause of both the Fifth Amendment to the United States Constitution and Article 3 Section 14 of the Mississippi Constitution, the Secretary found that the Respondents committed "fraud" by "making substantial omissions in the requisitions for payments."[5] (Ex. 1, at Pg. 5; Ex. 2, at Pgs. 6 & 9; Ex. 4

---

[4]The Secretary in his Final Order went out of his way to add, to the findings recommended by the Hearing Office in this case, a legally-groundless critique of distribution payments made to the members and owners of Retro Metro LLC, namely Respondent Watkins Development, Socrates Garrett, Jason Goree, Howard Catchings, Sam Begley, and Leroy Walker. (Ex. 1, at Pg. 3).

[5]One of the three violations found by the Secretary stated that the "fraud" statute quoted above was violated because there were "substantial omissions in the requisitions for payments" made after the bond closing itself was completed. (Ex. 1, at Pg. 5). Every one of the "requisition" forms used by Respondent David Watkins as Manager of Retro Metro LLC disclosed that the requisitions were for payment of "professional fees" as well as "construction costs" and other stated items. (Division Hearing Ex. 18). The first such requisition form had specifically disclosed that Retro Metro LLC was seeking to withdraw $400,000 to fund the "partner distribution" on which the Secretary has based one of his other findings of "fraud". The record of this case contains no evidence that any recipient or payor of any of those requisitions ever regarded any of them as incomplete, or as inadequate, or as submitted in breach of any duty, or as otherwise not worthy of being paid as submitted.

(Notice of Intent, making no mention of requisition forms), and Ex. 6 (Amended Notice of Intent, making no mention of requisition forms)).[6]

IV. The Secretary Disregarded Undisputed Proof that Watkins Made No False or Misleading Statement in Connection with the Bond Sale.

11. There was no evidence at the hearing of this case that Watkins ever made any false statement in connection with the subject bond sale, stating or implying that no profit distribution would be made to Retro Metro LLC members.

12. There was no evidence at the hearing of this case that Watkins ever made any false statement in connection with the subject bond sale, stating or implying anything inconsistent with the requisition forms later used to draw down increments of bond proceeds.

13. There was no evidence at the hearing of this case that Watkins ever made any false statement in connection with the subject bond sale, stating or implying that bond proceeds would not be used to pay professional fees of professionals engaged by Retro Metro LLC to carry out its work, including payments which Retro Metro had agreed to pay to its developer, Watkins Development, pursuant to the terms of a Development

---

[6]As if the Secretary's constitutional violations were not enough for the Court to strike the Secretary's findings noted above, the Secretary in finding multiple violations that were not alleged in any pre-hearing notice or pleading communicated to Watkins also violated the procedural requirements of the Mississippi Securities Act itself, under which any such pre-hearing "notice" to a charged party is required to provide "a statement of the reasons for the order," and is also to provide the respondent with a "reasonable opportunity to defend" against the reasons for the charges. *Mississippi Code Ann.* §§ 75-71-604(b) and 75-71-611(e).

Agreement between those two parties.[7]

14. There was no evidence at the hearing of this case that Watkins, or any other participant in the bond sale, ever regarded the obligation by Retro Metro LLC to pay Watkins Development the fees due to it under the two parties' Development Agreement (for developing and managing its entire enterprise), to be an obligation "adversely affecting" the interests of Retro Metro LLC itself.[8]

15. There was no evidence at the hearing of this case that any buyer of the

---

[7]The Secretary noted language from the bond sale documents that the core purpose of the Retro Metro enterprise in using the bond proceeds was "to improve the approximately 120,0000 square foot first floor of an existing building commonly known as the 'Belk Building' in the Metrocenter shopping center" in Jackson. (Ex. 1, at Pg. 3). But it does not follow from that general statement of purpose that it was "fraud" for Retro Metro, *in order to cause those intended improvements to be constructed*, to pay contractual fees to its own professional service providers, including its own developer and construction manager Watkins Development. Neither common commercial experience, nor any evidence introduced at the hearing of this case, supports any such finding of "fraud." Indeed, the evidence was that the buyer of the bonds was specifically told that, while the construction costs to improve the subject building were expected to total $2.5 million, *the bond sale proceeds would total over twice that amount*. All of the relevant evidence defies the Secretary's finding that it was "fraud" not to spend all of the bond proceeds on the direct costs of physical construction (expected to reach only $2.5 million).

[8]The one and only provision in the transaction documents exchanged "in connection with" the subject bond closing on April 12, 2011, which either the Secretary or the Hearing Officer in this case asserts to have been a false statement, was this provision contained in a related Loan Agreement: "Other than any agreements which have been delivered to the Issuer and the Trustee or the Purchaser, (Retro Metro LLC) is not a party to any indenture, agreement or other instrument *materially and adversely* affecting its business, properties, assets, liabilities, operations, income or condition, whether financial or otherwise." (Ex. 2, at Pgs. 4-5; emphasis added). As will be demonstrated through a supporting brief herein, both of the two hearing witnesses who testified about this issue agreed that a company's obligations to pay professional fees to professional service providers are *not* obligations "*adversely* affecting" the company's condition within the meaning of that language. The Secretary, without any evidentiary basis, ruled otherwise. (*Ibid.*) In recommending such a ruling, the Hearing Officer mis-stated the most important part of the language quoted above. (Ex. 2, at Pg. 12, Parag. 53).

subject bonds ever regarded any transaction or obligation to be material to its decision about whether to buy (and what to pay for) the bonds, other than the terms of the legal obligation and the financial capacity of the City of Jackson to make the lease payments which indirectly were expected to pay for all of the interest and principal due to the bond buyers.[9]

16. There was no evidence at the hearing of this case that Watkins, at any time which "coincided" with and was thus "in connection with" the April 12, 2011 bond sale transaction, knew or intended that *almost two months later, in June of 2011,* Watkins Development would use some of the fees due to it from Retro Metro LLC (under the terms of their Development Agreement), to purchase (for later renovation by Watkins Development) a commercial building in Meridian, Mississippi.[10] The Secretary was

---

[9]For that matter, there was no evidence presented at any time in the administrative proceeding that any buyer of the bonds ever regarded, or now regards, any conduct ever engaged in by David Watkins or Watkins Development LLC to have been any breach of any legal duty to anyone at any time. Much less is there any evidence that any such buyer, even in hindsight, believes that anyone committed fraud, or has caused them any loss, in connection with their purchase.

[10]Indeed, the Hearing Officer's own specific finding that the "Respondents knew at least one week, if not three weeks, prior to the (June 2011) transaction that funds other than from a loan would be needed" to buy the Meridian property, demonstrates why it was physically impossible for the same persons to have "known" that same fact back on April 12, 2011, and thus to have known it "in connection with" the bond closing on that earlier date. As will be demonstrated through the complete record and a brief thereon to be filed in accordance with the Court's schedule, the Meridian property was not bought until June 7, 2011. By the Hearing Officer's own finding, Watkins "knew" no earlier than mid-May of that year - and thus not until a month after the communications made "in connection with" the bond sale had been completed - that Watkins Development would need to use some of its fee entitlement from Retro Metro LLC to fund its purchase of the Meridian property in June. All of the hearing evidence placed the earliest point of that knowledge or understanding well after the April 2011 bond sale. The Hearing Officer and Secretary simply disregarded the limits imposed by the "in connection with"

therefore without any legal authority to determine that any such intent or activity occurred "in connection with" *the April 2011 bond sale.*[11]

IV. The Secretary Disregarded (by Declaring "Irrelevant") Watkins' Contractual Right to be Paid for Professional Services as Retro Metro's Authorized Developer.

17. The Secretary adopted a legal view that in ruling about the legal propriety of Retro Metro's fee payments to its developer Watkins Development (pursuant to a Development Agreement between the parties), "*whether or not the money was owed is irrelevant*" to the analysis. (Ex. 2, at Pg. 18; emphasis added).[12] Nothing could be further

---

language of the statute they purport to enforce here.

[11]If the Secretary's unprecedented view of his governmental regulatory authority were the law, then he as the State's securities regulator, once a company raises capital through a securities transaction, has the power to adjudicate every later contract dispute, every later accounting issue, and every other significant company-wide controversy which may occur weeks, months, or even years after the securities sale, whether or not it was even known or contemplated at the time of (and thus "in connection with") that sale. If that were the law, then state and federal securities regulators, rather than courts and juries, would have the power to decide, under the guise of regulating past securities sales, substantially all major commercial disputes affecting companies once they have used the sale of securities to raise capital. If that were the law, the American economy would no doubt sink, since no one would want to raise capital through the sale of a security if doing so got them entirely unforeseeable risks of liabilities for all such future and unforeseen company-wide controversies. But that is not the law, either at the federal or the state level.

[12]When the Secretary instituted his administrative charge in July of 2013, he asserted his allegations through a "Notice of Intent to Impose Administrative Penalty" which made no mention of any Development Agreement (or of any allegation associated with any such Agreement). (Ex. 4). His office represented at that time that the Notice "details the result of our investigation and our intended action based on that investigation." (Ex. 3). But that representation turned out not to be true. Eighty-five days *after* the Secretary had made that representation and commenced his proceeding - and *only six days before the evidentiary hearing on that Notice of Intent was to start* on October 29, 2013 - the Secretary filed an "Amended Notice of Intent" adding multiple new charges arising out of the Development Agreement between Retro Metro LLC and Watkins Development LLC. (Ex. 6).

from the law, or from the proper statutory limits on the Secretary's regulatory powers. Whether or not a party as a matter of contract law is legally "owed" funds it receives, from a party to whom it has provided a professional service and with whom it has entered a written professional fee contract, *is* the core question any proper adjudicator should focus on in determining the legal propriety of any such transfer of funds. Instead, the Secretary declared Watkins' legal entitlement to be "irrelevant" to the Secretary's administrative adjudication of the legal propriety of that fee transfer.

Relief Requested

ACCORDINGLY, the Petitioners herein move the Court, pursuant to *Mississippi Code Ann.* § 75-71-609, to obtain and review the complete record of the administrative proceeding herein, and to authorize and order the presentation of a principal brief by the Petitioners, a principal brief on behalf of the Secretary, and a reply brief by the Petitioners, and to authorize and schedule an oral argument thereon, and to set aside the Final Order entered by the Secretary, and to authorize an award of attorneys' fees and litigation expenses in favor of the Petitioners, and to stay the effect of the Final Order pending such proceedings in this Court.

This the 17th day of April, 2014.

WATKINS DEVELOPMENT, LLC
and DAVID WATKINS
By their Attorneys,
PIGOTT & JOHNSON, P.A.

By: _____
J. Brad Pigott

J. Brad Pigott, Mississippi Bar No. 4350
Pigott & Johnson Law Firm
775 North Congress Street
Jackson, Mississippi 39202
Telephone: 601-940-0450
Fax: 601-354-7854
Email: bpigott@pjlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, through means both of the United States Mails at the physical addresses set forth below, and of electronic mail to the email addresses set forth below, the foregoing Petition to the persons named below:

Honorable Cheryn Netz
Assistant Secretary of State for Securities
Mississippi Secretary of State's Office
700 North Street
Jackson, Mississippi 39202
Cheryn.Netz@sos.ms.gov

Honorable Jessica Leigh Long
Senior Attorney, Securities Division
Mississippi Secretary of State's Office
700 North Street
Jackson, Mississippi 39202
Jessica.Long@sos.ms.gov

This the 17th day of April, 2014.

J. Brad Pigott