

1 STATE OF WASHINGTON
2 DEPARTMENT OF FINANCIAL INSTITUTIONS
3 SECURITIES DIVISION

4 IN THE MATTER OF DETERMINING) Order Number S-04-187-07-TO02
5 Whether there has been a violation of the)
6 Securities Act of Washington by:) STATEMENT OF CHARGES AND NOTICE
7) OF INTENT TO ENTER ORDER TO CEASE
8 M & W Charitable Foundation; M & W) AND DESIST, IMPOSE FINES, AND
9 Charitable Trust; The Clark 2001 Subscriber) RECOVER COSTS
Trust; Russell F. Kenaga, Jr.; and Victor H.)
Clarke)
Respondents

10
11 THE STATE OF WASHINGTON TO: M & W Charitable Foundation
12 M & W Charitable Trust
13 The Clarke 2001 Subscriber Trust
14 Russell F. Kenaga, Jr.
15 Victor H. Clark

16 STATEMENT OF CHARGES

17 Please take notice that the Securities Administrator of the State of Washington has reason
18 to believe that Respondents, M & W Charitable Foundation, M & W Charitable Trust, The Clark
19 2001 Subscriber Trust, Russell F. Kenaga, Jr. and Victor H. Clarke have each violated the
20 Securities Act of Washington and that their violations justify the entry of an order of the
21 Securities Administrator under RCW 21.20.390 against each to cease and desist from such
22 violations. The Securities Administrator finds as follows:

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24 //

25 STATEMENT OF CHARGES AND NOTICE OF INTENT 1
TO ISSUE AN ORDER TO CEASE AND DESIST,
IMPOSE FINES, AND CHARGE COSTS

DEPARTMENT OF FINANCIAL INSTITUTIONS
Securities Division
PO Box 9033
Olympia, WA 98507-9033
360-902-8760

1 **TENTATIVE FINDINGS OF FACT**

2 **PARTIES**

3 1. M & W Charitable Foundation, a Corporate Sole incorporated in Utah, has a
4 principal place of business in Vancouver, Washington.

5 2. M & W Charitable Foundation is doing business as M & W Charitable Trust.

6 3. The Clarke 2001 Subscriber Trust is an entity controlled by Victor H. Clarke and
7 Sam Greenberg.

8 4. M & W Charitable Foundation is controlled by Russell F. Kenaga Jr. (Kenaga).
9 Kenaga is the Trustee for M & W Charitable Foundation. Kenaga is a resident of Vancouver,
10 Washington.

11 5. Victor H. Clarke, a resident of Palm Desert, California, is a principal of The
12 Clarke 2001 Subscriber Trust.

13 **NATURE OF THE OFFERING**

14 6. Beginning no later than October 2000 and continuing through November 2001,
15 Kenaga, via M & W Charitable Foundation and M & W Charitable Trust, raised and collaborated
16 with others to raise at least \$13,190,000 from at least 145 individuals for a high-yield investment
17 program. Investors are located in 26 states (including Washington), the District of Columbia,
18 Australia, Canada, Chile, Egypt, Finland, France, Germany, Greece, Japan, Luxembourg, the
19 Netherlands, Singapore, the Slovak Republic, South Africa, Spain and the United Kingdom.

20 7. Investors thought that they were going to receive a return of investment of 25%
21 per week for 49 weeks over a one year period based upon documents provided to investors by
22 Kenaga and Kenaga's oral representations. Investors thought their funds were going to be
23 invested in Medium Term Notes, Prime Bank Instruments or High Yield Notes. Clarke and
24
25

1 Kenaga told investors that their funds would go into a non-depletion bank account where their
2 principal investment amount would stay in the bank account and then be returned to the investors
3 four weeks after their investment. The investors were told that the investment would continue to
4 earn the return based upon the compounding of the weekly profits.

5 8. Investors were required to complete a number of documents, including a Joint
6 Venture Agreement, Limited Power of Attorney form, Non-Disclosure Non-Solicitation
7 document and an Authority to Move Funds document. Kenaga provided the investors with these
8 documents as well as answering the investors' questions regarding the investment and receiving
9 investors' funds.
10

11 9. Kenaga first learned of the investment opportunity in The Clarke 2001 Subscriber
12 Trust from Sam Greenberg of Toronto, Canada. Kenaga had multiple telephone conversations
13 with Greenberg and Clarke regarding the investment. Clarke told Kenaga that Kenaga would act
14 as a "pooler" of investor funds for investors that invested between the minimum investment of
15 \$10,000 and \$100,000. Kenaga would then pool the investor funds together and wire the
16 combined funds to Clarke at Clarke's direction. (A pooler is a person that acts to collect investor
17 funds and promote the investment and then transfer all or part of the funds collected to a person
18 higher up in the investment scheme, in this matter Clarke.) Clarke told Kenaga that those
19 investors that contributed \$100,000 and above were to send the funds directly to Clarke. Kenaga
20 still provided the offering documents and explained the investment to the investors that sent their
21 money directly to Clarke. Kenaga explained the investment opportunity to potential investors
22 when they contacted him to inquire about the investment. Kenaga then sent the potential
23 investors' investment related documents and also sent the potential investor banking coordinates
24 to a bank account that he controlled for the investors' funds.
25

1 10. Kenaga was to be compensated for being a pooler for Clarke. Kenaga was
2 provided a document that detailed the compensation that he would receive based upon the profits
3 made from the money that his investors brought in. Kenaga also had the ability to take a portion
4 of the compensation he was to receive and give that to people who brought investors to him.

5
6 **MISREPRESENTATIONS AND OMISSIONS**

7 11. The Respondents failed to provide investors with a disclosure document
8 containing material information about the investment opportunity described above, including but
9 not limited to, a reasonable basis for the financial projections provided by Kenaga, the use of the
10 investors' funds, the compensation that Kenaga was to receive for soliciting investors and the
11 fact that the investors' funds were not actually placed into a bank account where their funds
12 would not be removed.

13 12. Kenaga also failed to disclose to investors that the Oregon Department of
14 Consumer and Business Services, Division of Finance and Corporate Securities issued a Cease
15 and Desist Order against Kenaga in 1995 for the offer and sale of unregistered securities and
16 selling securities in Oregon without a securities salesperson or broker-dealer license, to which
17 Kenaga consented.

18 13. The Securities Division's investigation has found that these types of purported
19 investments are the subject of an October 21, 1993, a June 11, 1996, and a May 20, 2002
20 Investment Scheme Advisory issued by the Board of Governors of the Federal Reserve System
21 warning the public about illegal high yield note schemes which often utilize language including
22 "prime bank," "top world banks," "top European banks," and "medium term notes."

23 14. The Offer and/or sale of investments in The Clarke 2001 Subscriber Trust is not
24 currently registered under the Securities Act of Washington nor has the offer and/or sale
25 previously been so registered.

1 15. Kenaga and Clarke are not currently registered as securities salespersons or
2 broker-dealers in the state of Washington and none have previously been so registered.

3 16. The Securities Administrator finds that the continued offering of this investment
4 opportunity in the manner described in Tentative Finding of Facts represents a threat to the
5 investing public.

6 Based upon the Tentative Findings of Fact, the following Conclusions of Law are made:
7

8 **CONCLUSIONS OF LAW**

9 17. The offer or sale of the investment described above constitutes the offer or sale of
10 a security as defined in RCW 21.20.005(10) and (12), to wit: an investment contract, evidence of
11 indebtedness or risk capital.

12 18. The offer or sale of said securities is in violation of RCW 21.20.140 because no
13 registration or notification of claim of exemption for such offer or sale is on file with the
14 Securities Administrator.

15 19. Russell F. Kenaga, Jr. and Victor H. Clarke have each violated RCW 21.20.040
16 by offering or selling said securities while not registered as a securities salespersons or broker-
17 dealers in the state of Washington.

18 20. The offer or sale of said securities was made in violation of RCW 21.20.010
19 because the Respondents made misstatements of material fact or omitted to state material facts
20 necessary in order to make the statements made, in the light of the circumstances under which they
21 were made, not misleading.

22 **NOTICE OF INTENT TO ORDER RESPONDENTS TO CEASE AND DESIST**

23 Pursuant to RCW 21.20.390, and based on the above Tentative Findings of Fact and
24 Conclusions of Law, the Securities Administrator intends to order that M & W Charitable
25

1 Foundation, M & W Charitable Trust, The Clarke 2001 Subscribers Trust, Russell F. Kenaga, Jr.,
2 Victor H. Clarke, and their agents and employees, each cease and desist from offering or selling
3 securities in any manner in violation of RCW 21.20.140, the section of the Securities Act of
4 Washington requiring registration.

5 The Securities Administrator intends to order that respondents, M & W Charitable
6 Foundation, M & W Charitable Trust, The Clarke 2001 Subscribers Trust, Russell F. Kenaga, Jr.,
7 Victor H. Clarke, and their agents and employees, each cease and desist from violation of RCW
8 21.20.010, the anti-fraud section of the Securities Act.

9 The Securities Administrator intends to order that Russell F. Kenaga, Jr. and Victor H.
10 Clarke, each cease and desist from violation of RCW 21.20.040, the section of the Securities Act
11 that requires registration of securities salespersons and broker-dealers.

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13 **NOTICE OF INTENT TO IMPOSE FINE**

14 Pursuant to RCW 21.20.395, and based upon the above Tentative Findings of Fact and
15 Conclusions of Law, the Securities Administrator finds that Respondents M & W Charitable
16 Foundation, M & W Charitable Trust, The Clarke 2001 Subscribers Trust, Russell F. Kenaga, Jr.
17 and Victor H. Clarke have committed a knowing or reckless violation of the Securities Act such
18 that the imposition of a fine is required. Therefore, the Securities Administrator intends to order
19 that the Respondents shall jointly and severally pay a fine in the amount of \$50,000.

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21 **NOTICE OF INTENT TO CHARGE COSTS**

22 Pursuant to RCW 21.20.390 and based upon the Tentative Findings of Fact and
23 Conclusions of Law, the Securities Administrator intends to order that the Respondents M & W
24 Charitable Foundation, M & W Charitable Trust, The Clarke 2001 Subscribers Trust, Russell F.
25 Kenaga, Jr. and Victor H. Clarke shall jointly and severally be liable for and pay the Securities

1 Division the costs, fees and other expenses incurred in the conduct of the administrative
2 investigation and hearing of this matter, in an amount not less than \$2,000.

3 **AUTHORITY AND PROCEDURE**

4 This Statement of Charges is entered pursuant to the provisions of RCW 21.20.390 and
5 RCW 21.20.395 and is subject to the provisions of RCW 34.05. The respondents, M & W
6 Charitable Foundation, M & W Charitable Trust, The Clarke 2001 Subscribers Trust, Russell F.
7 Kenaga, Jr. and Victor H. Clarke may each make a written request for a hearing as set forth in
8 the NOTICE OF OPPORTUNITY TO DEFEND AND OPPORTUNITY FOR HEARING
9 accompanying this Statement of Charges.
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11 If a respondent does not request a hearing, the Securities Administrator intends to adopt
12 the above Tentative Findings of Fact and Conclusions of Law as final, enter a permanent cease
13 and desist order as to that Respondent, and impose the fines and costs sought.

14 Dated and Entered this 28th day of December, 2007

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18 MICHAEL E. STEVENSON
19 Securities Administrator

20 Approved by:

21 

22 Martin Cordell
23 Chief of Enforcement

Presented by:

24 

25 Tyler Letey
Financial Legal Examiner