

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MAY 08 2010

JAMES N. HATTEN, Clerk  
*Be* Deputy Clerk

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

NEW DAY ATLANTA, LLC d/b/a NDA  
FINANCIAL, LLC, ANDREW L. AVERY,  
and LEE E. MARKS,

Defendants .

Civil Action File No.

1 10·CV-1333

**COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF**

Plaintiff, Securities and Exchange Commission ("Commission"), files this  
Complaint and alleges as follows:

**SUMMARY**

1. Andrew L. Avery ("Avery"), Lee E. Marks ("Marks"), and an entity they control, New Day Atlanta, LLC d/b/a NDA Financial, LLC ("NDA") have conducted a fraudulent and unregistered offering and sale of securities since 2007, raising more than \$3.2 million from more than 70 investors through the sale of purported high-yield, fixed rate Real Estate Investment Notes ("REINs").

2. Defendants Avery, Marks and NDA marketed and sold the REINs to the general public primarily on the internet at [www.ndafinancial.com](http://www.ndafinancial.com) (the “Website”) and through use of a written prospectus (the “Prospectus”). Avery and Marks jointly prepared and maintained both the Website and the Prospectus.

3. Through the Website and Prospectus, and in personal communications with investors and potential investors, defendants Avery, Marks and NDA made material misrepresentations, misleading statements and omissions of fact regarding, among other things, the safety of investor proceeds, the gross value of NDA’s assets, and the amounts of NDA’s gross revenues.

4. Through their conduct, defendants Avery, Marks and NDA have engaged, and unless restrained and enjoined by this Court, will continue to engage in acts and practices that constitute and will constitute violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. §§ 77e(a), 77e(c) and 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

### **JURISDICTION AND VENUE**

5. The Commission brings this action pursuant to Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t and 77v] and Sections 21(d) and 21(e) of the

Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)], to enjoin defendants Avery, Marks and NDA from engaging in the transactions, acts, practices, and courses of business alleged in this complaint, and transactions, acts, practices, and courses of business of similar purport and object, for disgorgement with prejudgment interest thereon, civil penalties and for other relief.

6. This Court has jurisdiction over this action pursuant to Sections 20 and 22 of the Securities Act [15 U.S.C. §§ 77t and 77v] and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa].

7. Defendants Avery, Marks and NDA, directly and indirectly, made use of the mails, the means and instruments of transportation and communication in interstate commerce and the means and instrumentalities of interstate commerce in connection with the transactions, acts, practices, and courses of business alleged in this complaint.

8. Certain of the transactions, acts, practices, and courses of business constituting violations of the Securities Act and the Exchange Act occurred in the Northern District of Georgia. NDA's principal place of business is located in Atlanta, Georgia and defendants Avery and Marks solicited investments from and sold REINs to multiple individuals who reside in the Northern District of Georgia.

9. Defendants Avery, Marks and NDA, unless restrained and enjoined by this Court, will continue to engage in the transactions, acts, practices, and courses of business alleged in this complaint, and in transactions, acts, practices, and courses of business of similar purport and object.

#### **DEFENDANTS**

10. **New Day Atlanta, LLC d/b/a/ NDA Financial, LLC.**, is a Georgia limited liability company organized in 2007 with its principal place of business in Atlanta, Georgia.

11. **Andrew L. Avery** is 35 years of age and is a resident of Dunwoody, Georgia. He is a co-founder of NDA and is currently its sole-owner and principal.

12. **Lee E. Marks** is 35 years of age and is a resident of Lawrenceville, Georgia. As a co-founder of NDA, Marks assisted Avery in managing NDA's assets and operations until October 2008, when he sold his interests to Avery. Marks continues to serve NDA in a consulting capacity and remains responsible for the maintenance of the Website.

#### **DEFENDANT'S FRAUDULENT AND UNREGISTERED OFFERING OF SECURITIES**

13. Avery and Marks created NDA in 2007 as a Georgia limited liability company.

14. In approximately September 2007, Avery and Marks began utilizing the Website to promote and offer the REINs to the general public.

15. In exchange for investing with NDA, investors were provided with notes evidencing their REIN and specific terms of their investment.

16. Defendants Avery, Marks and NDA represented on the Website that the REINs could vary in term from one to five years and annual percentage yields would vary from 5.8% to 10.15% depending on the term and face purchase amount of the REIN.

17. Defendants Avery, Marks and NDA represented to investors and potential investors that they could elect to receive monthly interest payments via an "Income Advantage Note" or a compounded lump sum payment at the end of the investment period via a "Traditional Note." The Website touted that the minimum investment available was \$5,000, or \$15,000 if an individual wished to invest money from an existing IRA.

18. Defendants Avery, Marks and NDA marketed the REINS on the Website and in the Prospectus as "no load, no fee" instruments by which individuals could invest in the so-called Magnolia Real Estate Fund (the "Magnolia Fund").

19. The Magnolia Fund is a fictitious name devised by Avery and Marks to describe NDA's assets and holdings in a collective sense and is not registered with any state or federal agency in any manner.

20. NDA's Website and Prospectus characterized the Magnolia Fund as a "diversified fund of premium real estate investments" with purported assets of approximately \$6 million made up primarily of rental and lease purchase properties located in and around the Atlanta, Georgia metropolitan area.

21. NDA purported to use investor proceeds to purchase low-cost and distressed real estate, which it then leased for alleged profit.

22. Defendants Avery, Marks and NDA, through the Website, represented to investors and potential investors that they could invest with NDA by purchasing REINs and in doing so would obtain "peace of mind" with "high levels of security" and "no more stock market ups and downs."

23. Defendants Avery, Marks and NDA, through the Website, represented to investors and potential investors a purported four-to-one asset to investment ratio for NDA, promising that each REIN was "backed by four times its face value in free and clear real assets," so investors "can rest assured that there is solid value standing behind" each REIN.

24. Defendants Avery, Marks and NDA, through the Website, described the REINs to investors and potential investors as an “asset-backed security,” and represented that the “average NDA Magnolia Investor has gained over 17% the past 24 months.”

25. Defendants Avery, Marks and NDA, through the Website, promised investors and potential investors “rapid fund growth” and represented that NDA had “gross annual revenues topping \$1 million.”

26. Defendants Avery, Marks and NDA, through the Prospectus, made similar statements to investors and potential investors regarding the asset-backed nature of the REINs and stated that the “current approximate investment to asset ratio is .208 or close to 1:5.”

27. Defendants Avery, Marks and NDA, through the Prospectus, represented to investors and potential investors that the Magnolia Fund had assets valued at \$6.2 million.

28. Defendants Avery, Marks and NDA, within the Prospectus, specifically referred to the REINs as “fixed-yield investment instruments” and “investment products.”

29. As of March 11, 2010, NDA, Avery, and Marks had offered and sold \$3,282,935 of REINs to 72 investors.

30. As of March 11, 2010, NDA's liability to 60 outstanding investors under the REINs was \$2,936,310 (with a represented maturity value of \$3,242,597).

31. Investors who purchased REINs had no involvement with the operation of NDA beyond their contribution of capital.

32. The key managerial aspects of the NDA are controlled solely by defendants Avery, Marks and NDA, with no input or responsibility on the part of any investors.

33. Defendants Avery, Marks and NDA did not determine whether REIN purchasers were accredited investors.

34. No registration statement has been filed with the Commission or is in effect for the offering of securities in the NDA REINs, and there is no exemption from registration with respect to defendants Avery, Marks and NDA offering of securities in the form of REINs.

35. By virtue of their conduct described above, defendants Avery, Marks and NDA have conducted an unregistered public offering of securities.



**DEFENDANTS' MATERIAL  
FALSE STATEMENTS AND OMISSIONS**

**A. Annual Percentage Yields**

36. Defendants Avery, Marks and NDA represented to investors in the Website and the Prospectus that NDA was generating annual percentage yields ranging from 5.8% to 10.15%.

37. Defendants Avery, Marks and NDA knew from at least September 2007 through at least February 2010 that NDA was not generating income sufficient to provide effective annual returns from between 5.8% and 10.15% and that such statements were false. Defendants Avery, Marks and NDA further knew that NDA was not able to generate income sufficient to provide for its obligations under the REINs.

**B. Four-to-One Asset Protection**

38. Defendants Avery, Marks and NDA represented to investors in the Website and the Prospectus that each REIN was backed by four times its face value in free and clear real assets.

39. Defendants Avery, Marks and NDA knew from at least September 2007 through at least February 2010 that at no point in NDA's existence has the value of its unencumbered assets been equivalent to four times the amount of its obligations under the REINs.

40. As of March 11, 2010, defendants Avery, Marks and NDA knew that NDA's liability to outstanding investors was more than \$2.9 million (with a maturity value of more than \$3.2 million), while, based on its own valuation methodology, its unencumbered assets were worth no more than \$1,864,000 – materially less than four times the amount of outstanding REINs.

41. Defendants Avery, Marks and NDA represented within the Prospectus that that the Magnolia Fund had assets valued at \$6.2 million.

42. Defendants Avery, Marks and NDA knew from at least September 2007 through at least February 2010 that the value of NDA's assets were materially less than \$6.2 million – yet defendants Avery, Marks and NDA continued to publicly tout on the Website and in the Prospectus that NDA's assets were valued at \$6.2 million.

43. Defendants Avery, Marks and NDA knew or were extremely reckless in not knowing from at least September 2007 through at least February 2010 that the REINs were not asset-backed securities as referred to in the Website. Instead, the REINs were unsecured obligations.

### **C. Gross Annual Revenues and Balance Sheet Insolvency**

44. Defendants Avery, Marks and NDA represented in the Website that NDA had “gross annual revenues topping \$1 million.”

45. Defendants Avery, Marks and NDA knew that NDA's gross revenues never exceeded \$1 million in any given twelve-month period.

46. Defendants Avery, Marks and NDA knew that for nearly the entirety of its existence, NDA's balance sheet indicated it was insolvent in that its total balance sheet liabilities exceeded its total balance sheet assets.

47. From at least September 2007 through at least March 2010, Avery received draws from NDA of at least \$214,127.57.

48. From at least September 2007 through at least March 2010, Marks received draws from NDA of at least \$96,998.18.

**COUNT I—UNREGISTERED OFFERING OF SECURITIES**

**Violations of Sections 5(a) and 5(c) of the Securities Act**

**[15 U.S.C. § 77e(a) and 77e(c)]**

49. Paragraphs 1 through 48 are hereby realleged and are incorporated herein by reference.

50. No registration statement has been filed or is in effect with the Commission pursuant to the Securities Act and no exemption from registration exists with respect to the transactions described herein.

51. From at least September 2007 through at least February 2010, NDA, Avery, and Marks, singly and in concert, have:

a. made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell securities, through the use or medium of a prospectus or otherwise;

b. carried securities or caused such securities to be carried through the mails or in interstate commerce, by any means or instruments of transportation, for the purpose of sale or for delivery after sale; and

c. made use of the means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy securities, through the use or medium of any prospectus or otherwise, without a registration statement having been filed with the Commission as to such securities.

52. By reason of the foregoing, defendants Marks, Avery and NDA, directly and indirectly, singly and in concert, have violated Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

**COUNT II—FRAUD**  
**Violations of Section 17(a)(1) of the Securities Act**  
**[15 U.S.C. § 77q(a)(1)]**

53. Paragraphs 1 through 48 are hereby realleged and are incorporated herein by reference.

54. From at least September 2007 through at least February 2010, defendants Avery, Marks and NDA, in the offer and sale of the securities described herein, by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, employed devices, schemes and artifices to defraud purchasers of such securities, all as more particularly described above.

55. Defendants Avery, Marks and NDA acted knowingly, intentionally, and/or with severe recklessness in engaging in the aforementioned devices, schemes and artifices to defraud.

56. While engaging in the course of conduct described above, the defendants acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

57. By reason of the foregoing, defendants Avery, Marks and NDA, directly and indirectly, have violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

**COUNT III—FRAUD**  
**Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act[15 U.S.C. §§**  
**77q(a)(2) and 77q(a)(3)]**

58. Paragraphs 1 through 48 are hereby realleged and are incorporated herein by reference.

59. From at least September 2007 through at least February 2010, defendants Avery, Marks and NDA, in the offer and sale of the securities described herein, by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly:

a. obtained money and property by means of untrue statements of material fact and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and

b. engaged in transactions, practices and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

60. By reason of the foregoing, defendants Avery, Marks and NDA, directly and indirectly, have violated and, unless enjoined, will continue to violate Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

#### **COUNT IV—FRAUD**

#### **Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)]and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]**

61. Paragraphs 1 through 48 are hereby realleged and are incorporated herein by reference.

62. From at least September 2007 through at least February 2010, defendants Avery, Marks and NDA, in connection with the purchase and sale of securities described herein, by the use of the means and instrumentalities of interstate commerce and by use of the mails, directly and indirectly:

- a. employed devices, schemes, and artifices to defraud;
- b. made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and
- c. engaged in acts, practices, and courses of business which would and did operate as a fraud and deceit upon the purchasers of such securities, all as more particularly described above.

63. Defendants Avery, Marks and NDA knowingly, intentionally, and/or recklessly engaged in the aforementioned devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in fraudulent acts, practices and courses of business. In engaging in such conduct, the defendants acted with scienter, that is, with an intent to deceive, manipulate or defraud or with a severe reckless disregard for the truth.

64. By reason of the foregoing, defendants Avery, Marks and NDA, directly and indirectly, have violated and, unless enjoined, will continue to violate Section

10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Commission respectfully prays for:

**I.**

Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, finding that the defendants Avery, Marks and NDA named herein committed the violations alleged herein.

**II.**

Permanent injunctions enjoining the defendants Avery, Marks and NDA, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order of injunction, by personal service or otherwise, and each of them, from violating, directly or indirectly, Sections 5 (a), 5(c), and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a) and (c) and 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] promulgated thereunder.



**III.**

An order requiring an accounting of the use of proceeds of the sales of the securities described in this Complaint.

**IV.**

An order requiring disgorgement by defendants Avery, Marks and NDA of all ill-gotten gains or unjust enrichment with prejudgment interest, to effect the remedial purposes of the federal securities laws,

**V.**

An order freezing the assets and preserving documents of the defendants, to preserve the status quo.

**VI.**

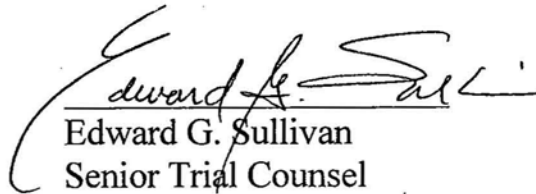
An order pursuant to Section 20(d) of the Securities Act [15 U.S.C. 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. 78u(d)(3)] imposing civil penalties against defendants Avery, Marks and NDA.

**VII.**

Such other and further relief as this Court may deem just, equitable, and appropriate in connection with the enforcement of the federal securities laws and for the protection of investors.

Respectfully submitted this 3<sup>rd</sup> day of May, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward G. Sullivan". The signature is written in a cursive style with a large initial "E" and "S".

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