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J. Frank Burdick; Jimmy V. Henrie; Grant B. Howell; Ella Dean Hunter; Terry L. Jordan; Richard Manus; Teresa Manus; Michael Marquez; Teri Marquez; Lurene Swinburne, Personal Representative, for and on behalf of the estate of Robert D. Swinburne; and Wylma Temples v. Hornor, Townsend & Kent, Inc.; Jeffrey C. Campbell; Five Star Financial Group : Brief of Appellant

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IN THE SUPREME COURT FOR THE STATE OF UTAH

J. FRANK BURDICK; JIMMY V.
HENRIE; GRANT B. HOWELL; ELLA
DEAN HUNTER; TERRY L. JORDAN;
RICHARD MANUS; TERESA MANUS;
MICHAEL MARQUEZ; TERI
MARQUEZ; LURENE SWINBURNE,
PERSONAL REPRESENTATIVE, FOR
AND ON BEHALF OF THE ESTATE OF
ROBERT D. SWINBURNE; and WYLMA
TEMPLES,

Appellants,

vs.

HORNOR, TOWNSEND & KENT, INC.;
JEFFREY C. CAMPBELL; FIVE STAR
FINANCIAL GROUP,

Appellees.

Appellate Court No. 20110479

Civil No. 060700588

BRIEF OF APPELLANTS

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON
COUNTY, STATE OF UTAH, JUDGE DOUGLAS THOMAS

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UTAH APPELLATE COURTS

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JURISDICTION:

This appeal is from a final Judgment and orders of the Seventh District Court, Honorable Judge Douglas Thomas. This Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES:

Issue No.1: Did appellants produce sufficient evidence to hold HTK liable for the recommendation of BHDC where appellants relied on Campbell/Five Star's appearance of authority to give investment advice and were never informed of their termination from HTK? [TR4214-24; 6721-43; 5831-40] The review of the trial court's granting of summary judgment involves questions of law which are reviewed for correctness with no deference to the trial court. *Haik v. Sandy City*, 2011 UT 26, ¶10.

Issue No.2: Did the trial court err when it ruled HTK owed no duties of care to appellants following the termination of their registered representative? [TR4228-35; 6748-60; 5845-51] The determination of whether a legal duty exists is entirely a question of law. *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶18. Legal questions such as the existence of a duty and its scope are reviewed for correctness with no deference to the trial court. *McLaughlin v Schenck*, 2009 UT 64, ¶14.

Issue No.3: Does the participation of HTK's actual and apparent agents in the sale of BHDC constitute material aid in the sale of unregistered securities? [TR4225-26; 6745-48; 5844-45] The review of the trial court's granting of summary judgment involves questions

of law which are reviewed for correctness with no deference to the trial court. *Haik v. Sandy City*, 2011 UT 26, ¶10.

Issue No.4: Did the trial court err in striking appellants' evidence of HTK's control person liability as prejudicial to HTK where the evidence corrected an inaccurate record created by HTK? [TR5840-43; 6744-45; 5840-43] The trial court's striking of appellants' evidence in support of HTK's control person liability is reviewed for an abuse of discretion. *Cabaness v. Thomas*, 2010 UT 23, ¶50.

Issue No.5: Did the trial court abuse its discretion in rejecting appellants' attorneys' fees without evaluating the factors for award of reasonable contingent fees? [TR5803-11; 6117-23] The trial court's calculation of reasonable attorneys' fees is reviewed for an abuse of discretion. *Softsolutions, Inc. v. Brigham Young Univ.*, 2000 UT 46, ¶ 12.

Issue No.6: Did the trial court err when it ruled the Release between Grant Howell and Penn Mutual was clear and unambiguous despite language limiting the Release to Howell's insurance policy? [TR1238-46] Questions of contract interpretation are reviewed for correctness. *Holladay Towne Ctr., L.L.C. v. Brown Family Holdings, L.L.C.*, 2011 UT 9, ¶18.

STATEMENT OF THE CASE:

Appellee Hornor, Townsend & Kent ("HTK") is a broker-dealer of securities and investment products. [TR1832] HTK licenses registered representatives to act on its behalf. [TR4560; 4435] HTK entered into Registered Representative Contracts with Jeff Campbell,

Frank Wheeler, Fred Davis and Mary Alger. [TR4680-81; 4698-4700; 4360-61; 4435] These persons represented HTK in Price, Utah under the name Five Star Financial Group. [TR4376-77; 4359-61]

The Beverly Hills Development Company (“BHDC”) was a real estate scam operated out of Alpine, Utah by Michael Fitzgerald. Jeff Campbell first spoke to his HTK supervisor about selling BHDC notes in mid-2002. [TR4358; 4678-79] Less than a year prior, the NASD issued Notice to Members 01-79, plainly outlining promissory note scams like BHDC. [TR4201; 4281-82; 6766-686] HTK relayed this information to its representatives in its newsletter and recommended its representatives review the scam in the Top 10 Scams List from securities regulators. [TR4807]

Yet, Campbell explained to his supervisor the BHDC investments would involve promissory notes backed by property, so the notes were not securities. [TR4408-09; 4415] Knowing that Notice 01-79 outlined this precise type of scam, HTK was not fooled and Campbell’s compliance manager told him the BHDC notes were indeed securities. [TR4380]

Undeterred, in November, 2002, Campbell surrendered his securities license and resigned from HTK. [TR4397] HTK understood it was important for the remaining HTK representatives at Five Star to distinguish themselves from Campbell. [TR4381] HTK was concerned that since the representatives had worked together with Campbell in the past, clients could perceive they were also involved in BHDC. [TR4548]

Despite its concerns, HTK never instructed Campbell to sever ties with the remaining

HTK representatives. [TR4410] HTK never recommended its agents leave the office or change the signs. [TR4552-53] The representatives did not change their stationary, business cards, office signs, office configuration, or the phone and fax lines. [TR4549-50] Rather, HTK representative Wheeler referred customers to Campbell to invest in BHDC, HTK representative Alger handled the paperwork and put the files together for each BHDC investor, and HTK representative Davis actually invested himself. [TR4498-4500; 4523; 4430; 4436]

Thus, as HTK knew would happen, appellants, who were HTK/Five Star customers, were pitched BHDC investments at HTK's office through Campbell. [TR4193-96] Campbell did nothing to inform his clients of his termination from HTK. [TR4416-17] HTK took no action to notify customers of Campbell's termination. [TR4382; 4370; 4433] HTK likewise took no action to notify customers BHDC was not authorized by HTK. [TR4382; 4371] Appellants invested in BHDC and lost their entire investments.

SUMMARY OF ARGUMENTS:

HTK moved for summary judgment against appellant Howell based on his signing of a Release with HTK's parent company, Penn Mutual (Issue No. 6). The trial court granted HTK's motion. Appellant Howell appeals that ruling based on the ambiguity of the Release and asks his claim be remanded for determination by a jury.

HTK then moved for summary judgment on the remaining appellants' claims based on apparent authority, negligent supervision, and violations of the Utah Uniform Securities

Act (Issue Nos. 1-4). The trial court granted HTK's motion. Appellants appeal that ruling because they produced sufficient evidence they reasonably relied on the appearance of authority generated by HTK's sponsorship of Campbell and Five Star when they invested in BHDC. Appellants also presented sufficient evidence HTK owed them duties of care to support a negligence claim which survived Campbell's termination from HTK. Finally, appellants produced sufficient evidence HTK was liable for Campbell's sale of unregistered securities under the "material aid" and/or "control person" provisions of Utah's securities act. Appellants seek remand of these issues for trial by jury.

Following HTK's dismissal, appellants proceeded to trial against Campbell/Five Star Financial and obtained a jury verdict in their favor. Appellants requested attorneys' fees in accordance with Utah's securities statute and HTK objected (Issue No. 5). The trial court rejected appellants' fee request because appellants did not sufficiently distinguish the hours spent on their claims against Campbell from those against HTK. Appellants appeal this ruling because there is no such requirement in a contingent fee case. Appellants presented evidence of the complexity of the litigation, the work performed, the risks taken, and the results obtained. This is the evidence which the trial court should have considered. Appellants ask for remand of the attorneys' fee issue.

ARGUMENT

I. APPELLANTS PRODUCED SUFFICIENT EVIDENCE TO HOLD HTK LIABLE FOR THE RECOMMENDATION OF BHDC

Appellants¹ raised a question of fact whether they relied on Campbell/Five Star's apparent authority to invest in BHDC where they relied on IITK and Campbell for investment advice and were never informed of his termination from IITK. Utah follows the Restatement's definition of apparent authority as "conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Luddington v. Bodeninvest, Ltd.*, 855 P.2d 204, 209 (Utah 1993), *quoting* Restatement (Second) of Agency § 27.

Appellants produced sufficient evidence: 1) HTK manifested its consent to the exercise of authority; 2) appellants reasonably believed their agents possessed authority; and 3) suffered damage as a result of their reliance on the appearance of authority. *Luddington*, 855 P.2d at 209. "Questions of agency and an agent's authority ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship or authority." *E.A. Prince & Son, Inc. v. Selective Ins. Co.*, 818 F.Supp. 910, 912 (D.S.C. 1993)(emphasis in original).

¹ The trial court found different reasons to dismiss each appellant's claim, so appellants Burdick, Temples, Marquez, Hunter and Jordan are reviewed individually in this section. Appellants Manus, Henrie and Swinburne did not appeal this ruling.

Appellant Frank Burdick

The trial court dismissed Mr. Burdick's apparent authority claim stating he produced no evidence he relied on HTK to invest in BHDC. Appellants and the court disagreed regarding what was required for this reliance element. Appellants argued *Luddington* required only reliance on the appearance of authority, whereas the trial court insisted the reliance must be on a specific principal.² As explained below, in opposing summary judgment, Mr. Burdick produced sufficient evidence to satisfy either theory. Yet, the trial court additionally abused its discretion by refusing to consider evidence on reconsideration which created a question of fact.

Specifically, appellants moved for reconsideration and produced the evidence the trial court wanted, i.e. declarations they relied on HTK, its investment advice, its recommendation, and their belief Campbell represented HTK when they invested in BHDC. [TR6766-692-702)]³; see *Nyman v. McDonald*, 966 P.2d 1210, 1213 (Utah App. 1998)(finding "[o]ne sworn statement under oath is all that is necessary to create a factual issue, thereby precluding summary judgment.") The trial court rejected the evidence as untimely and, more candidly, as raising questions of fact. [TR6156] The trial court stated,

² The court explained, "[a]t no time does Mr. Burdick indicate . . . that he invested in BHDC because of HTK. Never says that. He never says, you know, it was because of HTK that I thought it was okay to invest in BHDC. Or, I thought it would be a good idea to invest in BHDC because I knew that HTK was there. Never said that." [TR6081].

³ The italicized pin cite 6766-[], indicates a document from appellants' reconsideration appendix which were not individually numbered in the trial court record.

“I don’t think its fair or appropriate that the Court utilize additional information essentially to meet the Court’s basis for its ruling in a summary judgment, to now try and create a factual dispute. I don’t believe its appropriate.” [TR6157] However, the presentation of new evidence is exactly the purpose of allowing a trial court to reconsider its rulings.

Prior to final judgment, “[a] court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a ‘different light’ or under ‘different circumstances;’ (2) there has been a change in the governing law; (3) a party offers new evidence; (4) ‘manifest injustice’ will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.” *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah App. 1994).

Here, the new evidence was particularly appropriate because, “[d]evelopment of the record is particularly warranted where lower courts have applied a different rule of law to the facts and the parties have not had an opportunity to develop the record with an eye toward the newly articulated rule.” *Park v. Stanford*, 2011 UT 41, ¶ 33; --- P.3d ---- . In this instance, appellants produced evidence to satisfy the trial court’s ruling that appellants had to rely specifically on IFTK rather than the apparent authority of IFTK’s agents. Therefore, the trial court abused its discretion in refusing to consider appellants’ evidence merely because it raised questions of fact.

However, even without reconsideration, Mr. Burdick produced sufficient evidence he

relied on Campbell/Five Star's appearance of authority and HTK to invest in BHDC. The trial court ruled, "Mr. Burdick presented no evidence that he invested in BHDC because of HTK's involvement or because he made any assumption about HTK's involvement." [TR5006] In so ruling, the trial court failed to view the facts and inferences in the light most favorable to Mr. Burdick. *USA Power, LLC v. Pacificorp*, 2010 UT 31, ¶ 28; 235 P.3d 749.

Appellants produced evidence Campbell approached Mr. Burdick in 2001 knowing of his recent retirement. [TR4384] Mr. Burdick knew he needed to invest his retirement and "just didn't want to give it to somebody off the street." [TR2148] Campbell told Mr. Burdick he was a professional financial adviser affiliated with HTK. [TR2148; 2150] Campbell told Mr. Burdick that HTK could help him invest with its assets, tools, and personnel. [TR2145; 6766-148d] HTK would be "hands on" to watch Mr. Burdick's investments, and move the investments when favorable to avoid a loss. [TR6766-148e] Campbell told him, "[HTK] can do a lot better than just letting it set there in one thing all the time." *Id.*

HTK recommended Mr. Burdick roll over his IRA to a Penn Mutual Variable Annuity. [TR4703-06; 2153] Campbell and Alger were listed on the application as Mr. Burdick's HTK agents, which was reviewed and approved by HTK. [TR 4705] Mr. Burdick filled out HTK's Variable Annuity Client Suitability Questionnaire which was also reviewed and approved by HTK. [TR4705] Statements were then sent to Mr. Burdick identifying HTK as his broker-dealer. [TR6766-666] As a result, Mr. Burdick understood when he rolled over his IRA that he and his retirement were now affiliated with HTK. [TR2148] Mr. Burdick

further understood IITK licensed Campbell. [TR4390]

Through 2001-2002, while Mr. Burdick held the Penn Mutual Variable Annuity, HTK told him it would try to “locate investment opportunities where the interest rate of return would be more to [his] liking.” [TR6766-154c: 2209] Sometime in the beginning of 2003 Campbell called him and said he had found an investment with a better return. [TR2209] The investment was BHDC.

The Restatement (Third) of Agency explains, “apparent authority is based on a third party’s understanding of signals of all sorts concerning the actor with whom the third party interacts. . . . It is usually a question for the trier of fact whether a reasonable person in the position of a third party would believe that an agent had the authority or the right to do a particular act. It is a separate but related question of fact whether such a belief is traceable to a manifestation of the principal.” § 2.03, cmt. (d). Here, Mr. Burdick produced sufficient evidence of manifestations of authority traceable to HTK to create a question of fact.

Mr. Burdick also produced sufficient evidence to raise a question of fact whether he relied on this appearance of authority or HTK to invest. By the time Campbell contacted Mr. Burdick about BHDC he had been terminated from HTK. But HTK had never informed Mr. Burdick of the termination nor reassigned him to a new representative. [TR 4702: 6766-154a: 2206] Indeed, when Campbell pitched BHDC to Mr. Burdick, everything was the same as the previous 15-20 times Mr. Burdick had dealt with Campbell at HTK’s Five Star office. [TR4386: 2178] At the HTK office, Campbell told Mr. Burdick they could simply “roll

over” the Penn Mutual annuity into BHDC to realize a better return. [TR2185; 6766-150c] This is precisely the type of service HTK had promised it could provide.

Indeed, Mr. Burdick understood BHDC was just another investment option and, based on his signing up with HTK to invest his retirement, Mr. Burdick assumed Campbell was still affiliated with HTK and HTK was still involved. [TR4385; 6766-154f] In fact, as stated by this Court, Mr. Burdick was entitled to assume HTK was still involved: “One who has dealt with an agent in a matter within the agent’s authority has the right to assume, if not otherwise informed, that such authority continues.” *Montana Reservoir & Irrigation Co. v. Utah Junk Co.*, 228 P. 201, 202 (Utah 1924); *accord Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 392 N.W.2d 759, 764 (Neb. 1986)(reversing summary judgment for commodities firm finding questions of fact existed regarding agent’s apparent authority post-termination where firm did not notify customers of termination); *E.A. Prince*, 818 F.Supp. at 915 (finding question of fact based on customer’s reasonable belief its agent continued to act within authority because never notified of termination).

The trial court could and should have inferred in Mr. Burdick’s favor that had HTK destroyed Campbell and Five Star’s apparent authority, he would not have invested in BHDC. He wanted professional advice, and would not have invested in an unauthorized product with an unaffiliated agent. The trial court compounded this error with another by rejecting Mr. Burdick’s declaration which made these inferences explicit.

Here, a jury could determine HTK represented to Mr. Burdick it would research

investments for him and move his retirement from one product to another to reap the best returns. Mr. Burdick relied on HTK to advise him when and how to invest, and did so through Campbell/Five Star. The jury could find BHDC was presented to Mr. Burdick as simply another investment option. Viewing the inferences of such facts in Mr. Burdick's favor, the jury could find Mr. Burdick continued to rely on HTK's market research and advice to invest in BHDC because he was never told of Campbell's termination or reassigned to a new agent. Thus, there was sufficient evidence to raise a question of fact whether Mr. Burdick relied on HTK, or Five Star and Campbell's appearance of authority, when he invested in BHDC.

Appellant Wylma Temples

Appellants likewise produced sufficient evidence to raise a question of fact whether Mrs. Temples relied on HTK, or Five Star and Campbell's appearance of authority, when she invested in BHDC. Mrs. Temples went to HTK for investment advice concerning an inheritance. [TR 4514; 6766-711] She met with Frank Wheeler at HTK's Five Star Financial office. [TR3437] Wheeler introduced her to Campbell. [TR4515] Campbell told her he was also an HTK representative. [TR4518]

Campbell sold Mrs. Temples an HTK-approved Pacific Life Variable Annuity. [TR4659-60] Mrs. Temples completed an HTK Account Agreement listing her registered representatives as Campbell and Wheeler and also completed an HTK Variable Annuity Client Suitability Questionnaire, also signed by Campbell and Wheeler. [TR4661-63] Mrs.

Temples then received Quarterly Statements showing HTK as her broker-dealer at the Five Star address. [TR6766-667] Mrs. Temples concluded Campbell worked for HTK by way of Campbell's authorized statements, meetings, and paperwork. [TR4516]

Mrs. Temples met with Campbell at the Five Star office approximately every quarter to review her investments. [TR3478] They would discuss her annuities, life insurance, and, beginning in the fall of 2002, BHDC. [TR6766-269a; 3471] Mrs. Temples continued to receive Quarterly Statements for her HTK-approved annuity listing HTK as her broker-dealer at HTK's Five Star address. [TR6766-668] HTK never informed Mrs. Temples of Campbell's resignation. Indeed, Mrs. Temples testified, "well, there had - ever been a change. He never told me he did anything different, so I assumed it was with Townsend and Hornor and Kent." [TR4521] In fact, after Campbell's termination, HTK simply continued to manage Mrs. Temples' Pacific Life annuity through Wheeler. [TR4664]

In late 2002, Campbell discussed moving Mrs. Temples' annuity into BHDC. HTK knew Mrs. Temples was being pitched BHDC from its office because Mrs. Temples asked Wheeler what he thought about BHDC and he responded, "[i]t sounded like a good thing." [TR4517]⁴ Mrs. Temples' Quarterly Statements continued to list her broker-dealer as HTK with the address of HTK's Five Star Financial office. [TR4654]

Around May, 2003, Campbell called and again recommended BHDC. [TR3481] Mrs.

⁴ Since "corporations act, and can act, only through and by their officers or agents designated by such officers," then, "[k]nowledge imparted to the [agents] is generally held to be knowledge of the corporation." *Montana Reservoir*, 228 P. at 202.

Temples still had no reason to suspect Campbell had left HTK. She explained, “The door was never closed. The offices were right together. . . Jeff would go in to Frank’s office. Frank would come into Jeff’s. Mary would come in frequently. I mean, there’s – it wasn’t a closed-door situation.” [TR4524] Thus, Mrs. Temples had no reason to believe BHDC was not an HTK-approved product or that Campbell was not an authorized HTK representative. In fact, under Utah law, she was entitled to assume the opposite. *See Montana Reservoir*, 228 P. at 202.

Mrs. Temples again asked Wheeler his opinion on investing in BHDC. Wheeler did not tell Mrs. Temples that Campbell had been terminated from HTK or that BHDC was not an HTK-approved product. [TR6766-712] Instead Wheeler told her, “it was a good deal and if he had any extra money he would invest in it too.” [TR4517] This was important to Mrs. Temples, “I would have to say that [Wheeler’s] opinions – I did take very seriously. . . that did weigh heavily with my decision.” [TR3530] Wheeler’s recommendation prompted Mrs. Temples to invest. She testified this was her “last holdup. I just wanted to hear what [Wheeler] had to say . . . I hold [Wheeler’s] thoughts and recommendations in high regard.” [TR4520; 3483]

Mrs. Temples went to HTK’s Five Star office on May 8, 2003 to sign paperwork to surrender her Pacific Life annuity. [TR4523; 3584] HTK representative Mary Alger had prepared the paperwork to surrender her annuity. [TR4523] Ms. Alger likewise had prepared the BHDC paperwork. *Id.* Pacific Life liquidated Mrs. Temples’ annuity and sent the

Transaction Confirmation to HTK at its Five Star office. [TR4652] Based on the above, Mrs. Temples believed BHDC was authorized by HTK. [TR3473]

The trial court erred by construing all the above evidence and inferences against Mrs. Temples. The court ruled, “[Mrs. Temples] assumed HTK authorized Mr. Campbell to invest in BHDC because he had never told her anything to the contrary,” but, “[t]here was no evidence that she would not have invested anyway and HTK, therefore, cannot be considered a cause of her investment.” [TR5008] Yet, the jury could infer she was relying on HTK when Mrs. Temples said she relied on Campbell and Wheeler’s investment advice, and assumed HTK was authorizing that advice. Indeed, appellants produced evidence that Mrs. Temples was asked when she first thought of HTK in connection with her investment in BHDC and responded, “probably when Jeff started talking about it . . . I never disassociated them. They were always in the background. I considered them an employer . . . I knew that they were affiliated from the beginning. And I never stopped and said, ‘Okay. This is them and this isn’t them’ or ‘Here they come back in on this.’ It was just an overall umbrella that they were there.” [TR3537-38]

The trial court should have inferred that when Mrs. Temples was relying on Wheeler’s recommendation, if he had told her BHDC was not authorized, she would not have invested. The trial court should have inferred that when Mrs. Temples relied on Campbell/Five Star’s apparent authority, she relied on HTK. These inferences were made explicit in her declaration. The court erred by ignoring and rejecting all evidence in Mrs. Temples’ favor.

Appellants Michael and Teri Marquez

The trial court dismissed the Marquezes' apparent authority claim finding they failed to produce evidence of manifestations of authority traceable to HTK which the Marquezes could believe authorized Campbell, Wheeler and Five Star to act on HTK's behalf.⁵ Again, contrary to its charge on summary judgment, the trial court viewed all facts and inferences against the Marquezes rather than in their favor.

The trial court first ruled the Marquezes "failed to produce any evidence that they relied upon any affirmative action by HTK." [TR5013] The trial court erred because the required manifestation may be in the form of "written or spoken words or any other conduct of the principal." Restatement (Second) Agency § 27. Such conduct includes "signs, advertising, authorization of an agent to claim that he is authorized, or continuous employment of the agent." Restatement (Second) Agency § 8, cmt(b). For example, the Utah Court of Appeals found apparent authority where the principal allowed an agent to travel in a car bearing its insignia and supplied the documents for his sales transactions. *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 16 (Utah App. 1995) In *Johnson v. Nationwide Gen. Ins. Co.*, the court found the principal manifested its agent's authority by allowing him to advertise his agency, authorizing him to sell securities and insurance to the public, and giving him sales materials and forms to facilitate those sales. 971 F.Supp. 725, 731 (N.D.N.Y. 1997).

⁵ The trial court found evidence the Marquezes relied on HTK to invest. [TR5013]

The Marquezes produced sufficient evidence of similar manifestations traceable to HTK. For example, HTK entered into Registered Representative Contracts with Five Star's members: Campbell, Wheeler, Davis and Alger. HTK sent letters to these new representatives congratulating them on their registration with HTK. The letters stated, "Welcome to HTK!!! . . . This approval means that you can now solicit and effect securities transactions." [TR4682] Appellants produced evidence this authority included actual and implied authority to advise and recommend investments, sell securities, complete forms and applications, and oversee withdrawals, surrenders and distributions. [TR4538-39] Appellants also produced evidence of Five Star's use of HTK Block Transfer forms, HTK Account Agreements, HTK Suitability Questionnaires, and HTK Transaction Checklists. [TR4765; 4661-62; 4663; 4729] Appellants demonstrated HTK inspected and approved the Five Star office in Price; approved Five Star's yellow pages listing and office signs; and approved Five Star's business cards with the required legend, "Securities Offered Through Hornor, Townsend & Kent, Inc." [TR4540-41; 4748-64; 4544; 4379; 6766-581; 4808-09]

Though licensed by HTK, the Five Star members marketed themselves as Five Star Financial. HTK knew of and approved of this arrangement, which was not unusual. [TR4748-64] For example, HTK's branch office in Salt Lake was marketed as Cambridge Financial, which was "nothing other than a dba for Penn Mutual and HTK." [TR4375] Likewise, HTK understood Five Star Financial "was a dba used in [its] insurance and securities-related business." [TR4376-77] The arrangement benefitted both parties. Five

Star and its members got the required broker-dealer affiliation and HTK got new customers through the members' networks and contacts.

With HTK's authority, Frank Wheeler began meeting with the Marquezes to give them investment advice. [TR4574, 6766-705] Their first meeting took place at HTK's Five Star office. [TR4574] Wheeler gave them a Five Star Financial card identifying HTK as his broker-dealer. [TR4556; 3098-99]⁶ A jury could find these were manifestations of authority traceable to HTK.

Secondly, the trial court ruled the Marquezes could not have reasonably relied on such manifestations. [TR5014] Yet, "questions of reasonableness necessarily pose questions of fact which should ordinarily be reserved for jury resolution." *Nielsen v. Spencer*, 2008 UT App 375, ¶ 16; 196 P.3d 616. The trial court erred because the Marquezes produced sufficient evidence to raise a question of fact whether they had a good faith belief Five Star, Wheeler and Campbell were authorized by HTK.

Specifically, Wheeler discussed authorized investments with the Marquezes such as Fidelity mutual funds. [TR4574; 4591-93] Yet, without distinguishing the two, Wheeler also recommended BHDC as "another option" and even walked the Marquezes across the hall to

⁶ The trial court disregarded the business card by ruling the card "limited" HTK's manifestation of authority to the sale of mutual funds and variable contracts, and BHDC was neither. [TR5014] According to the trial court, an apparent agency claim would only be possible if HTK's business card listed "Promissory Note Scams." The evidence demonstrates, however, HTK discussed mutual funds with the Marquezes which were authorized by the card.

Campbell. [TR4494; 4498-99] Both Wheeler and Campbell told the Marquezes they were representatives of HTK. [TR4497]⁷ The Marquezes were never informed BHDC was not approved by HTK. [TR6766-706] Wheeler never told them BHDC was unregistered, unauthorized and unsuitable. [TR4557] Rather, Wheeler, their HTK representative, told them, “Boy, if I had the money, I would surely invest in it” and gave them a “Growth Chart” demonstrating how a \$50,000 investment in BHDC would grow at 12% interest. [TR4487; 4498; 4509-10; 4620-27]

Based on all the above, Mr. Marquez testified he believed he was doing business with agents of HTK and that HTK and Five Star backed Wheeler and Campbell’s advice, including their recommendation of BHDC. [TR3104; 6766-245a] Mrs. Marquez similarly testified, “we assumed with [Campbell] being in those offices, everybody doing this financial planning, all the stuff, that it was all affiliated together . . . We assumed [Campbell] was with Hornor, Townsend & Kent. I mean, everything we knew, all these guys are in the same office, the same - worked for the same company, did the same things, only they were all different agents.” [TR4502; 3215] A jury could find the Marquezes’ belief that they were doing business with HTK was reasonable based on: they went to HTK for financial advice; they were advised by HTK representatives who recommended both HTK and non-HTK products without distinguishing the two; those representatives recommended BHDC; and

⁷ Indeed, the Marquezes invested in BHDC while Campbell was still an HTK representative. *See infra* at 40.

their HTK representatives produced a “Growth Chart” regarding their BHDC investment. Accordingly, the trial court erred in dismissing the Marquezes’ claim.

Appellant Ella Dean Hunter

The trial court dismissed Mrs. Hunter’s apparent authority claim finding, “there is no evidence that Mrs. Hunter relied on any actions or manifestations of HTK regarding Mr. Campbell’s alleged authority to sell investments in BHDC.” [TR5010] The trial court erred because Mrs. Hunter produced evidence she relied on HTK, through it’s agents, according to HTK’s marketing strategy.

Mrs. Hunter testified, “I always believed there was a financial company that [Campbell] worked for that would back up what he told me and the investments I made through him.” [TR4813] This belief was traceable to HTK because HTK licensed Campbell and authorized him to conduct securities transactions. Mrs. Hunter became an HTK customer through HTK’s Block Transfer of Campbell’s clients from his former brokerage. [TR4394; 4765] Of course, HTK marketed itself in Price as Five Star Financial Group, not HTK. Thus, Mrs. Hunter testified she received a Five Star business card, saw “Five Star Financial Group” on the window of the office, and knew Jeff Campbell was with Five Star. [TR1917; 6766-201a, 201b] Mrs. Hunter invested in BHDC because of Campbell and Five Star’s recommendation. [TR1915]

The trial court construed this evidence against Mrs. Hunter to rule she could not have relied on HTK because she relied on Campbell/Five Star. [TR5010] This is not the law. The

Restatement (Third) of Agency states, “[i]f the agent occupies a position customarily carrying authority to do specific types of acts on behalf of a principal, it is reasonable for the third party to believe that the agent possesses such authority even though the third party does not know the identity of the principal. The principal’s identity is irrelevant to the reasonableness of a third party’s belief that a principal has consented to be bound by the acts of a conventional type of agent.” *Id.* at §2.03, cmt (f).

Thus, it was irrelevant Mrs. Hunter could not identify HTK because “[c]orporations can only act through agents.” *Davis v. Payne & Day, Inc.*, 348 P.2d 337, 339 (Utah 1960). In Utah, “[a]ny act or omission of an agent of a corporation, in the performance of the duties or within the scope of the authority of the agent, is the act or omission of the corporation.” MUJI 25.1. Viewing these facts and inferences in Mrs. Hunter’s favor, a jury could find she reasonably relied on Campbell’s appearance of authority acting on behalf of HTK, even though HTK was not identified. Therefore, the trial court erred in dismissing Mrs. Hunter’s claim.

Appellant Terry Jordan

The trial court ruled HTK did not manifest any authority to Mr. Jordan because Mr. Jordan did not meet with Campbell until after his termination from HTK. [TR5012] As set forth above, HTK’s establishment and advertising of Five Star Financial, and employment of Five Star’s members were all manifestations of authority. The trial court erred by ruling these manifestations were made after Campbell’s termination. Appellants also produced

evidence to the court that Campbell did not use his HTK card after his termination and that Campbell was “quite sure” his first meeting with Mr. Jordan took place before he resigned from HTK. [TR2844; 4926, 2814; 6766-165a, 165b)] The trial court erred in ignoring this evidence which plainly contradicted its ruling.

The court also erred in ruling Mr. Jordan’s “sole knowledge of HTK came from the business card.” [TR5011]⁸ Appellants produced evidence Campbell approached Mr. Jordan regarding investing his retirement, including moving Mr. Jordan’s IRA to other investments under HTK management. [TR 4425; 6766-165b, 165c)] Campbell gave Mr. Jordan his HTK -authorized business card. [TR4445; 6766-165a, 165b] Mr. Jordan went to HTK’s office a few days later to discuss investments with Campbell and asked Campbell about his qualifications and certification to sell securities. [TR4455; 4450-52] Mr. Jordan testified they may have discussed that Campbell worked for and sold insurance through HTK which

⁸ Again, the trial court proposed to discredit any reliance on the business card by ruling HTK’s involvement was limited on the face of the card to mutual funds and variable contracts, and the BHDC investment was neither. [TR5011] Yet, the evidence indicated Campbell approached Mr. Jordan regarding investment of his 401(k) which was in a 72t IRA. [TR2852] Investments in 401(k)s and IRAs were on Five Star’s card but did not have an asterisk. [TR4563] Yet, HTK had authorized Five Star to advise customers regarding their retirement investments, including 401(k)s and IRAs, and they had authority to process liquidation, transfer, or roll over of such funds into other securities which were effected through HTK. So whatever the asterisk on the business card meant, the court erred in ruling HTK’s involvement was limited to mutual funds and variable contracts. Indeed, the card alone was enough to avoid summary judgment. *See Ince v. AMEV Investors, Inc.*, 857 P.2d 165, 167 (Or.App. 1993) (finding a question of fact existed whether a customer could reasonably rely on a registered representative’s business card as sufficient manifestation by the principal of authority).

was “his affiliate with the investment stuff he was doing.” [TR4446] Thus, Mr. Jordan understood Campbell was an agent of HTK. [TR4466]

Based on the above, a jury could find Mr. Jordan did not just rely on Campbell’s card, but also relied on his meetings with Campbell, HTK’s Five Star office, HTK’s licensing of Campbell, and Campbell’s authorized representation to Mr. Jordan that he was affiliated with HTK. Thus, there was sufficient evidence to raise a question of fact whether Mr. Jordan relied on Five Star’s appearance of authority or on HTK to invest.

In conclusion, NASD Notice 01-79 explained BHDC’s promissory note scam was predicated on a customers’ reliance on his or her registered representative. The registered representative could never reach such position of trust without being licensed by a broker-dealer. The scam simply doesn’t work without the broker-dealer’s shroud of apparent authority. In Utah, “[b]asic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority.” *Horrocks*, 892 P.2d at 15. As stated in *Johnson*, “when one has constituted and accredited another his agent to carry on a business, the authority of the agent to bind his principal continues even after the actual revocation, until notice of the revocation is given.” 971 F.Supp. at 731. Thus, “if the principal does not take appropriate, affirmative steps to destroy the former agent’s apparent authority and reasonable action to inform third parties, the principal may be held liable for an apparent agent’s actions.” *Id.* Accordingly, under Utah law, “[t]he loss that results from [the agent’s] misconduct must be borne by the party who empowered [the agent] to commit the wrong.”

Horrocks, 892 P.2d at 17. Thus, appellants respectfully ask their claims for HTK liability based on apparent authority be remanded for determination by a jury.

II. THE TRIAL COURT ERRED WHEN IT RULED HTK OWED NO DUTIES TO ITS CUSTOMERS AFTER CAMPBELL'S TERMINATION

The trial court erred in ruling HTK owed no duties to its customers following Campbell's termination. All appellants appeal the trial court's ruling their negligent supervision claim was based on Campbell's relationship with HTK as either a registered representative or apparent agent. [TR5018] Appellants tried in vain to explain to the court (initially and again on reconsideration) that their claim was based on appellants' relationship with HTK and the duties HTK owed them directly as customers, regardless of Campbell. The trial court recognized appellants claimed a failure to supervise both "Mr. Campbell *and* HTK's clients" but still only ruled HTK had no duty to supervise Campbell post-termination, and did not rule on HTK's duties to its clients. [TR5018] This was the focus of appellants' reconsideration motion, but the trial court still refused to rule on the issue.⁹ The trial court

⁹ HTK argued on reconsideration the negligence claim was "new." Though the trial court did not adopt this argument as a basis for its ruling, the court seemed receptive at one point stating, "I'm going to hold the parties to their pleadings as to where they were at, at that particular time and I tried to handle each one of the claims as they were pled, and go through each one of those claims. And I think the order does that." [TR6193] HTK's argument and the court's commentary contradict *Casaday v. Allstate Ins. Co.*, 2010 UT App 82 at ¶ 12; 232 P.3d 1075 where the only consideration was defendant's notice of the claim. HTK had notice of appellants' negligence claim from their complaint, from their expert's report, and from their opposition to summary judgment. [TR808-811; 4228-4239; 4248] The claim was thus raised in the pleadings under Rule 15(b) and "tried" on summary judgment. *Fisher v. Davidhizar*, 2011 UT App 270, ¶ 12.

erred in dismissing appellants' negligence claims against HTK.

The trial court had sufficient evidence of HTK's duties to its customers. HTK did not dispute a duty to: 1) provide full and fair disclosure; 2) observe high standards of professionalism; and 3) recommend suitable investments. [TR6766-555] According to HTK, these duties were intended "to ensure the [sic] that the clients' welfare is served and protected." Id. In addition, appellants submitted the expert report of Stuart A. Ober, a securities professional with thirty-five years of experience in the securities industry. [TR4247] Mr. Ober opined, "HTK failed in its duty to inform its customers of Mr. Campbell's termination and the sale of unregistered and unsuitable securities . . . The conduct of the Defendants was a violation of the rules and obligations of investment brokers and/or advisors as set forth by regulatory authorities and against the practices and procedures of the industry." [TR4248] Mr. Ober submitted a 108 page report detailing and supporting his opinions regarding HTK's duties to its customers.¹⁰ [TR4244-4350]

Yet, by dismissing appellants' negligence claim, the trial court ruled HTK owed no duties to its customers. In Utah, "[a] court determines whether a duty exists by analyzing the

¹⁰ The trial court struck Mr. Ober's report finding it "focus[ed] on various industry standards, duties, and regulations that would apply once the authority of an agent to act on behalf of the principal has been established." [TR4899] The trial court abused its discretion to the extent its ruling could be argued to apply to appellants' negligence claim because, "[u]nder Utah law, expert testimony may be necessary to establish the standard of care required in cases dealing with the duties owed by a particular profession, especially where the average person has little understanding of the duties owed by the particular profession at issue." *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, 1121; 222 P.3d 775. Mr. Ober's report satisfied this requirement.

legal relationship between the parties, the foreseeability of injury, the likelihood of injury, and other general policy considerations.” *Normandeau v. Hanson Equip., Inc.*, 2009 UT 44, ¶ 19; 215 P.3d 152. These factors impose duties of care on broker-dealers to their customers which survive termination of their agents.

Legal Relationship between the Parties

Appellants were customers of HTK. Appellants Burdick, Temples and the Manuses all signed HTK Account Agreements and purchased HTK approved products. HTK block transferred the accounts of appellants Ella Dean Hunter, Jimmy Henrie and Robert Swinburne to HTK and collected commissions on their accounts. Appellants Marquez were HTK customers because they met with HTK representative Wheeler at HTK’s office for the purpose of receiving investment advice. Likewise, appellant Terry Jordan was approached to invest his retirement through HTK and met with Campbell at HTK’s Five Star office. Though Marquez and Jordan did not open HTK accounts, they were still customers. *See e.g. Dolin v. Contemporary Fin. Solutions, Inc.*, 622 F.Supp.2d 1077, 1083 (D.Colo. 2009)(finding plaintiffs were customers of the broker-dealer based on their dealings with the registered representative whether or not they had opened a formal account); *Washington Square Securities, Inc. v. Sowers*, 218 F.Supp.2d 1108, 1117 (D.Minn. 2002) (finding customers of registered representative who sold unregistered securities were also customers of broker-dealer despite not opening accounts). Therefore, the relationship between the parties was one of broker and customer.

This customer relationship survived Campbell's termination. Jay Baker, HTK's Manager of Market Conduct and Compliance, testified Campbell's clients were not transferred to another broker-dealer "and were still customers of Hornor, Townsend & Kent." [TR4369-70] Therefore, though Campbell was terminated, appellants remained customers of HTK.

Foreseeability of Injury

Following Campbell's termination, it was foreseeable to HTK that appellants would be injured if HTK failed to comply with its duties of care. "Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of harm could be foreseen." *Normandeau*, 2009 UT 44 at ¶20. Here, HTK was well aware of both the general harm and the specific scheme.

First, it was foreseeable to HTK that its customers would continue to invest with Campbell if HTK did not inform them of his termination. As set forth in the Restatement, "if the principal has reason to know that an agent may have begun to deal with a third person, he ordinarily has reason to know that the third person is likely to continue to deal with the agent until he has information as to facts indicating that the agent's authority has terminated or otherwise has notice of the termination. The third person, on his part, is ordinarily reasonable in believing that he will be informed if conditions change." Restatement (Second) of Agency, § 129, comment (a). HTK's Registered Representative Contract acknowledged the importance of notifying customers of termination: "Representative shall immediately

notify all clients in writing that Representative is no longer associated with HTAK [sic], sending a copy of such notice to HTK.” [TR4681]¹¹ Yet, neither Campbell nor HTK ever did anything to notify customers of Campbell’s termination.

Second, it was foreseeable to HTK that Campbell was going to approach HTK customers about investing in his real estate scam. Campbell, prior to selling BHDC, told his HTK supervisors and fellow HTK agents he was going to sell promissory notes that were supposedly not securities because they were backed by real estate. [TR4408; 4409; 4415; 4358] HTK had received information from the NASD in December, 2001 regarding fraudulent promissory note schemes such as the fund-raising efforts of BHDC.¹² From the

¹¹ Mr. Ober confirmed, “[i]t is an industry standard for a brokerage firm, such as HTK, to notify its customers when one of its agents is terminated or leaves for another firm.” [TR4236]

¹² HTK argued, and the trial court ruled, appellants could not rely on NASD Notice to Members 01-79 because they presented it to the court for the first time on reconsideration. [TR5906] The Court abused its discretion in making this ruling because reconsideration prior to final judgment can be for the very purpose of considering new evidence. It is only after final judgment that appellants would have been required to justify why the evidence was not brought forth earlier. Regardless, the court further abused its discretion by accepting HTK’s assertion that Notice 01-79 was “new” in any respect because of appellants’ persistent reliance on the Notice *prior* to reconsideration. For example:

1) Appellants stated in their Statement of Facts in their Opposition to Summary Judgment: “In December, 2001, the NASD issued Notice to Members 01-79. This Notice plainly described the BHDC scam for HTK.” Appellants then quoted from the Notice. [TR4201-02] HTK acknowledged the Notice in its Reply. [TR4951]

2) Appellants further relied on the Notice in their brief. [TR4230-31]

3) Appellants’ expert, Stuart Ober, relied on the Notice and quoted extensively

Notice, HTK knew the schemes targeted “Series 6” representatives such as Campbell to sell promissory notes to their customers; the notes were promoted as short-term, prime-quality, risk-free investments with significant returns; and that the notes were securities, but that representatives often mistakenly concluded they were not securities. Furthermore, HTK knew the sale of unauthorized private securities was the most frequent violation at remote offices such as Five Star. [TR6766-653] HTK knew representatives like Campbell often sold these private securities “due to the belief or the advice of third parties that the product involved was not a security.” [TR6766-654]

Here, HTK knew the BHDC notes were securities despite Campbell’s assurances to the contrary. Yet, when Campbell told HTK he was going to sell BHDC, it still accepted the surrender of his securities license. Thus, HTK knew Campbell was headed off to sell unregistered securities to its customers without a securities license.

Despite this knowledge, HTK did not inform its customers that Campbell had resigned and was no longer authorized to give investment advice on behalf of HTK or to sell securities. [TR4381-82] Through its contract with Campbell, HTK was entitled to the

from the Notice in his report. [TR4281-82] The court ruled appellants could rely on any factual background from Mr. Ober’s report even if they had not included it in the original appendix because already in the report. [TR5000]

4) Appellants discussed the Notice in oral argument telling the court again that the NASD had laid out the scam for HTK in its Notice 01-79. [TR6035-36; 6051]

5) Appellants provided the Court a copy of the Notice for the Court’s reference during oral argument on HTK’s motion for summary judgment. [TR6035]

originals and copies of all client files which both parties agreed were HTK's property. [TR4681] HTK could have used the files to contact customers or reassign them to new representatives. Yet, HTK never asked for the files and never re-assigned its customers to new HTK representatives. [TR4407; 4701-01]

HTK understood customers were likely to believe HTK approved of Campbell and BHDC if it failed to draw some kind of distinction between Campbell and HTK's remaining representatives. Under its contract, HTK could have required Campbell and Five Star to "immediately remove any signs . . . including telephone listings if possible, which may indicate an association with HTK." [TR4681] Yet, HTK did not make any changes to its Price office or tell its representatives to avoid BHDC. [TR4549-50; 4552-53] HTK did not inform its customers BHDC was not an HTK-authorized investment. [TR4382] It was thus foreseeable to HTK that its customers would believe BHDC was authorized.

Likelihood of Injury

Following Campbell's termination, HTK knew its customers would likely lose their investments if they were not warned BHDC was not a suitable investment. HTK sent out its own "Compliance Corner" newsletter in the wake of the NASD's Notice to Members 01-79. [TR4807] It demonstrates HTK knew promissory note scams such as BHDC had cost investors more than \$300 million. *Id.* HTK knew that in 2000 alone, 300 investors had lost more than \$12 million, landing the promissory note scheme on the "Top 10 Investment Scams List Released by State Securities Regulators." [TR4807] Finally, HTK knew its

customers were particularly vulnerable to scams promising significant, safe returns during market downturns when customers worried about the volatility in their long-term, variable product investments. [TR6766-690]

Indeed, in the weeks and months following Campbell's resignation, HTK knew its customers were being called in to invest in BHDC at HTK's Price office. [TR4436-37] As set forth above, HTK personnel participated in the BHDC sales by referring customers to Campbell, recommending BHDC to customers, preparing and maintaining BHDC paperwork and files, and even investing themselves.

Thus, HTK knew its customers were being pitched an extremely risky investment contrary to their investment goals. As explained *supra*, Campbell told HTK what he intended to do and HTK knew his scheme fit precisely within the NASD's recent warning about promissory note scams. HTK knew BHDC's promise of safe, significant returns was unfounded. HTK acknowledged, "a customer who indicates that they are a conservative investor and expects a high return with a growth objective, should be advised that their objectives and expectations are not compatible with their risk tolerance." [TR6766-566] Yet HTK never advised its customers BHDC's high interest rate equated with high risk.

HTK already had the means in place to warn customers of such risks. Similar to private placements, HTK customers at times expressed interest in over-the-counter stocks. In such instances HTK would send a form letter entitled "Customer Disclosure Acknowledgment for Speculative Low-Priced Securities." [TR6766-645] The letter simply

stated, "Hornor, Townsend & Kent does not recommend transactions in speculative low priced securities . . . Due to the speculative nature of these securities, Hornor, Townsend & Kent requests that you carefully consider the risks associated with transactions in these securities." Id. The customer then signed a statement that, "I understand the risks associated with this transaction, and I understand that I may lose all or part of my investment." Id. HTK did not send these letters to appellants.

HTK also had procedures in place in the case of customers who wanted to invest in private placements such as BHDC, which HTK called "direct investments." HTK dictated that, "[d]ue to the illiquidity of most direct investments and their inherent risks, only predetermined suitable customers may be offered approved products." [TR6766-575] To determine the suitability of the customer, HTK had a "Direct Investment Suitability Questionnaire." [TR6766-639-642] HTK did not send Questionnaires to appellants.

HTK also never informed its customers BHDC was being sold as an unregistered security. HTK knew BHDC was a security and knew Campbell had resigned his securities license. Yet, HTK said nothing to its customers. HTK never informed appellants it did not recommend nor approve of BHDC, or that BHDC was high risk. Yet, it allowed the sales to go forth from its Five Star office, manned by HTK representatives, who referred customers and recommended the sales.

In a market where its top selling representative in Price wanted to sell sham promissory notes, and persuaded even fellow HTK registered representatives to invest, HTK

knew there was a likelihood its customers would be pitched the investment scam and would lose their investment as well. HTK had a duty to disclose to its customers that BHDC was an unregistered, unsuitable security.

General Policy Considerations

The securities laws were enacted “to protect unsophisticated investors from securities fraud.” *Bradford v. Moench*, 809 F.Supp. 1473, 1487 (D.Utah 1992). The law requires securities, such as the BHDC promissory notes, to be registered. The purpose of prohibiting the sale of unregistered securities to persons incapable of evaluating and bearing the risks of such investments (i.e. non-accredited investors) is “to protect unsophisticated and unknowledgeable investors who are not able to fend for themselves.” *Cook v. Bishop*, 764 P.2d 189, 190 (Okla. 1988).

One duty of broker-dealers is protecting unsophisticated investors. The SEC has recognized for decades “that the relation of a securities dealer to his clients is not that of an ordinary merchant to his customers. Even apart from the relationship of agency which may exist, the status of a dealer in relation to the uninformed client is one of special trust and confidence, approaching and perhaps even equaling that of a fiduciary.” *In the Matter of Alexander Smith*, 22 SEC 13 (1946); quoting *William J. Stelmack Corp.*, 11 SEC 601 (1942). Thus, there exists a strong public policy that investors are supposed to be able to trust their broker-dealers to protect their interests and not be walked into a known fraud.

In *Steenblik v. Lichfield*, 906 P.2d 872 (Utah 1995), a widow defrauded of her savings

sued the financial planning company and partners involved. Defendant Lichfield claimed he was not personally involved in the transactions and thus owed no duty to Steenblik. This Court disagreed and found, “Lichfield clearly knew that Steenblik was being fraudulently enticed into making investments. He did nothing to warn her or prevent her savings from being consumed.” *Id.* at 879. Similarly, in *Prymak v. Contemporary Fin. Solutions, Inc.*, 2007 WL 4250020, *15 (D.Colo. 2007), the court ruled, “requiring a broker-dealer to take actions to protect its clients from being advised by a registered representative known to be involved in a scheme to defraud investors has virtually no practical consequences other than those that would flow from running a typical brokerage firm. It is fundamental to the success of any broker-dealer that it must protect its client-investors from known fraud.” Thus, there is ample support for duties of full and fair disclosure, professionalism, and suitability.

The duty of full and fair disclosure is intended to protect investors. *Tcherepnin v. Knight*, 389 U.S. 322, 336; 88 S.Ct. 548, 553 (1967). “The fundamental purpose [of securities laws] is to implement a policy of full and fair disclosure so that potential purchasers and sellers can make informed investment decisions.” *Davidson v. Belcor, Inc.*, 933 F.3d 603, 606 (7th Cir.1991). HTK stated the purpose of full and fair disclosure was to provide “the most complete and accurate information to a client to enable them to make an informed and wise decision as to investing their hard-earned resources to obtain their personal and financial goals.” [TR6766-555]

Regarding professionalism, “[i]t is not to be questioned that [broker-dealers], who

are licensed to render service as brokers, must be deemed to have and use specialized knowledge, experience and integrity in rendering that service.” *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 717 (Utah 1982). HTK acknowledged, “[m]any failure-to-supervise cases involve indicators of misconduct, or ‘red flags,’ that should immediately alert management to potential wrongdoing.” [TR6766-659] In fact, the SEC has long required “those in authority exercise the utmost vigilance whenever even a remote indication of irregularity reaches their attention.” *Reynolds & Co.*, 39 S.E.C. 902, 916 (1960).

Regarding suitability, the NASD has “Know Your Customer” rules to protect investors. “NASD rule [2310] requires broker/dealers to update customer account information in order to ensure that a recommended transaction is consistent with customer goals and desired risk levels.” *Vinogradova v. Suntrust Bank, Inc.*, 875 A.2d 222, 229 (Md.App. 2005). According to HTK, “the client must understand the product and services they are purchasing,” including “the degree of risk.” [TR6766-555]

HTK owed its customers duties of full and fair disclosure, professionalism and suitability. “Legal duty . . . is the product of policy judgments applied to relationships.” *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 17; 143 P.3d 283. Here, unless the above duties survive termination of the agent, everyone is in on the promissory note scam except for the unwitting investor: 1) the NASD knows of the scam and sends a Notice to its members laying out the scam; 2) HTK receives the Notice and sends out a newsletter to its representatives laying out the scam; 3) the representatives decide to engage in the scam and

inform their supervisors of their plan and their supervisors say, “That’s fine, just don’t put our name on it when you sell it to our customers;” 4) HTK then turns its representative loose on its customers to invest in the scam without ever informing them the representative was terminated, that it does not authorize the sales or the product, and that its Five Star Financial Group office is now selling both authorized and unauthorized products.

This is not the law. In *White v. Consolidated Planning, Inc.*, 603 S.E.2d 147 (N.C.App. 2004), the Whites sued the financial planning firm which had employed their son as an account executive. The firm had become aware of the son’s misappropriation of funds and terminated him, but did not tell his customers. The firm did not notify the Whites of the termination, allowed their son to take their account files, and never reassigned the Whites to a new representative. This allowed the White’s son to continue draining his parents’ retirement accounts of \$300,000. The court ruled these factors were sufficient for the Whites to proceed with a negligent supervision claim. *Id.* at 161; *accord Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976)(finding brokerage that knew of agent’s sale of unauthorized products “had an affirmative obligation to prevent use of the prestige of its firm to defraud the investing public.”).

Likewise, in *Prymak*, a registered representative sold bogus promissory notes to customers after his termination, but the court found the broker-dealer had a duty to its customers to alert them of the fraud regardless of whether or not it still had control over the agent. 2007 WL 4250020 at *14-15; *compare Dolin*, 622 F.Supp.2d at 1083-84 (allowing

negligence claims to go forward against broker despite agent's termination).

In *Johnson*, where Nationwide terminated its agent for suspected fraud, the court ruled, "[u]nder such circumstances, Nationwide should have taken positive steps to alert the public of the threat [the agent] posed. At a minimum, Nationwide should have initially notified all of [the agent's] clients that he was no longer permitted to sell any Nationwide products." 971 F.Supp. at 733; *see also Badger v. Paulson Investment Co., Inc.*, 803 P.2d 1178, 1185 (Ore. 1991)(upholding jury verdict for purchasers of unregistered securities against broker who failed to inform clients that sales were not approved and that agents were acting on their own behalf).

Here, the relationship between the parties, the foreseeability of injury, the likelihood of injury, and public policy all support the imposition of a duty in this case from a broker to its customers, even after termination of their agent. In addition to the evidence and caselaw cited above appellants produced expert opinion that, "[w]ith these NASD notices regarding the 'significant number of fraudulent promissory note schemes,' and the need for firms to protect clients, and given the red flag that Mr. Campbell was going to be selling the Notes and still remain in the same office with other HTK representatives, with the same signs and phone number, secretary, etc., all these factors point to the culpability of the complete failure of HTK's compliance to reasonably prevent the sale of BHDC Notes to its clients." [TR4238] This was sufficient to avoid summary judgment. Accordingly, appellants ask their negligent supervision claim be remanded for trial by jury.

III. THE PARTICIPATION OF HTK'S ACTUAL AND APPARENT AGENTS IN THE SALE OF BHDC CONSTITUTED MATERIAL AID IN THE SALE OF UNREGISTERED SECURITIES

Under Utah's Securities Act, a broker-dealer who "materially aids in the sale" of unregistered securities is jointly and severally liable for damages. Utah Code Ann. § 61-1-22(4)(a). As discussed *supra*, HTK authorized Five Star Financial and its members to solicit and effect securities transactions on its behalf. Customers were never notified of any change to this authority and thus relied on the continued appearance of authority to invest in BHDC. "A principal who puts a servant or other agent in a position which enables the agent while apparently acting within his authority to commit a fraud upon third persons, is subject to liability to such third person for the fraud." Restatement (Second) of Agency, § 261. It is irrelevant that the agent did so for his own benefit.¹³ Here, HTK materially aided Five Star and Campbell's sales of BHDC to appellants Burdick, Temples, Marquez, Hunter and Jordan by failing to destroy Campbell and Five Star's apparent authority.

Moreover, beyond apparent authority, HTK directly participated in the sales to the Marquezes and Mrs. Temples. HTK, through Wheeler, met with the Marquezes at its Five Star office and discussed various investments. [TR4498-99] These discussions included

¹³ See Restatement (Second) of Agency, § 262 (Illustration 1: P, whose business is that of advising persons concerning investments, represents to T that A is his manager. At P's office, T seeks advice of A concerning investments. A, acting solely to promote an enterprise of which he is the owner, makes deceitful statements in regard to it, on the strength of which T invests and loses. P is subject to liability to T.) *Accord Horrocks*, 892 P.2d at 17.

BHDC. Mrs. Marquez testified Wheeler said, “if we were interested, that he would introduce us to [Campbell] . . . he walked us across the hall and introduced us to [Campbell] and told him we were interested in his project that he had, his real estate deal.” [TR4402; 4498-4500] Wheeler then gave the Marquezes a “Growth Chart” demonstrating how a \$50,000 investment in BHDC would grow at 12% interest. [TR4620-27] Wheeler further recommended BHDC to the Marquezes saying, “if I had the money, I would surely invest in it.” [TR4498; 3130] Thus, HTK’s agent told the Marquezes about the investment, referred them to Campbell, introduced them to Campbell in the same office, and arranged a meeting with Campbell regarding BHDC.

The NASD included the following in its warning to HTK regarding promissory note schemes: “Associated persons are reminded that ‘participation’ in a securities transaction includes not only making the sale, but referring customers, introducing customers to the issuer, arranging and/or participating in meeting between customers and the issuer, or receiving a referral or finder’s fee from the issuer.” [TR6766-689] Wheeler’s recommendation, introduction, and production of the “Growth Chart” at least raised a question of fact regarding HTK’s material aid in the sale of BHDC to the Marquezes.

Likewise, there is a question of fact whether HTK materially aided in the sale to Mrs. Temples. As previously set forth, Campbell discussed moving Mrs. Temples’ annuity into BHDC. Mrs. Temples asked HTK’s Wheeler what he thought about BHDC and he responded, “[i]t sounded like a good thing.” [TR4517] Wheeler was co-agent on the annuity

with Campbell and HTK had authorized him to make recommendations regarding disposition of the annuity. Before investing in BHDC, Mrs. Temples again asked Wheeler his opinion. HTK, through Wheeler, did not tell Mrs. Temples that Campbell had been terminated from HTK or that BHDC was not an HTK-approved product. Instead HTK, through Wheeler, told her “it was a good deal and if he had any extra money he would invest in it too.” [TR4517] A jury could find Wheeler’s recommendations constituted material aid. Therefore, appellants ask for remand of this claim for a jury to determine whether HTK is jointly and severally liable with Five Star and Campbell for BHDC sales to these appellants.

IV. THE TRIAL COURT ERRED IN STRIKING APPELLANTS’ EVIDENCE OF CONTROL PERSON LIABILITY WHERE THE EVIDENCE CORRECTED AN INACCURATE RECORD

Appellants Manus and Marquez appeal the trial court’s rejection of their control person liability claim. Under Utah’s Uniform Securities Act, “[e]very person who directly or indirectly controls a seller . . . liable under Subsection (1) . . . are also liable jointly and severally.” Utah Code Ann. § 61-1-22(4)(a). A broker-dealer, such as HTK, is considered a “control” person. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1574 (9th Cir. 1990).

On reconsideration, appellants presented new evidence HTK was subject to “Control Person” liability for BHDC sales to appellants Manus and Marquez. The evidence consisted of Campbell’s CRD listing (Central Registration Depository maintained by FINRA) demonstrating that though Campbell tendered his resignation to HTK on October 17, 2002, HTK remained responsible for his supervision until November 18, 2002. HTK’s continuing supervision is mandated by *Utah Code Ann.* § 61-1-6(7)(a) which states a registered

representative's withdrawal does not become effective for 30 days. Here, Campbell's CRD showed his registration status with HTK was not terminated until November 18, 2002. [TR6766-677] Therefore, HTK was a "control" person at the time the Manuses and Marquezes invested in BHDC.

This evidence contradicted HTK's earlier representation and affidavit stating, "On October 17, 2002, Campbell terminated his independent contractor relationship with HTK in order to become a fundraiser for BHDC." [TR2121] HTK even represented this information was supported by Campbell's CRD. [TR2122] In preparing for trial against Campbell, appellants discovered HTK had incorrectly represented Campbell's CRD and termination date.

On reconsideration, the trial court rejected appellants' evidence as untimely pursuant to Utah R. Civ. P. 37(f). Because Rule 37 requires the evidence also be harmful, the court explained, "HTK will be prejudiced if [appellants] are allowed to submit new evidence and declarations, whereby HTK would be forced to address evidence and issues that were not timely submitted prior to the entry of [summary judgment]." [TR5906] The trial court abused its discretion in ruling HTK would be prejudiced by the new evidence.

First, the trial court erred in finding evidence of Control Person liability would force HTK to address a new issue. The issue was not new to HTK as evidenced by HTK's arguing the issue in its initial Motion for Summary Judgment. [TR2135-36] Second, the trial court erred in finding HTK would be prejudiced by having to address new evidence. It should never be said that setting the record straight, and correcting a previous fiction, is prejudicial

to the party that created the fiction in the first place. Here, HTK submitted an affidavit that inaccurately stated Campbell's relationship with HTK terminated on October 17, 2002. [TR2121-22] HTK could never be prejudiced by that inaccurate statement being corrected.

In stark contrast to this case, in *Brussow v. Webster*, 2011 UT App 193, ¶4, the Court of Appeals upheld exclusion of an untimely designated witness under Rule 37(f) because appellee could not depose the new witness or meet his testimony and, thus, "impaired [appellee's] ability to defend against [appellant's] claims." In *Lippmann v. Coldwell Banker Residential Brokerage Co.*, 2010 UT App 89, ¶5, the Court of Appeals upheld the exclusion of an untimely designated witness under Rule 37(f) because the appellee would have been prejudiced by the delay of trial.

No such prejudice exists here. There was no trial date set, no witnesses to be deposed, no hardship to HTK. There was merely the correction of a fallacy perpetuated by HTK in the first place. There is no prejudice in a litigant having to face an accurate record. Therefore, the trial court erred in dismissing appellants' claims against HTK under a theory of control person liability.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANTS' ATTORNEYS' FEES WITHOUT EVALUATING THE FACTORS FOR AWARD OF CONTINGENT FEES

The trial court abused its discretion in ruling appellants' failed to present evidence that their attorneys' fees, based on a contingency fee, were reasonable. All appellants were entitled to recover "reasonable attorneys' fees" under Utah's Uniform Securities Act. *Utah*

Code Ann. § 61-1-22(1)(b). A 1/3rd contingent fee can be awarded as a reasonable attorneys' fee. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996). The only question for the trial court was the reasonableness of awarding a contingent fee.

Appellants submitted a declaration of counsel complying with Utah R. Civ. P. 73 and demonstrating their agreement with counsel to pay a 33 1/3 % contingent fee. [TR803-5811] Appellants detailed work on the case totaling 1,426.5 hours over four years of litigation. *Id.* Fees for such work totaled \$427,950 when multiplied by a reasonable hourly rate. *Id.* According to the judgment entered against Campbell totaling \$2,941,563.41, payment of a contingent fee would amount to \$980,423.08.

The trial court abused its discretion when it analyzed the reasonableness of this amount as an hourly rate as opposed to a contingent fee. The court relied on *Kealamakia, Inc. v. Kealamakia* to determine reasonableness considering the legal work actually performed, whether the work was reasonably necessary to adequately prosecute the matter, the customary billing rates for such work, and circumstances which require consideration of additional factors. 2009 UT App 148, ¶ 10; 213 P.3d 13. The court focused almost entirely on the second factor and consequently rejected appellants' fee request for failure to distinguish between hours spent on claims against Campbell versus claims against HTK. [TR6142-44]¹⁴ While such distinction is relevant in an hourly case, it carries little weight in

¹⁴ Despite the trial court's stated reasoning, the court even refused to award fees for those hours spent on the case solely against Campbell after HTK was dismissed.

a contingency case. The trial court should have considered the “additional factors” unique to contingent fee cases.

For example, in *In re Priceline.com, Inc. Securities Lit.*, 2007 WL 2115592, (D.Conn. 2007), plaintiffs obtained an \$80 million dollar settlement in a class action alleging Priceline’s federal securities violations. Counsel submitted evidence of their hours spent on the case and hourly rates amounting to 12.1 million dollars. The court, however, awarded counsel double that amount in their requested contingent fee of 30% (or 24 million dollars). In doing so, the court explained, “[t]he award of the percentage requested here will encourage enforcement of the securities laws and support attorneys’ decisions to take these types of cases on a contingent fee basis. The fee fairly compensates competent counsel in a complex securities case and helps to perpetuate the availability of skilled counsel for future cases of this nature.” *Id.* at * 5. Counsel’s description of the hours spent on the case demonstrated the “magnitude and complexity of this case,” the “more than six years of contentious discovery,” and the “intricate issues regarding proof of liability and loss and complex accounting issues.” *Id.* The court allowed the doubling of the hourly rate for such work in recognition of “the risks associated with contingent fee litigation, and the quality of representation here and the results obtained.” *Id.*

Here, despite having the same information before it, the trial court abused its discretion by not considering any of the work performed, the extent of the litigation, the complexity of the case, the risk of contingent fee litigation, the quality of counsel, or the

result obtained. [TR6117-23] Had the trial court properly considered these factors, the court could have found the fee request reasonable or it could have reduced the fee if it found the above factors did not warrant the requested fee. The trial court, however, abused its discretion by doing neither. Therefore, the issue of attorneys' fees must be remanded to the trial court for determination of the reasonableness of appellants' contingent fee.

VI. THE TRIAL COURT ERRED WHEN IT RULED THE RELEASE BETWEEN APPELLANT HOWELL AND PENN MUTUAL WAS CLEAR AND UNAMBIGUOUS DESPITE LANGUAGE LIMITING THE RELEASE TO HOWELL'S INSURANCE POLICY

Appellant Howell appeals the trial court's ruling that the Settlement Agreement and Release between Howell and Penn Mutual was clear and unambiguous as a matter of law. Under Pennsylvania law, a release is ambiguous "if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense." *Black v. Jamison*, 913 A.2d 313, 318 (Pa.Comm.w.Ct. 2006). Such can be the case when there is "limiting language" that restricts the release to specific parties or claims. Penn Mutual's Release is ambiguous because it contained limiting language restricting the Release to claims arising out of the Penn Mutual Policy Number 8129818 but reserving Howell's claims regarding Howell's BHDC investment.

The release is governed and construed according to the laws of Pennsylvania. [TR1257] Under Pennsylvania law, the "court must look to the terms of the release, both clear and ambiguous, and examine the document to determine the intent of the parties." *Martin v. Donahue*, 698 A.2d 614, 616 (Pa.Super. 1997). Here, the Release's first numbered

paragraph states, “The parties to the Agreement desire to settle and compromise all disputes and claims **between *them* arising from the sale of Penn Mutual Policy Number 8129818** (‘the policy’) by Jeffrey Campbell to Mr. Grant Howell.” [TR1257] There is no mention of settling claims against Campbell generally and, though known to Penn Mutual, there is no mention of settling claims arising out of Howell’s BHDC investment.

The second numbered paragraph similarly focuses solely on Howell’s insurance policy, stating, “In consideration of the mutual promises contained in this Agreement, and upon full execution and delivery of this Agreement, Penn Mutual agrees to pay to Mr. Howell cash surrender value of the policy prior to the lapse of the policy on June 28, 2004 . . . It is further agreed that in consideration of the mutual promises contained in this Agreement, Mr. Grant Howell will have no further rights or obligations with respect to Policy Number 8129818.” [TR1257] Again, the consideration for the Release does not mention general claims against Campbell nor Howell’s claims arising out of his BHDC investment.

The third numbered paragraph releases Penn Mutual and affiliates, but expressly says, “not including Mr. Jeffrey Campbell.” *Id.* In this paragraph, Howell released his claims against Penn Mutual “arising from, or in any way related to his dealings with Campbell, including the solicitation, purchase, issuance or administration of Penn Mutual Policy Number 8129818.” *Id.* Here, not only is the focus again placed on claims regarding Penn Mutual’s insurance policy, but Howell expressly reserved his claims against Campbell, i.e.

his claims regarding his BHDC investment.

The trial court ruled there was no ambiguity because, based on the content of the third paragraph, HTK was released from all claims as a subsidiary of Penn Mutual. [TR1483] A different construction is evident, however, when these three paragraphs of the Release are read as a whole. The first paragraph states that the Release is intended to settle disputes and claims arising from the sale of the Penn Mutual insurance policy. This is limiting language consistent with the consideration set forth in the second paragraph and Howell's reservation of claims against Campbell in the third paragraph. These paragraphs are capable of being understood to release Howell's claims arising out of the insurance policy, but reserving Howell's claims arising out of his BHDC investment.

Reading the Release as reserving Howell's claims against HTK for the BHDC investment is consistent with Pennsylvania case law. For example, in *Harrity v. Medical College of Penn. Hosp.*, 653 A.2d 5 (Pa.Super. 1994), a hotel guest fell and injured her wrist. In addition, the physician treating her improperly set her fracture causing permanent damage to the wrist. Plaintiff sued the hotel in federal court and later sued the doctor and hospital in state court. Plaintiff signed a Release settling her claims against the hotel and "any other person or corporation from all actions or claims arising out of an accident which occurred June 22, 1986 . . ." *Id.* at 7. The trial court dismissed plaintiff's claims against the doctor and hospital since they were "any other person or corporation." The Superior Court overturned the ruling, however, because the Release contained the limiting language "and

for which suit was brought in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 88-4913.” This limiting language rendered the Release only applicable to the hotel action.

Likewise, in *Martin v. Donahue*, 698 A.2d 614 (Pa.Super. 1997), the plaintiff was injured in a work-place accident. The plaintiff sued the contractor that employed him for workers comp benefits and also sued the doctor who improperly treated his injuries. In settling with the contractor, plaintiff released “all other persons or entities” and agreed to “a complete bar to all claims on suits for injuries or damages . . . resulting . . . from said . . . medical treatment.” The Superior Court again found this release did not exempt the doctor from suit because the release contained other language releasing only those entities liable for plaintiff’s claims in the contractor suit. “This language limits the long arm of this release to the parties named in the particular lawsuit which arose from [plaintiff’s] fall.” *Id.* at 617.

Finally, in *Black*, plaintiff sued the estate of the driver responsible for a tragic car accident as well as the Pennsylvania Department of Transportation (“DOT”). Plaintiff eventually signed a release with State Farm insurance - her own underinsured carrier. The plaintiff released “all other firms, corporations, associations, partnerships, affiliates, subsidiaries and entities whatsoever” for “all claims resulting or to result from an accident which occurred on or about May 15, 1999.” 913 A.2d 316. Based on the release between the plaintiff and her insurer, DOT sought summary judgment claiming the release settled all claims arising from the accident.

The *Black* court determined the language from the release where the plaintiff released “all other . . . entities whatsoever” for “all claims resulting or to result from an accident which occurred on or about May 15, 1999” could not be read in isolation. In a subsequent paragraph, the release stated, “It is understood and agreed that this settlement is being offered as the available underinsured coverage under a policy issued by [State Farm] . . .” *Id.* at 321. The court ruled, “[t]he first paragraph of the Release certainly bears similarities to the general release . . . However, the third paragraph identifies the parties and states that the settlement was offered as the available underinsured coverage *and conceivably limits the terms* of the Release to State Farm.” *Id.* (emphasis added). Due the discrepancy in the language, the court ruled, “it is so difficult to reconcile paragraph one and paragraph three of the Release that it was reasonably necessary to consider extrinsic evidence.” *Id.* at 321-22.

The same result must be reached in this case. Paragraph one of Penn Mutual’s Release can conceivably be read as limiting language: limiting the Release to “all disputes and claims between them arising from the sale of Penn Mutual Policy Number 8129818.” This places HTK’s interpretation of paragraph three at odds with paragraph one, resulting in ambiguity.

Therefore, Mr. Howell’s claim must be remanded for determination by a jury.

CONCLUSION

Based on the above, appellants seek the following relief:

Appellants Burdick, Temples, Marquez, Hunter and Jordan seek remand of their apparent authority claims against HTK for determination by jury;

All appellants seek remand of their negligent supervision claims against HTK for determination by jury;

All appellants seek remand of their material aid claims against HTK for determination by jury;

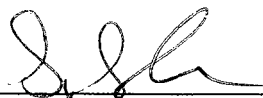
Appellants Manus and Marquez seek remand of their control person liability claims against HTK for determination by jury;

All appellants seek remand of their requested attorneys' fees for proper calculation by the trial court;

Appellant Howell seeks remand of his claims against HTK for determination by jury.

DATED this 22nd day of September, 2011.

SILVESTER & CONROY, L.C.



Fred R. Silvester
Spencer Siebers
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of September, 2011, I caused to be to be mailed via U.S. Mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLANTS** to the following:

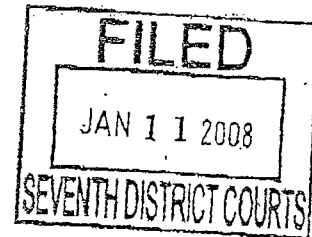
John Harrington
Sherilyn A. Olsen
Holland & Hart
60 E South Temple, Ste 2000
Salt Lake City, Utah 84111
Attorney for Hornor Townsend & Kent

Tressie Jordan

ADDENDUM

1. Order Granting Summary Judgment January 11, 2008.
2. Order Denying Motion to Set Aside Summary Judgment Regarding Grant Howell Release and Granting Second Motion for Summary Judgment as to Grant Howell June 16, 2009.
3. Order Granting Summary Judgment as to Burdick, Henrie, Hunter, the Manuses, Jordan, The Marquezes, Temples, Thayn and Swinburne June 16, 2009.
4. Order regarding Motion to Strike Expert Report of Stuart A. Ober as Used by Plaintiffs in Support of Their Memorandum in Opposition to Motions for Summary Judgment June 16, 2009.
5. Judgment May 10, 2011.
6. Order Regarding (1) Plaintiffs' Motion for Entry of Judgment; (2) Defendant HTK's Motion to Strike Declarations and Appendix Exhibits Submitted with Motion for Reconsideration May 4, 2011.
7. U.C.A. 1953 § 61-2-22.

Tab 1



Proposed Order Prepared by:

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY
STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

ORDER GRANTING SUMMARY
JUDGMENT REGARDING GRANT
HOWELL RELEASE

Civil No. 060700588

Judge Douglas B. Thomas

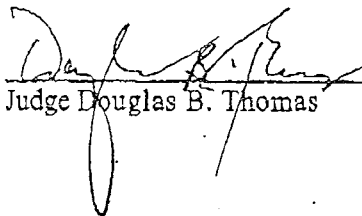
Defendant Horner, Townsend & Kent, Inc.'s ("HTK") Motion for Summary Judgment as to the Settlement Agreement and Release dated January 10, 2005 and signed by Grant Howell ("Motion") came before the Court on December 11, 2007 at 1:30 p.m. Sherilyn A. Olsen and John P. Harrington of Holland & Hart LLP appeared representing HTK. Spencer C. Siebers of Silvester & Conroy, L.C. appeared representing Plaintiff Grant Howell ("Mr. Howell"). Other parties noted their appearances on the record.

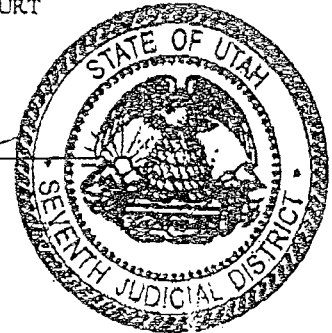
After reviewing the pleadings, considering the affidavits and evidence submitted by the parties, and hearing oral argument, the Court hereby ORDERS, DECREES, AND ADJUDGES as follows:

1. The Settlement Agreement and Release dated January 10, 2005 between Mr. Howell and Penn Mutual Life Insurance Company (the "Release") is clear and unambiguous. As a wholly owned subsidiary of Penn Mutual Life Insurance Company, Mr. Howell released HTK and waived any claims against HTK in accordance with the Release.
2. There are no genuine issues of material fact with respect to the Release and Mr. Howell's release of HTK. Therefore, HTK is entitled to judgment as a matter of law.
3. HTK's Motion is granted.
4. The deadline for the completion of fact discovery shall be Monday, February 11, 2008. Although the Court has ruled that the Release is clear and unambiguous and has granted summary judgment to HTK, Mr. Howell shall be permitted to conduct discovery on the limited issue of whether the Release was procured by fraud or mutual mistake.

DATED this 11th day of January 2008

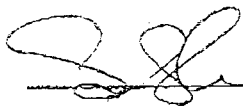
SEVENTH JUDICIAL DISTRICT COURT


Judge Douglas B. Thomas



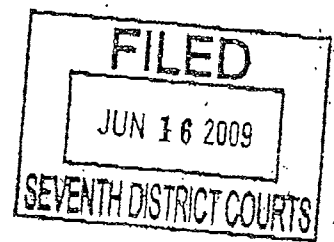
Approved as to form:

Silvester & Conroy, L.C.


Spencer C. Silvester

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Tab 2



Proposed Order Prepared by:

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY
STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

CAMPBELL CASE

ORDER DENYING MOTION TO
SET ASIDE SUMMARY JUDGMENT
REGARDING GRANT HOWELL
RELEASE AND GRANTING
SECOND MOTION FOR SUMMARY
JUDGMENT AS TO GRANT
HOWELL

Civil No. 060700588

Judge Douglas B. Thomas

On January 11, 2008, this Court entered an Order (the "First Summary Judgment Order") granting defendant Hornor, Townsend & Kent, Inc.'s ("HTK") Motion for Summary Judgment Regarding Grant Howell Release (the "First Summary Judgment Motion"). In the First Summary Judgment Order, the Court held that in the Settlement Agreement and Release dated January 10, 2005 (the "Release"), Mr. Howell clearly and unambiguously released Penn Mutual Life Insurance Company and its wholly-owned subsidiaries, including HTK, from the claims asserted in this case. The First Summary Judgment Order also allowed Mr. Howell to conduct additional discovery on the limited issue of whether the Release was procured by fraud or mutual mistake.

Following additional discovery, HTK filed its Motion for Summary Judgment against Grant Howell That Release Was Not Procured By Fraud or Mistake ("Second Summary Judgment Motion") and Plaintiffs filed their Motion to Set Aside Summary Judgment—Grant Howell ("Motion to Set Aside"). The Second Summary Judgment Motion and the Motion to Set Aside came before the Court on April 7, 2009. John P. Harrington and Sherilyn A. Olsen of Holland & Hart LLP appeared representing HTK. Spencer C. Siebers of Silvester & Conroy, L.C., appeared representing Plaintiff Grant Howell. Other parties noted their appearances on the record.

After reviewing the pleadings, considering the affidavits and evidence submitted by the parties, and hearing oral argument, the Court hereby ORDERS, DECREES, AND ADJUDGES as follows:

1. In support of the Motion to Set Aside, Mr. Howell relies essentially on the same facts and arguments that he raised in response to the First Summary Judgment Motion. Mr.

Howell has not presented any facts that would affect or alter the basis for the First Summary Judgment Order.

2. There is no evidence that Penn Mutual knew that Mr. Howell was laboring under a misapprehension when he signed the Release.

3. When Mr. Howell executed the Release, Penn Mutual did not know that he intended to reserve his claims against HTK.

4. At the time Mr. Howell signed the Release, he was represented by counsel he had retained to represent him in his claims regarding Beverly Hills Development Corporation ("BHDC"). It would not have taken much investigation or research to find out whether HTK was involved in the BHDC transactions or whether HTK was a subsidiary of Penn Mutual.

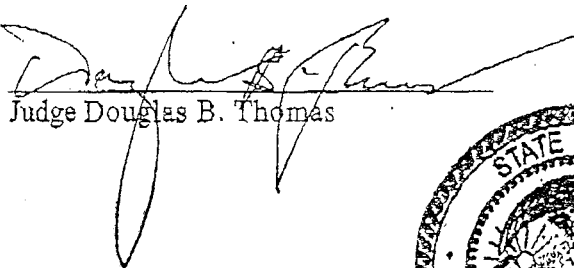
5. At the time Mr. Howell signed the Release, he believed HTK was somehow involved in the sale of investments in BHDC. Had Mr. Howell intended to maintain and preserve his potential claims against HTK, his counsel could have done so. Mr. Howell's counsel could have excluded the entire BHDC claim from the Release or listed HTK or all parties associated with the BHDC claims as parties excepted from the Release. But counsel did not do so. Instead, the Release reserved only the claims against Jeff Campbell.

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6. There are no genuine issues of material fact as to whether the Release was procured by fraud or mistake. Therefore, Plaintiffs' Motion to Set Aside is denied, and HTK's Second Summary Judgment Motion is granted.


DATED this 15th day of June, 2009.

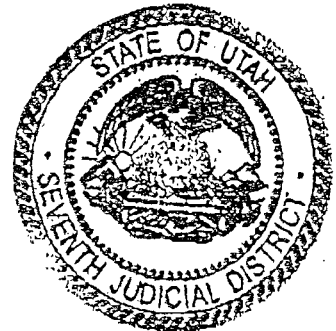
SEVENTH JUDICIAL DISTRICT COURT


Judge Douglas B. Thomas

Approved as to form:

Silvester & Conroy, L.C.


Spencer C. Silvester



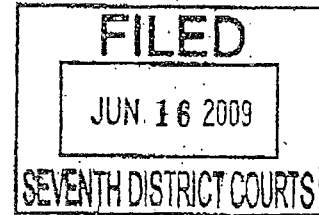
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Tab 3

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY
STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

CAMPBELL CASE

ORDER GRANTING SUMMARY
JUDGMENT AS TO BURDICK,
HENRIE, HUNTER, THE
MANUSES, JORDAN, THE
MARQUEZES, TEMPLES, THAYN,
AND SWINBURNE

Civil No. 060700588

Judge Douglas B. Thomas

On April 7, 2009, Defendant Hornor, Townsend & Kent, Inc.'s ("HTK") Motions for Summary Judgment on the claims of Plaintiffs Frank Burdick, Jimmy Henrie, Ella Dean Hunter, Richard and Teresa Manus, Terry L. Jordan, Michael and Teri Marquez, Wylma Temples, Loralie Thays, and Robert Swinburne (the "Plaintiffs") came before the Court. Sherilyn A. Olsen and John P. Harrington of Holland & Hart LLP appeared representing HTK. Spencer C. Siebers of Silvester & Conroy, L.C., appeared representing the Plaintiffs. Other parties noted their appearances on the record.

After reviewing the pleadings, considering the affidavits and evidence submitted by the parties, and hearing oral argument, the Court hereby ORDERS, DECREES, AND ADJUDGES as follows:

1. The parties have completed factual discovery.
2. Based upon the stipulation of the parties, Plaintiffs' Fourth Cause of Action (Employment of Unlicensed Agents) and Eighth Cause of Action (Breach of Fiduciary Duty) are dismissed with prejudice.
3. By prior stipulation and Order dated January 11, 2008, the Ninth Cause of Action (Civil Conspiracy) was dismissed with prejudice against HTK.
4. By prior stipulation and Order dated March 10, 2008, the Fifth (Fraud) and Sixth Causes of Action (Fraudulent Concealment) were dismissed with prejudice against HTK.
5. The only remaining causes of action to be determined by the Court as to HTK are the "State Security Claims" (First Cause of Action, Second Cause of Action, and Third Cause of Action), the "Negligent Misrepresentation Claim" (Seventh Cause of Action), and the

"Failure to Supervise Claim" (Eleventh Cause of Action) (referred to collectively as the "Remaining Causes of Action").

6. HTK seeks summary judgment as to the Remaining Causes of Action.

7. A party is entitled to summary judgment upon a showing that there are no genuine issues of material fact. See Utah R. Civ. P. 56(c). The very "purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder." *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984). "In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial." *Id.* Conclusory statements that contain only unsubstantiated beliefs are insufficient to defeat summary judgment. See *Brown v. Wanlass*, 18 P.3d 1137, 1139 (Ut. Ct. App. 2001).

8. For the reasons set forth below, the Court concludes that there are no genuine issues of material fact and HTK is entitled to judgment as a matter of law on the Remaining Causes of Action.

9. In reaching these conclusions, the Court has not made factual findings; it has made only legal rulings based upon the undisputed evidence presented by the parties. In summary, the Plaintiffs have failed to produce sufficient evidence to create a genuine issue of material fact as to whether Mr. Campbell acted with the apparent authority of HTK when he sold Plaintiffs investments in Beverly Hills Development Corporation ("BHDC"). The Court addresses each of the Remaining Claims below.

STATE SECURITY CLAIMS AND NEGLIGENT MISREPRESENTATION CLAIM

10. In their pleadings, Plaintiffs appear to assert that HTK is liable on the State Security Claims and the Negligent Misrepresentation Claim because Mr. Campbell sold BHDC to Plaintiffs under the actual and/or apparent authority of HTK.

11. At the hearing, the parties stipulated that Mr. Campbell did not solicit investments in BHDC with the actual authority of HTK.

12. Thus, to pursue their State Security Claims and Negligent Misrepresentation Claim against HTK, Plaintiffs must show that Campbell acted with HTK's apparent authority when he solicited investments in BHDC from Plaintiffs.

13. In order to show apparent authority in Utah, the following must be established:

(1) that the principal has manifested his [or her] consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his [or her] position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Luddington v. Eodenvest Ltd., 855 P.2d 204, 209 (Utah 1993) (quoting Am.Jur.2d Agency §. 80 (1986)).

14. In addition, when a third party deals exclusively with an alleged agent and believes that the agent is acting with the principal's authority, the third party has an affirmative duty to ascertain the scope of that agent's alleged authority. *See Workers' Compensation Fund v. Hahnemann Corp.*, ___ P.3d ___, 2009 WL 748825, 626 Utah Adv. Rep. 18 (Utah 2009); *Zions First Nat'l Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1095 (Utah 1988).

15. The Plaintiffs can be separated into two categories—the Category One Plaintiffs and the Category Two Plaintiffs.

16. The Category One Plaintiffs are the Plaintiffs who purchased HTK-approved products through Mr. Campbell while he was an authorized representative of HTK. The Category One Plaintiffs are Mr. Burdick, Mr. and Mrs. Manus, and Mrs. Temples.

17. The Category Two Plaintiffs are the Plaintiffs who purchased products from Mr. Campbell while he was not an authorized representative of HTK. The Category Two Plaintiffs are Mr. Henrie, Mrs. Hunter, Mr. Jordan, Mr. and Mrs. Marquez, Mr. Swinburne, and Mrs. Thayne.

18. As to the Category One Plaintiffs, the primary issue is whether these Plaintiffs can establish the third element of apparent authority, namely, whether these Plaintiffs have shown a genuine issue of material fact as to whether they relied on the involvement of HTK when they invested in BHDC.

19. As to the Category Two Plaintiffs, all three elements of apparent authority are at issue. More specifically, the question is whether the Category Two Plaintiffs have shown a genuine issue of material fact as to whether: (1) HTK manifested its consent to the exercise of Mr. Campbell's authority or knowingly permitted Mr. Campbell to assume the exercise of authority on HTK's behalf; (2) Plaintiffs knew that HTK manifested its consent to exercise this authority, and acting in good faith, they had reason to believe and actually did believe that Mr. Campbell possessed the authority to act on HTK's behalf; and (3) relying on this appearance of authority, Plaintiffs changed their position and will be injured or suffer loss if the act done or transaction executed by Mr. Campbell does not bind HTK.

20. HTK is entitled to summary judgment on all Plaintiffs' State Security Claims and Negligent Misrepresentation Claims because all Plaintiffs failed to offer any evidence creating a genuine issue of material fact as to one or more elements of apparent authority. Mr. and Mrs. Marquez's State Security Claims are also barred by the applicable two-year statute of limitations. Therefore, HTK also is entitled to summary judgment on these claims on this ground.

**The Category One Plaintiffs
(Burdick, Manus, and Temples)**

A. Frank Burdick

21. At no time did Mr. Burdick state that he invested in BHDC because of HTK.

22. Mr. Burdick testified that he believed HTK was one of the investment resources to which Mr. Campbell had access; he thought HTK represented potential investors and with some legal type of licensing; he understood Mr. Campbell was somehow affiliated with HTK, but that he did not understand what the affiliation was; and he assumed HTK was somehow involved in the sale of BHDC because HTK had been involved with Mr. Campbell two years prior to investing in BHDC.

23. Nonetheless, Mr. Burdick presented no evidence that he invested in BHDC because of HTK's involvement or because he made any assumption about HTK's involvement. ~~Therefore, he did not show any genuine issue of material fact regarding whether he relied on~~
HTK's alleged involvement. Without such reliance, there is no causation.

24. Because Mr. Burdick failed to present any genuine issue of material fact regarding his reliance on HTK's involvement with his BHDC investment, HTK is entitled to

judgment as a matter of law on Mr. Burdick's State Security Claims and his Negligent Misrepresentation Claim.

B. Richard & Teresa Manus

25. In her deposition, Mrs. Manus testified as follows:

Question: When you were making your decision to invest in BHDC did you or—or your husband, to the best of your understanding, in any way rely on HTK as somehow being involved before you made your decision to invest in BHDC?

Answer: No.

T. Manus Depo. 109:19-24. This testimony establishes that Mr. and Mrs. Manus did not rely on HTK.

26. Based on a business card, Mrs. Manus thought Mr. Campbell was associated with a reputable broker. But she cannot remember whether she obtained that knowledge in 2002 when she got the business card, or later, when she was gathering information for this litigation. She also testified that she trusted Mr. Campbell because he was a friend.

27. Mr. Manus testified that he was not sure whether he had first heard about HTK before or after he invested in BHDC. Mr. Manus testified that he assumed Mr. Campbell was tied in with an "outfit," but that he did not know much about it.

28. Mr. and Mrs. Manus did not produce any evidence that they relied on any alleged involvement of HTK when they made their decision to invest in BHDC. Without reliance, there is no causation as to HTK. Therefore, HTK is entitled to judgment as a matter of law on Mr. and Mrs. Manus' State Security Claims and Negligent Misrepresentation Claim.

C. Wylma Temples

29. Mrs. Temples testified that she first became aware of HTK when she started doing business with Mr. Campbell in 2001. She recalls seeing the name "HTK" on the building where Mr. Campbell maintained an office, some financial documents she received, and a certificate she saw on the wall. She believes Mr. Campbell may have stated that he was a representative of HTK, although she does not recall any formal discussions regarding what HTK was. Mrs. Temples indicated that she assumed HTK authorized Mr. Campbell to invest in BHDC because he had never told her anything to the contrary. However, Mrs. Temples also testified that she had no idea whether Mr. Campbell was authorized in any capacity to sell investments in BHDC.

30. When Mrs. Temples was asked why she decided to invest in BHDC, she testified that she (1) liked and trusted Campbell, (2) felt obligated to do something with the inheritance she received from her mother, (3) valued Mr. Wheeler's thoughts, and (4) was influenced by Mr. Campbell's representations that there were many satisfied customers.

31. At no time did Mrs. Temples testify that she invested in BHDC because of HTK's alleged involvement. There is no evidence that she would not have invested anyway and HTK, therefore, cannot be considered a cause of her investment. Because Mrs. Temples failed to offer any evidence to create a genuine issue of material regarding her reliance on HTK's alleged involvement in her investment in BHDC, HTK is entitled to judgment as a matter of law on Mrs. Temples's State Security Claims and Negligent Misrepresentation Claim.

The Category Two Plaintiffs
(Henrie, Hunter, Jordan, Marquez, Swinburne, Thayn)

A. Jimmy Henrie

32. Before Mr. Campbell became affiliated with HTK, Mr. Henrie began investing with Mr. Campbell in 1998.

33. Mr. Campbell sold no new investment products to Mr. Henrie while Mr. Campbell was affiliated with HTK.

34. Mr. Henrie decided to invest in BHDC because it "looked good" based on the representations of Mr. Campbell, which included references to "big money, big houses, and prime property."

35. Mr. Henrie could not recall whether Mr. Campbell represented anything about HTK's involvement with BHDC, had no recollection of HTK, and did not really know what HTK was. In fact, Mr. Henrie did not recall hearing about HTK before his deposition in this case, and at his deposition, Mr. Henrie testified that he did not know what HTK did.

36. Mr. Henrie failed to establish any genuine issue of material fact as to whether (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Campbell to assume the exercise of such authority on HTK's behalf; (2) he, knowing the facts, and acting in good faith, had reason to believe and did actually believe, that Mr. Campbell possessed such authority; or (3) he, relying on the appearance of Mr. Campbell's authority to act on behalf of HTK, changed his position.

37. Because Mr. Hentrie failed to establish any genuine issue of material fact as to any of the elements of apparent authority, HTK is entitled to judgment as a matter of law on Mr. Hentrie's State Security Claims and Negligent Misrepresentation Claim.

B. Ella Dean Hunter

38. Mrs. Hunter testified that she did not learn of HTK until after this litigation commenced, and even then she believed HTK was an "attorney firm."

39. In her declaration, Mrs. Hunter stated that she never believed that Mr. Campbell worked alone, and she always believed that he worked for a financial company that would back up what he told her and the investments that she made through him.

40. However, there is no evidence that Mrs. Hunter relied on any actions or manifestations of HTK regarding Mr. Campbell's alleged authority to sell investments in BHDC. And there is no evidence before the Court that she relied on the manifestations of HTK in making her decision to invest in BHDC.

41. Mrs. Hunter testified that when Mr. Campbell recommended the Pacific Life investment to her, she thought that his advice was backed by the company he worked for, but she does not know what company that was.

42. Mrs. Hunter failed to establish that (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Mr. Campbell to assume the exercise of such authority on HTK's behalf; (2) she, knowing the facts, and acting in good faith, had reason to believe and did actually believe, that Mr. Campbell possessed such authority; and (3) she, relying on the appearance of Mr. Campbell's authority to act on behalf of HTK, changed her position.

43. Because Mrs. Hunter failed to establish any genuine issues of material fact as to any of the elements of apparent authority, HTK is entitled to judgment as a matter of law on Mrs. Hunter's State Security Claims and Negligent Misrepresentation Claim.

C. Terry Jordan

44. Mr. Jordan testified that he thought he was a client of HTK because at some point in time, Mr. Jordan received a business card from Mr. Campbell. The card stated, "Securities Offered Through Hornor, Townsend & Kent, Inc. . . ." as a footnote to the terms "mutual funds" and "variable contracts." From the way Mr. Campbell represented himself with the business card, Mr. Jordan understood it described his qualifications to make investments.

45. Mr. Jordan testified that he first recalled learning about HTK from the business card, that his sole knowledge of HTK came from the business card, and he did not know what HTK did.

46. When Mr. Jordan was asked whether he understood that the investment in BHDC was being sold by HTK or by Five Star Financial Group, he answered, "I just figured it was being sold by Five Star Investment Group."

47. The business card is limiting on its face. It states that HTK's involvement applies only to mutual funds and variable contracts. The Court finds that if someone is going to rely on a business card, that person must rely on what it says. In this case, the business card limits Mr. Campbell's alleged affiliation with HTK to mutual funds and variable contracts. The BHDC investment was neither a mutual fund nor a variable contract.

48. In addition, there is no evidence before the Court that HTK was involved in presenting any of the BHDC investment information to Mr. Jordan.

49. Mr. Jordan did not meet with Mr. Campbell until after Mr. Campbell terminated his relationship with HTK. HTK made no manifestations or representations to Mr. Jordan whatsoever. Any representations to Mr. Jordan were made solely by Mr. Campbell after he disassociated himself from HTK. Therefore, Mr. Jordan did not rely on any independent acts of HTK.

50. There is no evidence that Mr. Jordan relied on HTK in making his investment in BHDC. Mr. Jordan cannot prove causation because he did not state that he invested in BHDC because of HTK.

51. Mr. Jordan failed to establish that (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Campbell to assume the exercise of such authority on HTK's behalf; (2) he knew of the facts and, acting in good faith, had reason to believe, and did actually believe that Mr. Campbell possessed such authority; and (3) he, relying on the appearance of Mr. Campbell's authority to act on behalf of HTK, changed his position.

52. Because Mr. Jordan failed to establish any genuine issues of material fact as to any of the elements of apparent authority, HTK is entitled to judgment as a matter of law on Mr. Jordan's State Security Claims and Negligent Misrepresentation Claim.

D. Mike & Teri Marquez

53. Based upon a business card he saw, Mr. Marquez testified that, he relied on the involvement of HTK when he invested in BHDC. Earlier in his deposition, however, when asked what he relied upon when investing in BHDC, Mr. Marquez testified that he was relying on Mr. Wheeler's and Mr. Campbell's representations that it was a good investment.

54. With respect to the third element of apparent agency, i.e., reliance, the Court believes there is likely a disputed issue of fact.

55. However, with respect to the first element of apparent authority, i.e., that HTK did something to manifest its consent or knowingly permitted Mr. Campbell to assume the exercise of such authority, the Court finds that Mr. and Mrs. Marquez failed to produce any evidence that they relied upon any affirmative action by HTK.

56. Mr. Marquez thought Mr. Campbell was an agent for a large corporation. Mrs. Marquez claimed that Mr. Campbell said that he was a representative of HTK when he sold her the investment in BHDC. Later, Mrs. Marquez clarified that Mr. Campbell did not tell her that HTK was involved in BHDC and that she assumed he was working with HTK.

57. Mrs. Marquez testified that they decided to invest in BHDC because they believed it was the option that would provide the best rate of return and that was the only reason why they invested.

58. Mrs. Marquez said they assumed Mr. Campbell was with HTK and that the assumption came from seeing the company name, but she could not recall where she saw it. She said she saw it sometime in Mr. Wheeler's or Mr. Campbell's office. When asked whether she had a specific recollection of where she saw HTK's name, she said, "I don't know."

59. Mr. Marquez recalls seeing Mr. Campbell's name and Five Star's name on a business card. Mr. Marquez testified that he believed he was a client of HTK based on the alleged business card, but Mr. and Mrs. Marquez were unable to produce the business card.

60. Again, the business card is limiting on its face. The business card indicates that HTK's alleged affiliation with Mr. Campbell is limited to mutual funds and variable contracts. The BHDC investment was neither a mutual fund or a variable contract.

61. Mrs. Marquez also testified that she had received the business card. But she was unable to say with certainty that at the time she invested in BHDC, she had read HTK's name on the card. Mr. and Mrs. Marquez testified that they did not research HTK until after they had invested in BHDC.

62. It does not appear that HTK did anything upon which Mr. and Mrs. Marquez could reasonably rely. Mr. Campbell may have done something, but Mr. and Mrs. Marquez were not clients of Mr. Campbell when he was associated with HTK. The Marquezes had not purchased any products that would put HTK on notice. Moreover, Mr. and Mrs. Marquez did not do any investigation of HTK until after they invested in BHDC.

63. Mr. and Mrs. Marquez failed to establish that (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Campbell to assume the exercise of such authority on HTK's behalf; and (2) Mr. and Mrs. Marquez knew the facts, and acting in good faith, had reason to believe and did actually believe that Mr. Campbell possessed such authority. In addition, Mr. and Mrs. Marquez failed to ascertain the scope of Mr. Campbell's alleged authority to act on behalf of HTK prior to investing in BHDC.

64. Because Mr. and Mrs. Marquez failed to establish any genuine issue of material fact as to the first two elements of apparent authority and failed to ascertain the scope of Mr. Campbell's alleged authority, HTK is entitled to judgment as a matter of law on Mr. and Mrs. Marquez's State Security Claims and Negligent Misrepresentation Claim against HTK.

E. Robert Swinburne

65. Mr. Swinburne began investing with Mr. Campbell before Mr. Campbell was affiliated with HTK and while Mr. Campbell was a registered representative of Washington Square Securities ("WSS"). Mr. Swinburne did not realize that Mr. Campbell had changed affiliations from WSS to HTK until reviewing documents the night before his deposition in this case.

66. Mr. Swinburne did not know that HTK was allegedly involved in this case until the night before his deposition in this case.

67. Mr. Campbell sold no new investment products to Mr. Swinburne while Mr. Campbell was affiliated with HTK.

68. When Mr. Swinburne decided to invest in BHDC, he did not have any understanding as to whether HTK was involved with Mr. Campbell or BHDC. Mr. Swinburne may have had some general understanding that a company was behind Mr. Campbell, but he did not know what the company was, and he certainly did not rely on HTK when making his investment in BHDC.

69. Mr. Swinburne failed to establish that (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Campbell to assume the exercise of such authority on HTK's behalf; (2) he knew the facts and acting in good faith, had reason to believe, and did actually believe, that Mr. Campbell possessed such authority; and (3) he, relying on the appearance of Mr. Campbell's authority to act on behalf of HTK, changed his position.

70. Because Mr. Swinburne failed to establish any genuine issue of material fact as to any of the elements of apparent authority, HTK is entitled to judgment as a matter of law on Mr. Swinburne's State Security Claims and Negligent Misrepresentation Claim.

3. Loralee Thayne

71. Mrs. Thayne did not purchase any products from Mr. Campbell while he was affiliated with HTK.

72. Mrs. Thayne invested in BHDC because her husband asked her to do so.

73. Mr. Thayne relied only upon the representations of Mr. Jordan and Mr. Campbell when deciding to invest in BHDC. Mr. Thayne did not have an understanding of whether or not HTK was involved in BHDC.

74. Mrs. Thayne first heard about HTK after she met with her attorney involved in this litigation.

75. Mrs. Thayne testified that she had no reason to believe that HTK was involved in BHDC or that HTK made a misrepresentation to her.

76. Mrs. Thayne failed to establish that (1) HTK manifested its consent to Mr. Campbell exercising authority on HTK's behalf or that HTK knowingly permitted Campbell to assume the exercise of such authority on HTK's behalf; (2) she knew the facts and, acting in good faith had reason to believe, and did actually believe, that Mr. Campbell possessed such authority; and (3) she, relying on the appearance of Mr. Campbell's authority to act on behalf of HTK, changed her position.

77. Because Mrs. Thayn failed to establish any genuine issue of material fact as to any of the elements of apparent authority, HTK is entitled to judgment as a matter of law on Mrs. Thayn's State Security Claims and Negligent Misrepresentation Claim.

**State Security Claims: Statute of Limitations
(Burdick, Jordan, Manus, and Marquez)**

78. HTK properly pled the statute of limitations as an affirmative defense pursuant to the standards set forth in *Bangerter v. Petty*, 2008 UT App 153, ¶ 18, 184 P.3d 1249, 1253 (Utah Ct. App. 2008), *cert. granted*, No. 20080562, 2008 Utah Lexis 168, at *1 (Utah Sept. 17, 2008).

79. More specifically, HTK properly pled the statute of limitations because the statute HTK relied upon is the same statute Plaintiffs relied upon in their Complaint. As such, the Plaintiffs were on sufficient notice as to the statute on which HTK was relying in its affirmative defense.

80. Under Utah Code Ann. § 61-1-22(a)(7), the statute of limitations on the State Security Claims is two years "after the discovery by the plaintiff of the facts constituting the violation"

81. As to Plaintiffs Mr. Burdick, Mr. Jordan, and Mr. and Mrs. Manus, there are genuine issues of fact regarding whether their State Security Claims are barred by the statute of limitations.

82. As to Mr. and Mrs. Marquez, the undisputed material facts establish that on March 1, 2004, Mr. and Mrs. Marquez learned directly from Mr. Campbell that BHDC's assets were frozen and that Mr. Fitzgerald "had taken off with all of the money" At this time, Mr. and Mrs. Marquez had sufficient facts to put them on notice that they had a cause of action

regarding the suitability of their investment, the safety of their investment, or the existence of their investment.

83. Mr. and Mrs. Marquez did not file their State Security Claim until March 6, 2006. Because this was more than two years after March 1, 2004, their State Security Claims are barred by the statute of limitations.

84. HTK is entitled to judgment as a matter of law on its defense that Mr. and Mrs. Marquez's State Security Claims are barred by the statute of limitations.

FAILURE TO SUPERVISE CLAIM

85. Plaintiffs also claim that HTK failed to properly supervise Mr. Campbell and HTK's clients during the sale of investments in BHDC.

86. More specifically, Plaintiffs appear to contend that HTK's duty to supervise Mr. Campbell arises from Mr. Campbell selling BHDC as either a registered representative of HTK or as its alleged agent.

87. Plaintiffs' first theory fails as a matter of law because it is undisputed that Mr. Campbell terminated his relationship as a registered representative with HTK on October 17, 2002, and that Mr. Campbell solicited investments from the Plaintiffs in BHDC after this date. Because Mr. Campbell was not a registered representative of HTK at the time he sold BHDC, HTK owed no duty to supervise Mr. Campbell as its alleged registered representative.

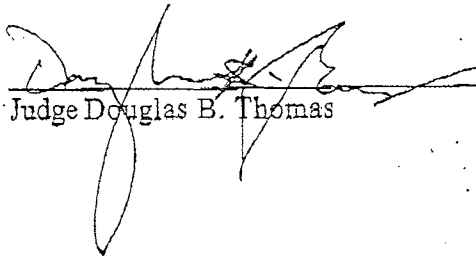
88. Plaintiffs' second theory also fails as a matter of law. As stated above, it is undisputed that Mr. Campbell did not solicit investments in BHDC with the actual authority of HTK. In addition and for the reasons set forth in detail above, Plaintiffs have failed to establish a genuine issue of material fact as to whether Mr. Campbell solicited investments in BHDC with

the apparent authority of HTK. Because Mr. Campbell did not solicit investments in BHDC with the actual or apparent authority of HTK, it had no duty to supervise him as its alleged agent.

89. For these reasons, HTK is entitled to judgment as a matter of law dismissing the Plaintiffs' Failure to Supervise Claim.


DATED this 15th day of June, 2009.

SEVENTH JUDICIAL DISTRICT COURT


Judge Douglas B. Thomas

Approved as to form:

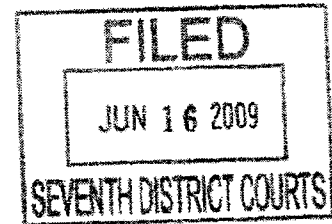
Silvester & Conroy, L.C.


Spencer C. Silvester

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Tab 4

COPY



Proposed Order Prepared by:

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY
STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

CAMPBELL CASE

ORDER REGARDING MOTION TO
STRIKE EXPERT REPORT OF
STUART A. OBER AS USED BY
PLAINTIFFS IN SUPPORT OF
THEIR MEMORANDUM IN
OPPOSITION TO MOTIONS FOR
SUMMARY JUDGMENT

Civil No. 060700588

Judge Douglas B. Thomas

Defendant Hornor, Townsend & Kent, Inc.'s ("HTK") Motion To Strike Expert Testimony of Stuart Ober as used by Plaintiffs in Support of Their Memorandum in Opposition to Motions for Summary Judgment ("**Motion to Strike**") came before the Court on April 7, 2009. John P. Harrington and Sherilyn A. Olsen of Holland & Hart LLP appeared representing HTK. Spencer C. Siebers of Silvester & Conroy, L.C., appeared representing Plaintiffs. Other parties noted their appearances on the record.

After reviewing the pleadings, considering the affidavits and evidence submitted by the parties, and hearing oral argument, the Court hereby ORDERS, DECREES, AND ADJUDGES as follows:

1. By stipulation of the parties, HTK has reserved its right to file a subsequent Motion in Limine, seeking to exclude the admission into evidence of Mr. Ober's testimony and/or expert report at a trial in this case.
2. HTK's motions for summary judgment primarily raise the issues of vicarious liability, actual authority, and apparent authority; that is, whether Mr. Campbell had actual or apparent authority to act on behalf of HTK.
3. Mr. Ober's report focuses on various industry standards, duties, and regulations that would apply once the authority of an agent to act on behalf of the principal has been established.
4. The first several pages of factual background in Mr. Ober's report are based solely upon the allegations in the Plaintiffs' Complaint, not on deposition testimony.
5. Mr. Ober's report does not contain any facts regarding apparent authority that were not otherwise available to the parties or the Court.

6. In ruling on HTK's motions for summary judgment, the Court will not consider Mr. Ober's legal opinions, including his opinions concerning whether the facts support a finding that Mr. Campbell acted with apparent authority.

7. In his report, Mr. Ober may have relied on facts, deposition testimony, or other evidence in the record. And in their memorandum in opposition to the motions for summary judgment, Plaintiffs may have cited to Mr. Ober's report as support for certain facts, rather than citing to deposition transcripts or other evidence. To the extent that this occurred, Plaintiffs may continue to rely on Mr. Ober's report for facts or evidence that are in his report and not otherwise included in Plaintiffs' memorandum in opposition to summary judgment or supporting materials.


DATED this 15th day of June, 2009.

SEVENTH JUDICIAL DISTRICT COURT

/S/ DBT
Judge Douglas B. Thomas

Approved as to form:

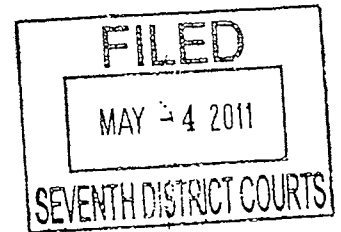
Silvester & Conroy, L.C.



Spencer C. Silvester

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Tab 5



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IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR CARBON COUNTY, STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

CAMPBELL CASE

**[PROPOSED] ORDER REGARDING (1)
PLAINTIFFS' MOTION FOR ENTRY OF
JUDGMENT; (2) DEFENDANT HTK'S
MOTION TO STRIKE DECLARATIONS
AND APPENDIX EXHIBITS SUBMITTED
WITH MOTION FOR
RECONSIDERATION; AND (3)
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Civil No. 060700588

Judge Douglas B. Thomas

Plaintiffs Jimmy V. Henrie, Grant B. Howell, Terry L. Jordan, Richard Manus, Teresa Manus, Michael Marquez, Teri Marquez, Robert D. Swinburne, Wylma Temples, J. Frank Burdick, Loralie Thayn and Ella Dean Hunter ("Plaintiffs") filed the following:

1. Motion for Entry of Judgment and proposed Judgment dated November 19, 2010.
2. Motion for Reconsideration and Memorandum in Support dated November 19, 2010 and Supplement to Memorandum in Support of Reconsideration dated November 16, 2010. Plaintiffs Grant B. Howell and Loralie Thayn did not join the Motion for Reconsideration and Memorandum in Support.

Defendant Hornor Townsend & Kent, Inc. ("HTK") filed in response the following:

1. Objection to Plaintiffs' Motion for Entry of Judgment and Proposed Judgment dated January 10, 2011.
2. Objection to Plaintiffs' Motion for Reconsideration filed January 12, 2011.
3. Motion to Strike Declarations of Frank Burdick, Jimmy Henrie, Ella Dean Hunter, Terry Jordan, Richard Manus, Teri Marquez, Robert Swinburne and Wylma Temples and Certain Appendix Exhibits Submitted with the Motion for Reconsideration and accompanying Memorandum filed January 10, 2011 ("Motion to Strike").

In response to HTK's Objections and Motion to Strike, Plaintiffs filed the following:

1. Plaintiffs' Reply Memorandum in Support of Motion for Entry of Judgment dated January 31, 2011, including the Declaration of Spencer Siebers in Support of Attorneys' Fees signed on January 31, 2011 as Exhibit B to Plaintiffs' Reply Memorandum.

2. Plaintiffs' Reply Memorandum in Support of Reconsideration dated January 31, 2011.

3. Plaintiffs' Memorandum in Opposition to HTK's Motion to Strike dated January 31, 2011.

In response to Plaintiffs' Memorandum in Opposition to HTK's Motion to Strike, HTK filed the following:

1. HTK's Reply Memorandum in Support of Motion to Strike Declarations and Appendix Exhibits Submitted by Plaintiffs with the Motion for Reconsideration dated February 22, 2011.

On March 22, 2011, the Court heard oral argument regarding Plaintiffs' Motion for Entry of Judgment, Plaintiffs' Motion for Reconsideration and HTK's Motion to Strike. Plaintiffs were represented by Fred R. Silvester of SILVESTER & CONROY. HTK was represented by John P. Harrington and Sherilyn A. Olsen of HOLLAND & HART LLP. After considering all of the pleadings, exhibits and materials cited above, the oral arguments of legal counsel, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Preliminary Findings of Fact and Judicial Notice

With respect to the following, the Court makes the following findings of fact and takes judicial notice of the following:

A. Plaintiffs filed their Complaint on March 6, 2006.

B. On February 14, 2008, the Court entered its Order granting Plaintiffs' Motion for Separate Trials, whereby, the claims against Defendants James Kulow, World Financial Group, and World Group Securities asserted by Sid Harvey, Charlene Jensen, Sharon Juliano, Dixon Peacock, Blake Jones, Edward Hickman and Donna Lemmon were separated from the claims against Defendants Jeffrey C. Campbell, Frank Wheeler, Five Star Financial Group (a d/b/a of Jeffrey C. Campbell) and Defendant HTK (the "Campbell Case Defendants") asserted by Jimmy V. Henrie, Grant B. Howell, Terry L. Jordan, Richard Manus, Teresa Manus, Michael Marquez, Teri Marquez, Robert D. Swinburne, Wylma Temples, J. Frank Burdick, Loralie Thayn, and Ella Dean Hunter (the "Campbell Case Plaintiffs").

C. On June 16, 2009, the Court filed its Order granting HTK's Motion for Summary Judgment as to the Campbell Case Plaintiffs (i.e., Plaintiff Frank Burdick, Jimmy Henrie, Ella Dean Hunter, Richard and Teresa Manus, Terry L. Jordan, Michael and Teri Marquez, Wylma Temples, Loralie Thayn, and Robert D. Swinburne).

D. Plaintiffs' claimed that Defendant Jeffrey C. Campbell and his d/b/a Five Star Financial sold unregistered securities in a reckless manner. Only the reckless sale of unregistered securities claim was tried to a jury in September 2010. The jury rendered a verdict in favor of the Campbell Case Plaintiffs and against Defendant Jeffrey C. Campbell and his d/b/a Five Star Financial Group on September 30, 2010.

Order Regarding Plaintiffs' Motion for Entry of Final Judgment

1. On November 11, 2010, Plaintiffs filed its Motion for Judgment and proposed Judgment as a result of the entry of a jury verdict against Defendant Jeffery Campbell and his

d/b/a Five Star Financial. Plaintiffs' claims against HTK were dismissed on summary judgment on June 16, 2009. The claims of Grant B. Howell were previously dismissed on January 11, 2008, and the Motion to Set Aside the granting of summary judgment against Grant B. Howell was denied on June 16, 2009.

2. The evidence presented by Campbell Case Plaintiffs with respect to the award of attorneys' fees pursuant to § 61-1-22, UTAH CODE ANN., including the Declaration of Mr. Spencer Siebers, has insufficient detail to permit the Court to make a factual determination as to the reasonableness of the attorneys' fees requested by Plaintiffs. Furthermore, the Declaration of Mr. Spencer Siebers indicates that a portion of the attorneys' fees incurred by Plaintiffs is attributable to work performed with respect to the claims against HTK. The award of attorneys' fees in this matter is limited to the prosecution of claims against Defendant Jeffrey C. Campbell and his d/b/a Five Star Financial, not HTK. The failure to segregate the work performed with respect to Defendant Jeffrey Campbell and his d/b/a Five Star Financial (as opposed to HTK) prevents the Court from being able to determine the reasonableness of attorneys' fees. The one-third contingency fee agreement between the Campbell Case Plaintiffs and their counsel is not sufficient to establish the reasonableness of the attorneys' fees.

3. The award of attorneys' fees as part of the proposed Judgment is therefore **DENIED.**

4. As a result of the jury verdict against Defendant Jeffrey C. Campbell and his d/b/a Five Star Financial for the reckless sale of unregistered securities, the trebling of damages is permitted according to § 61-1-22(c), UTAH CODE ANN. which this Court will award in an amount

equal to three times the consideration paid for the security, together with interest, costs, and attorneys' fees, less any amounts paid. The only amount to be trebled is the consideration paid. Once the consideration paid is multiplied by three, then interest, costs and attorneys' fees shall be added thereto. Finally, the amounts repaid to Plaintiffs shall be subtracted from the total, which is expressed as:

[(consideration paid X three) + interest, costs and attorneys' fees]
less (-) amount repaid = total damages.

5. The following damages with respect to Jeffrey C. Campbell, an individual and as a d/b/a of Five Star Financial are hereby **GRANTED**:

Plaintiff	Date Invested	No. of Days to Verdict	Orig. Consid.	Treble Consid.	Interest	Less Funds Received	Sub Total	Total
Burdick	9/29/2003	2558	\$43,581.46	\$130,744.38	\$36,651.41	-\$8,182.54		\$159,213.25
Henrie	11/21/2002	2870	\$114,983.69	\$344,951.07	\$108,494.20	-\$56,459.26	\$396,986.01	
	9/8/2003	2579	\$15,000.00	\$45,000.00	\$12,718.36	\$0.00	\$57,718.36	\$454,704.37
Howell	11/6/2002	2885	\$23,124.00	\$69,372.00	\$21,932.96	-\$18,894.13	\$72,410.83	
	11/6/2002	2885	\$32,021.77	\$96,065.31	\$30,372.43	\$0.00	\$126,437.74	
	2/12/2003	2787	\$45,000.00	\$135,000.00	\$41,232.33	\$0.00	\$176,232.33	\$375,080.89
Hunter	4/17/2003	2723	\$14,311.45	\$42,934.35	\$12,812.08	-\$2,700.38		\$53,046.05
Jordan	2/14/2003	2785	\$197,530.47	\$592,591.41	\$180,862.15	-\$78,084.25		\$695,369.31
Manus	11/15/2002	2876	\$37,294.35	\$111,883.05	\$35,263.09	-\$20,295.48	\$126,850.66	
	11/15/2002	2876	\$42,471.42	\$127,414.26	\$40,158.18	-\$3,465.00	\$164,107.44	
	12/1/2002	2860	\$23,000.00	\$69,000.00	\$21,626.30	\$0.00	\$90,626.30	\$381,584.40
Marquez	11/4/2002	2887	\$50,000.00	\$150,000.00	\$47,457.53	-\$8,933.28		\$188,524.25
Swinburne	12/4/2002	2857	\$35,706.64	\$107,119.92	\$33,538.81	-\$8,623.27	\$32,035.46	
	10/26/2003	2531	\$10,000.00	\$30,000.00	\$8,321.10	\$0.00	\$38,321.10	\$170,356.55
Temples	5/27/2003	2683	\$59,507.45	\$178,522.35	\$52,490.46	-\$18,866.56	\$212,146.25	
	5/27/2003	2683	\$40,492.55	\$121,477.65	\$35,717.76	\$0.00	\$157,195.41	\$369,341.66
Thayn	4/4/2003	2736	\$25,000.00	\$75,000.00	\$22,487.67	-\$3,144.99	94,342.68	\$94,342.68

6. Plaintiffs will submit a Judgment in conformity with this Order.

Order Regarding HTK's Motion to Strike

1. Attached to Plaintiffs' Motion for Reconsideration were the declarations of Plaintiffs Frank Burdick, Jimmy Henrie, Ella Dean Hunter, Terry Jordan, Richard Manus, Teri Marquez, Robert Swinburne, and Wylma Temples (collectively, the "Declarations"). In addition, Plaintiffs submitted Central Registration Depository ("CRD") data summary pertaining to Defendant Jeffrey C. Campbell, the National Association of Securities Dealers ("NASD") Notice to Members 01-79D, and FINRA arbitration resolutions (collectively, the "Appendix Pages").

2. The Declarations and Appendix Pages were available at the time of the summary judgment proceedings for presentation and consideration by the Court. No cognizable excuse, justification or reason was provided by Plaintiffs as to why the Declarations and Appendix Pages were not presented and submitted prior to the Court's entry of its Order filed on June 16, 2009 granting HTK's motions for summary judgment. Discovery in this lawsuit began in 2006 and was concluded on February 11, 2008. HTK will be prejudiced if Plaintiffs are allowed to submit new evidence and declarations, whereby HTK would be forced to address evidence and issues that were not timely submitted prior to the entry of the Order dated June 16, 2009.

3. The submission of the Declarations and Appendix Pages as part of Plaintiffs' Motion for Reconsideration is untimely and the Declarations and Appendix Pages will be stricken from the record. The Court will not consider the Declarations and Appendix Pages and

any new arguments based on the Declarations and Appendix Pages made by Plaintiffs after June 16, 2009. Therefore, HTK's Motion to Strike Declarations and Appendix Pages is **GRANTED**.

Order Regarding Plaintiffs' Motion for Reconsideration

1. After the entry of the jury verdict on September 29, 2010, the Court, *sua sponte*, requested further briefing from Plaintiffs, Defendants and HTK as to whether the United States Supreme Court's ruling in *Merck & Co., Inc. v. Reynolds* ("Merck"), 130 S.Ct. 1784 (2010), required reconsideration of the Court's ruling that the state securities claims of Plaintiffs Michael and Teri Marquez were barred by the applicable Utah Statute of Limitation.

2. In response to the Court's request for briefing on the *Merck* case, Plaintiffs filed the Motion for Reconsideration, the Declarations and the Appendix Pages.

3. In the Order filed on June 16, 2009 granting HTK's motions for summary judgment, the Court ruled in Paragraphs 78 through 84 as follows:

78. HTK properly pled the statute of limitations as an affirmative defense pursuant to the standards set forth in *Bangerter v. Petty*, 2008 UT App 153, ¶ 18, 184 P.3d 1249, 1253 (Utah Ct. App. 2008), *cert. granted*, No. 20080562, 2008 Utah Lexis 168, at *1 (Utah Sept. 17, 2008).

79. More specifically, HTK properly pled the statute of limitations because the statute HTK relied upon is the same statute Plaintiffs relied upon in their Complaint. As such, the Plaintiffs were on sufficient notice as to the statute on which HTK was relying in its affirmative defense.

80. Under Utah Code Ann. § 61-1-22(a)(7), the statute of limitations on the State Security Claims is two years "after the discovery by the plaintiff of the facts constituting the violation"

81. As to Plaintiffs Mr. Burdick, Mr. Jordan, and Mr. and Mrs. Manus, there are genuine issues of fact regarding whether their State Security Claims are barred by the statute of limitations.

82. As to Mr. and Mrs. Marquez, the undisputed material facts establish that on March 1, 2004, Mr. and Mrs. Marquez learned directly from Mr. Campbell that BHDC's assets were frozen and that Mr. Fitzgerald "had taken off with all of the money" At this time, Mr. and Mrs. Marquez had sufficient facts to put them on notice that they had a cause of action regarding the suitability of their investment, the safety of their investment, or the existence of their investment.

83. Mr. and Mrs. Marquez did not file their State Security Claim until March 6, 2006. Because this was more than two years after March 1, 2004, their State Security Claims are barred by the statute of limitations.

84. HTK is entitled to judgment as a matter of law on its defense that Mr. and Mrs. Marquez's State Security Claims are barred by the statute of limitations.

4. In light of the *Merck* decision, the Court has reconsidered its Order of June 16, 2009 and hereby modifies and amends the Order of June 16, 2009 as follows:

A. Paragraph 82 of the Order filed June 16, 2009 shall be replaced in its entirety with the following new Paragraph 82:

82. As to Mr. and Mrs. Marquez, the undisputed material facts establish that on March 1, 2004, Mr. and Mrs. Marquez learned directly from Mr. Campbell that BHDC's assets were frozen and that Mr. Fitzgerald "had taken off with all of the money" It is a question of fact, however, if Mr. and Mrs. Marquez had sufficient facts that they had a cause of action regarding the suitability of their investment, the safety of their investment, or the existence of their investment. There are genuine issues of fact regarding whether the State Security Claims of Mr. and Mrs. Marquez are barred by the statute of limitations.

B. Paragraph 83 of the Order filed June 16, 2009 shall be replaced in its entirety with the following new Paragraph 83:

83. The portions of HTK's Motions for Summary Judgment concerning the statute of limitations under Utah Code Ann. § 61-1-22(a)(7) are denied.

C. Paragraph 84 of the Order filed June 16, 2009 is hereby deleted in its entirety, shall not be replaced, and shall remain blank.

5. Plaintiffs' Motion for Reconsideration is **GRANTED** only with respect to the statute of limitations under UTAH CODE ANN. § 61-1-22(a)(7) pertaining to Mr. and Mrs. Marquez.

6. The Court reconsidered Plaintiffs' claims that HTK is liable, as a principal, for the actions of Jeffrey C. Campbell, an individual doing business as Five Star Financial Group, as an agent of HTK, under the concept of apparent authority. The Court reaffirms for both legal and factual reasons its ruling regarding the concept of apparent authority set forth in its June 16, 2009 order Granting HTK's Motion for Summary Judgment in the Campbell Case. Therefore, Plaintiffs' Motion for Reconsideration is **DENIED** with respect to Plaintiffs' claims of apparent authority liability.

7. The Court reconsidered Plaintiffs' claims that HTK is liable as a control person for the actions of Jeffrey C. Campbell, an individual doing business as Five Star Financial Group. Pursuant to this Court's Order Granting HTK's Motion to Strike, Plaintiffs' evidence and affidavits denominating HTK as a control person liability are stricken as untimely and are

not to be considered. Therefore, Plaintiffs' Motion for Reconsideration is **DENIED** with respect to Plaintiffs' claims that HTK is a control person.

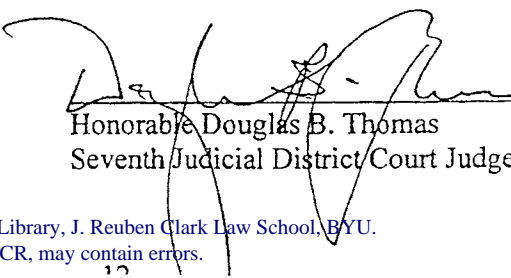
8. The Court reconsidered Plaintiffs' claims that HTK is liable for materially aiding Jeffrey C. Campbell, an individual doing business as Five Star Financial Group, in the sale of unregistered securities. The Court reaffirms for both legal and factual reasons its ruling regarding the concept of HTK having materially aided the sale of unregistered securities as set forth in its June 16, 2009 order Granting HTK's Motion for Summary Judgment in the Campbell Case. Therefore, Plaintiffs' Motion for Reconsideration is **DENIED** with respect to Plaintiffs' claims that HTK is liable for materially aiding Jeffrey C. Campbell, an individual doing business as Five Star Financial Group, in the sale of unregistered securities.

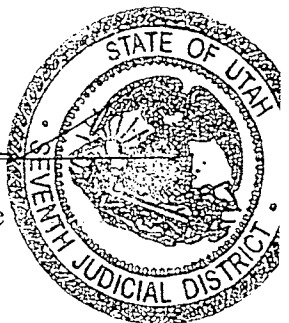
9. The Court reconsidered Plaintiffs' claims that HTK acted negligently. The Court reaffirms for both legal and factual reasons its ruling regarding Plaintiffs' claim that HTK acted negligently. Therefore, Plaintiffs' Motion for Reconsideration is **DENIED** with respect to Plaintiffs' claims that HTK acted negligently.

10. All other matters, issues and arguments for which Plaintiffs have requested reconsideration are **DENIED**.

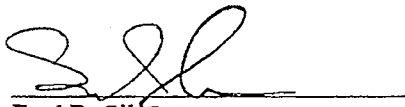
DATED this 3rd day of May, 2011.

BY THE COURT:


Honorable Douglas B. Thomas
Seventh Judicial District Court Judge



APPROVED AS TO FORM:



Fred R. Silvester

Spencer C. Siebers

Attorneys for Plaintiffs Jimmy V. Henrie,

Grant B. Howell, Terry L. Jordan, Richard Manus,

Teresa Manus, Michael Marquez, Teri Marquez,

Robert D. Swinburne, Wylma Temples, J. Frank Burdick,

Loralie Thayn and Ella Dean Hunter

Tab 6

MAY 24 2011

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Spencer Siebers (8320)
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Telephone: (801) 532-2266
Facsimile: (801)

*Attorneys for Plaintiffs Frank Burdick, Jimmy Henrie, Grant B. Howell, Ella Dean Hunter,
Terry Jordan, Richard and Teresa Manus, Michael and Teri Marquez, Robert Swinburne,
Wylma Temples and Loralie Thayn*

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR CARBON COUNTY, STATE OF UTAH

SID HARVEY, CHARLENE JENSEN,
SHARON JULIANO, DIXON PEACOCK,
BLAKE JONES, EDWARD HICKMAN,
DONNA LEMMON, JIMMY V. HENRIE,
GRANT B. HOWELL, TERRY L. JORDAN,
RICHARD MANUS, TERESA MANUS,
MICHAEL MARQUEZ, TERI MARQUEZ,
ROBERT D. SWINBURNE, WYLMA
TEMPLES, J. FRANK BURDICK, LORALIE
THAYN and ELLA DEAN HUNTER,

Plaintiffs,

v.

WORLD GROUP FINANCIAL, JAMES C.
KULOW, JR., HORNOR, TOWNSEND &
KENT INC., FRANK C. WHEELER,
JEFFREY C. CAMPBELL, FIVE STAR
FINANCIAL and DOES 1-10,

Defendants.

CAMPBELL CASE

JUDGMENT

Civil No. 060700588

Judge Douglas B. Thomas

This action came on for trial before a jury and the Court, Honorable Douglas B. Thomas, Seventh Judicial District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict on September 30, 2010,

IT IS ORDERED AND ADJUDGED THAT:

Frank Burdick

1. Plaintiff J. Frank Burdick recover from Defendants Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Frank Burdick for the security (i.e., \$43,581.45) as trebled pursuant to § 61-1-22(c), UTAH CODE ANN., which equals \$130,744.38;

2. With interest of 12% on the consideration paid for the security as of September 29, 2003, or \$36,651.41;

3. Less amounts received of \$8,182.54;

4. For a total of \$159,213.25;

Jimmy Henrie

5. Plaintiff Jimmy V. Henrie recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Jimmy V. Henrie for the securities (i.e., \$114,983.69 and \$15,000.00) as trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$389,951.07 (\$344,951.07 and \$45,000.00);

6. With interest of 12% on the consideration paid for the securities as of November 21, 2002 and September 8, 2003), or \$121,212.56;

7. Less amounts received of \$56,459.26;

8. For a total of \$454,704.37;

Grant B. Howell

9. Plaintiff Grant B. Howell recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Grant B. Howell (i.e., \$23,124.00, \$32,021.77 and \$45,000.00) as trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$300,437.31;

10. With interest of 12% on the consideration paid for the securities as of November 6, 2002 and February 12, 2003, or \$93,537.72;

11. Less amounts received of \$18,894.13;

12. For a total of \$375,080.89;

Ella Dean Hunter

13. Plaintiff Ella Dean Hunter recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Ella Dean Hunter (i.e., \$14,311.45) as trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$42,934.35;

14. With interest of 12% on the consideration paid by Ella Dean Hunter for the securities as of April 17, 2003, or \$12,812.08;

15. Less amounts received of \$2,700.38;

16. For a total of \$53,046.05;

Terry Jordan

17. Plaintiff Terry Jordan recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Terry Jordan for the securities (i.e., \$197,530.47) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$592,591.41;

18. With interest of 12% on the consideration paid by Terry Jordan for the securities as of February 14, 2003, or \$180,862.15;

19. Less amounts received of \$78,084.25;

20. For a total of \$695,369.31;

Richard and Teresa Manus

21. Plaintiffs Richard and Teresa Manus recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, the consideration paid by Richard and Teresa Manus (i.e., \$37,294.35, \$42,471.42 and \$23,000.00) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$308,297.31;

22. With interest of 12% on the consideration paid by Richard and Teresa Manus as of November 15, 2002 and December 1, 2002, or \$97,047.57;

23. Less amounts received of \$23,760.48;

24. For a total of \$381,584.40;

Michael and Teri Marquez

25. Plaintiffs Michael and Teri Marquez recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, consideration paid

by Michael and Teri Marquez for the securities (i.e., \$50,000.00) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$150,000.00;

26. With interest of 12% on the consideration paid Michael and Teri Marquez as of November 4, 2002, or \$47,457.53;

27. Less amounts received of \$8,933.28;

28. For a total of \$188,524.25;

Robert Swinburne

29. Plaintiff Robert Swinburne recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, consideration paid by Robert Swinburne (i.e., \$35,706.64 and \$10,000.00) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$137,119.92;

30. With interest of 12% on the consideration paid by Robert Swinburne as of December 4, 2002 and October 26, 2003, or \$41,859.91;

31. Less amounts received of \$8,623.27;

32. For a total of \$170,356.55;

Wylma Temples

33. Plaintiff Wylma Temples recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, consideration paid by Wylma Temples (i.e., \$59,507.45 and \$40,492.55) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$300,000.00;

34. With interest of 12% on the consideration paid by Wylma Temples for the securities as of May 27, 2003, or \$88,208.22;

35. Less amounts received of \$18,866.56;

36. For a total of \$369,341.66;

Loralie Thayn

37. Plaintiff Loralie Thayn recover from Defendant Jeffrey C. Campbell, an individual doing business as (d/b/a) Five Star Financial Group, consideration paid by Loralie Thayn (\$25,000.00) trebled pursuant to § 61-1-22(c), UTAH CODE ANN., or \$75,000.00;

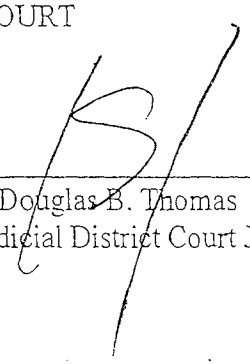
38. With interest of 12% on the consideration paid by Loralie Thayn as of April 4, 2003, or \$22,487.67;

39. Less amounts received of \$3,144.99;

40. For a total of \$94,342.68;

DATED this 22nd day of May, 2011.

BY THE COURT



Honorable Douglas B. Thomas
Seventh Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2011, I caused a true and correct copy of the foregoing Judgment to be served via First Class United States mail, postage prepaid to the following:

Jeffrey C. Campbell and Five Star Financial
2288 Bryson Circle
Santa Clara UT 84765-5429

John Harrington
Sherilyn A. Olsen
HOLLAND & HART, LLP
222 S Main St ste 2200
SALT LAKE CITY UT 84101-2194
Attorney for Hornor Townsend & Kent



Tab 7

Westlaw

U.C.A. 1953 § 61-1-22

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C

West's Utah Code Annotated Currentness

Title 61. Securities Division--Real Estate Division

Chapter 1. Utah Uniform Securities Act (Refs & Annos)

→ § 61-1-22. Sales and purchases in violation--Remedies--Limitation of actions

(1)(a) This Subsection (1) applies to a person who:

(i) offers or sells a security in violation of:

(A) Subsection 61-1-3(1) ;

(B) Section 61-1-7 ;

(C) Subsection 61-1-17(2) ;

(D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used ; or

(E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7) ; or

(ii) offers, sells, or purchases a security in violation of Subsection 61-1-1(2).

(b) A person described in Subsection (1)(a) is liable to a person selling the security to or buying the security from the person described in Subsection (1)(a). The person to whom the person described in Subsection (1)(a) is liable may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security, upon the tender of the security or for damages if the person no longer owns the security.

(c) Damages are an amount calculated as follows:

- (i) subtract from the amount that would be recoverable upon a tender under Subsection (7)(b) the value of the security when the buyer disposed of the security; and

(ii) add to the amount calculated under Subsection (1)(c)(i) interest at:

(A) 12% per year :

(I) beginning the day on which the security is purchased by the buyer; and

(II) ending on the date of disposition ; and

(B) after the period described in Subsection (1)(c)(ii)(A), 12% per year on the amount lost at disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4)(a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that the nonseller or nonpurchaser did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(b) There is contribution as in cases of contract among the several persons so liable.

(5) A tender specified in this section may be made at any time before entry of judgment.

(6) A cause of action under this section survives the death of a person who might have been a plaintiff or defendant.

(7)(a) An action may not be maintained to enforce liability under this section unless brought

before the earlier of:

- (i) the expiration of five years after the act or transaction constituting the violation; or
- (ii) the expiration of two years after the discovery by the plaintiff of the facts constituting the violation.

(b) A person may not sue under this section if:

- (i) the buyer or seller received a written offer, before suit and at a time when the buyer or seller owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and the buyer or seller failed to accept the offer within 30 days of its receipt; or
- (ii) the buyer or seller received such an offer before suit and at a time when the buyer or seller did not own the security, unless the buyer or seller rejected the offer in writing within 30 days of its receipt.

(8) A person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order issued under this chapter, or who has acquired a purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may not base a suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order issued under this chapter is void.

(10)(a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity.

(b) This chapter does not create a cause of action not specified in this section or Subsection 61-1-4(6).

CREDIT(S)

Laws 1963, c. 145, § 1; Laws 1979, c. 218, § 7; Laws 1983, c. 284, § 32; Laws 1986, c. 107, § 2; Laws 1990, c. 133, § 15; Laws 1991, c. 161, § 14; Laws 1998, c. 13, § 62, eff. May 4, 1998; Laws 2006, 3rd Sp.Sess., c. 4, § 3, eff. May 26, 2006; Laws 2007, c. 292, § 3, eff. April 30, 2007; Laws 2009, c. 351, § 22, eff. May 12, 2009.

HISTORICAL AND STATUTORY NOTES