



moves this Court for an Order remanding this matter back to the state administrative agency, on grounds and for the reasons that removal of this matter is not permitted under 28 U.S.C.A. § 1441 and is procedurally defective, to wit: Life Partners has failed to satisfy the elements of removal under the statute, and the federal district court lacks original jurisdiction. The Division also asks for just costs and any actual expenses including attorney fees, pursuant to 28 U.S.C.A. § 1447(c). The Division's motion is supported by the accompanying memorandum of points and authorities.

Respectfully submitted this December 14, 2006.

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/s/ Jeffrey Buckner  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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DIVISION OF SECURITIES, UTAH	:	<b>MEMORANDUM OF POINTS AND</b>
DEPARTMENT OF COMMERCE,	:	<b>AUTHORITIES SUPPORTING</b>
	:	<b>MOTION TO REMAND</b>
Plaintiff,	:	
	:	
v.	:	Civil No.: 2:06cv00968 PGC
	:	
LIFE PARTNERS, INC., a Texas	:	
Corporation, LIFE PARTNERS	:	
HOLDINGS, INC., a Texas Corporation; and	:	
MARK BRUCE SUTHERLAND, a Nevada	:	
resident,	:	
	:	
Defendants.	:	Judge: Paul G. Cassell
	:	

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**STATEMENT OF RELEVANT FACTS**

The Utah Division of Securities (Division) commenced agency action – an administrative proceeding authorized under Utah’s Administrative Procedure Act – against Respondents Life

Partners, Inc., Life Partners Holdings, Inc. (collectively Life Partners), and Mark Bruce Sutherland (Sutherland), on October 20, 2006, by issuing an order to show cause. The Division's administrative Order to Show Cause alleged that, in October 2005, Sutherland came to Utah from Las Vegas for Texas-based Life Partners, to educate Utah mortgage agents about investment options in viatical settlement interests (viaticals).<sup>1</sup>

Sutherland ran a booth for Life Partners at a mortgage seminar in Salt Lake County. One Utah resident who visited the booth not only decided to purchase viaticals, but his father's company (for which he worked) also later entered into an agreement with Life Partners to sell viaticals to others. Over time, five investors solicited by this Utah company sent money to a company called Sterling Trust to purchase viaticals from Life Partners. The solicitations of viaticals by the Utah company came to the attention of the Division, which conducted an investigation. As a result of the investigation, the local promoter voluntarily ceased selling

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<sup>1</sup>“A viatical settlement is a transaction in which a terminally ill insured sells the benefits of his life insurance policy to a third party in return for a lump-sum cash payment equal to a percentage of the policy's face value. The purchaser of the viatical settlement realizes a profit if, when the insured dies, the policy benefits paid are greater than the purchase price, adjusted for time value. Thus, in purchasing a viatical settlement, it is of paramount importance that an accurate determination be made of the insured's expected date of death. If the insured lives longer than expected, the purchaser of the policy will realize a reduced return, or may lose money on the investment. Viatical settlement providers, like [Mutual Benefits Corp.], purchase policies from individual insureds and typically sell fractionalized interests in these policies to investors.” Securities & Exchange Commission v. Mutual Benefits Corp., 408 F.3d 737, 738 (11th Cir. 2005); see also Life Partners v. Miller, 420 F. Supp. 452, 457 (E. D. Va. 2006) (defining viaticals under Virginia Viatical Settlement Act).

viaticals in Utah, and sought refunds from Life Partners. Sterling Trust returned investments from three of the investors whose money had not yet been used to purchase viaticals.

The Division's administrative action against Life Partners and Sutherland followed. The Division's Order to Show Cause alleged that Life Partners violated Utah law by selling unregistered securities through an unlicensed agent in Utah and failed to make the required disclosures. Viaticals are specifically designated as securities under Utah law. Utah Code Ann. § 61-1-13(1)(x)(i)(R). The Division's Notice of Agency Action accompanying the Order to Show Cause notified Life Partners and Sutherland of an initial pre-hearing conference scheduled before the presiding officer of the Division on November 27, 2006.

On November 20, 2006, Life Partners filed a Notice of Removal, asserting that original jurisdiction over this state administrative proceeding lay in federal court, based on diversity jurisdiction. In the Notice of Removal filed in federal court, Life Partners tried to create the appearance that the agency action qualified for removal by creating a new caption for the agency action, calling itself "defendant" and the Division "plaintiff."<sup>2</sup> Also, in quoting the removal statute, Life Partners attempted to satisfy another element of removal jurisdiction by misquoting the language of 28 U.S.C. § 1441(a), inserting the words, in brackets, "state action" in place of "civil action," trying to make it appear that the removal statute authorized removal of any state action, not just civil actions. Sutherland joined the removal.

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<sup>2</sup>The caption of the agency action reads: "In the matter of Life Partners, Inc., Life Partners Holdings, Inc., and Mark Bruce Sutherland, Respondents."

On November 21, 2006, the Division hand-delivered a letter to counsel for Life Partners, explaining that this administrative proceeding was removed improperly because: (a) the administrative proceeding was not a civil action; (b) the agency action was not pending in state court; and (c) there was no diversity jurisdiction. The Division asked counsel to withdraw the Notice of Removal. Life Partners responded to the Division's request by filing an Amended Notice of Removal on November 22, 2006, adding a claim of federal question jurisdiction. Life Partners then assumed the role of moving party in a possible remand by filing a "Motion for the Court to Consider Briefs and Arguments on Removability," and submitted a proposed scheduling order for signature by the Court.

Life Partners filed its motion and proposed scheduling order without any prior consultation with the Division, and sought to deprive the Division of two substantive rights. First, Life Partners sought to deny the Division its right to move for remand and file a reply in support, by characterizing the Division's response to removal as an opposition.<sup>3</sup> Second, by taking on the role of moving party and characterizing the Division's response as an opposition, Life Partners invited the court to give the Division less time to challenge removal than authorized by statute. 28 U.S.C. § 1447(c) grants the Division thirty days after removal to file a motion for remand. The briefing schedule entered by the Court on Life Partner's motion

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<sup>3</sup>Because the Division is authorized, by statute, to move for remand, 28 U.S.C. § 1447(c), the Division is subsequently entitled to file a reply to Life Partner's response, not merely file an opposition memorandum to a Notice of Removal.

shortened this time period to 25 days.

On November 28, 2006, Life Partners filed an answer in federal court to the Division's administrative Order to Show Cause, and then moved for dismissal of the Division's agency action.

If the Division prevails in its motion to remand the case, the other filings by Life Partners in this court will be moot. Therefore, the Division will not be responding to Life Partners' Motion to Dismiss until after the jurisdictional question is resolved.

## **LAW AND ARGUMENT**

### **I Federal District Court Lacks Removal Jurisdiction.**

In order for an action to be removable to federal court under 28 U.S.C.A. § 1441(a), four conditions must be satisfied: (a) the action must be a "civil action"; (b) the civil action must have been brought in a "State court"; (c) the removing party must be a defendant in that civil action in state court; and (d) the federal district courts must have original jurisdiction over the subject matter of the civil action.

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

28 U.S.C.A. § 1441(a).

Federal removal statutes are strictly construed, and all doubts about removability are

resolved against removal. Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 108-09, 61 S. Ct. 868, 872, 85 L.Ed. 1214 (1941); Fajen v. Foundation Reserve Ins. Co., Inc., 683 F.2d 331, 333 (10<sup>th</sup> Cir. 1982). If removal was not properly taken from a civil action pending in a state court, there is no need to reach the issue of whether the federal court also has original jurisdiction. Oregon Bureau of Labor and Indus., ex rel. Richardson v. U. S. West Communications, 288 F.3d 414, 417 (9<sup>th</sup> Cir. 2002). The burden of establishing removal jurisdiction rests with the party seeking removal. Fajen, 683 F.2d at 333; see also Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5<sup>th</sup> Cir. 1995); California Packing Corp. v. I.L.W.U. Local 142, 253 F.Supp. 597, 598 (D. Haw. 1966). And “[t]he propriety of removal . . . depends on whether the case originally could have been filed in federal court.” City of Chicago v. Int’l College of Surgeons, 522 U. S. 156, 163, 118 S. Ct. 523, 529, 139 L.Ed.2d 525 (1997)(citations omitted).

In this case, none of the preconditions for removal is satisfied. The administrative agency action by the Division is not a “civil action.” The Division is not a “state court.” Life Partners is not a “defendant” in a civil action in state court, but is a respondent to an agency action. Finally, the federal district court does not have original jurisdiction over the subject matter of the agency action. Because Life Partners failed to establish any of these elements – much less all four of them – as a basis for removal jurisdiction, the agency action should be remanded back to the Utah Division of Securities.

#### **Agency Action is not a Civil Action**

Under Utah law, the term “civil action” is used to describe “all actions, suits, and

proceedings of a civil nature, whether cognizable at law or in equity” filed in “the courts of this state.” Utah R. Civ. P. 1(a)(emphasis added); Mills v. Gray, 50 Utah 224, 167 P. 358, 360 (Utah 1917)(formal distinctions between actions at law and suits in equity are abolished, and court may administer relief according to nature of cause of action set out); see also Utah R. Civ. P. 2 (one form of action under Utah Rules of Civil Procedure known as “civil action”). These definitions are similar to those in the federal rules of civil procedures. See FRCP 1, 2, and 3.

In contrast to a civil action, “agency action” is a statutory proceeding under Utah’s Administrative Procedure Act (UAPA), that describes ministerial or administrative action by the executive to “determine[] the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and judicial review of the action. Utah Code Ann. § 63-46b-1(2). In Utah, agency action is also known as an “adjudicative proceeding.” Utah Code Ann. § 63-46b-2(1)(a).

A civil action is commenced by filing a complaint with a court or by service of a summons together with a copy of the complaint. Utah R. Civ. P. 3(a). Agency action, by way of contrast, is commenced by an administrative agency’s notice of agency action or a request for agency action filed with an agency. Utah Code Ann. § 63-46b-3(1). The Utah Rules of Civil Procedure govern civil actions in state court. They do not apply to proceedings before an administrative agency seeking to regulate activities burdened with the public interest. Entre Nous Club v. Toronto, 4 Utah 2d 98, 287 P.2d 670, 672 (Utah 1955); see also Utah Admin. Code

R151-46b-5(3)(Utah Rules of Civil Procedure may be looked to as persuasive, but are not controlling authority in administrative proceedings before Utah Department of Commerce).

In this case, the Division commenced agency action under UAPA. Agency action is not the same as a civil action. No civil action was ever commenced by the Division against Life Partners.

### **The Executive Branch is not a State Court**

The state courts of Utah are created by the Constitution. UTAH CONST. art. VIII §§ 1, 5. The specific powers and duties of the state courts are further conferred by statute. Utah Code Ann. §§ 78-1-1(1), 78-3-4(1).

In contrast, agencies, as creatures of statute, have only those powers expressly or impliedly granted by statute, and have limited subject matter jurisdiction. SMP, Inc. v. Kirkham, 843 P.2d 531, 533 (Utah App. 1992); see also Sun Buick, Inc. v. SSAG Cars USA, Inc., 26 F.3d 1259, 1265 (3<sup>rd</sup> Cir. 1994)(“administrative agency would not be considered a court if it did not have the ‘power to accord relief equivalent to that available from a court.’”).

Under UAPA, an agency is not a court. Utah Code Ann. § 63-46b-2(1)(b)(“courts” specifically excluded from definition of “agency”); see also Bevens v. Industrial Comm’n of Utah, 790 P.2d 573, 576-77 (Utah App. 1990)(“Industrial Commission remains a statutorily-created agency, not a court of equity. As such, the Industrial Commission has only those powers expressly or impliedly granted to it by the legislature.”)(citations omitted); see also Industrial Comm’n of Utah v. Evans, 52 Utah 394, 174 P. 825, 829 (Utah 1917)(commission’s powers are

special and limited, ministerial and administrative as “contradistinguished from judicial”).

In this case, the Division is not a state court. It is not part of the state court system. It has no power to afford relief similar to a state court. The Division is simply an agency within the executive branch. Utah Code Ann. §§ 13-1-2(2); 61-1-18(1).

### **Life Partners Is Not A Defendant**

Parties to a civil action are typically denominated as “plaintiff” and “defendant.” Utah R. Civ. P. 17. Parties to agency action, by way of contrast, can mean either “the agency or other person commencing an adjudicative proceeding,” Utah Code Ann. § 63-46b-2(1)(f); but the “person against whom an adjudicative proceeding is initiated, whether by an agency or any other person” is called a “respondent,” not a defendant. Utah Code Ann. § 63-46b-2(1)(i).

### **Other Federal Courts Have Rejected Removal Of State Agency Actions**

Although no Tenth Circuit case on point was found, other federal courts that have addressed whether state agency actions can be removed have rejected the argument. “The plain language of 28 U.S.C.A. § 1441(a) limits removal to cases before a ‘state court.’” Oregon Bureau of Labor, 288 F.3d at 417. “Generally the word ‘court’ in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers.” Sun Buick, 26 F.3d at 1264; see also id., at 1266 (Pennsylvania Board of Vehicles not a court because “it is not described in the portions of the Pennsylvania Constitution related to its court system . . . or Pennsylvania statutes relating to the court system.”)(internal citations omitted); Oregon Bureau of Labor, 288 F.3d at 417 (“State court” is not an ambiguous term, the

Ninth Circuit said, and the plain “language of § 1441(a) ‘should be dispositive.’ Thus, our analysis of the statutory language need go no further; 28 U.S.C. § 1441(a) authorizes removal only from a ‘state court,’ which necessarily implies that the entity in question must be a *court.*”(italics in the original); California Packing Corp. v. I.L.W.U. Local 142, 253 F.Supp. 597, 598 (D. Haw. 1966)(“[t]he entire series of code sections dealing with removal refer only to removal from state courts, not to removal from administrative bodies.”).

“Federal district courts are courts of limited, original jurisdiction with no power to sit as appellate tribunals over state court or administrative proceedings. Federal courts cannot directly supervise and supplant state administrative action by affirming, reversing, or modifying administrative decisions” Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380, 387 (4<sup>th</sup> Cir. 2000)(arguing under 20 U.S.C. § 1415, not 28 U.S.C. § 1441); see also County of Nassau v. Cost of Living Council, 499 F.2d 1340, 1343 (Temp. Emer.Ct. Ap. 1974)(both NY state statute “and 28 U.S.C. § 1441(a) contemplate removal from other court proceedings to a federal court; they do not apply to interruption of administrative proceedings . . .”); accord Dep’t of Employment Security of the Indus. Comm’n of Utah v. Ninth Circuit Court, 718 P.2d 782, 784 (Utah 1986) (“Courts generally lack jurisdiction to interfere with or control administrative agencies in exercising or performing duties of an administrative character which are within the scope of the authority granted to them by the legislature.”). Indeed, “[i]mportant federalism concerns weigh against expanding removal of state court cases.” Coastal States Mktg., Inc. v. New England Petroleum Corp., 604 F.2d 179, 183 (2<sup>nd</sup> Cir. 1979).

## **Summary**

This court lacks removal jurisdiction because none of the preconditions to removal is met: agency action is not a “civil action;” the Division is not a “state court;” and Life Partners is not a “defendant” in a civil action in state court. Because the court lacks removal jurisdiction, the agency action should be remanded back to the Division.

## **II. The Federal District Court Lacks Original Jurisdiction**

In order to be removable, district court must also have original jurisdiction over the subject matter, either under federal question or diversity jurisdiction. 28 U.S.C. §§ 1331, 1332, 1441(a); see also Caterpillar Inc. v. Williams, 482 U. S. 386, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987)(“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question is required.”).

### **No Diversity Jurisdiction**

It is well-settled law that the State is not a citizen for purpose of diversity jurisdiction. Arkansas v. Kansas & Tex. Coal. Co., 183 U. S. 185, 188, 22 S. Ct. 47, 48, 46 L.Ed 147 (1901); City Bank Farmers’ Trust Co. v. Schander, 291 U. S. 24, 29, 54 S. Ct. 259, 261, 78 L.Ed 628 (1934); Illinois v. Kerr-McGee Chemical Corp., 672 F.2d 571, 575 (7<sup>th</sup> Cir. 1982), cert. denied 459 U. S. 1049, 103 S. Ct. 469, 74 L.Ed.2d 618.

Because the State is not a citizen for purpose of diversity jurisdiction, Life Partners’ assertion of diversity jurisdiction is improper.

### **No Federal Question**

“The district courts have original jurisdiction under the federal question statute over cases ‘arising under the Constitution, laws, or treaties of the United States.’” City of Chicago, 522 U. S. at 163, 118 S. Ct. at 529. Federal question jurisdiction is determined, under the well-pleaded complaint rule, by examining the allegations as they appear on the face of the complaint filed in state court, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U. S. 1, 9-10, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983); “unaided by anything alleged in anticipation or avoidance of defense,” Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S. Ct. 724, 58 L.Ed. 1218 (1914); because it is “long-settled law that a cause of action arises under federal law only when plaintiff’s well-pleaded complaint raise issues of federal law.” Metropolitan Life Ins. Co. v. Taylor, 481 U. S. 58, 63, 107 S. Ct. 1542, 1546, 95 L.Ed.2d 55 (1987); see also Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908)(well-pleaded complaint rule articulated); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 398-99, 107 S.Ct. 2425, 2430, 2433 96 L.Ed.2d 318 (1987)(explaining “well-pleaded” complaint rule); accord Jefferson County, Alabama v. Acker, 527 U. S. 423, 430, 119 S. Ct. 2069, 2074-75, 114 L.Ed.2d 408 (1999); Oklahoma Tax Comm’n v. Graham, 489 U. S. 838, 840-41, 109 S. Ct. 1519, 1521, 103 L.Ed.2d 924 (1989).

To find jurisdiction under 28 U.S.C. § 1331, two conditions must be satisfied. First, a question of federal law must appear on the face of plaintiff’s well-pleaded complaint. Rice v.

Office of Servicemembers Group Life Ins., 260 F.3d 1240, 1245 (10th Cir. 2001).<sup>4</sup> Second, plaintiff's cause of action must either be (1) created by federal law, or (2) if it is a state-created cause of action, "its resolution must necessarily turn on a substantial question of federal law." Id. (citing Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L.Ed.2d 650 (1986)); see also Franchise Tax Bd., 463 U. S. at 10, 103 S. Ct. at 2847 ("a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"). "A court examining whether a case turns on a [substantial ] question of federal law [must] focus on whether Congress evidenced an intent to provide a federal forum." Morris v. City of Hobart, 39 F.3d 1105, 1111 (10<sup>th</sup> Cir. 1994)(citation omitted).

In this case, no federal question appears on the face of the Division's Order to Show Cause. The authority for the agency action rests solely on state law. Its resolution turns on application of state law. It does not turn on a substantial question of federal law. Neither state nor the federal district courts handle administrative law matters such as licensing broker-dealers or investment advisers, revoking securities licenses, registering securities, or regulating notice filings. The Division has no authority to commence agency action in federal court and ask respondents to show cause to the federal court why respondents should not be found to have violated Utah law, why they should not be ordered to cease and desist, or why an administrative

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<sup>4</sup>Although the Division is not a plaintiff and the Order to Show Cause is not a complaint, Rice is analogous, saying that to keep this case in federal court, this court would need to find that a federal question was stated on the face of the Division's Order to Show Cause.

fine should not be imposed.

Life Partners cannot create a federal question where one does not exist by alleging defenses that arise under federal law. To the extent that the Respondents in this, or any, administrative action brought by the Division, want to assert federal or constitutional defenses, those defenses should be asserted in the administrative agency action.

### **Summary**

Because no federal question or diversity jurisdiction exists, this case could not have been filed originally by the Division in federal court. As such, the district court does not have original jurisdiction, and removal by Life Partners was improper.

### **III Attorneys Fees Are Appropriate in this Case**

The remand statute expressly permits just costs and any actual expenses, including attorneys fees, for improper removal. 28 U.S.C. 1447(c). “Factors that courts generally consider in deciding whether or not to award attorney’s fees and costs to a plaintiff include: [1] whether the defendant’s argument for removal was ‘at least colorable’ or had any merit; [2] the complexity of the subject matter and subtleties surrounding the reach of the federal question(s) potentially raised in a complaint; and [3] whether ‘the nonremovability of the action is obvious.’” Pressman v. Meridian Mortgage Co., Inc., 334 F.Supp.2d 1236, 1241 (D. Haw. 2004)(internal citations omitted).

For the reasons stated above, removal was clearly improper. Life Partners does not satisfy any of the elements of removal jurisdiction. Life Partners does not even address them in

its filings, despite having the burden of demonstrating removal jurisdiction. In addition, Life Partners removed the agency action for an improper purpose: to interrupt the administrative proceeding. The removal statute does not permit interrupting an administrative proceeding. County of Nassau, 499 F.2d at 1343. “[T]o permit removal purely for the purpose of dismissing the action so removed, is an exercise in futility.” California Packing, 253 F. Supp. at 599.

Finally, counsel for Life Partners has been acting in bad faith. The Division asked Life Partners to withdraw its notice of removal, explaining that the case did not qualify for removal. Life Partners refused. Instead, Life Partners amended its Notice of Removal to add yet another invalid claim. Moreover, after filing the Notice of Removal, Life Partners attempted to disadvantage the Division’s right to have thirty days to seek a remand, and to prevent a reply. Because the Division has been unduly burdened with unnecessary expense in seeking remand of a removal that had no legal basis to begin with, the Division should be awarded attorneys fees. While bad faith is not required in order to be awarded attorneys fees, the existence of bad faith provides additional compelling justification for such an award.

### CONCLUSION

For all of these reasons, the agency action should be remanded to the Division, and Life Partners should be ordered to pay reasonable attorneys fees to the Division.

Respectfully submitted this December 14, 2006.

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UTAH ATTORNEY GENERAL

/s/ Jeffrey Buckner  
Jeffrey Buckner  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I, Rick Norton, hereby certify that on the 14<sup>th</sup> day of November, 2006, I electronically filed the foregoing **Motion to Remand and Memorandum of Points and Authorities in Support of Motion to Remand** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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Dated at Salt Lake City, Utah this \_\_\_ day of December 2006.

/s/ Rick Norton