

**Utah Securities Commission  
May 30<sup>th</sup> 2013  
Room 451 – 9:00 AM  
Agenda**

	<b>Welcome &amp; Call to Order</b>	Erik Christiansen
	<b>Oath of Office- Mr. David A. Russon and Mr. Gary Cornia</b>	Keith Woodwell
<b>Tab 1</b>	<b>Approval of March 28, 2013 Minutes</b>	Erik Christiansen
<b>Tab 2</b>	<b>Oral Argument for the Division's Motion for Default- Jared Brent Muir</b>	Jennie Jonsson
<b>Tab 3</b>	<b>Joshua Dyches &amp; Dymond Capital -Recommended Order on Default Conference call</b>	Ann Skaggs
	<b><u>Director's Report</u></b>	Keith Woodwell
	Update on Budget	
	Schedule for future Commission Meetings	
	<b><u>Section Reports</u></b>	
<b>Tab 4</b>	a. <b><u>Licensing &amp; Compliance Section</u></b>	Ken Barton
	b. <b><u>Corporate Finance Section</u></b>	Benjamin Johnson
	c. <b><u>Enforcement Section</u></b>	Dave Hermansen
	<b><u>Investor Education Update</u></b>	Karen McMullin
	<b><u>Education and Training Fund Report</u></b>	Benjamin Johnson
	<b><u>Consideration and Approval of Proposed Orders</u></b>	
<b>Tab 5</b>	<b>Conestoga Settlement Trust, Conestoga Settlement Services, LLC Michael C. McDermott, Walter C. Young, Creative Wealth Designs, LLC, Dayspring Financial, LLC, Michael John Woods</b>	Ken Barton
<b>Tab 6</b>	<b>Markham L. Caldwell</b>	Ken Barton
<b>Tab 7</b>	<b>Scott Steinmetz</b>	Ken Barton
<b>Tab 8</b>	<b>Jeffrey Kahn</b>	Ken Barton
<b>Tab 9</b>	<b>Profitable Solution, Executive Capital Funding, LLC, PS1 Group, LLC, Timothy V. Provost, LH Solutions</b>	Dave Hermansen
<b>Tab 10</b>	<b>Daniel G. Maynard</b>	Dave Hermansen
<b>Tab 11</b>	<b>Intelicloud Holdings Inc., Intelicloud Holdings Inc., Jeffrey Friederichs</b>	Ann Skaggs
<b>Tab 12</b>	<b>Greenfolders/ Michael Shaun Kirby</b>	Dave Hermansen



In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this meeting should notify Maria Skedros, ADA Coordinator, Division of Securities, P O Box 146760, 160 E 300 S, Salt Lake City, Utah 84114-6711, Phone (801) 530-6436, at least three working days prior to the meeting.

# Utah Securities Commission

## Meeting Minutes

### March 28, 2013

#### **Division of Securities Staff Present**

Keith Woodwell, Division Director  
Ken Barton, Licensing and Compliance Director  
Dave Hermansen, Enforcement Director  
Benjamin Johnson, Corporate Finance Director  
Dee Johnson, Investor Education Director  
Karen McMullin, Investor Education Coordinator  
Maria Skedros, Board Secretary  
Chip Lyons, Securities Analyst  
Ann Skaggs, Securities Analyst  
Richard Jaramillo, Securities Examiner  
Brandon Henrie, Securities Examiner  
Russ Bulloch, Securities Examiner  
Kristi Wilkinson, Securities Investigator  
Heidie George, Securities Examiner  
Adam Sweet, Securities Investigator  
Nadene Adams, Administrative Assistant

#### **Other State of Utah Employees:**

Jennie Johnson, Administrative Law Judge, Department of Commerce  
Julie Price, Administrative Secretary, Department of Commerce  
Ron Ockey, Assistant Attorney General

#### **Commissioners Present**

Laura Polacheck, AARP Utah  
Tim Bangerter, Bangerter Financial Group  
Erik Christiansen, Parsons Behle & Latimer  
Brent Baker, Clyde Snow & Sessions  
Jane Cameron, Zions Bank

#### **Commissioners Absent**

None

#### **Public Present:**

There was no one from the public present.

**Minutes:** At 9:07 am, the meeting was called to order and Commissioner Christiansen made the motion to approve the minutes from the January 24<sup>th</sup> 2013 Commission meeting. Tim Bangerter seconded the motion; and the motion was approved unanimously.

**Director's Report:** Director Woodwell reported that The Division of Securities Base Budget for the fiscal year 2014 was approved by the Legislature with minimal changes from fiscal year 2013. There is a 1% cost of living adjustment, but no other changes. The base budget for fiscal year 2014 will be approximately \$1,630,000.

The Securities Investor Education, Training and Enforcement Fund had a balance of \$302,000 as of March 12, 2013. The trend continues to be slightly negative as fine payments outpace expenditures, but the balance is still healthy.

**Division staffing:** We have a new administrative secretary: Maria Skedros, who previously worked for DOPL, as a Kindergarten teacher, and owned her own business. We also have a new Securities Examiner in the Licensing and Compliance Section: Russ Bulloch, who previously worked in the securities industry with Edward Jones and also a defense contractor.

**Meeting Schedules:** We may have a full day hearing scheduled in May with the Conestoga case, which is likely to settle. There is also a possible two-day hearing which is tentatively scheduled for July 25<sup>th</sup> -26<sup>th</sup>; the timing is open for discussion, due to the State holiday.

**Erik Christiansen and Brent Baker** have a conflict in May with the trial date. They will not be available to meet on May 23<sup>rd</sup>. They are able to move the date back one week and that would work with the Commission.

**Jennie Johnson:** the Administrative Law Judge for Securities cases suggested that the hearing scheduled for July should be moved to August, due to the fact that the Respondent is requesting to move the date and also seeking five days for the trial. Director Woodwell suggested that the Division will discuss date options with the Commission for possible trial dates in August. An email will be sent out to the Commission for possible trial dates in August.

**Director Keith Woodwell:** Would the Commission like to consider moving our start time to 9:00 a.m. with or without a hearing scheduled? All Commissioners agreed that this is a good idea, and future Commission Meetings will be scheduled to begin at 9:00 a.m.

Commissioners Jane Cameron, Erik Christiansen and Laura Polacheck's terms are expiring on May 12<sup>th</sup>, 2013. Erik Christiansen requested that his name be submitted to the Governor's Office for renewal. Laura Polacheck and Jane Cameron are not seeking re-nomination to the Commission due to their previous service with the Advisory Board and, other commitments. Director Woodwell also pointed out that Commissioners are allowed by statute to continue to serve on the Commission beyond the expiration of their term, until replacements have been appointed to their positions.

**Investor Education Update:** Karen McMullin reported that the Division attended 13 Investor Education events in February and March. Within the next nine weeks there will be 12 additional investor education events. We have new partners that are booking events in the Fall of 2013. There has been a great interest in Crowd Funding. The Division is receiving a lot of positive feedback on the new expo display. The iPad kiosk is allowing for broker checks at these events. The Division is formulating a survey on Survey Monkey to collect feedback and additional data

from individuals attending investor education events. The Division is focusing its education efforts on women and their lack of exposure to how to invest safely.

**Licensing & Compliance Section Report:** Ken Barton reported that in February and March 2013, Licensing and Compliance opened 14 new audits. There are six new Investment Adviser Firm Audits, five For-Cause Audits, three routine audits, and the section is following up on several complaints. There are seven administrative actions in progress, with three actions that have settled pending the Commission's approval today. There are four actions in settlement negotiations. There are three cases that have potential criminal violations. The annual amendment process for all state covered investment advisers will begin in earnest starting April 1<sup>st</sup>. Licensing and Compliance will be dedicating resources for the review of the amendments and looking at any material changes made that are counter to state and federal regulations.

**Corporate Finance Section Report:** Benjamin Johnson reported on a proposed rule change, which is essentially only a name change. "Standard & Poor's Corporation Records" is changing to "S&P Capital IQ Standard Corporation Descriptions". **Tim Bangerter** made the motion to approve the proposed rule amendment and **Laura Polacheck** seconded the motion. The motion was passed unanimously.

**Enforcement Section Report:** Dave Hermansen reported that next quarter, two of the Division's investigators will receive the John Reed Training, which is a highly sought after interview and interrogation training program. Enforcement currently has 12 unassigned cases. There are 34 cases which are active and 25 cases that have been referred to a criminal prosecutor. The section has had two recent criminal filings:

- 1) David Butters and Mark LaCount were charged with securities fraud. They claimed to develop a thumb drive device to be taken to the shopping mall where an individual could download 20-30 movies. Mr. Butters and Mr. LaCount collected approximately \$70,000 of investor funds, which were misused by the defendants. The Defendants made various misrepresentations and omissions in connection with the sale of security.
- 2) Salt Lake County Maverick Mining v Mark Bowman and Manly Logan: The Defendants collected \$75,000 in investment funds. Investors were told they would be paid back within six months and would receive stock. One investor was promised a 0.5% interest in the mines owned by Mr. Bowman. The respondents misrepresented material facts and made material omissions to the investors. Mr. Bowman had a Chapter 7 bankruptcy that was not disclosed, nine judgments against him and was previously convicted of securities fraud. Investors were told their investment would triple, and the stock price would reach \$50 per share. The Defendants were charged with three 2<sup>nd</sup> degree counts of securities fraud and two counts of theft.

**Education and Training Fund Expenditure Report:** Benjamin Johnson reported that no single expense stands out. **Director Woodwell** mentioned that expenses have gone up due to the use of expert witnesses in criminal cases, which were \$13,600.00 last quarter.

**Director Woodwell** reported that there is a grant request of \$2,500 from the Mountain West Capital Network for the Mountain West Capital Network Deal Flow Event which will be held on May 16, 2013. As a sponsor, the Division will be included in the Deal Flow Report with a full page ad and sponsor recognition at the event. The benefit to the Division is not substantial; however, Mountain West Capital Network's mission is to educate the public on investment opportunities within Utah, which is also the Division's goal.

Commissioner **Erik Christiansen** commented that he is familiar with Mountain West Capital Network and thinks it is a good and valuable organization for the public, which educates in an area where not a lot of help for people is available.

Commissioner **Jane Cameron** recused herself from the vote since Zion's Bank is a sponsor of this event.

Commissioner **Brent Baker** made the motion and **Tim Bangerter** seconded the motion to approve the grant funding. The motion passed unanimously, with Commissioner Cameron abstaining.

Education and Training Fund continued: **Benjamin Johnson** referred to Tab 3, the Request for Commission Authorization for 3/28/13, with expense request of \$37,887.82, which does not include the \$2,500.00 for Mountain West Capital. Commissioner **Brent Baker** made a motion to approve the Division's expense request and Commissioner **Jane Cameron** second the motion. The motion passed unanimously.

#### **Consideration and Approval of Proposed Orders:**

**Bryce Lee Karl dba Karl Hospitality, Inc. (Tab 5)** Dave Hermansen reported that Bryce Lee Karl, also operating as Karl Hospitality, has never been a broker-dealer agent, issuer agent or investment advisor in Utah. From October to March 2009, Mr. Karl offered and sold securities to at least two investors, in or from Utah, and collected a total of \$50,000.00. Mr. Karl made material misstatements and omissions in connection with the offer and sale of a security to the investors. The investors lost all of their investment funds, totaling \$50,000. The Division is seeking a cease and desist order and a securities bar against Mr. Karl.

Mr. Karl agrees to pay a fine of \$52,500.00 to the Division. The fine will be offset by restitution paid to the investor. Mr. Karl has already paid \$50,000 in restitution, leaving a \$2,500.00 fine payable to the Division. This amount shall be paid within thirty days of the entry of the Order. Commissioner **Laura Polacheck** made a motion to approve the proposed order and Commissioner **Tim Bangerter** seconded the motion. The motion passed unanimously.

#### **Breakthrough Technologies, Charles Ross Chatwin, and Mark Andrew Jackson: (Tab 6)**

Dave Hermansen reported that a prehearing conference was held on February 6, 2013, where the Respondents failed to appear. The Respondents have not filed a response to the Division's Order to Show Cause or made any effort to participate in the proceeding. Because of this, a Default Order against the Respondents has been recommended by the ALJ. The proposed default order requires

the Respondents to pay a fine of \$348,750.00 to the Division with any restitution paid to investors serving to offset the administrative fine on a dollar to dollar basis. Commissioner **Jane Cameron** made a motion to approve the order and Commissioner **Tim Bangerter** seconded the motion. The motion passed unanimously.

**Trump Alliance, LLC, Stephen Ronald Trump: (Tab 7)** Dave Hermansen reported that an adjudicative proceeding was initiated pursuant to a September 30, 2010 Notice of Agency Action. A response to the accompanying Order to Show Cause was due within 30 days of September 30, 2010. The Respondents have not filed a response to the Division's Order to Show Cause or made any effort to participate in the proceedings. The proposed default order requires Respondents to pay a fine of \$29,687.50 to the Division. Commissioner **Laura Polacheck** made a motion to approve the proposed order and Commissioner **Jane Cameron** seconded the motion. The motion passed unanimously.

**Rayda Roundy: (Tab 8)** Dave Hermansen reported that Ms. Rayda Roundy failed to participate in her scheduling hearing and failed to respond to correspondence which was delivered to her correct and active address. This resulted in the Division filing for a Recommended Order on Motion for Default. Ms. Roundy made false statements to more than one investor. Ms. Roundy failed to disclose material information that was necessary in order to make the representations made not misleading. She offered or sold securities in Utah without holding a valid license. The proposed order requires Ms. Roundy to pay a fine of \$81,250.00 to the Division with any restitution paid to the investors serving to offset the administrative fine on a dollar-to-dollar basis. Commissioner **Brent Baker** made a motion to approve the proposed order and Commissioner **Tim Bangerter** seconded the motion. The motion passed unanimously.

**James Lee Anderson: (Tab 9)** Dave Hermansen reported that Mr. James Lee Anderson failed to respond to the Scheduling Order entered on November 7, 2012. Having failed to respond to the Division's Agency Action, an Order of Default has been recommended by the ALJ. Mr. Anderson made false statements in connection with the offer and sale of securities to investors. The proposed order requires Mr. Anderson to pay a fine in the amount of \$187,405.00. Commissioner **Jane Cameron** made a motion to approve the proposed order and Commissioner **Laura Polacheck** seconded the motion. The motion passed unanimously.

**Craig Eldon Taylor d.b.a The Mall Hop & Smoothie Beach: (Tab 10)** Dave Hermansen reported that between April 2009 and December 2011, the Respondent offered and sold securities to an investor in or from Utah, and collected a total of \$5,800.00. The Respondent made material misstatements and omissions in connection with the offer and sale of securities to the investor. The Respondent agreed to a cease and desist order, and to not seek licensure or engage in the offer or sale of securities in the state of Utah. Under the proposed Stipulation and Consent Order the Respondent is to pay a fine of \$500 to the Division, which is to be paid within six months. Commissioner **Jane Cameron** asked why the fine was so small. **Dave Hermansen** responded that the Respondent had already paid back the investor in full and with the resources used for this case, it seemed reasonable to settle for this amount. Commissioner **Laura Polacheck** made a motion to approve the proposed order and Commissioner **Brent Baker** seconded the motion. The motion passed unanimously.

**Sonocine, Inc: (Tab 11)** Benjamin Johnson reported that Sonocine engaged in the offer and sale of securities within the state of Utah. The Respondent is not currently and has never been registered with the Utah Division of Corporations. The Respondent offered and sold securities to investors, and collected a total of \$9,000.00. The Respondent made material omissions in

connection with the offer and sale of securities to investors, by failing to disclose a bankruptcy filing by the CFO. Sonocine agrees to pay a fine of \$1,000.00 to the Division, which should be paid within 30 days. Commissioner **Jane Cameron** made a motion to approve the proposed order and Commissioner **Tim Bangerter** seconded the motion. The motion was approved unanimously.

**Morgan Asset Management/Morgan Keegan SCO (Tab 12):** Ken Barton reported that this case is a Multi-State investigation by the SEC, FINRA and state securities regulators. Utah joined in the Global Settlement.

Morgan Keegan is a Regional Broker-Dealer based out of Tennessee and operating primarily in the Southeast. At issue were investments in seven bond mutual funds operated by Morgan Keegan. The violations included: failure to disclose investment risks, exaggerating claims in sales materials, making misrepresentations in regulatory filings, and various supervisory systems failures. There are 30,000 investors that were impacted. Utah's share of the Global Settlement fine was commensurate with the relatively small impact to Utah investors. The fine allocation to the Division is \$6,043.00. Commissioner **Tim Bangerter** made a motion to approve the proposed order and Commissioner **Jane Cameron** seconded the motion. The motion passed unanimously.

Commissioner **Jane Cameron** asked what would happen if the Commission had rejected the proposed order against Morgan Keegan since it is part of a multi-state settlement. **Director Woodwell** responded that in a NASAA Global Settlement. If Utah elects not to participate, Utah would have to bring its own action against Morgan Keegan. Commissioner **Erik Christiansen** reconfirmed that the Commission can always reject any proposed order even if it is part of multi-state settlement.

**Respondent Taylor Capital Group/ Mark Stephan Taylor SCO (Tab 13):** Ken Barton reported is a Utah Licensed Investment Advisor which was first licensed in October 2012. Mark Taylor is the owner and designated official for Taylor Capital Group and licensed as an Investment Advisor Representative. Mountain West Debt Fund, LP was formed in March 2011. Taylor Capital Group is the General Partner for Mountain West Debt Fund. There is a Limited Partnership interest which was offered for sale by PPM, which began in May of 2011.

The Division's findings are that Taylor Capital transacted business for compensation in Utah as an Unlicensed Investment Advisor from May 2011 to October 2012. The Division also determined Taylor Capital received performance based fees which they were not entitled to collect.

In the proposed Stipulation and Consent Order, Respondents agree to disgorge \$18,830.51 in performance based compensation to investors and pay a \$1,170.00 fine to the Division. Commissioner **Erik Christiansen** recused himself from consideration of this case due to his law firm being involved and his personal knowledge of the details in this case. Commissioner **Brent Baker** made the motion to approve the proposed order and Commissioner **Jane Cameron** seconded the motion. The motion passed unanimously.

**Markham L Caldwell SCO (Tab 14):** Ken Barton reported is a licensed Insurance Agent in Utah. From 1997 to 2002 Caldwell was also a licensed securities agent with a broker-dealer firm.

In 2002, Caldwell's broker-dealer firm terminated him for engaging in private securities transactions without the firm's approval. In connection with these transactions, Mr. Caldwell was charged with a third degree felony for the sale of unregistered securities. The criminal charges were dismissed as part of a plea in abeyance agreement. Administratively, Mr. Caldwell was fined and suspended by the Division. In this action, the Division discovered Mr. Caldwell was an insurance agent with Horizon Financial Insurance Group, Inc. which is an entity owned and controlled by Dee Randall. Mr. Caldwell referred an insurance client and subsequently the client's beneficiaries to Mr. Randall for the purchase of private placement securities in the form of "Horizon Notes". Mr. Caldwell received compensation for the Horizon Note sale.

The Division concludes that Mr. Caldwell was not licensed to sell securities such as the Horizon notes, and Mr. Caldwell acted as an unlicensed agent. The Division recommends that Mr. Caldwell disgorges \$7,000.00 in commissions received and pay a \$5,000.00 fine to the Division.

Commissioner **Erick Christiansen** questioned why there was not a life time bar since Mr. Caldwell has a prior history with securities violation. **Commissioner Christiansen** asked whether Mr. Caldwell has cooperated in the Division's investigation.

Securities Analyst **Chip Lyons** answered that the Division's found that the Respondent only acted as an unlicensed agent, he did not actively participate in the solicitation efforts in the sale of the security. Mr. Caldwell's counsel has confirmed that he is out of the securities industry, and does not have any plans to return to the industry. If he were to ever file an application to be licensed he would probably be denied. Commissioner **Laura Polacheck** expressed her belief that the Respondent should be barred from industry.

**Director Keith Woodwell** added that this is the first of many Dee Randall Insurance Agency cases that the Commission is going to see. The Division has drawn a distinction between the agents. Some agents made the sales pitch themselves and other simply referred clients to Dee Randall. Mr. Caldwell fell into the second category, where he was just making the referral. He did not participate in actual fraud or misrepresentation. However, Mr. Caldwell should have known better, due to his background experience. Mr. Christiansen expressed his concern and asked why Mr. Caldwell wasn't asked to sign a document stating he would no longer engage in securities transactions. The Commission declined to take any action on the proposed order.

**Director Keith Woodwell** asked if the Commission felt that the amount of the proposed fine was acceptable and if it was just the issue of a permanent bar from the securities industry that the Division should renegotiate with the Respondent. The Commission agreed that the proposed fines were acceptable.

Commissioner **Erik Christiansen** made a motion to adjourn the meeting and Commissioner **Brent Baker** seconded the motion and it was unanimously approved by the Commission.

DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146760  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

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BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

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IN THE MATTER OF:

**JARED BRENT MUIR,**  
RESPONDENT

**NOTICE OF TIME AND PLACE FOR  
ORAL ARGUMENT ON PENDING  
MOTION FOR DEFAULT**

**CASE NO. SD-13-0008**

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**TO ALL PARTIES:**

Please take notice that oral argument on the pending motion for default in the above-captioned matter will take place before the Utah Securities Commission on May 30, 2013, beginning at 9:00 A.M. in Room 451 (4<sup>th</sup> Floor) of the Heber M. Wells Building, 160 East 300 South, Salt Lake City, UT.

One hour has been allotted for this proceeding. Each party will have 20 minutes to summarize and argue its position. Witnesses are not required, but may testify in person or telephonically as they see fit. Following the parties' presentations, the Commissioners will have 20 minutes to ask questions and seek clarifications.

This notice and the following filings will be provided to the Commissioners for review prior to their taking oral argument:

1. Division's motion for entry of default, filed April 23, 2013.
2. Respondent's opposition to motion for entry of default, filed May 3, 2013, including all exhibits.
3. Division's reply to Respondent's opposition to motion for entry of default, filed May 10, 2013.
4. Division's motion to strike affidavit of Jared Brent Muir, filed May 10, 2013.

Any filings that are made after the date of this order and that relate to the pending motion to strike will also be provided to the Commissioners prior to their taking oral argument.

DATED this 15<sup>th</sup> day of May, 2013.

UTAH DEPARTMENT OF COMMERCE

  
Jennie T. Jonsson, Presiding Officer

I hereby certify that on the 15<sup>th</sup> day of May, 2013, the undersigned served a true and correct copy of the foregoing document *by electronic mail only* to:

Jared Brent Muir  
muir\_j@hotmail.com

Jared Brent Muir  
c/o Jalyn Peterson  
jalyn@seblegal.com

Paul Amann, Assistant Attorney General  
pamann@utah.gov

Ann Skaggs, Division of Securities  
askaggs@utah.gov

Dave Hermansen, Division of Securities  
dhermans@utah.gov

A handwritten signature in cursive script, appearing to read "Jennie Johnson".

WADE FARRAWAY (5069)  
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JOHN E. SWALLOW (5802)  
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Telephone: (801) 366-0310  
Attorneys for Plaintiff/Petitioner

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

<b>IN THE MATTER OF:</b>  <b>JARED BRENT MUIR,</b>  <b>Respondent.</b>	<b>MOTION FOR ENTRY OF DEFAULT</b>  <b>Docket No. SD-13-0008</b>
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The State of Utah, Department of Commerce, Securities Division (Division), by and through its attorney Wade Farraway, respectfully requests that an order be entered finding the Respondent in default for failure to file an answer to the Division's Notice of Agency Action (Notice) and Order to Show Cause (OSC).

**I. BACKGROUND**

On January 3, 2013, the Division initiated a formal adjudicative proceeding against Respondent through the issuance of the OSC and Notice. Respondent was properly served with

the OSC and Notice, and he attended the initial hearing on March 18, 2013. However, he failed to file a written response with the Division, as required by Utah Code Ann. § 63G-4-204(1).

### RELEVANT FACTS

1. On January 3, 2013, the Division commenced a formal adjudicative proceeding by issuing the OSC and Notice.
2. On January 8, 2013, the Division mailed, by certified and regular mail, a copy of the OSC to Respondent, along with the Notice, advising Respondent that a default order may be entered if he failed to file a written response to the OSC within thirty (30) days of the mailing date of the Notice. The OSC and Notice scheduled an initial hearing for February 6, 2013 at 9:00 a.m.
3. On January 23, 2013, the Administrative Law Judge assigned to the case, Jennie Jonsson, issued a Notice of Continuation of Prehearing Conference, continuing the initial hearing until March 6, 2013 at 9:00 a.m.
4. As a result of a conflict with a co-respondent's schedule, the Administrative Law Judge issued a Second Notice of Continuation of Prehearing Conference on February 12, 2013, continuing the initial hearing until March 18, 2013 at 9:00 a.m.
5. On March 18, 2013, Respondent attended the initial hearing held at the Division's office, 160 East 300 South, Second Floor, Salt Lake City, Utah. At that meeting, Respondent

notified the Administrative Law Judge that he had not yet seen the OSC or Notice. The Division provided Respondent with a second copy of those documents.

6. Additionally, at the initial hearing, the Administrative Law Judge provided Respondent with an extension of time for filing his response to the OSC and Notice. As discussed at that meeting, and confirmed by the Scheduling Order issued March 18, 2013, Respondent had until April 17, 2013 to file his response with the Division.
7. During the initial hearing, the Administrative Law Judge informed Respondent that he could contact her with any questions regarding the elements or format of the filings, or he could contact the Division with any additional questions regarding the action or a potential settlement. As of the date of this motion, Respondent has not taken the opportunity to avail himself of this offer.
8. On April 17, 2013, at 10:22 p.m., Respondent sent an email to the Administrative Law Judge stating that he and his attorney have not had an opportunity to review and respond to the OSC and Notice. Additionally, Respondent pleads the Fifth Amendment.
9. On April 19, 2013, Respondent's attorney, Jalyn Peterson, sent an email to the Administrative Law Judge requesting additional time to file a response to the OSC and Notice or, in the alternative, an explanation of the options available to her client.

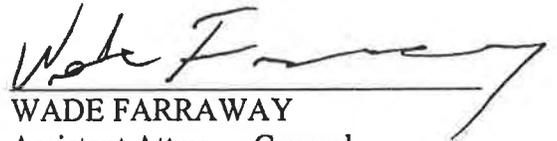
## ARGUMENT

As required by the Utah Administrative Procedures Act (UAPA), the Notice mailed to Respondent on January 8, 2013, advised him that he must file a written response with the Division within thirty (30) days of the mailing date of the Notice. Utah Code Ann. § 63G-4-201(2)(a)(vi). Pursuant to the Scheduling Order issued March 18, 2013, Respondent then received an extension to the thirty (30) day time period provided by UAPA. As such, Respondent had until April 17, 2013 to file a response with the Division.

In accordance with Utah Code Ann. § 63G-4-204(1), the Notice provided to Respondent on several occasions clearly states that a response shall include, among other things, the relief the Respondent is requesting, a statement of the facts, and the reasons the requested relief should be granted. Respondent has failed to file the response required by UAPA and as set forth in the Notice. Instead, he provided the Administrative Law Judge with an email that claims he has not had sufficient time to prepare a response. Additionally, he inappropriately attempts to rely on the Fifth Amendment; however, no criminal action has been initiated, nor is one contemplated.

Pursuant to Utah Code Ann. § 63G-4-209(1)(c), “[t]he presiding officer may enter an order of default against a party if: . . . a respondent in a formal adjudicative proceeding fails to file a response under Section 63G-4-204.” Because Respondent has failed to file the required response to the Division’s OSC and Notice, the Division requests an order of default be entered against him.

Dated this 23<sup>rd</sup> day of April, 2013.

A handwritten signature in cursive script, appearing to read "Wade Faraway", written over a horizontal line.

WADE FARRAWAY  
Assistant Attorney General  
Counsel for the Division

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing on this 20<sup>th</sup> day of April, 2013 to the following:

<p>JARED BRENT MUIR c/o Jalyn Peterson 2225 E. Murray Holladay Road, Suite 111 Salt Lake City, UT 84117</p> <p>JARED BRENT MUIR</p>	<p>Sent via: <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Mailed (U.S. Mail, postage prepaid) <input type="checkbox"/> Other:</p> <p>Sent via: <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Facsimile: <input type="checkbox"/> Mailed (U.S. Mail, postage prepaid) <input checked="" type="checkbox"/> Other: muir_j@hotmail.com</p>
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Shayla Susmel

Received May 3, 2013

SEB Legal  
Sam Bell (10791)  
Jalyn Peterson (12624)  
2225 East Murray Holladay Rd., Suite 111  
Salt Lake City, UT 84117  
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Attorneys for Respondent

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

**IN THE MATTER OF:**

**JARED BRENT MUIR,**

**Respondent.**

**RESPONDENT'S OPPOSITION TO  
MOTION FOR ENTRY OF DEFAULT**

**Docket No. SD-13-0008**

Respondent, by and through counsel, respectfully requests that the Securities Division's Motion for Entry of Default be dismissed since Respondent's failure to file an answer conforming with the exact requirements of Utah Code Annotated § 63G-4-204(1) is excusable neglect. Furthermore, it is against the principles of fairness and justice to issue a final order in a case without resolving the issue on the merits when possible.

**RELEVANT FACTS**

1. An Order to Show cause against Respondent for an alleged violation of U.C.A. § 61-1-1 was allegedly sent to Respondent by the Securities Division ("Division") on January 8, 2013. (Division's Motion for Entry of Default, page 2, paragraph 2.)

2. The Order to Show Cause required that an answer be filed within 30-days and that a hearing was scheduled on February 6, 2013 at 9:00 a.m. (*Id.*)
3. Respondent did not personally receive a copy of the Order to Show Cause, as testified to during the March 18, 2013 hearing. (Affidavit of Jared Brent Muir)
4. Respondent learned of the proceedings through a phone conversation with co-Respondent Adam Calvin Leffler, who is also being investigated by the Division under Docket No. SD-13-009. (*Id.*)
5. Leffler, knowing that Respondent was not involved in the transactions between US Tiger and Petitioners, assured Respondent that he would make sure everything against Respondent was dismissed. (Affidavit of Jared Brent Muir)
6. The Division apparently continued the initial hearing date twice. Once by Order of the Administrative Law Judge, Jennie Jonsson and once at the request of the co-Respondent. The new hearing date was set for March 18, 2013. (Division's Motion for Entry of Default, page 2, paragraphs 3 and 4.)
7. The only reason Respondent knew to show up to the March 18, 2013 hearing was because Leffler communicated to him the hearing date and location the morning of the hearing. (Affidavit of Jared Brent Muir)
8. At the March 18, 2013 hearing, Judge Jonsson ordered a bifurcation of the cases between Respondent Muir and Respondent Leffler. (Recording of Hearing)
9. It was also ordered that the date of Notice of Agency Action against Respondent be changed to March 18, 2013, which gave Respondent until April 17, 2013 to file an answer with the Division. (*Id.*)

10. It was also agreed at the hearing that all service, including Respondent's answer to the Division, would be done electronically via e-mail. (*Id.*)
11. Respondent answered the Division's Order to Show Cause on April 17, 2013 via e-mail by pleading the Fifth Amendment. (Affidavit of Jared Muir, E-mail to Judge Jonsson.)
12. Respondent, without having the expertise of legal counsel, believed this to be a complete denial of all claims alleged against him by the Division. (Affidavit of Jared Muir.)
13. On April 19, 2013, Respondent retained legal counsel, who being unaware that Respondent had already attempted to answer the Order to Show Cause by pleading the Fifth Amendment, asked for an extension to file an answer in accordance with the requirements of U.C.A § 63G-4-204, or in the alternative, what other options Respondent had in order to get a fair hearing on the alleged claims. (E-mails between Jalyn Peterson and Jennie Jonsson.)
14. The Presiding Officer denied the request for an extension to file an answer and stated that Respondent had already been given "meaningful consideration" by the Division and the Division would most likely be filing a Motion for Entry of Default against Respondent. (*Id.*)
15. Respondent's counsel then received the Division's Motion for Entry of Default and the Scheduling Order on the Motion for Entry of Default on April 24, 2013.

#### ARGUMENT

#### RESPONDENT FILED A TIMELY RESPONSE IN THE CASE AND THEREFORE THE MOTION FOR ENTRY OF DEFAULT SHOULD BE DENIED

Under U.C.A. § 63G-4-209, a default may be entered in a formal action "when a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing

after receiving proper notice; or a respondent in a formal adjudicative proceeding fails to file a response under U.C.A. § 63G-4-204(1).” Furthermore, Utah case law has repeatedly held that, “A pro se defendant's 'lack of technical knowledge of law and procedure ... should be accorded every consideration that may reasonably be indulged.' " *Orem City v. Todd Bovo*, 2003 UT App 286, 1173 (Utah 2003) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) and *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962)).

Respondent did participate in the initial hearing held on this matter and did file a timely response. As a pro-se Respondent, Mr. Muir believed that his response of pleading the Fifth Amendment was an adequate response to the Division’s claims against him. His e-mail to Judge Jonsson on April 17, 2013 states, “So I should be able to plead the 5th amendment. and [sic] that should meet your request for the answer by the 17<sup>th</sup> .” (*Affidavit of Jared Brent Muir*, page 2, paragraphs 8-10.) Clearly, Respondent believed his response qualified as an answer required by the Division on or before April 17, 2013.

Additionally, Respondent lacks a clear understanding of the law and administrative procedure and should therefore be granted “every consideration that may reasonably be indulged.” (*Orem City v. Todd Bovo* at 1173.) Now with the benefit of legal counsel, Respondent concedes that his response did not strictly comply with the requirements of U.C.A. § 63G-4-204(1). However, as a pro-se respondent without the benefit of legal counsel, he believed that by pleading the Fifth Amendment he was denying all claims against him by the Division. (*See Affidavit of Jared Brent Muir.*) Additionally, at the March 18, 2013 hearing when asked if he understood what “discovery” meant, he stated he did not understand the meaning. (Recording of Hearing.) Respondent was also acting under the belief that he had so little involvement in the alleged facts surrounding this case that with co-Respondent Leffler’s assurances he would handle

the matter, his denial of all claims was all he needed to do and hiring legal counsel was unnecessary. (*See* Affidavit of Jared Brent Muir.) These facts clearly illustrate Respondent's lack of knowledge regarding the law and the severity of the Division's action against him.

It is true that the Division did grant Respondent additional time to file a response to the Division's claims. However, once Respondent obtained legal counsel, his request for a 5-day extension to file an answer that would strictly comply with U.C.A. § 63G-4-204(1) was denied. (*See* E-mail exchange between Jalyn Peterson and Judge Jonsson.) The Division granted itself an extension by moving the first hearing date, then granted co-Respondent Leffler an extension by moving the second hearing date, yet was unwilling to grant Respondent, who now had the benefit of legal counsel, an additional five days to file an answer in compliance with U.C.A. § 63G-4-204(1). The Division has yet to hear Respondent's side of the story and therefore his case has not been given meaningful consideration nor "every consideration that may be reasonably indulged." (*Orem City v. Todd Bovo* at 1173.)

Respondent, as a pro se defendant, attended the initial hearing held on March 18, 2013 and filed a timely response by denying all claims against him. Therefore, the Division's Motion for Entry of Default should be denied and Respondent granted the opportunity to file an Amended Answer that complies with U.C.A. § 63G-4-204(1) and given the full opportunity to defend the Division's claims against him.

UNDER RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE, RESPONDENT'S FAILURE TO FILE AN ANSWER IN STRICT COMPLIANCE WITH U.C.A. § 63G-4-204(1) IS EXCUSABLE NEGLIGENCE AND ENTRY OF DEFAULT WILL BE SET-ASIDE ON THOSE GROUNDS

Pursuant to the Scheduling Order issued by Judge Jonsson on April 24, 2013, the decision as to whether or not an Entry of Default should enter against Respondent will be based upon an

analysis of whether an entry of Default Judgment against Respondent would be set aside under Rule 60(b) of the Utah Rules of Civil Procedure. Rule 60(b)(1) of the Utah Rules of Civil Procedure states that relief from a judgment or order may be granted for “mistake, inadvertence, surprise, or excusable neglect.” In addressing the excusable neglect component of Rule 60(b), the Supreme Court of Utah stated,

“We have repeatedly emphasized that district courts have “broad discretion” in deciding whether to set aside a judgment for excusable neglect under rule 60(b). This discretion stems from the equitable nature of the excusable neglect determination itself. By their nature, equitable inquiries are designed to be flexible, taking into account all relevant factors in light of the particular circumstances. Equitable inquiries defy distillation into any formal legal test; instead, the question is always whether the particular relief sought is justified under principles of fundamental fairness in light of the particular facts.” *Jones v. Layton/Okland*, 214 P.3d 859, 863-864 (Utah 2009.)

The Court in *Jones v. Layton/Okland* clarified the meaning of excusable neglect by finding that

“in deciding whether a party is entitled to relief under rule 60(b) on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.” (*Id.* at 864)

Respondent’s attendance at the initial hearing and his compliance with filing a timely response on April 17, 2013 illustrate his sufficient diligence, especially considering he was operating pro se and under Leffler’s assurances that he would handle the matter against Mr. Muir. Furthermore, Respondent showed further diligence in finally seeking legal counsel and asking the court for additional time to file an answer in compliance with U.C.A. § 63G-4-204(1). Respondent’s absence of filing an answer by the initial February 8, 2013 deadline was due to the fact that he was unaware of the Division’s action against him at that time, despite the fact that the Division’s service of process was sufficient. However, when Respondent finally learned of the Division’s action against him, he participated in the proceedings and responded in a manner that

he believed was adequate. Respondent's lack of knowledge of the law and procedure is not to be regarded as a blatant disregard for the Division's action against him, but as excusable neglect considering the totality of the circumstances.

Additionally, it would be inequitable to grant a default judgment when Mr. Muir has attempted to defend himself. Equity demands that a case should be ruled on the merits, not just defaulted after a breach of administrative procedure by a pro se respondent. Respondent has sought to cure his deficiencies in defending himself by hiring legal counsel, which allows the case to be heard and judged on the facts and correct application of the law. Respondent is merely asking the Division for his proper day in court and an opportunity to truly defend.

A default judgment against Respondent would be set aside pursuant to U.R.C.P. Rule 60(b) for excusable neglect because Respondent acted diligently by participating in the initial hearing and filing a timely response. Furthermore, the relief sought (the ability to defend in order to have the case decided on its merits) is justifiable "under principles of fundamental fairness in light of the particular facts." *Jones v. Layton/Okland* at 863-864.

### CONCLUSION

The Division's Motion for Entry of Default should be denied because an answer was filed in the case by Respondent. Additionally, even if the Division does not accept Respondent's answer to be in strict compliance with the Administrative Procedures Act, as a pro-se defendant his response should be read in light of the Court's requirement to give Respondent "every consideration that may reasonably be indulged." (*Orem City v. Todd Bovo* at 1173.)

Furthermore, an Entry of Default would be set aside under U.R.C.P. Rule 60(b) for excusable neglect. Respondent has demonstrated sufficient diligence in defending himself and equity demands that he be given the opportunity to have his case heard on its merits.



# EXHIBIT

## APRIL 17, 2013 ELECTRONIC ANSWER FROM RESPONDENT TO JUDGE JONSSON

From: [muir\\_j@hotmail.com](mailto:muir_j@hotmail.com)  
To: [jjonsson@utah.gov](mailto:jjonsson@utah.gov)  
Subject: RE: Case SD-13-0008 scheduling order  
Date: Wed, 17 Apr 2013 22:22:12 -0600

Jennie T. Jonsson,

Here is my response to the documents you sent to me .  
I haven't hear from an attorney I sent it to today.

Both the attorney office and I didn't have time to review and respond.

I also read the document, but don't now what format you need it in.

I also have only been in town 4 day this last 30 day and I just don't have time to fill out.

So I should be able to plead the 5th amendment. and that should meet your request for the answer by the 17th .

I please the 5th amendment all all questions and discover.

thanks

Jared Muir  
801-870-5597

let me know if you need something more.

# EXHIBIT

## E-MAIL EXCHANGE BETWEEN JALYN PETERSON AND JUDGE JONSSON

On Fri, Apr 19, 2013 at 1:18 PM, Jalyn Peterson <[jalyn@seblegal.com](mailto:jalyn@seblegal.com)> wrote:  
Ms. Jonsson –

I am writing on behalf of my client, Jared Brent Muir, who only recently retained our services regarding the above-referenced case.

Clearly, the April 17<sup>th</sup> deadline to file an answer has past. My client is frequently out of town and wasn't able to meet the deadline – hence the need for our services.

I am asking for an extension to be able to file an answer next Friday, the 26<sup>th</sup> with initial disclosures due by May 3<sup>rd</sup>. All other deadlines should be fine.

Please let me know if this is acceptable with the Division and if not, what options are now available to my client in order to get a fair hearing.

Thank you for your consideration of this matter.

Jalyn Peterson  
Attorney  
801.449.9749  
2225 E. Murray Holladay Road, Suite 111  
Salt Lake City, Utah 84117

Ms. Peterson,

Under the administrative rules governing this proceeding, I do not have the discretion to extend the deadline for filing an answer. See Utah Administrative Code §§ R151-4-205(3), R151-4-107, and R151-4-109(3). I have forwarded to the Division's representatives your e-mail and copied them on this response. You may discuss with them whether they would consider declining to move for a default at this time.

Please be advised that the Division has already given Mr. Muir meaningful consideration. He acknowledges that the notice of agency action mailed on January 8, 2013 was sent to his correct address and likely received by his wife. Therefore, he could have been defaulted on approximately February 11, 2013. However, the Division declined to move for default at that time, and I went forward with the initial hearing on March 18, 2013. Mr. Muir was over 30 minutes late for the proceeding and admitted that he had not read the Division's pleading and was not prepared to present an answer. The Division provided him with a copy of the notice and

order to show cause at that meeting, and I advised him that he needed to review it, as well as any offer of settlement that the Division might make, in a timely manner. I also invited him to call me directly if he had questions or needed general assistance regarding the elements or format of the filings he was required to make as a pro.se respondent.

At the initial hearing, Mr. Muir suggested that I should e-mail him with anything I wanted him to actually see. Accordingly, and on that same day, I sent the scheduling order to him by e-mail and requested a return e-mail to confirm receipt. Mr. Muir did not comply with this request until April 17, when he e-mailed me indicating that he still was not prepared to file an answer..

In these circumstances, should the Division move for default, I would have to consider it. However, I would allow you to file a response before issuing a recommended order.

I have attached my recording of the initial hearing for your review.

Regards,

Jennie T. Jonsson  
Administrative Law Judge  
Utah Department of Commerce

SEB Legal  
Sam Bell (10791)  
Jalyn Peterson (12624)  
2225 East Murray Holladay Rd., Suite 111  
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jalyn@seblegal.com  
Attorneys for Respondent

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

<p><b>IN THE MATTER OF:</b></p> <p><b>JARED BRENT MUIR,</b></p> <p><b>Respondent.</b></p>	<p><b>AFFIDAVIT OF JARED BRENT MUIR</b></p> <p><b>Docket No. SD-13-0008</b></p>
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I, Jared Brent Muir, under penalties of perjury do state the following:

1. I am the Respondent in the above-referenced matter.
2. I am fully competent to testify regarding the matters related herein, which are based upon my personal knowledge.
3. If called upon to testify, my testimony would establish the facts averred in this Affidavit.
4. I did not personally see a copy of the Division of Securities ("Division") Order to Show Cause against me until it was presented to me at the March 18, 2013 hearing.
5. I found out about the March 18, 2013 hearing from a former roommate Calvin Leffler, who is a co-Respondent in the Division's action against both of us for securities fraud.

6. My communications with Leffler, US Tiger, and the Petitioners were so limited that I believed I did not need to go to the expense of hiring an attorney to defend me in this matter.
7. Furthermore, Leffler, knowing that I wasn't involved with the transactions between US Tiger and the Petitioner's, told me that he would make sure that everything against me was dropped.
8. It was my understanding from the March 18, 2013 hearing that an e-mail answer would be acceptable by Judge Jonsson and the Division.
9. I sent the attached e-mail directly to Judge Jonsson on April 17, 2013 as my answer to the Division's Order to Show Cause.
10. I believed my pleading the Fifth Amendment by e-mail to Judge Jonsson was a sufficient answer to deny all claims the Division has against me.
11. I retained legal counsel on April 19, 2013, who better explained the Division's action against me and the procedural mistakes I have made in this case.
12. I admit that I was in over my head and should have retained legal counsel much earlier in the process. I only ask that I be given a fair opportunity to provide the Division with my side of the story in order resolve the claims against me.

Pursuant to Utah Code 78B-5-705, I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED: May 2, 2013

*Jared Brent Muir*  
\_\_\_\_\_  
Jared Brent Muir

Received May 10, 2013

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BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

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IN THE MATTER OF,  
JARED BRENT MUIR,  
RESPONDENT.

REPLY TO RESPONDENT'S  
OPPOSITION TO MOTION FOR ENTRY  
OF DEFAULT

CASE NO. SD- 13-0008

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COMES NOW the undersigned Assistant Attorney General, Paul G. Amann, on behalf of the Securities Division of the state of Utah and hereby respectfully submits the following Reply to Respondent's Opposition to Motion for Entry of Default:

STATEMENT OF FACTS

1. An Order to Show Cause (OSC) was filed against Respondent Muir (SD-13-008) and Co-Respondents U.S. Tiger (SD-13-007) and Adam Calvin Leffler (SD-13-009) on January 3, 2013.
2. A Notice of Agency Action (Notice) was mailed to Respondent's proper address on January 8, 2013.

3. Respondent has acknowledged receipt of the Notice, stating that it was likely received by his wife.
4. This matter was ripe for entry of Default against Respondent on February 11, 2013.
5. The Division did not seek default at that time and the matter went forward to initial pre-hearing conference on March 18, 2013.
6. Respondent received notice of the date and time for the pre-hearing conference.
7. Respondent appeared in person, over thirty (30) minutes late and acknowledged failing to read the OSC.
8. Copies of the Notice and the OSC were again provided to Respondent at the initial hearing.
9. Respondent was advised by the presiding officer, Jennie Jonsson, to review the documents and any offer of settlement tendered by the Division.
10. Judge Jonsson also invited Respondent to call with any questions or if Respondent needed general assistance regarding the elements or format of the filings he was required to make as a pro se Respondent.
11. Judge Jonsson entered a scheduling order setting April 17, 2013 as the deadline for filing an answer.
12. Respondent was made aware of the deadline at the pre-hearing conference, and a copy of the scheduling order containing the deadline was sent to him.
13. Respondent failed to respond during regular business hours on April 17, 2013.
14. Respondent sent a non-responsive letter to Judge Jonsson by email at 10:22:12 p.m. that night.
15. That letter states, "I haven't hear [sic] from an attorney I sent it to today."
16. That letter also states, "Both the attorney office and I didn't have time to review and respond."
17. Respondent never sought an extension within which to file an answer until two days after the deadline had passed.
18. Though this tribunal was extraordinarily open and invited calls with any questions, there were none between the hearing on March 18, 2013 and the April 17, 2013 deadline.
19. On April 23, 2013, when there was still no responsive pleading, the state filed a Motion for Entry of Default.
20. Respondent, through counsel, filed a document styled as "Respondent's Opposition to Motion for Entry of Default and Exhibits" on May 3, 2013.

## STATEMENT OF LAW

The Utah Administrative Code provides the following, with respect to Default Orders:

R151-4-710. Default Orders.

- (1) The presiding officer may enter a default order under Section 63G-4-209, with or without a motion from a party.
- (2) If a basis exists for a default order, the order may enter without notice to the defaulting party or a hearing.
- (3) A default order is not required to be accompanied by a separate order.

Section 63G-4-209 of the Utah Administrative Procedures Act governs default and provides, in relevant part:

- (1) The presiding officer may enter an order of default against a party if:
  - (c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63G-4-204.

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Emphasis added.

## ARGUMENT

Respondent has failed to file an answer to the OSC. Respondent's letter stating, "I haven't hear [sic] from an attorney I sent it to today," is an implicit acknowledgment that Respondent waited until the last day to even seek counsel. Respondent's claim that, "Both the attorney office and I didn't have time to review and respond," is unfounded. Respondent had a full month to respond and obviously delayed until the last moment. Then he submitted an unresponsive letter.

Respondent cites to *Orem City v. Bovo*, a criminal case, for the proposition that, "A pro se defendant's 'lack of technical knowledge of law and procedure ... should be accorded every consideration that may reasonably be indulged.'" citing *Nelson v. Jacobsen*, 669 P.2d 1207, 1213

(Utah 1983) (quoting *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962)). 75 P.3d 1170, 1172<sup>1</sup> (Utah App. 2003). While that argument applies with full force in the criminal context, where life, liberty or property may be at stake, its applicability in an administrative context is more refined. Nonetheless, Respondent has already been accorded every consideration that may be reasonably indulged. In opposing entry of the default order, he now seeks to be unreasonably indulged. Respondent has asserted that his neglect was excusable. The state will address this issue *infra*.

Inasmuch as the *Orem City* ruling cites to civil matters involving pro se litigants, we should briefly examine those cases.<sup>2</sup> They are more germane than the *Orem City* ruling itself, given the administrative context of this matter.

Nelson sued Jacobsen for alienation of affection. 669 P.2d at 1209-10. In *Nelson v. Jacobsen*, the Utah Supreme Court found that, "In this case, the trial judge was as considerate and helpful as he could be expected to be during the course of the trial." 669 P.2d at 1214. Likewise, the presiding officer in the matter sub judice has been as considerate as could be expected, moreso. Unlike Respondent Muir, Jacobsen (the pro se litigant in *Nelson v. Jacobsen*) was not informed of information he should have been. He was not informed of the date of trial until two days prior to trial. He was not informed of the right to a jury trial. The *Nelson v. Jacobsen* case is distinct from Muir's case because the judge who presided over the *Nelson v. Jacobsen* trial failed to fully apprise Jacobsen of his rights. Conversely, Judge Jonsson fully apprised Respondent Muir of his rights and opened the door to provide any further guidance. Judge Jonsson has been as considerate and as helpful as she could be expected to be throughout these proceedings.

*Heathman v. Hatch* is a case that is closer factual to Muir's with regard to the pro se issue. The *Heath* Court found:

It is not to be gainsaid that plaintiff as a layman has the right to act as his own attorney and to pursue his own rights in this action; [footnote omitted] nor, that because of his lack of

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<sup>1</sup> In Respondent's brief at 4 (Respondent's brief is unnumbered, but this quote is made on the fourth page therein), Respondent's pin cite for this quote is "1173," the quote is actually at page 1172.

<sup>2</sup> Since the matter before this tribunal is not criminal, there is of course no Sixth Amendment right to counsel.

technical knowledge of law and procedure he should be accorded every consideration that may reasonably be indulged. Nevertheless, it appears from the record that at hearings on motions attacking his complaints, the judges of our district court patiently and at some length explained to him the necessity of observing . . . our Utah Rules of Civil Procedure.

372 P.2d at 991. Judge Jonsson likewise patiently: 1) awaited Respondent's arrival at the pre-hearing conference and 2) explained at some length to him the necessity of observing the rules adherent to this proceeding. She went above and beyond the call of duty by even inviting phone calls during which Respondent could have inquired as to any matter about which he had questions. The *Heathman* case stands for the proposition that acting pro se is not a license to ignore the rules.

In Respondent's letter of April 17, he asks (though without a question mark), "So I should be able to plead the 5<sup>th</sup> amendment. and [sic] that should meet your request for the answer by the 17<sup>th</sup>." Respondent was aware that he was at peril that his putative Fifth Amendment plea was non-responsive. Had he not been, there was no reason for this query. He could have merely replied with one sentence, "I plead the Fifth." Rather, he blames an attorney he contacted the same day for not responding, claims a lack of time to review the documents, *then* pleads a blanket Fifth Amendment right.

In the response filed on Respondent's behalf at page five, it is claimed that, "his denial of all claims was all he needed to do and hiring legal counsel was unnecessary." This assertion is either disingenuous or disregards the fact that the April 17 letter states, "I haven't hear[d] from an attorney I sent it to today. Both the attorney office and I didn't have time to review and respond." The assertion is also inaccurate in that there was no denial of all claims. Respondent's assertion that he "filed a timely response by denying all claims against him," (also contained on page five of his brief) is incorrect for the same reason. Pleading the Fifth Amendment is not tantamount to a denial. Quite the opposite. A jury may be instructed to take into consideration a defendant's refusal to testify due to defendant's invocation of the right against self-incrimination. *Carroll by Carroll v. Price*, 144 Misc.2d 837, 545 N.Y.S.2d 966 (N.Y. Supp. 1989).<sup>3</sup>

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<sup>3</sup> Counsel for the Securities Division was unable to locate cases on point in Utah involving the invocation of the right against self-incrimination in a civil context, and therefore broadened the scope of his search.

The Fifth Amendment to the Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. This is not a criminal matter. No criminal charges have been screened, nor is there any impending threat of criminal charges against Respondent. His invocation of the Fifth Amendment is therefore non-responsive. Respondent's letter of April 17 contained no denial of any of the assertions contained in the OSC. Respondent's opposition brief attempts to morph the inappropriate invocation of the Fifth Amendment into denials, but Respondent's letter was devoid of any denial.

Additionally, even if there were some threat of criminal charges, one cannot merely make a blanket invocation of the Fifth Amendment. *Id.* A defendant in a criminal case, or a respondent in a civil case who may face criminal charges, may only invoke the privilege on questions to which he honestly feels the answer may incriminate him in a criminal proceeding. *Id.* at 144 Misc. 2d 838, 545 N.Y.S. 2d at 968.

Finally, this Tribunal should consider *S.E.C. v. Grossman*, 121 F.R.D. 207 (S.D.N.Y. 1987). The Securities Exchange Commission (S.E.C.) brought a civil action against Grossman and others. Grossman refused to provide any discovery to plaintiff based on an assertion of the right against self-incrimination. *Id.* at 208. The Court stated,

In *Musella*, [38 Fed.R.Serv.2d 426, 427 (S.D.N.Y.1983) (citing *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970))] the court stated, "[t]he discomfort of defendant's position does not rise to the level of a deprivation of due process. Others have faced comparable circumstances; the choice may be unpleasant, but it is not illegal, and must be faced." In addition, in *Gellis v. Casey*, 338 F.Supp. 651 (S.D.N.Y.1972) the court stated generally, "[p]laintiff has no constitutional right to be relieved of the burden of the choice he faces. There is no violation of due process where a party is faced with the choice of testifying or invoking the Fifth Amendment.... Any witness in a civil or criminal trial who is himself under investigation or indictment is confronted with the dilemma of choosing to testify or to invoke his privilege against self-incrimination. Nevertheless, he must make the choice despite any extra legal problems and pressures that might follow." *Id.* at 653 (citations omitted).

*Id.* at 210. The *Grossman* Court also notes it is "unconstitutionally coercive to condition the exercise of the Fifth Amendment privilege against self-incrimination on the loss of substantial economic interests." *Id.* citing *Garrity v. New Jersey*, 385 U.S. 493, 498, 87 S.Ct. 616, 619, 17 L.Ed.2d 562 (1967) (unconstitutional to automatically remove police officers from office based on invocation of their Fifth Amendment right against self-incrimination during state investigation).

“This principle has been applied only in situations where (1) the sanctions imposed were so severe as to be inherently coercive, and (2) the sanctions followed automatically upon exercise of the right to remain silent.” *S.E.C. v. Gilbert*, 79 F.R.D. 683, 685 (S.D.N.Y.1978). Grossman did not meet these criteria. The *S.E.C. v. Grossman* Court therefore denied Grossman’s motion to stay civil proceedings. The Fifth Amendment did not provide Grossman a safe harbor from proceeding in a civil realm. Likewise Muir does not meet these criteria. His invocation of the Fifth Amendment does not provide him a safe harbor in this administrative realm. His letter of April 17 was not a response and no response has ever been filed. Entry of Default is therefore appropriate.

## II. Respondent’s neglect was not excusable.

The issue herein is whether Respondent’s neglect was excusable. Respondent cites to *Jones v. Layton/Okland* for support of his position that his default should not be entered due to excusable neglect. 214 P.3d 859 (Utah 2009).

The following language from *Jones v. Layton/Okland* is instructive:

But while a party need not be perfectly diligent in order to obtain relief, some diligence is necessary. To grant relief on the ground of excusable neglect where a party has exercised no diligence at all, but simply because other equitable considerations might favor it, subverts the purpose of the excusable neglect inquiry. Rule 60(b)'s use of “excusable” as a modifier of “neglect” makes clear that mere neglect alone is an insufficient justification for relief. The neglect must be excusable upon some basis.

It would be impermissible, for example, to grant relief for excusable neglect under rule 60(b) solely because the moving party would be severely prejudiced by a refusal to grant relief while the nonmoving party would only suffer the inconvenience incident to delay of the litigation. Although considerations of prejudice and good faith are relevant to the excusable neglect inquiry, to grant relief under rule 60(b) simply because there might be some equitable basis for doing so, absent any diligence by the moving party, would allow relief based on mere neglect alone. We decline to read the word “excusable” out of the rule in this manner.

Therefore, we hold that, in deciding whether a party is entitled to relief under rule 60(b) on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.

*Id.* at 864.

Respondent’s case was ripe for entry of default on February 11, 2013. The Division did not move for entry of default at that time, rather it went forward with the initial pre-hearing conference on

March 18. Respondent arrived 30 minutes late for the pre-hearing conference. His default may have been entered prior to that point for failure to appear. Instead, the proceeding was delayed until his arrival for his benefit. Respondent arrived without his copy of the OSC. He was provided another copy.

When the pre-hearing conference went forward on March 18, Respondent was apprised that his response was due in a month. A scheduling order was sent to him providing him the date as well. Respondent was well aware his response was due on April 17. Respondent, by his own admission, waited until April 17 to attempt to contact a lawyer. He then variously claimed that he didn't hear from the lawyer and that the lawyer didn't have time to respond. If, indeed a lawyer was contacted on April 17, s/he did not have time to respond only because of Respondent's neglect in not allowing time to respond.

Respondent has offered only evidence of his neglect. He has made no proffer as to why his neglect was excusable. Like Jones, he would have this tribunal read the word "excusable" out of the rule. In *Jones v. Layton/Okland*, the trial court and the Utah Supreme Court found that Jones "did not even exercise a minimal level of diligence." *Id.* at 865. Like the trial court in *Jones v. Layton/Okland* and the Utah Supreme Court, this tribunal should decline to read the word "excusable" out of the rule.

#### CONCLUSION

For the reasons stated herein, Respondent's Motion should be denied.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2013.



PAUL G. AMANN  
Assistant Attorney General  
Counsel for the Securities Division

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of May, 2013, I served a true and correct copy of the foregoing Reply to Respondent's Opposition to Motion for Entry of Default , via email, as agreed upon during the March 18, 2013 hearing, to the following:

Jalyn Peterson  
Counsel for Respondent  
[jalyn@seblegal.com](mailto:jalyn@seblegal.com)

and hand-delivered a true and correct copy to:

Ann M. Skaggs  
Department of Commerce  
160 East 300 South, Second Floor  
Salt Lake City, Utah 84111

---

Maria Skedros

Received May 10, 2013

PAUL G. AMANN (6465)  
Assistant Attorney General  
JOHN E. SWALLOW (5802)  
Utah Attorney General  
Attorneys for the State of Utah  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140872  
Salt Lake City, Utah 84114-0872  
Telephone (801) 366-0196  
Facsimile: (801) 366-0315  
Email: [pamann@utah.gov](mailto:pamann@utah.gov)

---

BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF,  
JARED BRENT MUIR,  
RESPONDENT.

MOTION TO STRIKE AFFIDAVIT OF  
JARED BRENT MUIR

CASE NO. SD- 13-0008

---

COMES NOW the undersigned Assistant Attorney General, Paul G. Amann, and hereby respectfully submits the following Motion to Strike the Affidavit of Jared Brent Muir.

STATEMENT OF FACTS

1. On May 2, 2013, Respondent Muir submitted an affidavit in his own behalf in this matter.
2. Paragraph 7 of that Affidavit states, "Furthermore, Leffler, knowing that I wasn't involved with the transactions between US Tiger and the Petitioner's [sic], told me that he would make sure that everything against me was dropped."

STATEMENT OF LAW

Rule 12(f) of the Utah Rules of Civil Procedure states, "Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by

these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. ”

#### ARGUMENT

Respondent’s affidavit, in order to be considered, must meet evidentiary sufficiency. Paragraph 2 of Respondent’s Affidavit states, “I am fully competent to testify regarding the matters related herein, which are based upon my personal knowledge.” Paragraph 3 of Respondent’s Affidavit states, “If called upon to testify, my testimony would establish the facts averred in this Affidavit.

In Paragraph 7, Respondent claims, “Furthermore, Leffler, knowing that I wasn’t involved with the transactions between US Tiger and the Petitioner’s [sic], told me that he would make sure that everything against me was dropped.” Respondent is not competent to testify as to Leffler’s knowledge. Only Leffler is competent in that regard. If Respondent seeks to adduce such testimony, he must do so by means of an Affidavit from Leffler.

Moreover, Respondent’s assertion regarding his claims about what Leffler told him are pure hearsay about which Respondent also cannot testify. Again, the advised course would be an Affidavit from Leffler.

In the matter of *Treloggan v. Treloggan*, the Utah Supreme Court held that affidavits on information and belief revealed no evidentiary facts, but merely reflected affiant’s unsubstantiated opinions and conclusions, and thus were insufficient to raise an issue of material fact. 699 P.2d 747 (Utah 1985). The Court stated, that an affidavit, “[M]ust be made on personal knowledge of the affiant, and set forth facts that would be admissible in evidence and show that the affiant is competent to testify to the matters stated therein. Statements made merely on information and belief will be disregarded.” *Id.* at 748 citing *Walker v. Rocky Mountain Recreation Corp.*, 508 P.2d 538 (1973). The *Treloggan* Court notes that it cited *Walker* with approval in *Jones v. Hinkle*, 611 P.2d 733 (Utah 1980).

The *Treloggan* court was addressing a matter wherein Rule 56(e) was germane. Its holding applies with equal force in these proceedings. There is no provision in the Utah Rules of Civil Procedure, the Utah Administrative Code or the Utah Administrative Procedures Act which

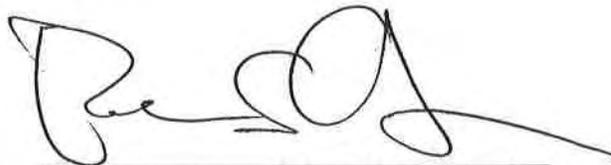
allows affidavits based on another's knowledge or based on hearsay.

Respondent's Affidavit is infirm and therefore subject to this motion to strike.

**CONCLUSION**

Wherefore, Petitioner moves this Court to Strike Respondent's Affidavit and Order that, any affidavits submitted must conform to Utah law.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2013.

A handwritten signature in black ink, appearing to read 'P. Amann', written over a horizontal line.

**PAUL G. AMANN**  
Assistant Attorney General  
Counsel for the Securities Division

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of May, 2013, I served a true and correct copy of the foregoing MOTION TO STRIKE AFFIDAVIT OF JARED BRENT MUIR, via email, as agreed upon during the March 18, 2013 hearing, to the following:

Jalyn Peterson  
Counsel for Respondent  
[jalyn@seblegal.com](mailto:jalyn@seblegal.com)

and hand-delivered a true and correct copy to:

Ann M. Skaggs  
Department of Commerce  
160 East 300 South, Second Floor  
Salt Lake City, Utah 84111



---

Maria Skedros

Received 5/15/2013

SEB Legal  
Sam Bell (10791)  
Jalyn Peterson (12624)  
2225 East Murray Holladay Rd., Suite 111  
Salt Lake City, UT 84117  
(801) 449-9749  
(801) 274-0049 Fax  
jalyn@seblegal.com  
Attorneys for Respondent

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

**IN THE MATTER OF:**

**JARED BRENT MUIR,**

**Respondent.**

**RESPONDENT'S OPPOSITION TO  
MOTION TO STRIKE AFFIDAVIT OF  
JARED BRENT MUIR**

**Docket No. SD-13-0008**

Respondent, by and through counsel, respectfully requests that the Division of Securities' Motion to Strike the Affidavit of Jared Brent Muir be denied since the statement made by Respondent in Paragraph 7 of his affidavit is not hearsay or qualifies as an exception to the hearsay rule under the Utah Rules of Evidence.

**RELEVANT FACTS**

1. On May 2, 2013, Respondent Muir submitted an affidavit in his own behalf in this matter.
2. Paragraph 7 of that Affidavit states, "Furthermore, Leffler, knowing that I wasn't involved with the transactions between US Tiger and the Petitioners, told me that he would make sure that everything against me was dropped."

3. On May 10, 2013, the Division filed a Motion to Strike Respondent's Affidavit based upon Paragraph 7.

### ARGUMENT

#### PARAGRAPH 7 OF RESPONDENT'S AFFIDAVIT IS NOT HEARSAY AND IS ALLOWABLE UNDER THE UTAH RULES OF EVIDENCE

Rule 801(c) of the Utah Rules of Evidence defines hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." In this case, the Division objects to Paragraph 7 of Respondent's affidavit which states: "Furthermore, Leffler, knowing that I wasn't involved with the transactions between US Tiger and the Petitioners, told me that he would make sure that everything against me was dropped." As illustrated by the use of this statement in Respondent's Opposition to Motion for Entry of Default, Respondent's statement is clearly not being offered to prove the truthfulness of the statement itself. (*See* pages 4-5 of Respondent's Opposition to Motion for Entry of Default.) It is irrelevant to Respondent's argument as to what Leffler's own knowledge is or the truthfulness of whether he could ensure that the Division's complaint against Respondent would be dropped. Respondent's statement in Paragraph 7 of his affidavit is offered only to show that a conversation between Respondent and Leffler occurred which led Respondent to act in a manner completely inconsistent with someone who the Division has deemed as being "aware that he was at peril." (Reply to Respondent's Opposition to Motion for Entry of Default.)

Furthermore, even if Respondent's statement was considered hearsay, it is allowable as an exception to the hearsay rule by Rule 803(3) of the Utah Rules of Evidence. Rule (803)(3) states that "A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)" is not excluded by the rule against hearsay. Once again, Respondent's statement is made to illustrate that pursuant to a conversation he had with Leffler, his state of mind regarding the Division's proceedings against him was not one of great concern. Because of Leffler's words, Respondent believed that Leffler was handling the situation and therefore Respondent did not need legal counsel and that his response was sufficient.

#### CONCLUSION

The Division's Motion to Strike Affidavit of Jared Brent Muir should be denied because the statement made by Respondent in Paragraph 7 of his affidavit is not hearsay and is therefore admissible. Furthermore, even if Respondent's statement is hearsay, it is still admissible as evidence pursuant to Rule (803)(3) of the Utah Rules of Evidence. Lastly, even if the tribunal does object to Paragraph 7 of the Affidavit, then only that paragraph should be stricken and not the entire affidavit.

Respectfully submitted this 14<sup>th</sup> day of May, 2013,

SEB Legal

/s/

---

Jalyn Peterson, signed electronically  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of May, 2013, I served a true and correct copy of the foregoing **RESPONDENT'S OPPOSITION TO MOTION TO STRIKE AFFIDAVIT OF JARED BRENT MUIR**, via e-mail as agreed upon during the March 18, 2013 hearing, to the following:

Ann Skaggs  
Division of Securities  
Heber M. Wells Building, 2<sup>nd</sup> Floor  
[askaggs@utah.gov](mailto:askaggs@utah.gov)

Paul G. Amann  
Assistant Attorney General  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, UT 84114-0872  
[pamann@utah.gov](mailto:pamann@utah.gov)

/s/  
\_\_\_\_\_  
Jalyn Peterson, signed electronically  
SEB Legal

SEB Legal  
Sam Bell (10791)  
Jalyn Peterson (12624)  
2225 East Murray Holladay Rd., Suite 111  
Salt Lake City, UT 84117  
(801) 449-9749  
(801) 274-0049 Fax  
jalyn@seblegal.com  
Attorneys for Respondent

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

**IN THE MATTER OF:**  
  
**JARED BRENT MUIR,**  
  
**Respondent.**

**RESPONDENT'S MOTION TO  
AMEND ANSWER**  
  
**Docket No. SD-13-0008**

Respondent, by and through counsel, and pursuant to Rule 151-4-204 of the Utah Administrative Code, requests leave of the presiding officer of this case to amend Respondent's answer that was filed electronically, as agreed upon in the March 18, 2013 hearing, on April 17, 2013.

**RELEVANT FACTS**

1. An Order to Show cause was initiated by the Division of Securities ("Division") pursuant to U.C.A. § 61-1-20(1) against Respondent for an alleged violation of U.C.A. § 61-1-1 on January 8, 2013.
2. Pursuant to U.C.A. § 61-1-20(1)(a), a hearing before the Securities Commission on the Division's Order to Show Cause was held on March 18, 2013.

3. The Notice of Agency Action was changed to March 18, 2013 at said hearing.
4. Pursuant to U.A.C. R151-4-205, Respondent was given until April 17, 2013 to electronically file a response to the Order to Show Cause.
5. Without the benefit of legal counsel, Respondent filed a response on April 17, 2013 that did not comply with U.C.A. § 63G-4-204.
6. When request was made by Respondent's legal counsel on April 19, 2013 under U.A.C. R151-4-109 for an extension to file a response in compliance with U.C.A. § 63G-4-204, the request was denied.
7. The Division filed a Motion for Entry of Default Judgment against Respondent on April 23, 2013.

### **ARGUMENT**

#### **JUSTICE REQUIRES THAT RESPONDENT BE GRANTED LEAVE TO FILE AN AMENDED ANSWER IN THE CASE**

Rule 151-4-204(1)(b) of the Utah Administrative Code states that a party may amend a pleading "by leave of the presiding officer or by written consent of the adverse party." The Utah Rules of Civil Procedure, which are persuasive authority in this matter, also state that "leave [to amend a pleading] shall be freely given when justice so requires." U.R.C.P. Rule 15(a). The Supreme Court of Utah has interpreted U.R.C.P. Rule 15(a) as follows:

"Rule 15(a), Utah Rules of Civil Procedure, permits amendment with leave of the court and states that "leave shall be freely given when justice so requires." In *Cheney v. Rucker*, **14 Utah 2d** 205, 211, **381 P.2d 86**, 91 (1963), we held that rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated: "[The rules of civil procedure] must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute." See also *Johnson v. Brinkerhoff*, **89 Utah 530**, 538-39, **57 P.2d 1132**, 1136 (1936) ("[T]he policy of the law is toward liberality in the allowance of amendments and to regard them favorably in order that the real controversy between the parties may be presented, their rights determined, and the cause decided."); *Hancock v. Luke*, **46 Utah**

26, 38, 148 P. 452, 457 (1915) ("Courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented on their merits.")” *Timm v. Dewsnup*, 851 P.2d 1178, 1183-1184 (Utah 1993)

In this case, Respondent filed an answer without the benefit of legal counsel. Despite his belief that his answer was a sufficient denial of all claims against him, it did not provide a sufficient defense to the Division’s claims. Additionally, his answer was clearly not in compliance with the Administrative Procedures Act. However, once armed with the benefit of legal counsel and aware of the ramifications of the alleged claims against him, the tribunal denied him the opportunity to cure his defective answer despite having the authority to do so under U.A.C. Rule 151-4-109. Furthermore, the Division didn’t even give Respondent’s counsel sufficient time to file an amended answer pursuant to U.A.C. Rule 151-4-204(1)(a) which allows for the amendment of a pleading “as a matter of course at any time before a responsive pleading is served.” Instead, the Division sought to ramrod through the entry of a default judgment against Respondent only four days after the request for an extension was made. These actions do not comport with public policy or Utah law, both of which favor the resolution of matters on the merits and allowing a defendant to fully present his or her case.

#### CONCLUSION

Under Utah law, which favors the liberal allowance of amended pleadings in order to fully adjudicate a matter, Respondent’s Motion to Amend his answer should be granted and the Division given ten days after service to respond accordingly pursuant to U.A.C. Rule 151-4-204(2)(b).

DATED this 14<sup>th</sup> day of May, 2013.

\_\_\_\_\_  
/s/  
Jalyn Peterson, signed electronically  
SEB Legal  
Attorneys for Respondent



DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146741  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

---

BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF

**DYMUND CAPITAL, LLC  
JOSHUA EDWARD DYCHES,**

RESPONDENTS

**RECOMMENDED ORDER ON DEFAULT**

**CASE NO. SD-12-0069  
CASE NO. SD-12-0070**

---

**BY THE PRESIDING OFFICER:**

This adjudicative proceeding was initiated pursuant to a December 6, 2012 notice of agency action. Thereafter, the parties negotiated toward settlement, but were unable to come to an agreement that met with the approval of the Utah Securities Commission. Therefore, on February 6, 2013, the presiding officer conducted an initial hearing, during which the parties indicated that they wished to continue settlement discussions before engaging in disclosure and discovery. Thereafter, negotiations between the Division and the Respondents regarding a stipulated agreement broke down, and the Division filed a motion for a deadline by which Respondents would be required to file an answer.

On April 19, 2013, having given Respondents proper opportunity to respond to the Division's motion, the presiding officer issued an order on setting May 3, 2013 as the deadline for answer. The order specified the following:

If Respondents fail to comply with this deadline, the presiding officer will issue an order recommending default without any further notice to Respondents, and the hearing on May 30, 2013 will be conducted for the sole purpose of reviewing the recommendation for default.

Respondents failed to file an answer by the May 3, 2013 deadline as required. In these circumstances, the presiding officer finds that, pursuant to Utah Code § 63G-4-209(1)(c), proper factual and legal bases exist for entering a default order against Respondents.

**RECOMMENDED ORDER**

Based on the foregoing, the presiding officer recommends that the Utah Securities Commission accept the allegations outlined in the Division's order to show cause as being true, to wit:

1. That the investment opportunities offered and sold by Respondents are securities under Utah Code Ann. § 61-1-13(1)(ee)(i);
2. That, in connection with the offer and sale of securities, and in violation of Utah Code Ann. § 61-1-1(2), Respondent(s) directly or indirectly made false statements to investors;
3. That, in connection with the offer and sale of securities, and in violation of Utah Code Ann. § 61-1-1(2), Respondents directly or indirectly failed to disclose material information that was necessary in order to make representations made not misleading; and

4. That Respondents' actions, which constitute one or more violations of Utah Code Ann. § 61-1 et seq, are grounds for sanction under the Act.

The presiding officer further recommends that the Utah Securities Commission enter a default order against Respondents, requiring them:

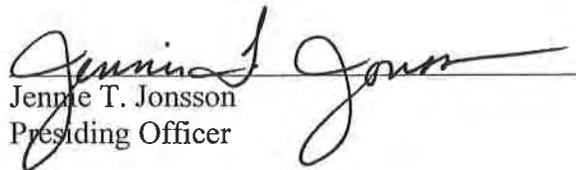
1. To cease and desist from engaging in any further conduct in violation of Utah Code Ann. § 61-1 et seq; and
2. To pay a fine of \$161,639 to the Utah Division of Securities, with any restitution paid to investors serving to offset the administrative fine on a dollar-to-dollar basis.

Finally, the presiding officer recommends that, upon entering the default order, the Utah Securities Commission dismiss any further proceedings in this case.

This recommended order shall be effective on the signature date below.

DATED this 6<sup>th</sup> day of May, 2013.

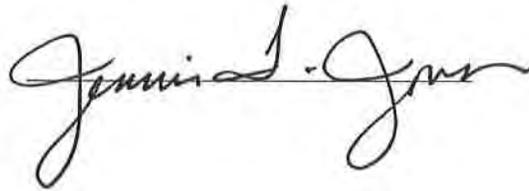
UTAH DEPARTMENT OF COMMERCE

  
Jennie T. Jonsson  
Presiding Officer

CERTIFICATE OF DELIVERY

I hereby certify that on the 6<sup>th</sup> day of May, 2013, the undersigned hand delivered a true and correct copy of the foregoing RECOMMENDED ORDER ON MOTION FOR DEFAULT to the following:

Utah Securities Commission  
c/o Keith Woodwell, Director, Utah Division of Securities  
Heber M. Wells Building, 2nd Floor  
Salt Lake City, UT

A handwritten signature in black ink, appearing to read "Jennifer L. Jones". The signature is written in a cursive style with a horizontal line through the middle.

DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146741  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

---

BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF

**DYMOND CAPITAL, LLC  
JOSHUA EDWARD DYCHES,**

RESPONDENTS

**ORDER ON DEFAULT**

**CASE NO. SD-12-0069  
CASE NO. SD-12-0070**

---

**BY THE UTAH SECURITIES COMMISSION:**

The presiding officer's May 6, 2013 recommended order on motion for default in this matter is hereby approved, confirmed, accepted, and entered by the Utah Securities Commission.

**ORDER**

Respondents are hereby ordered cease and desist from engaging in any further conduct in violation of Utah Code § 61-1 et seq.

Respondents are hereby ordered to pay a fine of \$161,639 to the Utah Division of Securities, with any restitution paid to investors serving to offset the administrative fine on a dollar-to-dollar basis.

All further proceedings in this case are dismissed. This dismissal does not relieve Respondent from complying with the terms of the default order.

This order shall be effective on the signature date below.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2013

**UTAH SECURITIES COMMISSION:**

---

Tim Bangerter

---

Erik Anthony Christiansen

---

Brent Baker

---

David A. Russon

---

Gary Cornia

NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

Agency review of this order may be obtained by filing a request for agency review with the Executive Director of the Department of Commerce, 160 East 300 South, Box 146701, Salt lake City, Utah 84114-6701, within thirty (30) days after the date of this order. A motion to set aside the order may also be filed with the presiding officer. The agency action in this case was a formal proceeding. The laws and rules governing agency review of this proceeding are found in Section 63G-4-101 et seq. of the Utah Code, and Rule 151-4 of the Utah Administrative Code.

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2013 the undersigned served a true and correct copy of the foregoing ORDER ON MOTION FOR DEFAULT by mailing a copy through first-class mail, postage prepaid, to:

Dymund Capital, LLC  
Joshua Edward Dyches  
51 West Center Street #235  
Orem, UT 84057

and caused a copy to be hand delivered to:

Paul Amann, Assistant Attorney General  
Division of Securities  
Heber M. Wells Building, 5<sup>th</sup> Floor

Ann Skaggs  
Division of Securities  
Heber M. Wells Building, 2<sup>nd</sup> Floor

Utah Division of Securities  
 Education Fund Expenditure Request  
 3rd and 4th Qtr. FY 2013  
 Expenses as of Apr. 28, 2013

<u>Description</u>	<u>Prior Approved Balances 03/28/13</u>	<u>Amounts Spent By Division To 04/30/13</u>	<u>Remaining Balances 04/30/13</u>	<u>Requests For Commission Authorization 05/30/13</u>	<u>Total Approved Balances As of 5/30/13</u>
<b>Public Investor Education</b>					
AAA Fair Credit	0.00	0.00	0.00	0.00	0.00
Jump Start Coalition	0.00	0.00	0.00	0.00	0.00
AARP Grant	0.00	0.00	0.00	0.00	0.00
Westminster College	0.00	0.00	0.00	0.00	0.00
Utah State University	0.00	0.00	0.00	0.00	0.00
Junior Achievement	0.00	0.00	0.00	0.00	0.00
Pamphlets, Books, etc.	295.01	165.01	130.00	3,620.00	3,750.00
TV/Radio Spots	11,726.00	0.00	11,726.00	-11,726.00	0.00
Utah Securities Assoc.	0.00	0.00	0.00	0.00	0.00
WISE Financial	0.00	0.00	0.00	0.00	0.00
Miscellaneous / Presentations	<u>3,589.70</u>	<u>448.00</u>	<u>3,141.70</u>	<u>608.30</u>	<u>3,750.00</u>
SUB TOTAL	\$15,610.71	\$613.01	\$14,997.70	-\$7,497.70	\$7,500.00
<b>Industry Education</b>					
Mountain West Capital Network	2,500.00	0.00	2,500.00	0.00	2,500.00
Wayne Brown Institute	0.00	0.00	0.00	0.00	0.00
Pamphlets, Books, etc.	0.00	0.00	0.00	0.00	0.00
Industry Outreach	83.81	0.00	83.81	-83.81	0.00
Miscellaneous / Presentations	<u>1,000.00</u>	<u>0.00</u>	<u>1,000.00</u>	<u>0.00</u>	<u>1,000.00</u>
SUB TOTAL	\$3,583.81	\$0.00	\$3,583.81	-\$83.81	\$3,500.00
<b>Investigation &amp; Litigation</b>					
Enforcement Investigation & Litigation	30,000.00	15,678.00	14,322.00	15,678.00	30,000.00
Licensing Investigation & Litigation	30,000.00	-45,137.06	75,137.06	-45,137.06	30,000.00
Registration Examination Expense	5,000.00	370.00	4,630.00	370.00	5,000.00
Expert Witnesses	20,000.00	19,783.38	216.62	19,783.38	20,000.00
Training	5,000.00	1,047.60	3,952.40	1,047.60	5,000.00
Computers	2,376.62	0.00	2,376.62	0.00	2,376.62
Software	907.13	105.68	801.45	0.00	801.45
Cellular Charges	3,000.00	1,513.75	1,486.25	1,513.75	3,000.00
Office Equipment & Supplies	6,000.00	3,558.00	2,442.00	3,558.00	6,000.00
Subscriptions & Publications	2,000.00	142.45	1,857.55	142.45	2,000.00
Remodel and Furniture	11,128.83	0.00	11,128.83	0.00	11,128.83
Enforcement Database Maintenance	7,000.00	0.00	7,000.00	0.00	7,000.00
Employees/Law Clerk/Transcriptionist	<u>25,000.00</u>	<u>16,182.70</u>	<u>8,817.30</u>	<u>16,182.70</u>	<u>25,000.00</u>
SUB TOTAL	\$147,412.58	\$13,244.50	\$134,168.08	\$13,138.82	\$147,306.90
GRAND TOTAL	\$166,607.10	\$13,857.51	\$152,749.59	\$5,557.31	\$158,306.90

Education Fund Balance as of 5/14/2013: **\$294,287.00**

Approval:

Division Director

Date

Commission Chair

Date

Executive Director

Date

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**CONESTOGA SETTLEMENT TRUST;  
CONESTOGA SETTLEMENT  
SERVICES, LLC;  
MICHAEL C. MCDERMOTT;  
WALTER C. YOUNG, CRD#1967829;  
CREATIVE WEALTH DESIGNS, LLC;  
DAYSRING FINANCIAL, LLC; and  
MICHAEL JOHN WOODS;**

**Respondents.**

**STIPULATION AND CONSENT ORDER**

**Docket No. SD-12-0061  
Docket No. SD-12-0062  
  
Docket No. SD-12-0063  
Docket No. SD-12-0064  
Docket No. SD-12-0065  
Docket No. SD-12-0066  
Docket No. SD-12-0067**

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The Utah Division of Securities (“Division”), by and through its Director of Licensing and Compliance, Kenneth O. Barton, and the Respondents, Conestoga Settlement Trust, Conestoga Settlement Services, LLC, Michael C. McDermott, Walter C. Young, Creative Wealth Designs, LLC, Dayspring Financial, LLC, and Michael John Woods (collectively referred to at times as “Respondents”), hereby stipulate and agree as follows:

1. Respondents have been the subject of an investigation by the Division into allegations that they violated the Utah Uniform Securities Act (“Act”), Utah Code Ann. §61-1-1, *et seq.*
2. On or about November 1, 2012, the Division initiated an administrative action against

Respondents by filing an Order to Show Cause.

3. Respondents hereby agree to settle this matter with the Division by way of this Stipulation and Consent Order (“Order”). If entered, the Order will fully resolve all claims the Division has against Respondents pertaining to the Order to Show Cause.
4. Respondents admit that the Division has jurisdiction over them and the subject matter of this action.
5. Respondents hereby waive any right to a hearing to challenge the Division’s evidence and present evidence on their behalf.
6. Respondents have read this Order, understand its contents, and voluntarily agree to the entry of the Order set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondents to enter into this Order, other than as described in this Order.
7. Respondents are represented by attorney Paul T. Moxley and are satisfied with the legal representation they have received.

#### **I. FINDINGS OF FACT**

##### **The Parties**

8. Conestoga Settlement Trust (“Issuer”) was formed in 2010 as a Delaware-based trust. The Austin, Texas law firm of De Leon & Washburn, P.C. (“DLW”) previously served as the trustee of Issuer and currently serves as legal counsel of Issuer.
9. Conestoga Settlement Services, LLC (“CSS”), a Delaware limited liability company, served as the initial trustor and manager of Issuer. Neither entity is licensed in the securities industry in any capacity.

10. Michael C. McDermott (“McDermott”), a Dallas, Texas resident during the period relevant to this matter<sup>1</sup>, is the manager of CSS and promoter of Issuer. He is not licensed in the securities industry in any capacity.
11. Walter C. Young (“Young”), a Seattle, Washington resident, is an insurance agent. He is not licensed in the securities industry in any capacity. At times relevant to the facts alleged in this Order, Young acted as an agent of CSS.
12. Creative Wealth Designs, LLC (“CWD”) at all relevant times was a Washington limited liability company, but it no longer exists. During the period relevant to this action, Young and his wife were the only two members. CWD was not licensed in the securities industry in any capacity. At times relevant to the facts alleged in this Order, CWD acted as an agent of CSS.
13. Dayspring Financial, LLC (“Dayspring”) is a Texas limited liability company. It is not licensed in the securities industry in any capacity.
14. Michael John Woods (“Woods”), a Texas resident, is the managing member of Dayspring. Woods is not licensed in the securities industry in any capacity.

### **The Offering**

15. On June 14, 2011, the Division received a Form D Rule 506 notice filing for a private placement securities offering by Issuer (“the offering”), Division File No. B01024166. The Form D was signed by McDermott on behalf of Issuer.
16. According to the Form D, the offering solicited investors to purchase “a specified

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<sup>1</sup>An amended Form D filed in April 2012 (“Amended Form D”) lists a San Juan, Puerto Rico address for McDermott. The amended Form D also identifies McDermott as the trustor of Issuer.

percentage interest in death benefits payable under a life insurance policy.” However, this description conflicts with a disclosure document provided to potential investors, which describes the offering as the purchase of beneficial interests in Issuer, which purchases and holds life settlement policies for the benefit of its investors. As a result, Issuer owns the policies and is responsible for maintaining the policies, making premium payments and claims under the individual policies, and distributing the proceeds to investors upon receipt of such funds.

17. With respect to the offering in Utah, a cover letter from DLW accompanying the notice filing indicated that sales had been made in Utah on August 4, 2010.
18. Following an inquiry from the Division, Issuer through DLW informed the Division that three transactions with a married Utah couple (referred to at times as “Husband” and “Wife”) were effected on August 4, 2010. DLW indicated that the sales had been made by Young. The letter further noted “[i]t appears that Young was not licensed at the time as a broker dealer in Utah. He was licensed in Washington.<sup>2</sup> We are surprised and concerned in learning this...”
19. In response, the Division requested additional information about the sales to Utah investors, Young, and whether any other parties received sales compensation. By letter dated July 25, 2011, DLW indicated that Dayspring and McDermott were also compensated by Issuer for the sales to Utah investors.

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<sup>2</sup>Young in fact was not licensed in Washington or any other state in the securities industry during the period relevant to this matter. Young and CWD were erroneously advised by legal counsel that no securities license was required to sell the offering to the Utah investors.

### **Sales to Utah Investors**

20. Pursuant to an Independent Contractor Agreement with CSS, CWD and Young agreed to “market the products and services” of CSS, and “to refer all suitable clients” for CSS’s products and services. Under the terms of the agreement, CWD and/or Young would be compensated by Issuer 12% of “all client-participant funds placed directly” by CWD and/or Young.
21. In August 2010, after being solicited by Young, the Utah residents made three investments in the offering, all of which were made with retirement monies.
22. Husband made two investments, consisting of \$30,000 in Roth IRA monies and \$180,000 from a traditional IRA account.
23. Wife invested \$45,000 in Roth IRA monies.
24. Pursuant to Young and Issuer’s instructions, Husband and Wife’s monies were deposited with CSS’s “escrow agent” and self-directed IRA administrator (“trust company”), which established self-directed IRA accounts for Husband and Wife.
25. Almost immediately after receipt of their monies, and without investor knowledge or consent, twenty percent of the Utah investors’ principal, totaling \$51,000, was paid by Issuer as sales commissions to Young, McDermott and Dayspring/Woods as follows:

Young:	\$30,600 (12%)
McDermott:	\$10,200 (4%)
Dayspring/Woods:	<u>\$10,200 (4%)</u>

\$51,000 (20%)<sup>3</sup>

26. Young, McDermott, and Woods are not licensed in Utah as securities agents and Dayspring is not licensed as a broker-dealer.
27. The trust company paid the sales commissions directly to Young, McDermott, and Dayspring/Woods pursuant to the terms of an Outsourcing Service Agreement (“Agreement”)<sup>4</sup> between the trust company and CSS.

### **Life Settlements**

28. The Utah investors did not receive a Private Placement Memorandum (“PPM”) for the offering. Instead, they received a document entitled “Important Disclosures” which describes life settlements and provides some disclosure of risk. Specifically, the document provided describes life settlement transactions as follows:

A “life settlement” is an agreement for the purchase of a percentage of the death benefit payable under a life insurance policy. In this transaction, the person insured under the policy (the “insured”) is paid a cash amount during his or her life. The amount paid is a discount from the actual death benefit payable under the policy. In return for receiving a cash payment during his or her lifetime, the insured transfers ownership of the policy and assigns the right to designate the beneficiary under the policy to the entity which has made such cash payment. In this transaction, the insured person who receives a cash payment in return for assigning the right to designate the beneficiary under the policy is called a “life settlor.”<sup>5</sup>

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<sup>3</sup>The Amended Form D reports that as of April 2012, approximately \$25,000,000 in sales had been made in the offering and compensation totaling \$5,000,000 paid to sales agents.

<sup>4</sup>Other services provided by the trust company under the Agreement include acting as custodian for investor funds, recordkeeping, acting as agent liaison, managing the commission distribution process, contract processing, client relations, agent training, and preparing account statements. Through a separate Escrow Agreement with CSS, the trust company provides escrow services, such as receiving investor monies, holding life settlement policies, making claims, receiving and distributing the proceeds.

<sup>5</sup>Thus, it appears the strategy in making such a life settlement investment is to purchase the policy at a discount to its face value, assume responsibility for premium payments, and when

Conestoga Settlement Services, LLC (hereinafter, "Conestoga") has arranged for the purchase of the policy from the original purchaser of the policy from the insured, and arranges for participants to participate in life settlement transactions, in which the life settlor has already sold his or her life insurance policy to the original purchaser of the policy. You may direct your IRA custodian to purchase for the benefit of your IRA, certain beneficial interests in a trust which holds life insurance policies. You may choose to have your IRA acquire a beneficial interest in either 100% of the death benefit payable under a life policy, or a fractional interest in such death benefit. If your custodian, for the benefit of your IRA, purchases a beneficial interest in a fractional interest in the policy death benefit, additional beneficial interests in the remaining fractional interests in such policy may be sold to other participants. When the life settlor dies, your IRA would receive the percentage of beneficial interests in the trust which your IRA acquired in the death benefit proceeds paid under the life insurance policy.

29. In selecting policies, Issuer's investors are presented with a policy list for which CSS has executed "Policy Purchase Agreements." The list includes information such as the face amount of the policy, insurance company, age and gender of the insured, life expectancy, and the length of time policy premiums are in escrow. Based upon that information, investors commit a certain amount to individual policies. Once the policies are selected, the investors are linked to those specific policies; however, CSS acknowledges that if a certain policy is not obtained or is already fully subscribed, CSS will replace the policy with one of comparable value and life expectancy.
30. Neither McDermott nor Dayspring/Woods had any contact with the Utah investors.

**Omissions of Material Facts**

31. Respondents omitted material facts in connection with the offer and sale of the offering, including but not limited to:
- a. failing to disclose that a 20% commission would be paid by Issuer to Young,

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the insured dies, the investor receives policy proceeds, hoping to net a gain after subtracting the amount paid for the policy, related fees and expenses, and the necessary premiums.

McDermott, and Dayspring/Woods from the amount paid by the investors for the participation interests purchased from Issuer;

- b. failing to disclose that Young, McDermott, and Dayspring/Woods were not licensed to sell securities or give investment advice; and
- c. failing to disclose relevant information about Issuer, such as its financial condition and liabilities.

32. In addition, the three Confidential Participant Capacity Information Forms (“Participant Information Forms”) provided by Issuer and completed by Husband and Wife were initialed by the investors, indicating the following statement applies to them:

I have a professional financial advisor (a) who is not directly or indirectly affiliated with Conestoga Settlement Services, LLC, or with the Conestoga Settlement Trust; (b) who is not directly or indirectly compensated by Conestoga Settlement Services, LLC or the Conestoga Settlement Trust, their affiliates or representatives; and (c) who has sufficient business and financial experience to protect my interests in connection with this transaction:  
The name, address, telephone number, and profession of my professional advisor are:  
[Young’s name and Washington business address; one form describes him as “financial advisor”]

33. Despite knowing such representations in the three Participant Information Forms to be false, Issuer, CSS, McDermott, CWD and Young took no action to correct the misinformation, or otherwise disclose to the Utah investors that Young in fact was both directly affiliated with and compensated by CSS; nor to disclose that Young did not have “sufficient business and financial experience” with respect to a securities transaction such as the offering because of his lack of experience in the securities industry and lack of any securities licenses.

## **II. CONCLUSIONS OF LAW**

34. Respondents Issuer, CSS, McDermott, CWD and Young violated Section 61-1-1(2) of the Act by omitting material facts as described in paragraphs 31 through 33 in connection with the offer and sale of the offering.
35. Respondents McDermott, Young, CWD, Woods and Dayspring violated Section 61-1-3 of the Act by transacting business in Utah as agents (McDermott, Young, Woods) and broker-dealers (CWD, Dayspring) while unlicensed.
36. Issuer and CSS violated Section 61-1-3(2) of the Act by engaging unlicensed entities and agents to sell the offering and pay compensation to agents while unlicensed.

## **III. REMEDIAL ACTIONS/SANCTIONS**

37. Respondents neither admit nor deny the Division's findings and conclusions, but consent to the sanctions below being imposed by the Division. Respondents represent that the failure to license was the result of erroneous legal advice.
38. Respondents have fully complied with and cooperated in the Division's investigation. Respondents represent that the information they have provided to the Division as part of the Division's investigation is accurate and complete.
39. Respondents agree to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.
40. Within thirty (30) days following entry of the Order, Respondents agree to send a letter to the Utah investors, in a form not objectionable to the Division, informing the Utah investors of their rights under Section 61-1-22 of the Act and offering rescission. Respondents shall report the Utah investors' response to the Division.
41. Respondents Young, CWD, Dayspring, Woods and McDermott agree to disgorge all

commissions, totaling \$51,000.00, to Issuer and to provide the Division with proof of the same within thirty (30) days following entry of this Order. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondents agree to pay fines as follows:

- a. Issuer, CSS, McDermott, jointly and severally: \$20,000
- b. Young and CWD, jointly and severally: \$5,000

The fines shall be paid within thirty (30) days following entry of the Order.

#### **IV. FINAL RESOLUTION**

- 42. Respondents acknowledge that this Order, upon approval by the Utah Securities Commission, shall be the final compromise and settlement of this matter. Respondents further acknowledge that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
- 43. Respondents acknowledge that the Order does not affect any civil or arbitration causes of action that third-parties may have against them arising in whole or in part from their actions, and that the Order does not affect any criminal causes of action that may arise as a result of their conduct referenced herein, if any. Respondents also acknowledge that any civil, criminal, arbitration or other causes of actions brought by third-parties against them have no effect on, and do not bar, this administrative action by the Division against them.
- 44. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

45. Respondents acknowledge that a violation of this Order is a third degree felony pursuant to Section 61-1-21(1)(b) of the Act.

Dated this 16 day of April, 2013

Kenneth O. Barton  
Kenneth O. Barton  
Director of Licensing and Compliance  
Utah Division of Securities

Dated this 16 day of April, 2013

Hector De Leon, legal representative  
Conestoga Settlement Trust

Michael C. McDermott  
Conestoga Settlement Services, LLC

Walter C. Young  
Creative Wealth Designs, LLC

Michael John Woods  
Dayspring Financial, LLC

Approved:

Wade Faraway  
Wade Faraway  
Assistant Attorney General

Approved:

Paul T. Moxley  
Paul T. Moxley  
Counsel for Respondents



45. Respondents acknowledge that a violation of this Order is a third degree felony pursuant to Section 61-1-21(1)(b) of the Act.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013

  
\_\_\_\_\_  
Kenneth O. Barton  
Director of Licensing and Compliance  
Utah Division of Securities

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013

  
\_\_\_\_\_  
Hector De Leon, legal representative  
Conestoga Settlement Trust

  
\_\_\_\_\_  
Michael C. McDermott  
Conestoga Settlement Services, LLC

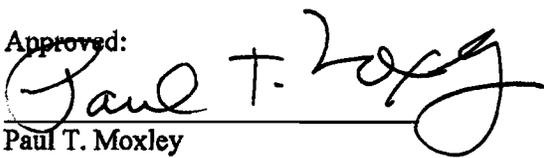
\_\_\_\_\_  
Walter C. Young  
Creative Wealth Designs, LLC

\_\_\_\_\_  
Michael John Woods  
Dayspring Financial, LLC

Approved:

\_\_\_\_\_  
Wade Farraway  
Assistant Attorney General

Approved:

  
\_\_\_\_\_  
Paul T. Moxley  
Counsel for Respondents



45. Respondents acknowledge that a violation of this Order is a third degree felony pursuant to Section 61-1-21(1)(b) of the Act.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013

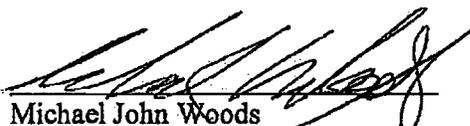
  
\_\_\_\_\_  
Kenneth O. Barton  
Director of Licensing and Compliance  
Utah Division of Securities

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013

\_\_\_\_\_  
Hector De Leon, legal representative  
Conestoga Settlement Trust

\_\_\_\_\_  
Michael C. McDermott  
Conestoga Settlement Services, LLC

\_\_\_\_\_  
Walter C. Young  
Creative Wealth Designs, LLC

  
\_\_\_\_\_  
Michael John Woods  
Dayspring Financial, LLC

Approved:

\_\_\_\_\_  
Wade Farraway  
Assistant Attorney General

Approved:

\_\_\_\_\_  
Paul T. Moxley  
Counsel for Respondents



**ORDER**

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, which are neither admitted nor denied by the Respondents, are hereby entered.
2. Respondents shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Within thirty (30) days following entry of the Order, Respondents shall send a letter to the Utah investors, in a form not objectionable to the Division, informing the Utah investors of their rights under Section 61-1-22 of the Act and offering rescission. Respondents shall report the Utah investors' response to the Division.
4. Respondents Young, CWD, Dayspring, Woods and McDermott shall disgorge commissions, totaling \$51,000.00, to Issuer and provide the Division with proof of the same within thirty (30) days following entry of the Order;
5. Pursuant to Utah Code Ann. § 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondents pay fines to the Division, within thirty (30) days following entry of this Order, as follows:
  - a. Issuer, CSS, McDermott, jointly and severally: \$20,000.00
  - b. Young and CWD, jointly and severally: \$5,000.00

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

  
\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Jane Cameron

\_\_\_\_\_  
Erik Christiansen

  
\_\_\_\_\_  
~~Laura Polachcek~~  
DAVID A. RUEBEN

**BY THE UTAH SECURITIES COMMISSION:**

The foregoing Stipulation and Consent Order is hereby accepted, confirmed and approved by the Utah Securities Commission.

DATED this 30 day of May, 2013.



Tim Bangerter

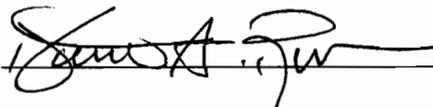


Gary Cornia

Erik Christiansen



Brent Baker



David A. Russon



Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

---

**IN THE MATTER OF:**

**MARKHAM L. CALDWELL,  
CRD#2837882**

**Respondent.**

**STIPULATION AND CONSENT ORDER**

**Docket No. SD-13-0015**

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The Utah Division of Securities (“Division”), by and through its Director of Enforcement, Dave R. Hermansen and the Respondent, Markham L. Caldwell (“Respondent” or “Caldwell”), hereby stipulate and agree as follows:

1. Respondent has been the subject of an investigation by the Division into allegations that he violated the Utah Uniform Securities Act (“Act”), Utah Code Ann. §61-1-1, *et seq.*
2. On or about February 5, 2013, the Division initiated an administrative action against Respondent by filing an Order to Show Cause.
3. Respondent hereby agrees to settle this matter with the Division by way of this Stipulation and Consent Order (“Order”). If entered, the Order will fully resolve all claims the Division has against Respondent pertaining to the Order to Show Cause.
4. Respondent admits that the Division has jurisdiction over him and the subject matter of

this action.

5. Respondent hereby waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf.
6. Respondent has read this Order, understands its contents, and voluntarily agrees to the entry of the Order set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondent to enter into this Order, other than as described in this Order.
7. Respondent is represented by attorney Tara L. Isaacson and is satisfied with the legal representation he has received.

#### I. FINDINGS OF FACT

8. Caldwell is an insurance agent licensed in Utah.
9. From 1997 through 2002 Caldwell was licensed in Utah as a broker-dealer agent with several broker-dealer firms.
10. Caldwell has taken and passed the FINRA Series 6 and 63 examinations.
11. According to records contained in the Central Registration Depository ("CRD"), in 2002 Caldwell's employment was terminated for selling a private securities offering, in the form of promissory notes, without the prior approval of his employing broker-dealer, Park Avenue Securities, LLC, CRD#46173.
12. Caldwell was criminally charged with a third degree felony for sale of an unregistered security pertaining to the events described in paragraph 11. He paid restitution and the charges were later dismissed as part of a plea in abeyance. Caldwell's conduct as described above also resulted in a fine and suspension of Mr. Caldwell's securities

license by the Division.

13. Since 2002, Caldwell has not been licensed in the securities industry in any capacity.
14. During the period relevant to this action, Caldwell was affiliated as an insurance agent with Horizon Financial and Insurance Group, Inc.<sup>1</sup> (“insurance agency”), a general insurance agent for Union Central Life Insurance Company. The insurance agency was owned and controlled by Dee Allen Randall (“Randall”).

Dee Randall and the Horizon Companies

15. Caldwell and others referred insurance clients to Randall, who offered private placement securities investments in “Horizon Notes” which, as used herein collectively refers to promissory notes issued by various companies owned and controlled by Randall. Those companies include, but are not limited to, Horizon Auto Funding, LLC, Horizon Financial Center I, LLC, and Horizon Mortgage and Investment, Inc. dba Independent Financial & Investment (collectively referred to at times as “the Horizon entities”).
16. In addition to selling insurance, Randall, through the Horizon entities and Horizon Notes, purported to offer private placement securities investments<sup>2</sup> in commercial and residential property development and rentals, as well as an automobile loan business for individuals with poor credit.

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<sup>1</sup>This entity was also known as or affiliated with other entities controlled by Randall, Horizon Financial & Insurance Agency, LLC, and Utah Horizon Financial & Insurance Agency, LLC.

<sup>2</sup>The Horizon Notes were purportedly sold in reliance on Rule 506 of Regulation D of the 1933 Securities Act.

17. The Horizon entities operated as a Ponzi scheme run by Randall<sup>3</sup> in which investor monies were routinely and freely commingled and transferred among the various Horizon entities. New investor monies were used to pay interest to prior investors, or for personal use, including the payment of sales compensation to agents, including Caldwell.

Referral to Randall

18. Caldwell referred one insurance client to Randall, who met with Randall and invested \$300,000 in a Horizon Note in 2002. The client received a number of interest payments on her note.
19. The Horizon Notes are securities under the Act.
20. When the client passed away in August 2007, Randall encouraged Caldwell to recommend that the beneficiaries of the decedent's estate invest \$703,771 in insurance monies in Horizon Notes. Randall told Caldwell he would pay Caldwell a 1% commission for the investment through the insurance agency.
21. On or about October 23, 2007, after meeting with Caldwell, the surviving beneficiaries invested \$703,771 in Horizon Notes.
22. On December 13, 2007, Caldwell received a check from the insurance agency designated as a "Commission Bonus" in the amount of \$7,000. In an interview with the Division, Caldwell acknowledged the payment was received for the sale of the Horizon Notes and not for the sale of any insurance sold through the insurance agency.

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<sup>3</sup>On December 18, 2012, the Division filed an Order to Show Cause against Randall and the Horizon entities, which action is currently pending. For additional information, see: <http://securities.utah.gov/dockets/12007901.pdf>

23. Interest payments due to investors under the Horizon Notes began to arrive late in 2009 or 2010, and payments to most investors ceased entirely in 2010.<sup>4</sup>

## II. CONCLUSIONS OF LAW

24. At no time was Caldwell licensed to offer or sell securities such as the Horizon Notes. In soliciting the investor and receiving compensation for the sale of the Horizon Notes, Caldwell acted as an unlicensed agent in violation of Section 61-1-3(1) of the Act.

## III. REMEDIAL ACTIONS/SANCTIONS

25. Respondent neither admits nor denies the Division's findings and conclusions, but consents to the sanctions below being imposed by the Division.
26. Respondent represents that the information he has provided to the Division as part of the Division's investigation is accurate and complete.
27. Respondent agrees to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.
28. Respondent agrees that he will not seek licensure or apply to be licensed by the Division as a broker-dealer agent, investment adviser or investment adviser representative, nor licensing as an agent for any issuer soliciting investor funds, nor licensing in any other capacity in the securities industry in the State of Utah at any time in the future.
29. Within ten (10) days following entry of the Order, Respondent agrees to disgorge to the

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<sup>4</sup>Randall declared a personal Chapter 11 bankruptcy on December 20, 2010. Following a September 2011 hearing in which Randall admitted commingling monies among the Horizon entities, a Trustee (the "Trustee") was appointed. The Trustee subsequently filed a Chapter 11 bankruptcy for each of the Horizon entities, all of which were consolidated with the Randall bankruptcy proceeding to be administered by the Trustee as a single bankruptcy estate.

Division the \$7,000 commission he received for sale of the Horizon Notes. The Division will forward those monies to the Trustee for distribution to investors as part of the bankruptcy estate.

30. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$5,000 to the Division, which shall be paid within ten (10) days following entry of the Order.
31. Respondent agrees that he will provide truthful testimony and cooperation, including production of documents and providing information informally without the necessity of a subpoena or other process, in any state or federal investigation (including investigations conducted by or actions filed by the Trustee) involving Randall, the Horizon entities, and any individuals under investigation as a result of their affiliation with Randall and/or the Horizon entities.

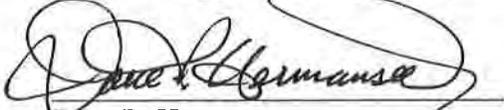
#### IV. FINAL RESOLUTION

32. Respondent acknowledges that this Order, upon approval by the Utah Securities Commission, shall be the final compromise and settlement of this matter. Respondent further acknowledges that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
33. Respondent acknowledges that the Order does not affect any civil or arbitration causes of action that third-parties may have against him arising in whole or in part from his actions, and that the Order does not affect any criminal causes of action that may arise as a result of his conduct referenced herein. Respondent also acknowledges that any civil, criminal,

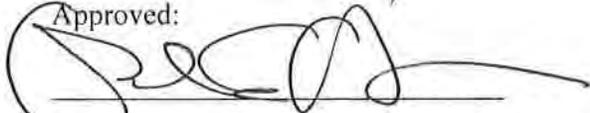
arbitration or other causes of actions brought by third-parties against him have no effect on, and do not bar, this administrative action by the Division against him.

34. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.
35. Respondent acknowledges that a violation of this Order is a third degree felony pursuant to Section 61-1-21(1)(b) of the Act.

Dated this 5<sup>th</sup> day of MAY, 2013

  
Dave R. Hermansen  
Director of Enforcement  
Utah Division of Securities

Approved:

  
Paul G. Amann  
Assistant Attorney General

Dated this 3<sup>rd</sup> day of May, 2013

  
Markham L. Caldwell

Approved:

  
Tara L. Isaacson  
Counsel for Respondents

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, which are neither admitted nor denied by the Respondent, are hereby entered.
2. Respondent shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Respondent shall not seek licensure or apply to be licensed by the Division as a broker-dealer agent, investment adviser or investment adviser representative, nor licensing as an agent for any issuer soliciting investor funds, nor licensing in any other capacity in the securities industry in the State of Utah at any time in the future.
4. Within ten (10) days following entry of the Order, Respondent shall disgorge to the Division the \$7,000 commission he received for sale of the Horizon Notes. The Division will forward those monies to the Trustee for distribution to investors as part of the bankruptcy estate.
5. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$5,000 to the Division within ten (10) days following entry of the Order.
6. Respondent shall provide truthful testimony and cooperation, including production of documents and providing information informally without the necessity of a subpoena or other process, in any state or federal investigation (including investigations conducted by or actions filed by the Trustee) involving Randall, the Horizon entities, and any individuals under investigation as a result of their affiliation with Randall and/or the Horizon entities.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

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Brent Baker

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Tim Bangerter

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Jane Cameron

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Erik Christiansen

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Laura Polacheck

**Certificate of Mailing**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 2013, I mailed, by certified mail, a true and correct copy of the fully executed Stipulation and Consent Order to:

Tara L. Isaacson  
BUGDEN & ISAACSON, LLC  
445 East 200 South, Suite 150  
Salt Lake City, UT 84111  
Counsel for Respondent

Certified Mail # \_\_\_\_\_

\_\_\_\_\_  
Maria Lohse  
Executive Secretary

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:  
SCOTT L. STEINMETZ**

**Respondent.**

**STIPULATION AND CONSENT ORDER**

**Docket No. SD-13-0013**

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The Utah Division of Securities (“Division”), by and through its Director of Enforcement, Dave R. Hermansen and the Respondent, Scott L. Steinmetz (“Respondent” or “Steinmetz”), hereby stipulate and agree as follows:

1. Respondent has been the subject of an investigation by the Division into allegations that he violated the Utah Uniform Securities Act (“Act”), Utah Code Ann. §61-1-1, *et seq.*
2. On or about February 5, 2013, the Division initiated an administrative action against Respondent by filing an Order to Show Cause.
3. Respondent hereby agrees to settle this matter with the Division by way of this Stipulation and Consent Order (“Order”). If entered, the Order will fully resolve all claims the Division has against Respondent pertaining to the Order to Show Cause.
4. Respondent admits that the Division has jurisdiction over him and the subject matter of this action.

5. Respondent hereby waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf.
6. Respondent has read this Order, understands its contents, and voluntarily agrees to the entry of the Order set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondent to enter into this Order, other than as described in this Order.
7. Respondent is represented by attorney Nathan D. Miller and is satisfied with the legal representation he has received.

#### **I. FINDINGS OF FACT**

8. Steinmetz is an insurance agent licensed in Utah. He has never been licensed in the securities industry in any capacity.
9. During the period relevant to this action, Steinmetz was affiliated as an insurance agent with Horizon Financial and Insurance Group, Inc.<sup>1</sup> ("insurance agency"), a general insurance agent for Union Central Life Insurance Company. The insurance agency was owned and controlled by Dee Allen Randall ("Randall").

#### Dee Randall and the Horizon Companies

10. Steinmetz and others referred their insurance clients to Randall, who offered private placement securities investments in "Horizon Notes" which, as used herein collectively refers to promissory notes issued by various companies owned and controlled by Randall. Those companies include, but are not limited to, Horizon Auto Funding, LLC, Horizon

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<sup>1</sup>This entity was also known as or affiliated with other entities controlled by Randall, Horizon Financial & Insurance Agency, LLC, and Utah Horizon Financial & Insurance Agency, LLC.

Financial Center I, LLC, and Horizon Mortgage and Investment, Inc. dba Independent Financial & Investment (collectively referred to at times as “the Horizon entities”).

11. In addition to selling insurance, Randall, through the Horizon entities and Horizon Notes, purported to offer private placement securities investments<sup>2</sup> in commercial and residential property development and rentals, as well as an automobile loan business for individuals with poor credit.
12. Unknown to Steinmetz, the Horizon entities operated as a Ponzi scheme run by Randall<sup>3</sup> in which investor monies were routinely and freely commingled and transferred among the various Horizon entities. New investor monies were used to pay interest to prior investors, or for personal use, including the payment of sales compensation to agents, including Steinmetz.

#### Referrals to Randall

13. Between 2005 and 2009, Steinmetz referred a number of his insurance clients, including his mother, to Randall to discuss investing in the Horizon Notes.
14. The Horizon Notes are securities under the Act.
15. Steinmetz arranged and attended most of the meetings his clients had with Randall.
16. Of the clients who met with Randall, eleven made investments in the Horizon Notes.

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<sup>2</sup>The Horizon Notes were purportedly sold in reliance on Rule 506 of Regulation D of the 1933 Securities Act.

<sup>3</sup>On December 18, 2012, the Division filed an Order to Show Cause against Randall and the Horizon entities, which action is currently pending. For additional information, see: <http://securities.utah.gov/dockets/12007901.pdf>

17. None of the notes were sold through a licensed broker-dealer. Steinmetz assisted clients with the paper work required to transfer their monies from existing accounts into the Horizon investments.
18. Steinmetz's clients' investments totaled approximately \$517,000, a majority of which consisted of retirement monies.
19. Steinmetz and other agents were compensated for those sales through the insurance agency. Agent compensation generally was calculated as a percentage of the amount of money invested. Payments were made by cash or check, or by other means, including credits applied to monies owed by agents to Randall.<sup>4</sup> Some of the payments were documented in the insurance agency records as "commission bonus" or "marketing bonus" or otherwise.
20. Steinmetz received at least \$6,600 in direct compensation for the sales of the Horizon Notes.
21. Interest payments due to investors under the Horizon Notes began to arrive late in 2009 or 2010, and payments to most investors ceased entirely in 2010.<sup>5</sup>

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<sup>4</sup>Such credits were applied against rent owed, office expenses, or monies owing as a result of "chargebacks" for insurance commissions previously received by agents when policies were later rescinded or canceled.

<sup>5</sup>Randall declared a personal Chapter 11 bankruptcy on December 20, 2010. Following a September 2011 hearing in which Randall admitted commingling monies among the Horizon entities, a Trustee (the "Trustee") was appointed. The Trustee subsequently filed a Chapter 11 bankruptcy for each of the Horizon entities, all of which were consolidated with the Randall bankruptcy proceeding to be administered by the Trustee as a single bankruptcy estate.

## **II. CONCLUSIONS OF LAW**

22. At no time was Steinmetz licensed to offer or sell securities such as the Horizon Notes. In soliciting investors and receiving compensation for the sales of the Horizon Notes, Steinmetz acted as an unlicensed agent in violation of Section 61-1-3(1) of the Act.

## **III. REMEDIAL ACTIONS/SANCTIONS**

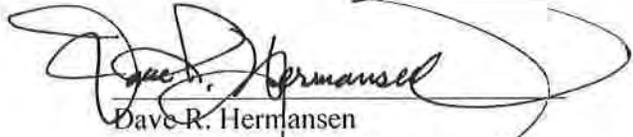
23. Respondent neither admits nor denies the Division's findings and conclusions, but consents to the sanctions below being imposed by the Division.
24. Respondent represents that the information he has provided to the Division as part of the Division's investigation is accurate and complete.
25. Respondent agrees to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.
26. Respondent agrees to disgorge \$6,600 in commissions he received for sale of the Horizon Notes, and to make payment in that amount to the Trustee for distribution to investors as part of the bankruptcy estate.
27. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$3,000 to the Division.
28. Respondent shall pay the disgorgement of commissions and fine as follows: (i) \$5,000 of the disgorgement within thirty (30) days of entry of the Order; and (ii) the remaining \$1,600 of disgorgement and, thereafter, the \$3,000 fine in 24 equal monthly installments of \$191.66 beginning on the sixtieth (60<sup>th</sup>) day following entry of the Order.
29. Respondent agrees that he will provide truthful testimony and cooperation, including

production of documents and providing information informally without the necessity of a subpoena or other process, in any state or federal investigation (including investigations conducted by or actions filed by the Trustee) involving Randall, the Horizon entities, and any individuals under investigation as a result of their affiliation with Randall and/or the Horizon entities.

#### **IV. FINAL RESOLUTION**

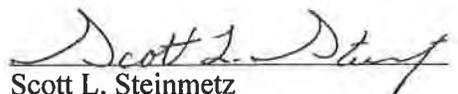
30. Respondent acknowledges that this Order, upon approval by the Utah Securities Commission, shall be the final compromise and settlement of this matter. Respondent further acknowledges that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
31. Respondent acknowledges that the Order does not affect any civil or arbitration causes of action that third-parties may have against him arising in whole or in part from his actions, and that the Order does not affect any criminal causes of action that may arise as a result of his conduct referenced herein. Respondent also acknowledges that any civil, criminal, arbitration or other causes of actions brought by third-parties against him have no effect on, and do not bar, this administrative action by the Division against him.
32. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

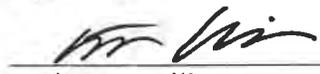
Dated this 13 day of MAY, 2013

  
Dave R. Hermansen  
Director of Enforcement  
Utah Division of Securities

Approved:  
  
Paul G. Amann  
Assistant Attorney General

Dated this 3<sup>rd</sup> day of May, 2013

  
Scott L. Steinmetz

Approved:  
  
Nathan D. Miller  
Attorney for Respondent

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, which are neither admitted nor denied by the Respondent, are hereby entered.
2. Respondent shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Respondent agrees to disgorge \$6,600 in commissions he received for sale of the Horizon Notes, and to make payment in that amount to the Trustee for distribution to investors as part of the bankruptcy estate.
4. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$3,000 to the Division.
5. Respondent shall pay the disgorgement of commissions and fine according to the schedule as set forth above in paragraph 28.
6. Respondent shall provide truthful testimony and cooperation, including production of documents and providing information informally without the necessity of a subpoena or other process, in any state or federal investigation (including investigations conducted by or actions filed by the Trustee) involving Randall, the Horizon entities, and any individuals under investigation as a result of their affiliation with Randall and/or the Horizon entities.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

---

Brent Baker

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Tim Bangerter

---

Jane Cameron

---

Erik Christiansen

---

Laura Polacheck

**Certificate of Mailing**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 2013, I mailed, by certified mail, a true and correct copy of the fully executed Stipulation and Consent Order to:

Nathan D. Miller  
Attorney for Scott Steinmetz  
311 S. State, Ste. 380  
Salt Lake City, UT 84111

Certified Mail # \_\_\_\_\_

---

Maria Lohse  
Executive Secretary

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
P.O. Box 146760  
Salt Lake City, Utah 84114-6760  
Telephone: 801 530-6600

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

---

**IN THE MATTER OF:**

**JEFFREY KAHN, CRD# 4830345**

**Respondent.**

**STIPULATION AND CONSENT ORDER**

**Docket No. SD-13-0014**

---

The Utah Division of Securities ("Division"), by and through its Director of Licensing and Compliance, Kenneth O. Barton, and the Respondent, Jeffrey Kahn ("Respondent" or "Kahn"), hereby stipulate and agree as follows:

1. Respondent has been the subject of an investigation by the Division into allegations that he violated the Utah Uniform Securities Act ("Act"), Utah Code Ann. §61-1-1, *et seq.*
2. On or about February 5, 2013, the Division initiated an administrative action against Respondent by filing an Order to Show Cause.
3. Respondent hereby agrees to settle this matter with the Division by way of this Stipulation and Consent Order ("Order"). If entered, the Order will fully resolve all claims the Division has against Respondent pertaining to the Order to Show Cause.
4. Respondent admits that the Division has jurisdiction over him and the subject matter of this action.

5. Respondent hereby waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf.
6. Respondent has read this Order, understands its contents, and voluntarily agrees to the entry of the Order set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondent to enter into this Order, other than as described in this Order.
7. Respondent is represented by attorney Jeremy C. Reutzel and is satisfied with the legal representation he has received.

#### I. FINDINGS OF FACT

8. RJR Investment Service, LLC ("RJR"), IARD#148843, is an investment adviser with its place of business in Salt Lake City, Utah. From December 11, 2008 to August 13, 2012,<sup>1</sup> RJR was notice filed in Utah as a federal covered investment adviser. RJR is currently licensed in Utah as a state covered investment adviser.
9. Jeffrey Kahn ("Kahn"), CRD# 4830345, was the president and a member of RJR. Kahn has never been licensed as an investment adviser representative in Utah.
10. Richard T. Budge ("Budge"), CRD# 1262979, is the Chief Executive Officer ("CEO") of RJR, and has been licensed in Utah as an investment adviser representative since December 15, 2008.

#### Application for Licensure and Division Investigation

11. On May 9, 2012, RJR initiated the process to become a Utah licensed investment

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<sup>1</sup>Following the August 2, 2012 approval of its application to become a state licensed adviser in Utah, RJR withdrew its federal registration.

adviser.<sup>2</sup>

12. During the review of RJR's application, it was discovered that Kahn was not licensed as an investment adviser representative of the federal covered investment adviser.
13. The Division contacted RJR to determine, among other things, why Kahn was not licensed as an investment adviser representative.
14. RJR incorporated as a limited liability company in Utah in October 2008. From October 2008 through December 2008, RJR conducted organizing activities, including registering with the United States Securities and Exchange Commission ("SEC") as a federal covered investment adviser and notice filing in Utah. RJR began operations as an investment adviser as of January 1, 2009.
15. Kahn and Budge were former employees of a bank's trust company that was closing the Utah business unit effective December 31, 2008. At the trust company, Budge and Kahn had client relationships whose accounts totaled approximately \$29 million in assets under management. A majority of the trust company clients affected by the closure transferred their accounts to RJR for investment advisory services beginning in January 2009.
16. RJR did not do mass advertising or seminars to attract new clients. Most clients were referred, without compensation, from existing clients that came from the trust company.
17. From December 11, 2008 to August 13, 2012, Kahn managed the relationships with most of the former trust company clients, met quarterly with clients, delivered quarterly

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<sup>2</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Reform Act of 2010 required that federal covered investment advisers that manage less than \$100 million in assets "switch" to state jurisdiction. RJR's application with Utah was in accordance with that requirement. Investment advisers that no longer qualified to remain registered with the SEC were required to complete the switch process and withdraw from the SEC by June 28, 2012.

statements and presented written investment recommendations prepared by Budge, discussed written investment recommendations with the clients, and relayed client objections or approvals to Budge. Kahn also met with potential clients to discuss RJR's services.

18. During the course of an investigation undertaken by the Division while reviewing RJR's investment adviser application, RJR provided an accounting of its clients identifying the source of the client, the person who solicited the account, the person who offered RJR's services, the person that negotiated the investment adviser's contract, and the person who delivered RJR's ADV Part 2 disclosure brochure. A majority of RJR's clients on the list were attributed to Kahn.
19. Kahn was reimbursed from RJR for expenses, including mileage, entertainment, home office, and cell phone. RJR then recorded Kahn's reimbursed expenses as operating expenses of the firm.
20. Kahn received compensation from RJR that was equal to one-third of the monthly revenue RJR generated from investment advisory fees on accounts under management less RJR's operating expenses for the month.
21. Budge met with the Division a number of times in June 2012 to discuss investment adviser representative licensing requirements and to affirm that Kahn needed to be licensed. Thereafter, Budge informed Kahn that Kahn needed to be licensed.

**Bank and Trust Referral Agreement**

22. In mid-June 2012, RJR became aware of a referral fee agreement Kahn negotiated on or about March 8, 2012 with a bank and trust company ("bank and trust"). Under the

agreement, Kahn was to refer new clients to the bank and trust for wealth management or custodial services to be provided by the bank and trust. Client assets would be placed in either a custodial account or a self-directed IRA account.

23. On March 8, 2012, an Executive Vice President for the bank and trust addressed a "letter of acknowledgment and approval of a referral arrangement between you" and the bank and trust to Kahn, President of RJR<sup>3</sup>. Material provisions of the arrangement included:

- a. A one-time only cash payment made up-front for 20% of the expected annual gross fee revenue<sup>4</sup> on a new wealth management or custodial account established with the bank and trust.
- b. A one-time only cash payment made up-front for 20% of the expected annual increase in gross fee revenue due to a deposit to an existing account. The increase in the fee must be at least \$100 in order to be paid.
- c. The agreement was for a non-employee, independent contractor status, for purposes of federal income and withholding tax, and therefore, no individual or corporate taxes were to be withheld from any payment. An Internal Revenue Service ("IRS") Form W-9 was provided to report the Taxpayer Identification number.
- d. Any and all payments under the plan would be disclosed in advance to the

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<sup>3</sup> The acknowledgment letter was addressed to Kahn as President of RJR at Kahn's home address in Provo, Utah and not the principal office and place of business of RJR in Layton, Utah.

<sup>4</sup> Gross fee revenue is defined as the expected revenue collected in the next twelve calendar months by the bank and trust for custodial, tax, base, and/or minimum fees, based on the market value of the account as reflected the time the account is funded on the bank's accounting system.

customer(s) or principal(s) who own, control, or have an interest in the accounts.

The customer would be required to approve of the proposed payment. A copy of the customer signed disclosure and approval would be provided to the bank and trust before any payment would be processed.

- e. An attached Schedule A listed the possible initial accounts to be included under the arrangement if approved by the customer. Schedule A listed seventeen (17) account names with total market account value of \$3,125,770 as of January 31, 2012.
  - f. Kahn acknowledged and accepted the agreement as President of RJR on March 16, 2012.
24. Kahn completed the IRS W-9 form with: 1) his individual name, 2) no business name, 3) federal tax classification as an individual/sole proprietor, and 4) taxpayer identification number as his individual social security number and signature dated March 15, 2012.
25. On April 30, 2012, Kahn obtained client J.B.'s signature on a "Disclosure of Referral Payment" acknowledgment form. The form informed client J.B. that RJR was a separate entity from the bank and trust, and that RJR had an agreement that stipulated a portion (20%) of "the expected first year fee collected on your account is paid to RJR/Jeffrey Kahn as a referral fee. This referral payment is also paid on additional deposits made into the account. This payment has absolutely no effect on your total fee whatsoever, but we wish to make full disclosure of this to you."
26. After learning of Kahn's activities, on July 31, 2012, RJR delivered a letter to the bank and trust canceling the March 16, 2012 agreement. RJR stated the reasons for

cancellation were:

- a. RJR's Form ADV Part 2 specifically states RJR does not accept direct or indirect referral fees,
  - b. Mr. Kahn may not have been legally able to either sign a fee-sharing contract or participate in its benefits, and
  - c. Mr. Kahn did not inform the other RJR principals of the existence of the contract, and instead, acted on his own using RJR's name.<sup>5</sup>
27. RJR, Budge, and Kahn were not able to come to an agreement regarding Kahn taking the applicable exams and becoming licensed as an investment adviser representative. RJR and Budge then took steps to disassociate Kahn from the investment adviser. Kahn was removed as an officer of RJR and as an active member of the LLC, and placed on "inactive status" until he became licensed.
28. On July 2, 2012, Kahn contacted the Division for information to take the Series 65 examination and the process for becoming licensed. To date, Kahn has not sought to be licensed with RJR or another investment adviser.

#### Unlicensed Activity

29. Kahn acted as an investment adviser representative from 2008 to 2012 without being properly licensed.
30. Kahn had clients that exceeded the *de minimis* tests, and on a regular basis met with and solicited clients for RJR.
31. In addition, Kahn acted as an unlicensed investment adviser from March 2012 to July

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<sup>5</sup>Kahn represents that in February 2012 he disclosed his proposed plans with the bank and trust to one of the other two members of RJR.

2012 by negotiating and entering an agreement to receive referral fees from the bank and trust without properly being licensed.

## II. CONCLUSIONS OF LAW

32. Respondent Kahn violated Section 61-1-3(3) of the Act by acting as an investment adviser representative from 2008 to 2012 while unlicensed. In addition, Kahn's activities pertaining to the bank and trust agreement constitute further unlicensed activity in violation of Section 61-1-3(3) of the Act.
33. By negotiating and executing a contract on behalf of RJR to benefit himself personally without the knowledge, consent or approval of the other principals or designated official of RJR, Kahn violated Section 61-1-2(1)(b) of the Act.

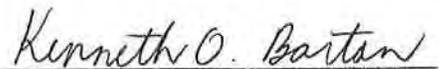
## III. REMEDIAL ACTIONS/SANCTIONS

34. Respondent admits to acting as an unlicensed investment adviser representative and neither admits nor denies the Division's other findings and conclusions. He agrees to the sanctions below being imposed by the Division for the purpose of resolving this action.
35. Respondent represents that the information he has provided to the Division as part of the Division's investigation is accurate and complete to the best of his knowledge.
36. Respondent agrees to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.
37. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$7,000 to the Division, which shall be paid within thirty (30) days following entry of the Order.

IV. FINAL RESOLUTION

38. Respondent acknowledges that this Order, upon approval by the Utah Securities Commission, shall be the final compromise and settlement of this matter. Respondent further acknowledges that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
39. Respondent acknowledges that the Order does not affect any civil or arbitration causes of action that third-parties may have against him arising in whole or in part from his actions, and that the Order does not affect any criminal causes of action that may arise as a result of his conduct referenced herein. Respondent also acknowledges that any civil, criminal, arbitration or other causes of actions brought by third-parties against him have no effect on, and do not bar, this administrative action by the Division against him.
40. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

Dated this 22 day of May, 2013

  
Kenneth O. Barton  
Director of Licensing and Compliance  
Utah Division of Securities

Dated this 22 day of May, 2013

  
Jeffrey Kahn

Approved:

  
Paul G. Amann  
Assistant Attorney General

**ORDER**

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, of which Respondent admits to acting as an unlicensed investment adviser representative but neither admits nor denies the Division's other Findings and Conclusions, are hereby entered.
2. Respondent shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$7,000 to the Division within thirty (30) days following entry of the Order.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Jane Cameron

\_\_\_\_\_  
Erik Christiansen

\_\_\_\_\_  
Laura Polacheck

**ORDER**

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, of which Respondent admits to acting as an unlicensed investment adviser representative but neither admits nor denies the Division's other Findings and Conclusions, are hereby entered.
2. Respondent shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Pursuant to Utah Code Ann. Section 61-1-20, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine in the amount of \$7,000 to the Division within thirty (30) days following entry of the Order.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013

\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Erik Christiansen

\_\_\_\_\_  
Gary Cornia

\_\_\_\_\_  
David A. Russon

**Certificate of Mailing**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 2013, I mailed, by certified mail, a true and correct copy of the fully executed Stipulation and Consent Order to:

Jeremy C. Reutzel  
BENNETT TUELLER JOHNSON & DEERE  
3165 East Millrock Drive, Suite 500  
Salt Lake City, UT 84121

Certified Mail # \_\_\_\_\_

---

Maria Lohse  
Executive Secretary

DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146741  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

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BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF

**PROFITABLE SOLUTIONS, LLC;  
EXCLUSIVE CAPITAL FUNDING, LLC;  
PS1 GROUP, LLC;  
TIMOTHY V. PROVOST, CRED#  
4934264, dba LH SOLUTIONS**

RESPONDENT

**ORDER ON DEFAULT**

**CASE NO. SD-11-0093  
CASE NO. SD-11-0094  
CASE NO. SD-11-0095  
CASE NO. SD-11-0096**

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**BY THE UTAH SECURITIES COMMISSION:**

The presiding officer's May 3, 2013 recommended order on default in this matter is hereby approved, confirmed, accepted, and entered by the Utah Securities Commission.

**ORDER**

Respondents are hereby ordered to cease and desist from engaging in any further conduct in violation of Utah Code § 61-1 et seq.

Respondents are hereby ordered to pay a fine of \$2,472,923 to the Utah Division of Securities, with any restitution paid to investors serving to offset the administrative fine on a dollar-to-dollar basis.

All further proceedings in this case are dismissed. This dismissal does not relieve Respondents from complying with the terms of this default order.

This order shall be effective on the signature date below.

DATED this 30 day of May, 2013

**UTAH SECURITIES COMMISSION:**



Tim Bangerter

\_\_\_\_\_  
Erik Anthony Christiansen

\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
David A. Russon

\_\_\_\_\_  
Gary Cornia

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**UTAH SECURITIES COMMISSION:**

---

Tim Bangerter

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Erik Anthony Christiansen

---

Brent Baker

---



David A. Russon

---

Gary Cornia

CERTIFICATE OF SERVICE

I certify that on the 30<sup>th</sup> day of May, 2013, I have served the foregoing RECOMMENDED ORDER ON DEFAULT and the associated ORDER ON DEFAULT on the parties in this proceeding by mailing a copy, properly addressed by first class mail with postage prepaid, to:

RUDY J. BAUTISTA  
ANDERSON & KARRENBURG, PC  
50 W. BROADWAY, SUITE 700  
SALT LAKE CITY, UT 84101

TIMOTHY V. PROVOST  
566 QUAIL HOLLOW LANE  
ALPINE, UT 84004

And by hand delivery to:

Paul Amann, Assistant Attorney General  
Office of the Attorney General of Utah

Ann Skaggs, Securities Analyst  
Utah Division of Securities

  
\_\_\_\_\_  
Executive Secretary

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
Box 146760  
Salt Lake City, UT 84114-6760  
Telephone: (801) 530-6600  
FAX: (801) 530-6980

---

**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

PROFITABLE SOLUTIONS, LLC,  
EXCLUSIVE CAPITAL FUNDING, LLC,  
PS1 GROUP, LLC,  
TIMOTHY V. PROVOST, CRD # 4934264 d.b.a.  
LH SOLUTIONS,  
**DANIEL G. MAYNARD**

**Respondents.**

**STIPULATION AND CONSENT  
ORDER AS TO DANIEL G.  
MAYNARD**

Docket No. SD-11-0093  
Docket No. SD-11-0094  
Docket No. SD-11-0095  
Docket No. SD-11-0096

**Docket No. SD-11-0097**

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The Utah Division of Securities (the Division), by and through its Director of Enforcement, Dave Hermansen, and Daniel G. Maynard (Maynard), hereby stipulate and agree as follows:

1. Maynard was the subject of an investigation conducted by the Utah County Attorney's Office into allegations that he violated certain provisions of the Utah Uniform Securities Act, Utah Code Ann. § 61-1-1, *et seq.*, as amended (the Act).
2. In connection with that investigation, the Division issued an Order to Show Cause against

Respondents on December 12, 2012, alleging securities fraud. Criminal charges were also filed against Maynard,<sup>1</sup> in connection with the investigation.

3. Respondent Maynard waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf. Respondent Maynard understands that by waiving a hearing that he is waiving the requirement that the Division prove the allegations against him by a preponderance of evidence, waiving his right to confront and cross-examine witnesses who may testify against him, to call witnesses on his own behalf, and any and all rights to appeal the findings, conclusions and sanctions set forth in this Stipulation and Consent Order.
4. Respondent Maynard is represented by attorney Brett Tolman and is satisfied with his representation.
5. Respondent Maynard acknowledges that this agreement does not affect any enforcement action that might be brought by a criminal prosecutor or any other local, state, or federal enforcement authority.
6. Respondent Maynard admits the jurisdiction of the Division over him and over the subject matter of this action.

## **I. THE DIVISION'S FINDINGS OF FACT**

### **THE RESPONDENT**

7. Maynard was, at all relevant times, a resident of the State of Utah. Maynard has never been

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<sup>1</sup>*State of Utah v. Daniel G. Maynard*, Case No. 101401298, Fourth Judicial District Court of Utah (2010). Maynard later pleaded guilty to one count of securities fraud, a class A misdemeanor, and one count of unregistered securities agent, a class A misdemeanor, on December 15, 2011. Maynard was ordered to pay a restitution judgment of \$30,000 and to date has complied with the payment schedule.

licensed in the securities industry in any capacity.

#### GENERAL ALLEGATIONS

1. From November 2007 to October 2008, Respondent Maynard offered and sold investment contracts to investors, in or from Utah, and collected at least \$12.3 million from forty investors. Some of those investments are listed below.
2. Investment contracts are securities under the Act.
3. Respondent Maynard made material misstatements and omissions in connection with the offer of securities to the investors below.

#### INVESTOR W.W.

4. In or about February 2008, W.W. was invited to a friend's house in Utah County, Utah to attend a presentation on an investment opportunity in Money & More, Inc. (M&M).<sup>2</sup> Two other potential investors attended as well.
5. During the meeting, Timothy Vernon Provost (Provost)<sup>3</sup> and Maynard made the following statements about an investment in M&M:
  - a. Investor money would be loaned out every month;
  - b. Investors would receive 7% per month after thirty days;

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<sup>2</sup> Money & More, Inc. is a Nevada corporation registered on December 18, 2002. Gale P. Robinson is the director and president. Money & More, Inc. operated as a deferred deposit transaction company (payday loan company), as defined by California Department of Corporations. Gale Robinson used "factor agreements" as a way of raising capital, which was then used to loan out to customers. Those who raised capital received a percentage based on how much money they raised.

- c. Investors could receive their principal back after one year;
  - d. If investors withdrew their investment funds before the one year term was up, there would be a penalty;
  - e. M&M had been in business for seven years and was a reliable company;
  - f. The only way investors could lose their money was if Gale Robinson (Robinson), the owner of M&M, “ran off” with their money<sup>4</sup>;
  - g. The investment was covered by the State of California through a UCC-1 lien;
  - h. There were a few ways to get investor funds returned if the investment went bad;
  - i. They had researched the payday loan industry and M&M was a “safe deal;” and
  - j. When the investors became full partners in the investment, they would be able to see all the paperwork and financial statements concerning the investment.
6. Provost and Maynard were initially investors in M&M, but later Larry O. Bosh (Bosh), Shawn David Benson, and Michael John Smith set them up to solicit investors for M&M. Provost and Maynard created their own companies to do so: Profitable Solutions, LLC, (PSL), Exclusive Capital Funding, LLC, (ECF), PS1 Group, LLC, (PS1), and LH Solutions.
7. Based on the statements of Provost and Maynard, W.W. invested a total of \$300,000 in

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<sup>3</sup> *State v. Timothy V. Provost*, Case No. 101401298 in Fourth Judicial District Court of Utah. (2010)

<sup>4</sup> On April 20, 2010, Gale Robinson, Larry O. Bosh, Shawn David Benson, and Michael John Smith were charged with ten counts of securities fraud, a second degree felony, ten counts of unregistered securities agent, a third degree felony, one count of pattern of unlawful activity, a second degree felony, and one count of money laundering, a second degree felony. *State of Utah v. Gale Robinson*, Case No. 101401277 in Fourth Judicial District Court of Utah. (2010)

M&M through Provost and Maynard. With Provost and Maynard's knowledge, W.W. used a home equity loan to raise the \$300,000 that he invested.

8. In exchange for the investment funds, W.W. received a New Member Agreement signed by Provost and a Preliminary Investor Suitability Questionnaire.

INVESTORS J.W. AND T.W.

9. J.W. and T.W. learned about M&M from a family member.
10. In or about April 2008, J.W. and T.W. met with Provost and Maynard in Utah County, Utah to discuss an investment opportunity in M&M.
11. During the meeting, Provost, in the presence of Maynard, made the following statements about an investment in M&M:
  - a. The investment amount would determine the return;
  - b. The beginning payout was 5% per month for a \$100,000 investment and would go up to 7.5% for a \$200,000 investment;
  - c. There were no guarantees, however, there were many "reassurances" about the investment;
  - d. Financial statements would be available at any time;
  - e. There was some risk in any investment;
  - f. People borrow more money in an unsure economy; and
  - g. Provost and Maynard would receive a commission for investors they brought in.

12. Based on the statements of Provost and Maynard, J.W. and T.W. invested a total of \$100,000 in M&M through PS1.

INVESTORS R.P., J.P., M.A., L.H., AND S.P.

13. In or about February 2008, R.P., J.P., M.A., L.H., and S.P. met with Provost and Maynard in Utah County, Utah to attend a presentation on an investment opportunity in M&M.
14. Provost and Maynard described the investment and explained the tiered percentages based on the investment amount.
15. During the meeting, Provost and Maynard made the following statements about an investment in M&M:
- a. The loans would be backed or guaranteed by UCC-1 filings in California;
  - b. The loans were legal because they were done through Provost and Maynard and through a private placement memorandum (PPM), so they were safe<sup>5</sup>;
  - c. Provost and Maynard need not be licensed because the investment was structured through a PPM;
  - d. There was no need for licensing so long as the investors went through Provost and Maynard's company<sup>6</sup>;

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<sup>5</sup> While Respondent claimed the investment was structured through a PPM, this never happened. Provost and Maynard waited for a PPM to be provided to them from Bosh, but this never happened either.

<sup>6</sup> On April 9, 2008, Provost and Maynard met with examiners from the Division to discuss the M&M investments. The examiners explained that Provost and Maynard were not in compliance with Utah securities laws and were not properly licensed.

16. Based on the statements of Provost and Maynard, R.P. invested \$37,500 in M&M through PSL. J.P. invested \$37,500 and M.A. invested \$75,000.
17. A short time later, two more investors invested \$50,000 with PSL by pooling the money with R.P., J.P., and M.A.
18. L.H. and S.P. were offered but did not invest. However, Provost and Maynard paid S.P. and L.H. a finder's fee of 1% for referring investors.

INVESTORS T.S. AND K.A.

19. On February 27, 2008 in Utah County, Utah, approximately thirty potential investors attended a presentation on an investment opportunity in M&M. Provost, Maynard, and Bosh were the presenters.
20. During the meeting, Provost, in the presence of Maynard, made the following statements about an investment in M&M:
  - a. Risk in the investment was minimal because M&M was audited by the U.S. Securities and Exchange Commission and the California Division of Securities every month;
  - b. Also, the risk was minimal because there was a UCC-1 against M&M's accounts receivables; and
  - c. There was an insurance policy on the investment.
21. Bosh told the investors how well M&M was doing and that the future of the investment was

bright. Bosh went on to explain the progress of the company, how the investments were performing, trends of the market, and how successful M&M was.

22. Bosh told investors he had a working knowledge of M&M and that he had a desire to purchase the company.
23. Based on the statements of Provost, Bosh, and Maynard, T.S. invested a total of \$490,000 in M&M through PS1. K.A. invested a total of \$1 million.
24. In exchange for the investment funds, T.S. and K.A. received a New Member Agreement and a Preliminary Investor Suitability Questionnaire.

**SECURITIES FRAUD UNDER § 61-1-1 OF THE ACT**

25. The Division incorporates and re-alleges paragraphs 1 through 24.
26. The investment opportunities offered and sold by Respondent Maynard are securities under § 61-1-13 of the Act.
27. In connection with the offer and sale of securities, Respondent Maynard, directly or indirectly, made false statements, including, but not limited to, the following:
  - a. The investment was safe, when in fact, Respondent Maynard had no reasonable basis for making such a statement;
  - b. The investment was legal, when in fact, examiners from the Division had already informed Respondent Maynard that the investments were not in compliance with Utah securities laws; and

- c. Respondent Maynard needs not be licensed because the investment was structured through a PPM, when in fact, examiners from the Division informed Respondent Maynard that he needed to be licensed.
28. In connection with the offer and sale of securities, Respondent Maynard, directly or indirectly, failed to disclose material information, including, but not limited to, the following, which was necessary in order to make statements made not misleading:
- a. Complete information concerning the investment;
  - b. On April 3, 2000, Bosh pleaded guilty to two counts of securities fraud;<sup>7</sup>
  - c. Provost and Maynard had spoken with examiners from the Division who explained that the investment was not in compliance and they needed to be licensed; and
  - d. Some or all of the information typically provided in an offering circular or prospectus regarding Respondent Maynard and M&M, such as:
    - i. Financial statements;
    - ii. Risk factors;
    - iii. The number of investors;
    - iv. Suitability factors for the investment;
    - v. Nature of competition; and
    - vi. Whether the investment was a registered security or exempt from registration.

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<sup>7</sup> *State of Utah v. Larry Bosh*, Case No. 001401021 in Fourth Judicial District Court of Utah. (2000)

**EMPLOYING AN UNLICENSED AGENT UNDER § 61-1-3(2)(a) OF THE ACT**

29. The Division incorporates and re-alleges paragraphs 1 through 24.
30. S.P. and L.H. have not been licensed in the securities industry in any capacity.
31. Provost and Maynard employed and compensated S.P. and L.H. as agents in the offering and/or sale of securities in Utah.
32. Based on the above information, Respondent Maynard violated §61-1-3(2)(a).

**SALE OF A SECURITY BY UNLICENSED AGENT UNDER § 61-1-3(1) OF THE ACT**

33. The Division incorporates and re-alleges paragraphs 1 through 24.
34. Provost and Maynard offered or sold securities in Utah.
35. When offering these securities on behalf of PSL, ECF, and PS1, Provost and Maynard were acting as agents of an issuer.
36. Provost and Maynard were not licensed to sell securities in Utah as an agent of the issuer.
37. Based on the above information, Respondent Maynard violated §61-1-3(1).

**SALE OF AN UNREGISTERED SECURITY UNDER § 61-1-7 OF THE ACT**

38. The Division incorporates and re-alleges paragraphs 1 through 24.
39. The investment opportunities offered and sold by Respondent Maynard are securities under § 61-1-13 of the Act.
40. The securities were offered and sold to investors in or from the State of Utah.

41. The securities offered and sold by Respondent Maynard were not registered under the Act.
42. The issuer did not file any claims of exemption relating to the securities nor does it qualify for a self-executing exemption pursuant to § 61-1-14.
43. The issuer did not make a notice filing pursuant to § 61-1-15.5.
44. Based on the above information, Respondent Maynard violated § 61-1-7 of the Act.

## **II. THE DIVISION'S CONCLUSIONS OF LAW**

45. Based on the Division's investigative findings, the Division concludes that:
  - a. Respondent Maynard violated § 61-1-1.
  - b. Respondent Maynard violated §61-1-3(2)(a).
  - c. Respondent Maynard violated §61-1-3(1).
  - d. Respondent Maynard violated § 61-1-7 of the Act.

## **III. REMEDIAL ACTIONS/SANCTIONS**

46. Respondent Maynard admits the Division's findings and conclusions and consent to the sanctions below being imposed by the Division.
47. Respondent Maynard agrees to the imposition of a cease and desist order, prohibiting him from any conduct that violates the Act.

48. Respondent Maynard agrees that he will be barred from (i) associating<sup>8</sup> with any broker-dealer or investment adviser licensed in Utah; (ii) acting as an agent for any issuer soliciting investor funds in Utah, and (iii) from being licensed in any capacity in the securities industry in Utah.
49. Respondent Maynard agrees to cooperate with the Division, the State of Utah, and the Federal Government in any future investigations and/or prosecutions relevant to the matter herein.
50. Respondent Maynard agrees to pay restitution as ordered in the criminal case, *State of Utah v. Daniel G. Maynard*, Case No. 101401298, Fourth Judicial District Court of Utah (2010).

#### **IV. FINAL RESOLUTION**

51. Respondent Maynard acknowledges that this Stipulation and Consent Order, upon approval by the Securities Commission shall be the final compromise and settlement of this matter.
52. Respondent Maynard further acknowledges that if the Securities Commission does not accept the terms of the Stipulation and Consent Order, it shall be deemed null and void and without any force or effect whatsoever.

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<sup>8</sup> "Associating" includes, but is not limited to, acting as an agent of, receiving compensation directly or indirectly from, or engaging in any business on behalf of a broker-dealer, agent, investment adviser, or investment adviser representative licensed in Utah. "Associating" does not include any contact with a broker-dealer, agent, investment adviser, or investment adviser representative licensed in Utah incidental to any personal relationship or business not related to the sale or promotion of securities or the giving of investment advice in the State of Utah.

53. Respondent Maynard acknowledges that the Stipulation and Consent Order does not affect any civil or arbitration causes of action that third-parties may have against him arising in whole or in part from his actions, and that the Stipulation and Consent Order does not affect any criminal causes of action that may arise as a result of his conduct referenced herein.
54. The Stipulation and Consent Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect the Order in any way.

Utah Division of Securities

Date:

By:

*May 8, 2013*  
*[Signature]*  
 Dave Hermansen  
 Director of Enforcement

Respondent Maynard

Date:

By:

*2 Apr. 1 2013*  
*[Signature]*  
 Daniel G. Maynard

Approved:

*5/7/13*  
*[Signature]*  
~~Wade Faraway~~ *PAUL G. AMANN #6465*  
 Assistant Attorney General  
 U.C.A.

Approved:

*[Signature]*  
 Brett Tolman  
 Attorney for Respondent

**ORDER**

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement.
2. Respondent Maynard cease and desist from violating the Utah Uniform Securities Act.
3. Respondent Maynard agrees to be barred from the securities industry in Utah.
4. Respondent Maynard cooperate with the Division in any future investigations.
5. Respondent Maynard agrees to pay restitution as ordered in the criminal case, *State of Utah v. Daniel G. Maynard*, Case No. 101402198, Fourth Judicial District Court of Utah (2010).

**BY THE UTAH SECURITIES COMMISSION:**

DATED this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Jane Cameron

\_\_\_\_\_  
Laura Polacheck

\_\_\_\_\_  
Erik Christiansen

\_\_\_\_\_  
Brent Baker

**Certificate of Mailing**

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2013, I mailed, by regular mail, a true and correct copy of the Stipulation and Consent Order to:

Daniel G. Maynard  
c/o Brett Tolman  
Ray Quinney & Nebeker  
36 S. State. St., #1400  
Salt Lake City, UT 84111

Certified # \_\_\_\_\_

---

DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146741  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

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BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF

**INTELICLOUD HOLDINGS, INC. FILE #  
B01109147;  
INTELICLOUD HOLDINGS, INC;  
JEFFREY FRIEDERICHS,**

RESPONDENTS

**RECOMMENDED ORDER ON DEFAULT**

**CASE NO. SD-13-0024**

**CASE NO. SD-13-0025**

**CASE NO. SD-13-0026**

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**BY THE PRESIDING OFFICER:**

This adjudicative proceeding was initiated pursuant to March 21, 2013 notices of agency action. Responses to the accompanying petition and order to show cause were due by April 23, 2013. The notices specified that a failure to comply with the deadline for response would result in the entry of a default order against Respondents without any further notice.

An initial hearing was held on May 1, 2013. Respondents failed to appear. As of the date of this order, Respondents have not filed responses to the Division's petition and order to show cause, nor have they made any effort to participate in the proceeding. Therefore, the presiding

officer finds that, pursuant to Utah Code Ann. § 63G-4-209(1)(b) and (c), proper factual and legal bases exist for entering a default order against Respondents.

**RECOMMENDED ORDER**

Based on the foregoing, the presiding officer recommends that the Utah Securities Commission accept the allegations outlined in the Division's petition and order to show cause as being true, to wit:

1. That, in violation of Utah Code Ann. § 61-1-15.5 and Utah Administrative Code § R164-15-2, Respondents have failed to provide the Division with a complete and accurate notice filing regarding their offer and sale of a federal covered security;
2. That Respondents' actions, which constitute one or more violations of Utah Code Ann. § 61-1 et seq, are grounds for sanction under the Act.

The presiding officer further recommends that the Utah Securities Commission enter a default order against Respondents:

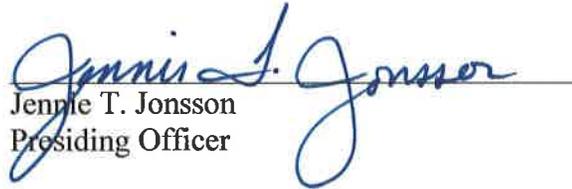
1. Suspending Respondents' offer and sale of a federal covered security;
2. Ordering Respondents to cease and desist from engaging in any further conduct in violation of Utah Code Ann. § 61-1 et seq;
3. Requiring Respondent Intelicloud Holdings, Inc. to pay a fine of \$1,000 to the Utah Division of Securities; and
4. Requiring Respondent Friederichs to pay a fine of \$1,000 to the Utah Division of Securities.

Finally, the presiding officer recommends that, upon entering the default order, the Utah Securities Commission dismiss any further proceedings in this case.

This recommended order shall be effective on the signature date below.

DATED this 1<sup>st</sup> day of May, 2013.

UTAH DEPARTMENT OF COMMERCE

  
Jennie T. Jonsson  
Presiding Officer

CERTIFICATE OF DELIVERY

I hereby certify that on the 1<sup>st</sup> day of May, 2013, the undersigned hand delivered a true and correct copy of the foregoing RECOMMENDED ORDER ON DEFAULT to the following:

Utah Securities Commission  
c/o Keith Woodwell, Director, Utah Division of Securities  
Heber M. Wells Building, 2nd Floor  
Salt Lake City, UT



DIVISION OF SECURITIES  
KEITH WOODWELL, DIRECTOR  
DEPARTMENT OF COMMERCE  
P.O. BOX 146741  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84114-6711  
Telephone: (801) 530-6628

---

BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH

---

IN THE MATTER OF

**INTELICLOUD HOLDINGS, INC. FILE #  
B01109147;**  
**INTELICLOUD HOLDINGS, INC.;**  
**JEFFREY FRIEDERICHS,**

RESPONDENTS

**ORDER ON DEFAULT**

**CASE NO. SD-13-0024**

**CASE NO. SD-13-0025**

**CASE NO. SD-13-0026**

---

**BY THE UTAH SECURITIES COMMISSION:**

The presiding officer's May 1, 2013 recommended order on default in this matter is hereby approved, confirmed, accepted, and entered by the Utah Securities Commission.

**ORDER**

Respondents' offer and sale of a federal covered security is hereby suspended.

Respondents are hereby ordered to cease and desist from engaging in any further conduct in violation of Utah Code § 61-1 et seq.

Respondent Intelicloud is hereby ordered to pay a fine of \$1,000 to the Utah Division of Securities.

Respondent Friedrichs is hereby ordered to pay a fine of \$1,000 to the Utah Division of Securities.

All further proceedings in this case are dismissed. This dismissal does not relieve Respondent from complying with the terms of the default order.

This order shall be effective on the signature date below.

DATED this 30 day of May, 2013

**UTAH SECURITIES COMMISSION:**



\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Erik Anthony Christiansen

\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
David A. Russon

\_\_\_\_\_  
Gary Cornia

Respondent Friedrichs is hereby ordered to pay a fine of \$1,000 to the Utah Division of Securities.

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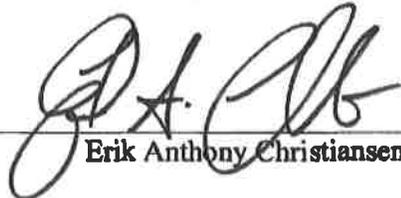
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DATED this 30 day of May, 2013

**UTAH SECURITIES COMMISSION:**

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Tim Bangerter



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Erik Anthony Christiansen

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Brent Baker

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David A. Russon

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Gary Cornia

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**UTAH SECURITIES COMMISSION:**

\_\_\_\_\_  
Tim Bangerter

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Gary Cornia

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**UTAH SECURITIES COMMISSION:**

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Tim Bangerter

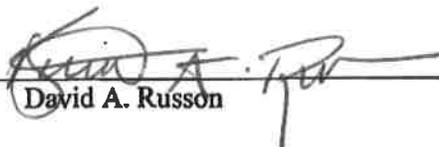
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Erik Anthony Christiansen

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Brent Baker

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David A. Russon

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Gary Cornia

**NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW**

**Agency review of this order may be obtained by filing a request for agency review with the Executive Director of the Department of Commerce, 160 East 300 South, Box 146701, Salt lake City, Utah 84114-6701, within thirty (30) days after the date of this order. A motion to set aside the order may also be filed with the presiding officer. The agency action in this case was a formal proceeding. The laws and rules governing agency review of this proceeding are found in Section 63G-4-101 et seq. of the Utah Code, and Rule 151-4 of the Utah Administrative Code.**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of May, 2013 the undersigned served a true and correct copy of the foregoing ORDER ON DEFAULT by mailing a copy through first-class mail, postage prepaid, to:

Jeffrey Friederichs  
Intelicloud Holdings, Inc.  
4600 Dampus Dr., Suite 106  
Newport Beach, CA 92660

and caused a copy to be hand delivered to:

Paul Amann, Assistant Attorney General  
Office of the Attorney General of Utah  
Fifth Floor, Heber M. Wells Building  
Salt Lake City, Utah

Utah Division of Securities  
Second Floor, Heber M. Wells Building  
Salt Lake City, Utah

  
\_\_\_\_\_

Division of Securities  
Utah Department of Commerce  
160 East 300 South  
Box 146760  
Salt Lake City, UT 84114-6760  
Telephone: (801) 530-6600  
Fax: (801) 530-6980

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**BEFORE THE DIVISION OF SECURITIES  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**MICHAEL SHAUN KIRBY,  
GREENFOLDERS, INC.,**

**Respondents.**

**STIPULATION AND CONSENT  
ORDER**

**Docket No. SD -13-0005**

**Docket No. SD-13-0006**

The Utah Division of Securities (the Division), by and through its Director of Enforcement, Dave Hermansen, and GreenFolders, Inc. (GreenFolders) and Michael Shaun Kirby (Kirby) hereby stipulate and agree as follows:

1. Respondents were the subject of an investigation conducted by the Division into allegations that they violated certain provisions of the Utah Uniform Securities Act, Utah Code Ann. § 61-1-1, *et seq.*, as amended (the Act).

2. In connection with that investigation, the Division issued an Order to Show Cause against Respondents on January 3, 2013, alleging securities fraud. The Division filed an Amended Order to Show Cause on March 27, 2013, which supersedes the Order to Show Cause filed on January 3, 2013.
3. Respondents filed a response to the Division's January 3, 2013 Order to Show Cause on or about February 15, 2013, which denies the Division's claims and sets forth Respondents' defenses, which response by agreement of the parties applies to the Division's Amended Order to Show Cause filed on March 27, 2013.
4. No hearing has been held in this matter. A hearing has been scheduled before the Securities Commission for August 14 – 15, 2013 for the purpose of adjudicating the Division's claims and the Respondent's defenses.
5. Respondents hereby agree to settle this matter with the Division by way of this Stipulation and Consent Order (Order). If entered, the Order will fully resolve all claims the Division has against Respondents pertaining to the January 3, 2013 Order to Show Cause and the March 27, 2013 Amended Order to Show Cause.
6. Respondents admit that the Division has jurisdiction over them and the subject matter of this action.

7. Respondents hereby waive any right to a hearing to challenge the Division's evidence and present evidence on their behalf.
8. Respondents have read this Order, understand its contents, and voluntarily agree to the entry of the Order. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondents to enter into this Order, other than as described in this Order.
9. Respondents are represented by Steven G. Loosle and Paula W. Faerber of Kruse Landa Maycock & Ricks, LLC and are satisfied with their advice and representation in this matter.

**I. THE DIVISION'S FINDINGS OF FACTS**

**THE RESPONDENTS**

10. Kirby was, at all relevant times, a resident of the state of Utah. Kirby has never been licensed in the securities industry in any capacity.
11. GreenFolders is a Utah corporation that registered with the Division of Corporations on January 5, 2007 under the name Emageo Holding Company, Inc. (Emageo). The name was changed to GreenFolders on March 15, 2009, then back to Emageo on September 1, 2011. The name GreenFolders was used by Kirby with investor H.P. Kirby currently serves as Emageo's Director. GreenFolders has never registered with the Division.

### GENERAL ALLEGATIONS

12. From February 11, 2009 to July 22, 2009, Respondents offered and sold stock to an investor, in or from Utah, and collected a total of \$375,000.
13. Stock is a security under the Act.
14. Respondents made material omissions in connection with the offer and sale of securities to the investor identified below.
15. The investor lost \$375,000 of his investment funds.

#### INVESTOR H.P.

#### FIRST INVESTMENT

16. H.P. met Kirby when Kirby began dating H.P.'s daughter J.T. Kirby also helped H.P. sell some properties through Kirby's title company, Integrated Title Services, Inc. (ITS).
17. In February 2009, Kirby asked H.P. to stop by his office in Midvale, Utah to discuss a certain matter. Two of H.P.'s adult children went with H.P. At Kirby's office, H.P. was shown a video presentation on GreenFolders' paperless office software developed for title companies.
18. Kirby told H.P. that GreenFolders needed to raise money to complete the software and was selling GreenFolders stock in four tranches of 100,000 shares for \$250,000 each. With respect thereto, Kirby made the following statements:

- a. The software was mostly finished, but was still undergoing minor tweaks, and GreenFolders needed to raise an additional one million dollars;
  - b. People were lining up to invest in GreenFolders;
  - c. H.P. would have no problem doubling his investment, and likely could earn more;  
and
  - d. A company like Microsoft was going to buy GreenFolders.
19. On February 11, 2009, after H.P. decided to invest with Kirby, J.T. delivered to Kirby a \$250,000 check made payable to GreenFolders. In exchange for the \$250,000, HDP Properties, LLC<sup>1</sup> received a stock certificate for 100,000 shares of Emageo, Inc., dated February 11, 2009.
  20. H.P. did not receive any disclosure documentation or other memorialization prior to his investment.

#### SECOND INVESTMENT

21. In July 2009, Kirby asked H.P. if he was interested in investing another \$250,000 with Kirby. H.P. said he could invest half that amount, \$125,000.
22. On July 22, 2009, after H.P. decided to invest the additional sum with Kirby, J.T. delivered to Kirby a \$125,000 check made payable to GreenFolders. In exchange for the

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<sup>1</sup> H.P. and his wife, D.P., set up HDP Properties, LLC as an estate-planning limited liability company.

\$125,000, HDP Properties, LLC received a stock certificate for 50,000 shares of Emageo, Inc., dated September 9, 2009.

23. H.P. did not receive any disclosure documentation or other memorialization prior to his investment.
24. In August 2011, another company offered to buy GreenFolders. H.P. said he went to a shareholder meeting to discuss the sale. There, H.P. learned he was the only shareholder who paid \$2.50 per share; many other shareholders only paid \$0.40 per share.
25. H.P. has not been repaid any of his \$375,000 investment principal.

#### **CAUSES OF ACTION**

##### **SECURITIES FRAUD UNDER § 61-1-1 OF THE ACT**

26. The Division incorporates and re-alleges paragraphs 1 through 25.
27. The stock offered and sold by Respondents is a security under § 61-1-13 of the Act.
28. In connection with the offer and sale of a security to the investor, Kirby, directly or indirectly, failed to disclose material information, including, but not limited to, the following, which was necessary in order to make statements made not misleading:
  - a. Why Kirby believed a company like Microsoft would be interested in purchasing GreenFolders;
  - b. How much GreenFolders had already raised, and what would happen if

GreenFolders did not raise one million dollars;

- c. No product sales of the GreenFolders software had taken place yet;
- d. Previous shareholders had paid significantly less than \$2.50 per share to purchase stock in GreenFolders; and
- e. Some or all of the information typically provided in an offering circular or prospectus regarding Kirby and GreenFolders, such as:
  - i. Financial statements;
  - ii. Risk factors;
  - iii. Suitability factors for the investment;
  - iv. Business experience and operating history;
  - v. Whether the investment is a registered security or exempt from registration; and
  - vi. Whether Respondents were licensed to sell securities.

## **II. THE DIVISION'S CONCLUSIONS OF LAW**

29. Based on the Division's investigation, the Division concludes that:
- a. The stock offered and sold by Respondents is a security under § 61-1-13 of the Act.
  - b. Respondents violated § 61-1-1(2) of the Act by omitting to state material facts in

connection with the offer and sale of securities, disclosure of which were necessary in order to make representations made not misleading.

### **III. REMEDIAL ACTIONS/SANCTIONS**

30. In connection with this settlement, Respondents neither admit nor deny the Division's findings of facts and conclusions of law but consent to the sanctions below being imposed by the Division.
31. Respondents agree to the imposition of a cease and desist order, prohibiting them from any conduct that violates the Act.
32. Respondents agree not to seek licensure, or engage in any activities that would require licensure, in the securities industry in the state of Utah.
33. Pursuant to § 61-1-20(1)(f) of the Act and in consideration of the guidelines set forth in Utah Administrative Code Rule R164-31-1, the Division imposes a fine of \$17,500 against Respondents, with at least \$8,750 due and payable within ten days of entry of the Order and the remainder to be paid in equal monthly payments over a two-year period, with the first monthly payment to be due one month from the entry of the Order, and the remaining monthly payments due on the same day of the following months until payment in full. If the Division finds that either Kirby or GreenFolders materially violates any term of this Order, thirty days after notice and an opportunity to be heard before an

administrative officer solely as to the issue of a material violation, Respondents consent to a judgment ordering the entire fine immediately due and payable.

34. Respondents agree to cooperate in any future investigations and/or prosecutions related to this matter; however, such agreement does not constitute a waiver of any Fifth Amendment right against self-incrimination.

#### IV. FINAL RESOLUTION

35. Respondents acknowledge that this Order, upon approval by the Securities Commission, shall be the final compromise and settlement of this matter.
36. Respondents further acknowledge that if the Securities Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.
37. Respondents and the Division acknowledge that the Order does not affect any civil or arbitration causes of action that third parties may have against them rising in whole or in part from Respondents' actions, and that the Order does not affect any criminal causes of action that may arise as a result of the conduct referenced herein.
38. Respondents acknowledge that a violation of this Order is a third degree felony pursuant to § 61-1-21(1)(b) of the Act.
39. The Order constitutes the entire agreement and settlement between the parties herein and

supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect the Order in any way. Upon entry of the Order, any further scheduled hearings are canceled.

*[Handwritten signature]*

Utah Division of Securities:

Date: \_\_\_\_\_

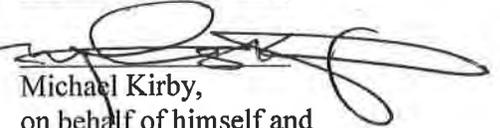
By: \_\_\_\_\_  
Dave R. Hermansen  
Director of Enforcement

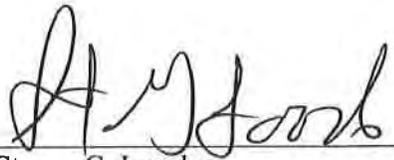
Approved:

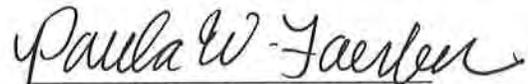
\_\_\_\_\_  
Paul Amann  
Assistant Attorney General  
N.M.

Respondent:

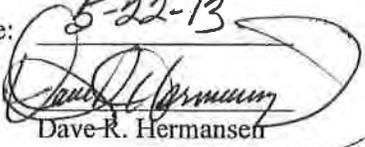
Date: 5-20-2013

By:   
Michael Kirby,  
on behalf of himself and  
GreenFolders, Inc.

  
\_\_\_\_\_  
Steven G. Loosle,  
Attorney for Michael Kirby  
and GreenFolders, Inc.

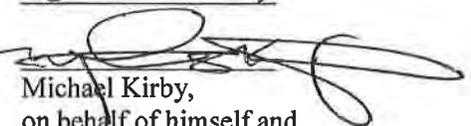
  
\_\_\_\_\_  
Paula W. Faerber,  
Attorney for Michael Kirby  
and GreenFolders, Inc.

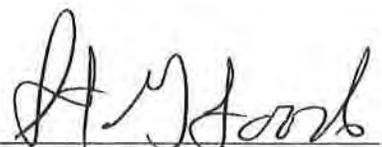
Utah Division of Securities:

Date: 5-22-13  
By:   
Dave R. Hermansen  
Director of Enforcement

Approved:   
Paul Amann  
Assistant Attorney General  
N.M.

Respondent:

Date: 5-20-2013  
By:   
Michael Kirby,  
on behalf of himself and  
GreenFolders, Inc.

  
Steven G. Loosle,  
Attorney for Michael Kirby  
and GreenFolders, Inc.

\_\_\_\_\_  
Paula W. Faerber,  
Attorney for Michael Kirby  
and GreenFolders, Inc.

right against self-incrimination.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2013.

**BY THE UTAH SECURITIES COMMISSION:**

\_\_\_\_\_  
Brent Baker

\_\_\_\_\_  
Tim Bangerter

\_\_\_\_\_  
Jane Cameron

\_\_\_\_\_  
Erik Christiansen

\_\_\_\_\_  
Laura Polacheck

**Certificate of Mailing**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 2013, I mailed a true and correct copy of the fully executed Stipulation and Consent Order to:

Michael Shaun Kirby  
GreenFolders, Inc.  
c/o Steven G. Loosle  
Kruse Landa Maycock & Ricks, LLC  
136 East South Temple, Suite 2100  
P.O. Box 45561  
Salt Lake City, Utah 84145-0561

Certified Mailing # \_\_\_\_\_

\_\_\_\_\_  
Maria Skedros  
Executive Secretary