How Does This Happen in America?

How does a man get charged with **securities fraud** when the top firms said it was not a security.

That is the unanswered question at the heart of the **Par Funding** case — a case that should alarm anyone who believes the Constitution still means what it says.

The government charged **Joe LaForte** with securities fraud based on the claim that Par Funding's merchant cash advance product was an unregistered security. But Par Funding did not operate in the shadows. It did not guess. It did not improvise.

Par Funding structured its product as a **non-security** — deliberately, transparently, and **under the advice of counsel from some of the largest and most sophisticated law firms in the country**. Firms whose job is to know exactly where the line is — and how not to cross it.

Yet the line was moved anyway.

No statute changed.
No regulation was rewritten.
No warning was issued.

Instead, a lawful product was retroactively rebranded as criminal — and a business was destroyed on that theory alone.

This is not a disagreement over fine print. It is the government asserting the power to **criminalize conduct after the fact**, even when that conduct was structured in reliance on legal advice from top-tier counsel. If that can happen here, it can happen anywhere.

The Constitution is supposed to prohibit exactly this. Due process requires notice. Fair warning is not optional. Laws are not supposed to bend to political winds or enforcement agendas.

And yet, in the Par Funding case, they did.

This exposé examines how a lawful financial product became a crime, how legal advice became meaningless, and how a prosecution moved forward not because the law was clear — but because power was.

If this can happen to Par Funding, the question is no longer *what is legal*.

The question is, "**who is safe?**

If the legal advice was wrong — why is the client the one charged?

That is the question no one in this case has been willing to answer.

Par Funding did not invent its structure in a vacuum. It relied on advice from **some of the largest, most sophisticated law firms in the United States** — firms that specialize in securities law, regulatory compliance, and risk mitigation. Firms whose opinions are relied upon every day by banks, hedge funds, and Fortune 500 companies.

If that advice was flawed, where are the consequences for the advisors?
If the law was unclear, where was the warning?
If the rules were changing, where was the notice?

Instead, the government skipped every constitutional safeguard and went straight to punishment — charging **Joe LaForte** with securities fraud for conduct undertaken **in reliance on counsel**, then pretending that reliance never existed.

That is not law enforcement.
That is retroactive criminalization.

And when the state can charge the client for following expert legal advice — while no one else is held accountable — the message is unmistakable: **compliance is irrelevant, and innocence is no defense**.

That should terrify every business owner in America.

How Can the SEC and the AUSA Ignore the Lawyers Advice of Counsel— and Still Call It Securities Fraud?

How does the **U.S. Securities and Exchange Commission** simply ignore the engagement letters, opinions, structuring work, form D Filings, and actual document creation of **some of the most powerful law firms in America**?

These were not back-alley advisors.
These were national firms paid **millions of dollars** to analyze the product, vet the structure, and ensure that **Par Funding** operated within the guidelines that the SEC provided.

Their work was not secret.
Their role was not hidden.
Their conclusions were not ambiguous.

Yet when a civil enforcement action began, those firms vanished from the narrative — while the client was criminally charged.

If the Lawyers Were Wrong, Why Isn't That the Story?

If the SEC truly believed the product was a security, there are only three possibilities:

1. The law firms misunderstood black-letter securities law
2. The law was unclear and evolving
3. The SEC changed its interpretation after the fact

None of those scenarios equal fraud.

And none justify criminal charges against a client who **relied on counsel**.

Yet instead of confronting the advisory record, the SEC acted as if it never existed.

The firms took their fees from Par Funding.
The government took the case.
And the client took the fall.

Where Is the Scienter?

This is where the case collapses under its own weight.

Scienter — the **intent to deceive, manipulate, or defraud** — is not optional. It is a required element of securities fraud.

So ask the obvious questions:

- Where is the intent to deceive when a company hires top-tier counsel?
- Where is the intent to defraud when disclosures are made and records are kept?
- Where is the criminal mindset when the business model is built *to comply*?

You cannot accidentally commit securities fraud **while actively trying not to**!!!!!

At worst, the government alleges a disagreement over classification.
A disagreement is not fraud.
A misclassification is not intent.
Compliance is not deception.

Without scienter, the charge fails.

This Is Not How Fraud Is Defined

Fraud requires:

- A knowing false statement
- Made with intent
- To deceive

What happened here was the opposite.

Joe LaForte did not hide the product.
He did not evade regulators.
He did not operate in secret.

He hired lawyers.
He followed their advice.
He structured accordingly.

Calling that “fraud” drains the word of all meaning.

What This Really Signals

When regulators can:

- Ignore legal opinions
- Disregard advice of counsel
- Skip scienter
- Criminalize hindsight disagreement

then **no compliance effort is safe**.

The message becomes clear:
The rules are whatever the government says they are *after* the fact.

That is not regulation.
That is power without constraint.

And if that is enough to destroy **Par Funding** — it is enough to destroy anyone.

The "Compliance Shield": Backed by the Titans of Law

In the world of securities, there is a difference between a neighborhood lawyer and a powerhouse firm that literally helps write the rules. Par Funding didn't search for shortcuts; they sought out the highest level of legal scrutiny available in the United States.
Par Funding engaged firms and individuals who are the "Gold Standard" of legal rankings—the experts that Fortune 500 companies and international banks hire when they need to ensure absolute compliance.
If the government claims Par Funding "intended" to defraud, they are essentially claiming that these world-class institutions and scholars—with thousands of combined years of experience—failed to spot what the SEC claims was "obvious."
Below is the chronological evidence of the professional advice Par Funding requested, paid for, and followed:

1. DLA Piper
The Global Powerhouse: DLA Piper is one of the largest and most prestigious law firms in the world. Their Capital Markets and Securities practice is regularly ranked Tier 1 by The Legal 500. They are the "Big Four" of the legal world.

EXHIBIT: DLA Piper Advice/Security & Form D Guidance

From: "Jacobs, Lisa" <Lisa.Jacobs@dlapiper.com>
To: "joecole@parfunding.com" <joecole@parfunding.com>
Cc: "Bushey, Jr., Michael E." <Michael.Bushey@dlapiper.com>
Subject: FW: RE: Complete Business Solutions Group
Sent: Thu, 10 Nov 2016 16:45:34 +0000

CBSG - Consulting Agreement (Isaac Shehebar).DOCX
CBSG A&R Promissory Note - Issac Shehebar (November 2016).DOCX
CBSG A&R Security Agreement (November 2016).DOCX
Consulting Agreement (Blackline).pdf
Promissory Note (Blackline).pdf
Security Agreement (Blackline).pdf

Joe - Attached are the following documents:

1. Amended and Restated Non-Negotiable Promissory Note issued to Isaac Shehebar (in the original principal amount of $3MM);
2. Blackline against Isaac's original Promissory Note (in the original principal amount of $1MM);
3. Amended and Restated Security Agreement;
4. Blackline against the Isaac's original Security Agreement;
5. Consulting Agreement for Isaac; and
6. Blackline against Perry Abbonizio's Consulting Agreement.

You will see my questions as you go through them. Let me know once you have had a chance to review.

Best~

Lisa

Lisa R. Jacobs
Partner
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M +1 215.694.9996
E lisa.jacobs@dlapiper.com

ACTUAL PROMISSORY NOTE DLA CRAFTED:

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THIS NOTE MAY NOT BE OFFERED, SOLD, ASSIGNED, TRANSFERRED, PLEDGED, HYPOTHECATED OR OTHERWISE DISPOSED OF IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT PERTAINING TO THIS NOTE UNDER SUCH LAWS, OR IF SUCH REGISTRATION IS NOT REQUIRED TO EFFECT SUCH SALE OR OFFER.

PROMISSORY NOTE

$3,000,000.00 Dated as of January 10, 2017

FOR VALUE RECEIVED, COMPLETE BUSINESS SOLUTIONS GROUP INC., a Delaware corporation (***"Maker"***), with an address of 141 2nd Street, Philadelphia, PA 19106, promises to pay, without rights of set-off, to the order of ALBERT CHEHEBAR (***"Payee"***), with an address 1407 Broadway, New York, NY 10018 or such other place as Payee may designate to Maker in writing, the principal amount of Three Million Dollars ($3,000,000.00) lawful money of the United States of America (the ***"Principal Amount"***), together with interest on the outstanding balance thereof, as provided herein.

1. Interest shall accrue on the Principal Amount of this Promissory Note (this ***"Note"***) from time to time outstanding hereunder at the rate of eighteen percent (18.0%) per annum. Accrued interest shall be paid as set forth in Section 2(a). All interest shall be calculated based upon the actual number of days elapsed.

2. REPAYMENT.

   (a) Interest. Accrued interest shall be paid monthly in arrears on the same day of each month, as the date of this Note, for the previous month (or if such day is not a business day, on the immediately following business day) during the term of this Note until the Principal Amount of this Note and all accrued interest is paid in full;

   (b) Payment at Maturity.

      (i) The Principal Amount and any accrued and unpaid interest thereon shall be paid in full on the earlier of January 9, 2022 (as such date may be automatically extended pursuant to clause (ii) hereof, the "***Maturity Date***") and the date of acceleration in accordance with Sections 6 or 7 hereof.

      (ii) Unless Payee provides Maker with prior written notice no less than six (6) months, and not more than one year prior to the then current Maturity Date stating that Payee declines to extend the maturity date,

Lisa R. Jacobs Bio:

DLA PIPER

Lisa R. Jacobs
Partner
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Lisa Jacobs represents businesses and institutional and individual clients in domestic and international transnational matters including mergers and acquisitions, complex corporate finance, venture capital transactions, institutional and private equity financings, asset securitizations and private placements, as well as private equity fund formation and governance issues.

RELATED SERVICES

- Corporate

In addition to serving numerous business, private equity and financial services clients, Lisa counsels government and sports organizations in structuring transactions. Her practice also focuses on the sports, entertainment and hospitality industries.

EXPERIENCE

Among her representative engagements, Lisa negotiated the agreement between the Republican National Committee and the City of Philadelphia that brought the 2000 Republican Presidential Convention to Philadelphia, the first time in history that a host city's financial obligations to a political party for staging the convention in that city were secured by an irrevocable letter of credit. She has represented several major families of private equity funds and venture funds in structuring and governance matters, and initial and follow-on investments in, and dispositions of, portfolio companies.

Lisa has advised a number of sports industry entities, including the Florida Panthers National Hockey League franchise, Mario Lemieux and a syndicate of investors in the purchase of the Pittsburgh Penguins National Hockey League franchise from bankruptcy, several AHL and minor hockey league franchises, and a minor league baseball team in their capital and financing requirements. She represents a number of food and beverage conglomerates and private healthcare service provider groups in their formation and structuring, merger and acquisition, financing and management activities.

CREDENTIALS

Admissions

- Pennsylvania

Education

- Harvard Leadership Program 2012
- J.D., Villanova University School of Law 1986
  cum laude
- B.S., University of Pennsylvania 1980
  cum laude

Memberships

Lisa is active in a number of national and regional professional associations, as well as in national and local politics, and serves on the boards of several civic and charitable organizations. The Governor of Pennsylvania appointed her in 2012 to the Uniform Law Commission (ULC), representing the Commonwealth. She currently chairs the ULC's Drafting Committeeson Canadian Judgment Registration and its Diversity and Inclusion Committee, and serves on its Scope and Program Committees (selection of new projects). She previously served on the ULC's Series of Unincorporated Business Entities, Social Media Privacy, Business Organization Acts and

Harmonization of Business Entity Acts Drafting Committees. She is a member of the ULC/ABA Joint Editorial Board on Uniform Unincorporated Organization Acts. Lisa has been a member of the American Law Institute since 2009 and is active in both the American Bar Association and the Pennsylvania Bar Association, currently serving as Chair of the Business Law Section's Business Organization Statutory Update Committee. Lisa was elected Chair of the Advisory Committee for the Pennsylvania Department of State Corporations Bureau (members are appointed by the Secretary of the Commonwealth) having served since 2015 and previously from 2002 through 2011. She also is a member of the Pennsylvania task force that drafted Act 170 – the legislation that overhauled the Commonwealth's business organization laws , which became effective in 2017.

Civic and Charitable

Lisa was elected to the Board of Directors of Republic Bank (a state-chartered bank operating in Pennsylvania and New Jersey) in 2017. Additionally, she serves on the Board of Directors of the Philadelphia-Freedom Valley YMCA (currently its Vice Chair). She is pro bono counsel to Teen Cancer America, a charitable organization sponsored by *The Who's* Roger Daltrey and Pete Townsend and devoted to improving the lives of teenagers and young adults with cancer, the Museum of the American Revolution, and Liberty Steam Fire Engine Co. No. 1 of Spring City.

INSIGHTS

Events

- Moderator and Lead Speaker, "Act 170 – Changing the Face of Pennsylvania Business Law," Pennsylvania Bar Institute (multiple programs in 2017 and 2018)
- Moderator and Panelist, "The Dreaded Deadlock in LLCs," 2017 Pennsylvania Bar Law Institute (November 2017)
- Speaker, "Model Entity Transactions Act," Pennsylvania Bar Institute (May 2015)
- Panelist, "Leading to Series LLC and Related Entities," The American Law Institute (April 2015)
- Panelist, "Globalization of Commercial Transactions: Leading in a Changing World," The National Association of Women Lawyers' GCI 10 Conference (November 2014)
- Co-Presenter, "Getting The Deal You Thought You Had," DELVACCA's 6th Annual In-House Counsel Conference, Philadelphia (April 2014)
- *Legal Intelligencer* In House Counsel Seminar (March 2014 "Staying Ahead of the Curve: Leveraging Your Compliance and Governance Programs as a Tool for Change Management")
- Drafting LLC Operating Agreements (January 2013)

2. Haynes and Boone, LLP
The Institutional Leaders: Nationally recognized for their expertise in SEC regulatory enforcement and corporate finance, Haynes and Boone is a staple on the "Best Law Firms" lists. They specialize in protecting clients against regulatory overreach.

EXHIBIT: Haynes Boone Advice/Compliance Review

From: Newman, Timothy
Sent: Thursday, March 12, 2020 8:33 PM
To: Goodman, Benjamin
Subject: RE: Promissory Notes/Securities

Thanks. I'll take a look.

haynesboone

Tim Newman | Partner
timothy.newman@haynesboone.com | (t) +1 214.651.5029

From: Goodman, Benjamin
Sent: Thursday, March 12, 2020 6:41 PM
To: Newman, Timothy <Timothy.Newman@haynesboone.com>
Subject: Promissory Notes/Securities

Tim,

Attached is the Supreme Court's opinion in *Reves* adopting the "family resemblance" test for whether a promissory note is a security, as well as an opinion from the Amarillo Court of Appeals applying the *Reves* test and holding that a note was not a security. *See Reves v. Ernst & Young*, 494 U.S. 56 (1990); *Campbell v. C.D. Payne & Geldermann Sec., Inc.*, 894 S.W.2d 411 (Tex. App.—Amarillo 1995, writ denied).

Best,
Benjamin

haynesboone

Benjamin Goodman
Associate
benjamin.goodman@haynesboone.com

Haynes and Boone, LLP
2323 Victory Avenue
Suite 700
Dallas, TX 75219-7672

From: Goodman, Benjamin
Sent: Monday, March 23, 2020 6:11 PM
To: Newman, Timothy
Subject: Par Funding - Security Research
Attachments: Sunset Management LLC v American Realty Investors Inc.pdf; Campbell v CD Payne and Geldermann Securities Inc.pdf

Follow Up Flag: Flag for follow up
Flag Status: Completed

Tim,

I've reached a good stopping point in my research into whether the notes are securities to provide an update. I've reviewed case law from Texas state courts, the U.S. Supreme Court, and courts within the Fifth Circuit. In sum, it's unclear how a court would rule (and odds may be against us), but I think we can make a legitimate, good-faith argument that these notes are not securities. Ultimately, a court (of SOAH) may find that they are securities, but the argument has enough merit to make the TSSB think twice and consider the chance of an adverse ruling. It is difficult to predict how a court would rule because the analysis is based on a four-factor balancing test, and it appears in some cases courts decide on a desired outcome and then mold the analysis of the four factors accordingly, leading to inconsistent results/analysis across cases.

Courts use the "family resemblance" test to determine whether a note is a security. The presumption is that every note is a security, but one can rebut this presumption. To start, there is a list of judicially-created exceptions, including a note delivered in consumer financing, a short-term note secured by a lien on a small business or some of its assets, and a short-term note secured by an assignment of accounts receivable. If the note at issue is not on the list, one can rebut the presumption by analyzing four factors to determine whether the note "bears a strong resemblance" to those that are on the list and, if not, whether the note is of a new category that "should be added" to the list of non-securities. The four factors are as follows:

(1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction—i.e., whether it's an investment whereby the seller raises money for general business use and the buyer is interested primarily in a profit the note is expected to generate, versus whether the note is to advance some commercial or consumer purpose;
(2) the plan of distribution of the instrument to determine whether it is an instrument in which there is common trading for speculation or investment, such as where the instrument is offered and sold to a broad segment of the public;
(3) the reasonable expectations of the investing public as to whether it is a security; and
(4) whether some factor significantly reduces the risk of the instrument, including another regulatory scheme other than the securities laws or the collateralization of the note.

Here, we could argue that these notes fit within some of the judicially-created exceptions mentioned above. But if not, we would have to analyze the four factors. The first factor weighs against us and in favor of the notes being securities. The second factor is arguably in our favor, particularly if the transaction is limited to Par and Merchant, although the TSSB could argue that Par offered many notes like these and they were meant as investments for the broader public. The third factor also could weigh in our favor because the notes

were clearly labeled "notes" rather than investments, and they state that they are not registered. But again, the TSSB could argue that the notes were advertised as investments to the broader public. Lastly, the fourth factor weighs in our favor because the note is collateralized, although at least one court called this neutral where there was not also a second regulatory scheme that governed the instruments.

As mentioned, we have a legitimate argument, it's difficult to predict what a court will do, but it may be an uphill battle particularly where there's a presumption that notes are securities. Yet, I've attached two cases that I found that held notes were *not* securities.

I am working on a memorandum that summarizes the law and analyzes some precedent, and I should have that to you in the next day or two.

Best,
Benjamin

haynesboone 50 CELEBRATING YEARS

Benjamin Goodman
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vCard | Bio | Website

2007 WL 8204463
Only the Westlaw citation is currently available.
United States District Court,
E.D. Texas,
Sherman Division.

SUNSET MANAGEMENT, LLC
v.
AMERICAN REALTY INVESTORS, INC., et al.

Nos. 4:06cv418 (LEAD), 4:06cv563 (Cons), 4:06cv483 (Cons).
|
March 8, 2007.

Attorneys and Law Firms

Deborah Rose Deitsch-Perez, Lackey Hershman, LLP, Patrick J. Neligan, Jr., Neligan Foley LLP, Dallas, TX, Clyde Moody Siebman, Siebman Reynolds Burg & Phillips LLP, Sherman, TX, for Sunset Management, LLC.

Marie Suzanne Phinney, James Robert Kramer, Friedman & Feiger, Mitchell Madden, Muddlemoore LLP, Deborah Rose Deitsch-Perez, Michelle Micarrie Kostura, Lackey Hershman, LLP, Patrick J. Neligan, Jr., Neligan Foley LLP, Alan Scott Trust, Trust Law Firm, PC, Bill E. Davidoff, Donald Colbchort, Figari & Davenport LLP, Mark Talbot Davenport, Figari Davenport & Graves, Dallas, TX, Robert Andrew Simms, Harlow Gorsek & Simms, Fort Worth, TX, Donna R. Duncan, Ernest Walker Leonard, Herschel Tracy Crawford, Rainey & Flock, Michael Tracy Crawford, Rainey & Flock, Inc Dedman Clayton, Parker Clayton, Tyler, TX, Robert Andrew Simms, Harlow Gorsek & Simms, Fort Worth, TX, Clyde Moody Siebman, Lawrence Augustine Phillips, Siebman Reynolds Burg & Phillips LLP, Sherman, TX, Michael Charles Smith, Lackey Hershman, LLP, Marshall, TX, for Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

DON D. BUSH, United States Magistrate Judge.

*1 American Realty Trust, Inc. ("ART"), Basic Capital Management, Inc. ("BCM"), EQK Holdings, Inc. ("EQK"), and American Realty Investors, Inc. ("ARI") ("Borrowers") filed this complaint for violation of securities law against Sunset Management ("Sunset") and John Muldrow.[1] The Borrowers contend that a commercial note in the sum of $30,000,000 is actually a security and not a commercial note. All four Borrowers signed the note which is payable to Sunset Management LLC. The note contains two loan provisions, one for a base loan and the other for an auxiliary loan. Both loans total $30,000,000 but have different interest rate factors in the single secured promissory note: There is a built-in default rate of 20% if any payment is in default. The note is governed by Nevada law which all parties appear to agree allows interest rate charges called for in the note. All Borrowers represent that ... *"this Note is good, valid and in all respects free from all defenses, both in law and in equity ..."* The Note were secured by a lien on property owned by Art Williamsburg, Inc. ("AWI") in Virginia and a lien on 1,672,395 shares of stock in Transcontinental Realty, Inc. Borrowers contend that Sunset never expected them to be able to repay the note. Borrowers contend that there was a modification on the terms of repayment when the original note came due, but Sunset denies this. Essentially, Borrowers complain that there were "hidden" charges within the note and that Sunset's enforcement of the terms and provisions of the note were in violation of the agreed upon modification. All of which Sunset denies. Borrowers complain that the failure to "specifically disclose" the late fee and Sunset's usage of it at the outset of the lending transaction was deceptive. Borrowers claim this note is a "security" under the Securities and Exchange Act because it had a blended interest rate of 22.07% and that the collateral reasonably valued exceeded the loan to a large amount.

1 Plaintiffs in Cause No. 4:06cv483 are now Defendants in this consolidated action.

Because Borrowers assert fraud claims under the Securities Exchange Act of 1934 ("Exchange Act") section 10(b), they must also satisfy the heightened pleading requirements imposed by FED. R. CIV. P. 9(b) and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u (1995) ("PSLRA"), to avoid dismissal. Rule 9(b) requires certain minimum allegations to be pled in securities fraud cases, including: the specific place, time, and content of the false representations; the identity of the individual making the false representations; and what that person gained from making the representations. *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir.1993). Additionally, the PSLRA requires complaints in security fraud cases to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."

*2 The PSLRA also requires Borrowers to allege facts demonstrating scienter. *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir.1996). Scienter is defined as a "mental state embracing an intent to deceive, manipulate or defraud." *Id.* The PSLRA requires complaints in state with particularity facts giving rise to a strong inference of scienter. 15 U.S.C. § 78u-4(b)(2); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407 (5th Cir.2001). Negligence alone is insufficient to support liability; however, severe recklessness suffices. *Id.* at 408-09. The defendant's motive and opportunity to commit fraud, alone, does not support a strong inference of scienter. *Id.* at 410-11. If the complaint does not plead scienter as required by the PSLRA, then the case must be dismissed. 15 U.S.C. § 78u-4(b)(3)(A); *Cramer v. Heartland Wireless Commc., Inc.*, 55 F.Supp.2d 628, 634 (N.D.Tex.1999).

Rule 10b-5, promulgated under section 10(b) of the Exchange Act ("Rule 10b-5"), makes it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading ... in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (2002). To state a claim under Rule 10b-5, a plaintiff must allege the following in connection with the sale or purchase of securities: (1) an omission or misstatement, (2) of a material fact, (3) made with scienter, (4) on which the plaintiff relied, (5) that proximately caused the plaintiff's injury. *Nathenson*, 267 F.3d at 407. As previously discussed, Borrowers must also state with particularity facts giving rise to a strong inference of scienter, specifically identify the alleged misleading omissions or misrepresentations, and discuss the reasons why the statement or omission is misleading. *Id.* at 412. The Court finds that Borrowers have not met the heightened pleading standard, but in any event, the Court can dismiss because this is not a "securities case."

The loan agreement between the parties states that the loan is for general working capital purposes. In addition, Borrowers also have agreed to indemnify Sunset for almost any action undertaken by Sunset, including its performance of the agreement or any loan documents or any claim or cause of action of any kind by any person which would have the effect of denying Sunset the full benefit or protection of any provision of the agreement or loan documents. "Person" is broadly defined within the note to include Borrowers.

The case has a protracted history of litigation in state court, federal court and bankruptcy court. Three separate cases have now been consolidated into this action. At issue here is only Sunset's Motion to Dismiss (Dkt. No. 3 in 4:06cv483). If this note is not a security as defined under the Securities Law, then the Motions should be granted. This note is not a security.

*3 The Exchange Act excludes the phrase "any note ..." within its definition of a "security." 15 U.S.C. § 78c(a)(10). However, Congress did not enact the federal securities laws in order "to provide a broad federal remedy for all fraud," but rather intended "to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 61, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990) (citation omitted) (emphasis in original). The Supreme Court states that "the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts." *Id.* at 62-63. To that end, the Court adopted the so-called "family resemblance" test for determining whether a promissory note should be deemed a security under federal law. *Id.* at 64-65.

The family resemblance tests begins with the presumption that every note is a security. *Id.* at 67. This presumption can be rebutted if the note at issue strongly resembles one of a number of instruments that are commonly referred to as "notes" but have nonetheless been judicially determined to be non-securities.[2] If an instrument does not bear a resemblance to any of the enumerated exceptions, the court must determine if it is of a type that should be added to the list by examining four factors identified in *Reves* as being indicative of non-security notes. *Id.* These factors consist of: (1) the motivations that would prompt a reasonable seller and buyer to enter into [the transaction]; (2) the 'plan of distribution' of the instrument; (3) the reasonable expectations of the investing public; and (4) whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary. *Id.* at 66-67.

2 The Court identified the following instruments as being notes of the non-security variety: "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing

> a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, ... a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized) ... [and] notes evidencing loans by commercial banks for current operations." *Reves*, 494 U.S. at 65 (citations omitted).

Under the first *Reves* factor, a note resembles a security "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate." *Id.* at 66. By contrast, a note that "is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose" will "less sensibly [be] described as a 'security.' " *Id.* The court must look objectively at "the motivations that would prompt a reasonable seller and buyer to enter into [the transaction]." *Id.* If the surrounding motivations appear to be geared toward investment, then the instrument at issue is more likely a security. *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 812 (2nd Cir.1994). Here, the avowed purpose of the note is to provide working capital to the Borrowers. The fact that AWI received no cash does not enhance its position. If AWI signed the note as an accommodation, such is sufficient.

***4** The second factor also weighs in favor of Sunset. The note was not offered to the general public. It was not offered in a wholesale or patronistic wholesale manner. In fact, it was not offered at all. The only profit from the note would relate to interest after the principal was repaid. The fact that the Borrowers agreed to an interest rate in conformity with Nevada law does not make it a security.

The third factor also weighs in favor of Sunset. No reasonable investor would think that the note is a security. The term of the note was short, one year, and is barely over the presumptive maximum period of nine months. The note offers no direct chance at profit. The face of the note is labeled a note, not an investment.

Under the fourth analysis, the Court finds that the factor weighs in favor of Sunset. The note was collateralized even though Borrowers contend it was excessively collateralized. The note is regulated by Nevada law and the parties agree that the note does not contravene Nevada law as it relates to interest charged.

A claim will not be dismissed unless the plaintiff (here borrowers) cannot prove any set of facts in support of its claim that would entitle it to relief. *EPCO Carbon Dioxide Products, Inc. v. JP Morgan Chase*, 467 F.3d 466 (5th Cir.2006). Here the claim should be dismissed. This is a note case and under no semblance of facts a security case.

Plaintiff's (Sunset's) Motion to Dismiss is granted.

RECOMMENDATION

Based upon the foregoing, the Court recommends that Plaintiff's (Sunset's) Motion to Dismiss (Dkt. No. 3 in 4:06cv183) be **GRANTED.**

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir.1988).

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> Court of Appeals of Texas, Amarillo.
>
> Magdalene CAMPBELL, Appellant,
> v.
> C.D. PAYNE AND GELDERMANN SECURITIES, INC., Appellees.
>
> No. 07-93-0442-CV.
> |
> Jan. 31, 1995.
> |
> Rehearing Overruled March 8, 1995.
> |
> Rehearing Overruled April 3, 1995.

Synopsis

Payee of note brought suit against maker and her employer alleging wrongful inducement to make investment in corporation. The 108th Judicial District Court, Randall County, Samuel C. Knize, Jr., entered judgment that payee take nothing against employer but recover $30,000 against maker. Payee appealed. The Court of Appeals, Boyd, J., held that: (1) Texas Securities Act did not apply to note; (2) jury's conclusion that payee had incurred only $1,000 in out of pocket expenses was against great weight and preponderance of evidence and was manifestly unjust; (3) employer was not liable for actions of maker/employee under ant- theory of agency; and (4) payee had not properly objected to jury charges.

Affirmed in part, reversed and remanded in part.

Attorneys and Law Firms

***414** John S. Dwyer, San Antonio, Hunker & Walton, Ed Walton, Jeffrey W. Shell, Amarillo, for appellant.

William L. Rivers, Amarillo, Quilling, Selander, Cummiskey, Chris & Lowndes, Steven J. Lowndes, James Craig Orr, Jr., Dallas, for appellees.

Before REYNOLDS, C.J., and BOYD and POPE, JJ. [*]

[*] Pope, J., whose term has expired, not participating.

Opinion

BOYD, Justice.

This appeal arises from a suit filed by appellant Magdalene Campbell (Campbell) against appellees C.D. Payne (C.D.), Stephen Bryan Payne (Stephen), and Goldermann Securities (Goldermann) f/k/a Heinhold Securities. In her suit, Campbell sought recovery for various alleged negligent misrepresentations, violations of the Texas Securities Act,[1] breach of the duty of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, negligent entrustment, negligent retention and/or negligent supervision, fraud, agency, civil conspiracy and violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).[2] The claims against Stephen, as well as a third party action C.D. brought against Fred Payne, were severed from this cause. From a judgment decreeing she take nothing against Goldermann but recover a total of $34,000 (including actual damages, mental anguish damages and punitive damages) from C.D., Campbell brings this appeal. For reasons hereinafter discussed, the judgment of the trial court is affirmed in part and reversed and remanded in part.

1 See Tex.Rev.Civ.Stat. arts. 581–1 to –42 (Vernon 1964 & Supp.1994).

2 See Tex.Bus. & Comm.Code Ann. §§ 17.41 – 63 (Vernon 1987 & Supp.1994).

A proper discussion of this appeal requires that we first give a brief overview of the extensive testimony in the case. C.D., who prior to her marriage in Fred Payne had also been known as C.D. Penner and C.D. Salas, began her career in the brokerage industry ***415** with the firm of Kidder Peabody in Amarillo, Texas. After approximately one year, she resigned from that firm and moved to Arkansas, where she was employed by Dean Witter Reynolds. After about one year there, she returned to Amarillo and again went to work for Kidder Peabody. Upon her return to Kidder Peabody, C.D. was given a one-day suspension for selling some stock, while she was employed in Arkansas, which was not registered in that state. After she had been with Kidder Peabody for approximately four years, C.D. sold some stock in a company called America Shopping Channel. The stock, however, was a private placement not authorized by her employer and, as a result of that sale, her employment with Kidder Peabody was terminated.

After her return to Amarillo, and while employed by Kidder Peabody, C.D. met Campbell. The facts concerning the beginning of their relationship are disputed. C.D. testified she met Campbell at an investment course she taught in Amarillo; however, Campbell claims they met through a friend of Campbell's. In the course of that relationship, according to C.D. they purchased money market funds, stocks traded on the New York Stock Exchange, over-the-counter stocks, options, and tax exempt bonds.

Subsequently, C.D. applied for employment with Heinhold Securities, the progenitor of Goldermann. After a trip to Heinhold's Chicago offices to explain why her employment with Kidder Peabody was terminated, C.D. was hired by that company, where she continued to be employed until sometime in 1987. Although she had never heard of Heinhold Securities prior to C.D.'s employment with the firm, Campbell transferred her account to Heinhold.

In 1984, C.D. became acquainted with Fred Payne, whom she subsequently married in January 1985. At that time, Fred was a partner with his brother, Stephen, in a company called Electrical Specialists, which was ultimately incorporated under the name of Enertech Systems, Inc. The company installed computerized components that controlled heating and cooling in public schools and in Furrs grocery stores. Furrs gave the company a contract covering 150 stores.

According to C.D., the profit potential for each grocery store was between five and seven thousand dollars. She was excited about that potential and communicated that excitement to Campbell. C.D. testified, although denied by Campbell, that Campbell expressed interest in loaning the company some money. It was Campbell's position that C.D. represented to her that putting money in Enertech was the best investment she could make to get a fixed income.

There was testimony that Campbell had made a number of personal loans to an Amarillo real estate investor named Tom Hawkins, such loans bearing an interest rate of 11% per annum. It was C.D.'s testimony, again contested, that none of Campbell's other investments had produced that rate of return and that Campbell was interested in making similar loans to Enertech.

The discussions between C.D. and Campbell culminated in a series of advancements totaling $111,500 made by six checks from Campbell made payable to C.D. (under her former name of C.D. Penner) and to Enertech. The first two of these checks, totaling $85,000, were payable to C.D. Penner and were deposited by her in her personal account. Of this $85,000, C.D. stated that she delivered $35,000 to Enertech. In exchange for these checks, on July 1, 1985, C.D. executed a written instrument denominated as a "promissory note" to the principal amount of $85,000, payable to Campbell, bearing interest at 11% per annum, and due on July 1, 1987. At that time, the instrument read that it would "either be paid off in full or rolled over yearly, both interest and principal upon a set number of years agreed upon by both parties." The remainder of the checks were made payable to Enertech and, in exchange, the corporation made four notes payable to Campbell, the face amounts of which totaled $48,500.

On July 1, 1986, C.D. and Fred executed another written instrument, also denominated as a "promissory note," in the original principal amount of $70,350, payable to Campbell, bearing interest at the rate of 11% per annum and due July 1, 1987. This note was in renewal and extension of the balance ***416** due on the $85,000 note, less the $15,000 C.D. had deposited directly to Enertech, plus $9,350 interest. On July 25, 1986, Enertech executed a note in the principal sum of $64,000 payable to Campbell, due on or before July 26, 1987, in renewal and extension of the $15,000 C.D. had delivered to Enertech as well as the four notes executed by Enertech in face amount totaling $48,500 that are mentioned above.

Subsequently, Furrs terminated its contract with Enertech which ultimately led to that corporation's dissolution. According to C.D., when Furrs terminated its contract with Enertech, she had two notes drawn, each in the amount of $31,000, dated August 11, 1986, and due on August 11, 1987, one of which was for execution by Stephen and the other by Fred. The two notes each represented one-half of the $64,000 corporate note assumed by the Payne brothers. Additional references to those advances, and/or the notes and renewal notes as well as other evidence, will be made as necessary to a discussion of Campbell's points of error.

In response to the questions submitted to it, the jury found: (1) C.D. made one or more negligent representations to Campbell; (2) a fiduciary relationship existed between C.D. and Campbell; (3) C.D. breached her fiduciary duty to Campbell which was a proximate cause of damages to Campbell; (4) C.D. made representations to Campbell which were material and false with the intention that Campbell act upon those representations, which she did, and which proximately caused Campbell damages; (5) C.D. made the representations either recklessly or with knowledge that they were false; and (6) that $30,000 should be assessed against C.D. as exemplary or punitive damages.

In response to the corresponding questions, the jury also (7) refused to find Goldermann's conduct was a producing cause of damages to Campbell; and (8) found that C.D.'s conduct was a producing cause of damages to Campbell. The jury also found (9) the transaction in question involved the sale or offer for sale of a security; (11) that C.D. sold or offered to sell a security by means of an untrue statement or an omission to state a material fact; and (12) Goldermann directly or indirectly controlled C.D. in the sale or offer for sale of securities.

In the following enumerated questions, the jury found that (13) it was reasonably foreseeable by C.D. that Campbell would rely to her detriment on C.D.'s promises and that reliance was a proximate cause of damages to Campbell; and (14) by July 17, 1987, through the exercise of reasonable diligence, Campbell should have discovered the nature of her injury. The jury also found (15) Campbell had incurred $3,000 out-of-pocket expenses; and (16) that Campbell was entitled to $3,000 as damages for her mental anguish.

The jury also made the following findings in response to submitted questions: (18) that Goldermann was negligent in its hiring or supervision of C.D.; and (19) that such negligence proximately caused Campbell $30,000 in damages. From the copy of the charge in the record, it does not appear that any questions numbered 20 and 21 were submitted. The jury then (22) refused to find Campbell suffered mental anguish as a result of Goldermann's conduct; and (23) did not answer the inquiry as to the amount necessary to compensate Campbell for any such mental anguish.

The jury also (24) refused to find that Goldermann's conduct was the result of a conscious indifference to the rights of its customers, including Campbell, which obviated the necessity for an answer as to (25) whether such acts or omissions were committed by managerial employees, and (26) whether the managerial employees were acting within the scope of their employment at the time of such acts or omissions. The jury then opined (27) that C.D. was an outlet employee who was employed recklessly by Goldermann, and (28) that 25% of the damages Campbell incurred as a result of Goldermann's negligent hiring or supervision of C.D. were proximately caused by her own negligence. The jury (29) refused to find that C.D. was acting in the course and scope of her employment with Goldermann in connection with the transactions giving rise to the suit. Because the jury found that Goldermann's conduct was not a producing cause of damages to Campbell, in compliance with the instructions of the court, the jury ***417** did not determine (30) whether Goldermann knowingly engaged in wrongful conduct; or (31) the amount of money that should be awarded Campbell as additional damages for such conduct. The jury also found (32) that C.D. had knowingly engaged in the wrongful conduct that was a producing cause of Campbell's damages; and (33) that Campbell should be awarded an additional $666,000 in damages. The jury then determined that (34) C.D.'s acts were intentional, or done with actual or implied malice toward Campbell; however, the jury refused to find Goldermann guilty of such conduct. As we have indicated above, judgment was rendered that Campbell take nothing against Goldermann, but that she recover $5,000 in actual damages, $1,000 in mental anguish damages, and $30,000 in exemplary damages from C.D.

In mounting her attack upon the trial court's judgment, Campbell raises eleven points of asserted error. We will discuss those points sequentially as they bear on the disposition of this appeal. In her first point, Campbell contends the trial court erred in overruling her motion for judgment against C.D. and Goldermann "based upon the jury's verdict on liability and the statutory relief for damages and rescission." Her argument under this point is based upon the jury's answers to questions 11 and 12 in which the jury found C.D. sold or offered for sale a security and that Goldermann "directly or indirectly" controlled her in that activity.

In large measure, Campbell's argument is premised on that portion of the Texas Securities Act which provides that a "control person" is liable "to the same extent as if he were the seller ... or issuer ..." Tex.Rev.Civ.Stat.Ann. art. 581–33(F) (1) (Vernon Supp.1995), and that portion which provides that a buyer, either through rescission or by damages "shall recover (a) the consideration he paid for the security, plus interest thereon at the legal rate ... less (b) the amount of any income he received on the security ..." *Id.* art. 581–33(D)(1).

Campbell contends that inasmuch as the amount of money she paid, *i.e.*, $111,500, and the amount she received, *i.e.*, $30,500, are not in dispute, "the Court must render judgment in the undisputed amount." She argues that liability is established when there is a sale of an unregistered security or when the security is sold through untruth or omission. She continues that as the parties stipulated the items involved

in the transaction in question were not registered, the jury's finding of untruth or omission requires rendition of judgment in the amount of $174,847.05, such amount including accrued interest less the payment as well as attorney's fees. We disagree.

It is the rule that, because of the obvious similarities between the Texas Securities Act and the federal Securities Exchange Act, Texas courts look to decisions of the federal courts to aid in the interpretation of the Texas act. *Searcy v. Commercial Trading Corp.*, 560 S.W.2d 637, 639 (Tex.1977); *Sun Supply Co. v. Jones*, 665 S.W.2d 198, 196 (Tex.App.—San Antonio 1984, no writ). For example, it has been held that the decisions of federal courts regarding the definition of "securities" under the federal act are a reliable guide to the definition of "securities" under the Texas act because the two acts contain virtually the same wording. *First Hine Leasing Corp. v. Blankenship, Potts, Johnson, Higgs and Stewart*, 648 S.W.2d 410, 414 (Tex.App.—Dallas 1983, writ ref'd n.r.e.); *Wilson v. Tex.*, 601 S.W.2d 482, 485 (Tex.Civ.App.—Dallas 1980, no writ). *See also* 15 U.S.C.S. § 77b (The term "security" means any note ...); Tex.Rev.Civ.Stat.Ann. § 581-4 (The term "security" or "securities" shall include any ... note ...).

In *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L.Ed.2d 47 (1990), the United States Supreme Court was presented with the question of whether certain demand notes issued by an agricultural cooperative were "securities" within the meaning of the federal Securities Exchange Act. *Id.*, 494 U.S. at 58, 110 S.Ct. at 947–48. The Court treated the determination of that question as one of law to be made by the Court. *Id.* at 61, 110 S.Ct. at 949; *see also Abraca v. American-Canadian Beaver Co.*, 438 F.2d 926, 928 (10th Cir.1970). Likewise, the determination of whether the documents with which we are concerned are "securities" within the purview of our Texas statute is ***410** also a matter of law to be determined by the trial court.

In the *Reves* case, the Court adopted the "family resemblance" test for determining whether a promissory note is a "security" as defined under the security statutes. *Reves*, 494 U.S. at 65, 110 S.Ct. at 951. En route to its decision, the Court noted that although Congress enacted a broad definition of "security" in the statute, it did not "intend to provide a broad federal remedy for all fraud." *Id.* at 61, 110 S.Ct. at 949 (citing *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223–24, 71 L.Ed.2d 409 (1982)). Rather, the Court explained that Congress intended "to regulate *investments*, in whatever form they are made and by whatever name they are called." *Id.* (original emphasis). The Court then commented that the term "note" is now viewed "as a relatively broad term that encompasses instruments with widely varying characteristics," depending upon the context in which it was issued. *Id.* at 62, 110 S.Ct. at 949–50. Because of this, the Court explained, "the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts." *Id.* at 63, 110 S.Ct. at 950.

In its decision, the Court enumerated certain type of notes that are not "securities," such as "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business ..." *Id.* at 65, 110 S.Ct. at 951.

Considering these matters, the *Reves* Court concluded that in determining whether an instrument denominated as a "note" is a "security" within the scope of the federal Securities Exchange Act, a court should apply the "family resemblance" test. *Id.* at 67, 110 S.Ct. at 952. In applying that test, a court should bear in mind that every note is presumed to be a "security." This presumption may be rebutted, however, by a showing that the note bears a "strong resemblance," as measured by four factors the Court identified, to one of the categories of notes the Court enumerated as beyond the scope of the Act. The Court also observed that if an instrument was not sufficiently similar to an item on the enumerated list, "the decision whether another category should be added is to be made by examining the same factors." *Id.*

The first factor the Court suggested is the motivation for the transaction, commenting that if "the seller/borrower's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer/lender is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'" *Id.* at 66, 110 S.Ct. at 952. On the other hand, if the note was exchanged to facilitate the purchase and sale of a minor asset or consumer good, in correct for the seller/borrower's cash-flow difficulties, or to advance some other commercial or consumer purpose, "the note is less sensibly described as a 'security.'"

The second factor is the plan of distribution of the instrument, *i.e.*, whether it is an instrument as to which there is common trading for speculation or investment. The third factor is the reasonable expectations of the investing public. The fourth and final factor is whether there exists another regulatory scheme which significantly reduces the risk of the instrument. *Id.* at 67, 110 S.Ct. at 952.

We find the "family resemblance" not to be reasonable and applicable to the determination of whether the notes in question here were "securities" within the purview of the Texas Securities Act. Examination of the motives of the parties show that Campbell did not expect a "profit" in the sense of capital appreciation or participation in earnings; instead, she expected only a fixed return in the form of interest on the notes. This record demonstrates there was no plan for the notes that was intended to lead to their common trading for speculation or investment. The record also demonstrates that these notes were not of such a nature ***419** that would lead the general public to consider them as securities.

In sum, the record shows that these notes represented a private transaction between Campbell and C.D. and were of a nature closely related to those transactions the *Reves* Court noted were not intended to be included within the regulatory scheme of a securities act. Inasmuch as that decision was a legal question to be determined by a court, the trial court in this case was entitled to disregard the jury's finding that the transaction in question involved the "sale or offer for sale of a security." *Anheuser–Busch Companies, Inc. v. Summit Coffee Company*, 858 S.W.2d 938, 953 (Tex.App.—Dallas 1993, writ denied). Additionally, inasmuch as the notes in question were not "securities" within the scope of the Texas Securities Act, Goldenman could not be a "control person" as defined by the Act and the trial court was justified in disregarding the jury's finding that Goldenman "directly or indirectly controlled C.D. [ ] in the sale or offer for sale of securities." Campbell's first point is overruled.

In her second point, Campbell posits the trial court erred in overruling her motion for judgment because the evidence before the court conclusively established, as a matter of law, that she had incurred actual damages in the amount of $125,000.

In the trial court's charge, the jury was instructed that if it had affirmatively answered any of questions 1, 3, 5, 7, 9, 11, or 13, it was to determine the amount of out-of-pocket expenses Campbell incurred. As submitted, and with the jury's answer, the question read:

Question No. 15

What sum of money, if any, if paid now in cash, would reasonably compensate Magdalene Campbell for her damages, if any, that resulted from such conduct?

Do not include any amount for interest on past damages, if any.

Consider the following elements of damage and none other:

a. Out of pocket expenses.

Answer in Dollars and Cents, if any.

Answer: $3,000.00

A motion to disregard a jury's findings may be granted only if the finding has no support in the evidence or if the issue is immaterial. *C. & B. Transport, Inc. v. Campbell*, 406 S.W.2d 193, 194 (Tex.1966), and it is only when the evidence conclusively establishes an opposite finding that a judge may substitute his own finding for that of the jury. *Menendez v. Joe Myers Ford, Inc.*, 658 S.W.2d 76, 78 (Tex.App.—Houston [1st Dist.] 1982, no writ). An issue is conclusively established when the evidence is such that there is no room for ordinary minds to differ as to the conclusions to be drawn from it. *Texas Oil and Gas Corp. v. Marline Constructors and Supply, Inc.*, 644 S.W.2d 443, 446 (Tex.1982). Where the proponent of a jury question has failed to obtain a favorable jury finding but contends that the matter which was the subject of the question was established as a matter of law, this court must, as with a no-evidence challenge, examine the entire record to determine if there is any evidence and reasonable inferences drawn therefrom which, when viewed in their most favorable light, oppose that which is urged as conclusive. If there is some such evidence and reasonable inferences drawn therefrom which, when viewed in their most favorable light, oppose that which is urged as conclusive, the inquiry stops because whatever the proponent's evidence, it cannot be conclusive if opposing evidence is in the record. *Stewart v. Hamilton Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989); *Hydrocarbon Management, Inc. v. Trendlar Exploration, Inc.*, 861 S.W.2d 427, 448 (Tex.App.—Amarillo 1993, no writ).

Texas Courts have recognized two measures of damages for misrepresentation. The first measure is known as the "out of pocket" measure and allows an injured party to recover damages for the actual injury suffered, calculated by determining the difference between the value of that which he has parted with and the value of that which he has received, calculated as of the date of the sale or delivery. *Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex.1984); *Hedley Freddie, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 840 (Tex.App.—Amarillo 1993, writ denied). ***420** *Chrysler Corp. v. McGlothlin*, 657 S.W.2d 858, 864 (Tex.App.—Amarillo 1983, no writ). The second measure is the "benefit of the bargain" measure, which is the difference between the value as represented and the value actually received. *Id.*

Damages must be measured by a legal standard and that standard must be used to guide the fact finder in determining what sum would properly compensate the injured party. While the form of submission of a particular question is left to the sound discretion of the trial court, it is essential that the submission be sufficient to enable the jury to make an award of damages on proper grounds and correct principles. In its instruction, the trial court should limit the jury's consideration to the specific facts that are properly a part of the damages allowable. However, when the trial court has erroneously failed to include instructions on the proper measure of damages, it is the complaining party's burden both to object to the charge and to tender such instructions in substantially correct form. *Texas Commerce Bank Reagan Through Texas Commerce Bank Nat. Ass'n v. Lehna Construction, Inc.*, 865 S.W.2d 68, 75 (Tex.App.—Corpus Christi 1993, no writ).

It is obvious that this question asking for the amount of Campbell's damages required the jury to use the "out of pocket" measure in determining its answer. Campbell makes no complaint as to the form and manner of this submission. In support of her position that the evidence conclusively established the amount of her damages, Campbell assumes that the undisputed testimony that she advanced a total of $173,500, when taken with the undisputed testimony that C.D. paid her $3,500 and Stephen paid her $9,000, was sufficient to conclusively establish that she incurred damages in the amount of $123,000, the difference between the total amount she advanced and the amounts she received.

This argument, however, overlooks C.D.'s testimony that after she received a demand letter from Campbell's attorney, she and Stephen both made an offer for repayment of the obligation. The reasonable inference from that testimony is that the notes which Campbell had received had some value in excess of the amount which had been paid on the notes. There is no evidence to the contrary. The evidence is not sufficient to establish, as a matter of law, that Campbell's out-of-pocket expenses amounted to $123,000 as she contends. Campbell's second point is overruled.

The gravamen of Campbell's third and fourth points is that the jury's finding that she incurred only $3,000 in out-of-pocket expenses is against the great weight and preponderance of the evidence and is manifestly unjust. That contention requires us to weigh all the evidence in the case to determine if the evidence supporting the finding is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly unjust. If we so determine, the finding should be set aside and a new trial ordered. *Cortez v. Abbott*, 395 S.W.2d 821, 823 (Tex.1965); *In re Kings Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). As we have noted above, in submitting Question 15 regarding damages, the trial court instructed the jury to consider only the "out of pocket" expenses Campbell incurred. By the use of that measure, the court intended for the jury to determine the difference between the value of that which was parted with and the value of that which was received. *Hedley Freddie, Inc.*, 855 S.W.2d at 840.

The evidence revealed that Campbell parted with $173,500 and had received only $80,500, of which C.D. paid $3,000 and Stephen paid $9,000, a difference of $123,000. It is reasonable to infer, from the testimony that C.D. and Stephen intended to fully repay their promissory note obligations, that the notes had some value. However, there is absolutely no evidence that $3,000 was the difference between the value of that with which Campbell parted and the value of that which she received. While jurors are not bound, as a matter of law, to accept the parties' testimony, that testimony does not authorize them to select a figure entirely outside the evidence in answering a question. *See Calliope v. Brazos Elec. Power Co-op.*, 759 S.W.2d 75, 75 (Tex.1988). Appellant's third and fourth points are sustained.

***421** In her fifth point, Campbell contends the trial court reversibly erred in excluding her exhibit 9 which she describes as C.D.'s employment application with Goldenmann. Initially, from the record it appears that exhibit 9, as tendered, actually contained several sets of documents in addition to any application for employment. These documents included an instrument entitled "employee address and telephone changes," an instrument entitled "Equifax services," as well as various letters from different people, hand-written notes, and personnel change notices. In making her tender, the record does not show that Campbell ever attempted to segregate the employment application from the remainder of the instruments.

Rule 901(a) of the Texas Rules of Civil Evidence provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The thrust of Campbell's argument is predicated upon the fact that C.D. stated she had followed the procedure suggested to her to applying for a job with Goldenmann (formerly Heinhold), that she "believed" she had filled out an employment application, that the application contained her social security number, and that the signature on the employment application "appear[ed] to be [her] signature." Campbell also contends the fact that items contained in exhibit 9 were produced by Goldenmann in response to discovery requests was sufficient to authenticate them.

Inasmuch as exhibit 9 was tendered as a whole, each of the documents in the exhibit should have been individually authenticated. *See Southwest Industries Inc. Co. v. Sauls*, 604 S.W.2d 233, 237 (Tex.Civ.App.—Dallas 1980, no writ). Parenthetically, we note C.D.'s testimony that she was unfamiliar with any Equifax report. Additionally, the mere fact that various instruments were received in response to a discovery request is not, in and of itself, sufficient to entitle their receipt into evidence. *Stromberger v. Ford Motor Co.*, 816 S.W.2d 755, 759–60 (Tex.App.—Dallas 1991, writ denied), *cert. denied*, 506 U.S. 831, 113 S.Ct. 97, 121 L.Ed.2d 58 (1992).

As Campbell recognizes, to reverse a judgment based upon an evidentiary ruling, it must be shown that the trial court abused its discretion in the admission or exclusion of the evidence and that a substantial right of the complaining party was affected. *Id.* Under this record, the trial court did not reversibly err in declining to admit Campbell's exhibit 9 as tendered. *See* Tex.R.Civ.Evid. 103(a). Campbell's fifth point is overruled.

In her sixth point, Campbell attacks the refusal of the trial court to admit her tendered exhibit 15, which appears to be a letter from C.D. addressed to Robert Delis, president of Goldenmann (then Heinhold). The thrust of her argument is that the letter was "probative of Goldenmann's knowledge that C.D. Payne made mistakes and that she had suffered the consequences of mistakes and that Goldenmann was negligent in its hiring of Ms. Payne." In the letter, the writer explains some of the history of C.D.'s relations with Kidder Peabody and Dean Witter and the events surrounding the America's Shopping Channel matter. C.D. never admitted she signed the letter and denied she knew anyone by the name of the addressee. Even so, citing *Dickerson v. Ideal Financial Corporation*, 452 S.W.2d 552, 557 (Tex.Civ.App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.), Campbell asserts the letter was admissible because samples of C.D.'s signature were available in evidence for the jury to see and compare with the signature on the exhibit in order to determine the credibility of C.D.'s denials.

However, even assuming arguendo, the letter was admissible, there was other evidence concerning C.D.'s suspension and termination and Goldenmann's imputed knowledge of such matters. In addition, the exhibit was tendered as bearing upon the question of Goldenmann's alleged negligence in its hiring and supervision of C.D. In its answer to Question 18, the jury found that Goldenmann was negligent in those respects. Again, as we noted in our discussion of the preceding point, the trial court's refusal to admit the evidence, even if error, would not require ***422** reversal. *See* Tex.R.Civ.Evid. 103(a). Campbell's sixth point is overruled.

In her seventh point, Campbell contends the trial court reversibly erred in failing to submit her requested jury question concerning whether C.D. had apparent authority to act for Goldenmann in her dealings with Campbell. Under Rule 277 of the Texas Rules of Civil Procedure, the trial court is required to submit fact questions raised by the pleadings and the evidence controlling the disposition of the case. *Laughlin v. Federal Deposit Ins. Corp.*, 657 S.W.2d 477, 480–81 (Tex.App.—Tyler 1983, no writ). Under Rule 278, if the question is one relied upon by a party, as in this case, the failure to submit the question does not require reversal unless the submission of the question was requested in writing and was tendered in substantially correct wording by the party complaining of the omission. While they do contend Campbell was not entitled to the submission of the question, neither C.D. nor Goldenmann challenge the form of the request.

In support of her proposition, Campbell cites the testimony that C.D. was an employee of Heinhold (now Goldenmann) and, as such, she had business cards, letterhead, a receptionist,

etc. There is also testimony that Campbell discussed some investment possibilities with C.D. at her office and that Campbell left her a second check in the amount of $75,000 payable to C.D. (under her former name of C.D. Poirier), with C.D.'s office at Heinhold in an envelope with directions to give it to C.D. There is also testimony that subsequent to C.D.'s leaving Heinhold, another Heinhold employee helped Campbell with her Mesa Petroleum stock.

Apparent authority is the power of an agent to affect the legal relations of another person by transactions with third persons. Apparent authority in Texas is based upon estoppel and may arise either from a principal knowingly permitting an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe the agent has the authority the agent purports to exercise. An agent acting within the scope of the agent's apparent authority binds a principal as though the principal had performed the act. *Jones v. Great Southern Bank*, 672 S.W.2d 447, 450 (Tex.1984). Thus, a prerequisite to a proper finding of apparent authority is evidence of conduct by a principal, relied upon by the party asserting apparent authority, which would lead a reasonably prudent person to believe an agent had authority to act for the principal. *Id.* The doctrine does not apply unless the person dealing with the agent was misled by the representation or conduct of the principal. The person dealing with the agent must have been induced to act, to his prejudice, by reason of the principal's conduct after exercising due diligence to ascertain the truth. *Federal Deposit Ins. Corp. v. Texas Bank of Garland*, 781 S.W.2d 664, 667 (Tex.App.—Dallas 1989, no writ).

As applied to this case, in order to invoke the doctrine, the evidence must have been sufficient to raise a fact question as to whether Campbell was induced to enter into the transactions in question here because of Goldenmann's conduct. There is no evidence in the record that Goldenmann had any knowledge of C.D.'s transactions with Campbell, nor is there evidence that Goldenmann's employment of C.D. led to these transactions. Campbell testified she had no knowledge of Goldenmann (Heinhold) prior to C.D.'s employment there and that she followed C.D. to Goldenmann only because of her previous dealings with C.D. Nothing in this record would indicate that a reasonably prudent person in Campbell's position would believe that C.D., by accepting checks made out to herself and to her husband's company in exchange for personal notes of obligation, was attempting to bind Goldenmann or was acting in its behalf. Accordingly, the trial court did not err in declining to submit the requested question. Campbell's seventh point is overruled.

In her eighth point, Campbell submits the trial court reversibly erred in refusing to allow her to call Goldenmann's corporate representative, Ned Bennett, as a witness. In support of that contention, Campbell points out that, although she had not *423 identified Bennett as a potential witness or a person with knowledge of relevant facts, he had been identified by Goldenmann as a person with knowledge of hiring policies and supervisory procedures as well as having been president of Goldenmann since November 1, 1987. In addition, Campbell contends Bennett's exclusion was particularly harmful inasmuch as he would have been able to identify certain documents she was attempting to introduce into evidence which apparently bore on the question of Goldenmann's negligence in hiring C.D.

As we have pointed out above, Rule 303(a)(2) of the Texas Rules of Civil Evidence provides that error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and the substance of the excluded evidence is made known to the court by offer. As far as this record shows, the only circumstances pertaining to Bennett's testimony are his brief statement that he became president of Goldenmann on November 1, 1987, a time subsequent to the events giving rise to this suit, and the statements of Goldenmann's counsel, addressed to the judge, that Bennett "sure wouldn't be able to identify any of those documents because he hasn't seen them before." This is not sufficient to show the substance of the testimony Campbell sought to produce from the witness. Additionally, in view of the jury's finding that Goldenmann was negligent in its hiring or supervision of C.D., the exclusion does not appear to have deprived Campbell of a substantial right.

Moreover, it is undisputed that Bennett had not been hired by Campbell in response to interrogatories. Even so, pursuant to Rule 101 of the Texas Rules of Civil Procedure which provides that either party to a suit may examine the other party as a witness, and citing the decision in *E–Z Mart Stores, Inc. v. Terry*, 794 S.W.2d63 (Tex.App.—Texarkana 1990, writ denied), Campbell contends she has an absolute right to call the witness as the representative of an adverse party.

It is true that the import of the decision in *E–Z Mart* is as Campbell contends. However, since the time of that decision, the courts have had an opportunity to consider the impact of our supreme court's decision in *Smith v. Southwest*

submitted only inquired about the date she discovered, or through the exercise of reasonable diligence should have discovered, "the nature of her injury," rather than inquiring as to the date she discovered "all the false, misleading or deceptive acts or practices" or her "cause of action." She asserts that the question was improper as it related to her DTPA and negligence claims in that it improperly focused on injury, *i.e.*, her loss of money, instead of properly focusing upon her discovery of her right of action or of the acts which caused her injury.

Rule 274 of the Texas Rules of Civil Procedure provides that a party objecting to a charge must point out distinctly the objectionable matter and the basis of the objection. In this instance, Campbell's submission of what she considered to be a correct question was not sufficient to preserve any alleged error. A mere request to submit an instruction or question different from that submitted by the trial court does not sufficiently point out the objectionable matter in the submitted question and will not be considered a sufficient "objection" for the purposes of Rule 274. *Religious of the Sacred Heart v. Houston*, 836 S.W.2d 606, 615–16 (Tex.1992); **425 Garza v. Southland Corp.*, 836 S.W.2d 218, 219 (Tex.App.—Houston [14th Dist.] 1992, no writ); *Jon T. Farren, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 745, 751 (Tex.Civ.App.—Amarillo 1977, writ ref'd n.r.e.).

We do note Campbell's closing objection in which counsel states he also "objects to the Court's charge in its entirety to the extent it does not include the requested questions and instructions." However, this type of general objection is subject to the same vice as the requested charge in that it does not sufficiently point out the objectionable matter and the reasons why the submitted question is insufficient. *Dorwood Shamrock Refining and Marketing Co. v. Mendez*, 869 S.W.2d 534, 523 (Tex.App.—San Antonio 1991), *aff'd in part, rev'd in part*, 844 S.W.2d 198 (Tex.1992); *Star-Telegram v. Cravens*, 774 S.W.2d 662, 666 (Tex.1989). Campbell's tenth point is overruled.

Our disposition of Campbell's first ten points obviates the necessity for a lengthy discussion of her eleventh point. In that point, she contends cumulative errors pervaded the trial and caused the rendition of an improper verdict, or that the cumulative effect of the errors alleged in her first ten points requires reversal. Suffice it to say, we find no cumulative series of error requiring a blanket reversal of the trial court's judgment and overrule Campbell's eleventh point.

In two cross-points, C.D. posits that by submitting the following question, the trial court sufficiently erred to entitle her to a take-nothing judgment in her favor. The question reads:

Question No. 4

Do you find that the defendant, C.D. Payne, a) made representations to the plaintiff, Magdalene Campbell, that were material and false, by with the intention that the representations should be acted upon by the plaintiff, c) that the plaintiff acted in reliance upon the representations and d) that such conduct, if any, was a proximate cause of damages to the plaintiff?

In support of her contention, C.D. asserts the question failed to include an essential element of recovery for fraud in that it failed to inquire whether the "false statements were made knowingly by the defendant C.D. Payne, knowing that they were false at the time they were made, or an inquiry as to whether or not the defendant C.D. Payne had intended at the time of the representations, that the obligations under the agreement would not be performed [sic]."

In *Stone v. Lawyers Title Insurance Co.*, 554 S.W.2d 183 (Tex.1977), the court instructed that in order to recover on a fraud claim, a plaintiff must prove 1) that a material representation was made; 2) that it was false; 3) that the speaker knew the material representation was false when made or made it without any knowledge of the truth and made it as a positive assertion; 4) that the speaker made the material representation with the intent that it be acted upon by the other party; 5) that the party acted in reliance upon the material representation; and 6) the party incurred damages. *Id.* at 185.

In *Wolf v. Fernandez*, 753 S.W.2d 695 (Tex.App.—San Antonio 1987, writ ref'd n.r.e.), the court explicated that to support a cause of action when the alleged misrepresentation concerned an action to be taken in the future, the plaintiff must establish: 1) the defendant made a promise to the plaintiff to perform an action in the future; 2) at the time the promise was made the defendant did not intend to perform; 3) the plaintiff relied upon the promise to his detriment; and 4) the plaintiff suffered damage thereby. *Id.* at 697.

It is the rule that if a trial court's charge fairly and fully presents all controlling issues to the jury, it is not error to refuse to submit additional issues or instructions which are mere eludes or variations of the issues already submitted.

Pizza Supply, 835 S.W.2d 89 (Tex.1992) and have reached a different conclusion. *See Turner v. Howe*, 860 S.W.2d 498, 464 (Tex.App.—El Paso 1993, no writ) and *Brokaw v. Ballard*, 836 S.W.2d 785, 785 (Tex.App.—Fort Worth 1992, no writ). We believe the later cases reached the correct result, *i.e.*, absent a showing of good cause, an undisclosed party is not removed from the automatic exclusion provisions of Rule 215(5) of the Texas Rules of Civil Procedure. For all of the above reasons, the trial court did not reversibly err in excluding Bennett's testimony. Campbell's eighth point is overruled.

In her ninth point, Campbell avers the trial court erred in excluding the testimony of Phyllis Jackson and Ned Bennett. For the reasons expressed in our discussion of the preceding point, the trial court did not err in excluding the testimony of Ned Bennett. With reference to Phyllis Jackson, Campbell contends the exclusion of her testimony was harmful because it "was necessary to correct untruthful testimony and loss of memory of C.D. Payne, an adverse witness," *viz.*, testimony concerning the hiring of C.D. and information available to Goldenmann (Heinhold) at the time of C.D.'s hiring.

It has become axiomatic that by provision of Rule 215(5) of the Texas Rules of Civil Procedure, failure to identify witnesses in response to opposing parties' interrogatories constitutes grounds for excluding the witnesses at trial. *Sharp v. Broadway Nat. Bank*, 780 S.W.2d 669, 671–72 (Tex.1989); *Cadwaller v. Dallas Independent School District*, 720 S.W.2d 691, 693–94 (Tex.1987); *Schlafly v. Mobility Dallas Retirement and Nursing Center Inc.*, 701 S.W.2d 243, 246–47 (Tex.1985). However, the exclusion sanction is neither designed nor intended to punish a litigant who cannot, in the exercise of good faith and due diligence, respond to a discovery request in a timely manner. Even so, the parties should not be allowed to rely upon the good cause exception as a means to evade their duty to engage in full discovery. *Cheek v. Tomberson, Inc.*, 774 S.W.2d 644, 646 (Tex.1989). For example, mere inadvertence **424* or neglect in failing to identify a witness in response to discovery requests is not sufficient to demonstrate good cause. *E.F. Hutton & Co., Inc. v. Youngblood*, 743 S.W.2d 363, 364 (Tex.1987) (per curiam). Similarly, the absence of surprise, unfairness, or authority is not, alone, sufficient to show good cause. *Sharp*, 784 S.W.2d at 671. Additionally, the fact that an unidentified witness possesses special knowledge is not sufficient to establish good cause for admitting the testimony. *Clark*, 774 S.W.2d at 646.

Pointing out that C.D. and Goldenmann failed to identify Jackson as a person with knowledge, even though she had been an employee of Goldenmann and had interviewed C.D., Campbell argues that they "violated the provisions and spirit of Rule 166b(6)(d)(1) by failing to identify Phyllis Jackson." As we understand Campbell's argument, the other parties' failure to list Jackson as a person with relevant knowledge constituted to her lack of knowledge of Jackson's potential testimony. Thus, as she had no knowledge of Jackson's potential as a witness at the time her listing of potential witnesses was made, Campbell's listing of potential witnesses was true and correct at the time it was made. Campbell then contends that because of the other parties' untruthful conduct, she should not have been required to supplement her listing and, by excluding Jackson's testimony, the trial court, in effect, rewarded the other parties' misconduct. We disagree.

Nothing in this record indicates any attempt on Goldenmann's part to mislead Campbell about Jackson's familiarity with the facts or to conceal any such knowledge from Campbell. Indeed, the dialogue of counsel at the time of the tender of Jackson's testimony reveals that "right around" March 22, 1991, Jackson met with Campbell's attorney and let him have access to her personal files and documents. Thus, Campbell had knowledge of the substance of Jackson's potential testimony some two years before the trial of this case, which began on March 29, 1993, but still did not list Jackson in her second supplemental response filed February 19, 1992.

Rule 166b(6)(a) of the Texas Rules of Civil Procedure provides that a party is under a duty to supplement a response to interrogatories when the party knows the response was incorrect or incomplete when made or when the party knows the response is no longer true and complete and circumstances are such that the failure to amend is, in substance, misleading. To ensure the benefit of Jackson's testimony, Campbell should have supplemented her response.

Moreover, Jackson's proffered testimony was in the area of Goldenmann's negligence in hiring C.D. As we have noted, Campbell received a favorable jury verdict on that question. Under this record, the trial court did not reversibly err in declining to receive Jackson's testimony. Campbell's ninth point is overruled.

In her tenth point, Campbell complains of the failure of the trial court to submit her requested jury question on the statute of limitations. In particular, she argues the question

Johnson v. King, 821 S.W.2d 425, 427 (Tex.App.—Fort Worth 1991, writ denied).

Rule 277 of the Texas Rules of Civil Procedure requires the trial court, whenever reasonable, to submit a case by broad form submissions. The submission of the question to the jury as to whether C.D. made material false representations to Campbell necessarily included the proposition that she must have **426* known the representations were not true or they would not be false. Further, if the representations were false and made with the intention that they be relied upon by Campbell, C.D. necessarily must not have intended to carry out these representations in the future or they would not have been false. Accordingly, the question as submitted was sufficient to properly cover the requisite elements for a fraud recovery. C.D.'s first cross-point is overruled.

In her second point, C.D. argues the trial court erred in submitting a jury question concerning her culpable mental state when the representations were made inasmuch as the question had no foundations in the pleadings. The question read:

Question No. 3

Did the defendant, C.D. Payne:

a. know the representations were false when made, or

b. make the representations recklessly, without any knowledge of their truth and as a positive assertion?

In paragraph IX of Campbell's third amended original petition she alleges:

IX. Fraud. Defendants received Plaintiff's money through the use of fraud. Specifically, Defendants made certain representations and failed to admit or make material facts known with the intent that the Plaintiff would rely on such representations with the admitted facts. Plaintiff did, in fact, rely on those representations and admitted facts to her detriment. Such stated facts and/or projections made were not true at the time they were made. Plaintiff's reliance was the proximate cause of actual damages and was the reason that she invested money with the Defendants.

Such fraud was the proximate cause of actual damages. Because the fraud was intentional the punitive damages are warranted.

Because the pleadings fail to specifically allege that C.D. knew the representations were false when made, or that she made the representations recklessly, without any knowledge of their truth and as a positive assertion, C.D. contends they were not sufficient to warrant submission of the above question. We disagree. In the absence of a special exception, the allegation that appellees made money through fraud and made intentional representations that were not true at the time they were made with the intent that Campbell would rely upon them is sufficient to justify the submission of the question. C.D.'s second cross-point is overruled.

In final summary, Campbell's third and fourth points are sustained and the remainder of her points are overruled. Both of C.D.'s cross-points are overruled. Under the jury's verdict, the trial court correctly ruled that Goldenmann was entitled to a take-nothing judgment against it. However, our sustention of Campbell's third and fourth points requires that we remand that portion of her suit to the trial court.

Accordingly, that portion of the trial court's judgment providing that Campbell take nothing against Goldenmann is severed and, as severed, affirmed. The remainder of the judgment providing that Campbell take nothing against C.D. is reversed and that portion of Campbell's cause remanded to the trial court.

All Citations

894 S.W.2d 431

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PRACTICES Litigation, Privacy and Cybersecurity, Securities and Shareholder Litigation, Class Action Defense, Products Liability Litigation, White Collar and Investigations, Antitrust and Competition, Criminal Investigations and Defense, False Claims Act and Qui Tam and Defense, Internal Investigations, SEC Enforcement, Financial Services Investigations and Enforcement

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Benjamin Goodman is a litigator known for his client-first approach, tireless dedication, and strategic thinking. Whether representing financial institutions in a securities class action, a manufacturer in a consumer fraud case, or a healthcare services company in antitrust litigation, he understands that successfully serving clients requires understanding the big picture—his clients' businesses and priorities—and not just the discrete legal issues at hand.

Benjamin's civil and criminal practice spans an array of white collar and commercial matters representing public and private companies, individual executives and officers, and boards. He routinely represents clients in securities, antitrust, healthcare, and other fraud-related litigation, including class actions. He navigates clients through data and privacy decisions, internal investigations, and investigations by government entities like the DOJ, SEC, and state AG offices. Benjamin's practice

extends beyond white collar matters to all types of commercial disputes and product liability cases.

Benjamin argues critical motions in venues across the country, such as a motion to dismiss a class action in Texas federal court and an opposition to class certification in Virgin Islands territorial court. He also prepares successful case-dispositive motions, including a motion to dismiss a fraud case against a manufacturer of work tools and a motion for summary judgment on behalf of a popular retailer who was victimized by a data breach. Clients appreciate Benjamin's sound judgment and reliability quarterbacking teams in complex matters—like parallel securities class actions, parallel antitrust class actions, and multi-jurisdictional product liability litigation.

As a Dallas native, Benjamin enjoys giving back to his local religious and non-profit communities. He serves on the firm's pro bono committee, co-leads the firm's partnership with the Katy Trail, and serves as a board member for The Sandlot Children's Charity, which provides financial assistance to organizations that support kids with physical and intellectual disabilities.

QUALIFICATIONS

EDUCATION

- J.D., The University of Texas School of Law, 2015, *High Honors*; Order of the Coif; Chancellors; Morgan L. Pearce Endowed Presidential Scholarship in Law; Editorial Board, Associate Recent Developments Editor, *Texas Journal of Oil, Gas, and Energy Law*
- B.A., Political Science and French, Vanderbilt University, 2011

CLERKSHIPS

- Judicial Intern to the Honorable Judge Lynn N. Hughes, U.S. District Court for the Southern District of Texas, July - August 2013

LANGUAGES

- French

ADMISSIONS

- Texas

COURT ADMISSIONS

- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Northern District of Texas

PUBLICATIONS AND SPEAKING ENGAGEMENTS

- "Now You See It, Now You Don't: What to Do About Ephemeral Data," speaker, Cybersecurity and Data Privacy Law Conference, Institute for Law and Technology at The Center for American and Internal Law, September 11, 2019.
- "Emerging Issues with Ephemeral Data and Messaging Applications," speaker, 2018 Essential

Cybersecurity Law Conference, Houston, Texas, July 25, 2018.

- "Recent Developments in Texas, United States, and International Energy Law," contributor, *Texas Journal of Oil, Gas, and Energy Law*, Volume 10.1 and 10.2.
- "Temporary Emergency Jurisdiction Under the UCCJEA: The Bermuda Triangle of Child Custody Determinations," author, *State Bar Section Report: Family Law*, Spring 2014, at 13.
- "The Evolving Landscape of Cybersecurity Disclosures," contributor, *American Bar Association Section of Litigation, Securities Litigation*, July 16, 2013.

PROFESSIONAL AFFILIATIONS AND ENGAGEMENTS

- Dallas Bar Association
- Dallas Association of Young Lawyers
- American Bar Association, Sections of Litigation, Health Law, and Antitrust
- National Association of College and University Attorneys
- Board Member, The Sandlot Children's Charity

SELECTED CLIENT REPRESENTATIONS

Antitrust Litigation and Investigations

- Secured complete dismissal of federal antitrust claims seeking $250 million in damages against

Cybersecurity Law Conference, Houston, Texas, July 25, 2018.

- "Recent Developments in Texas, United States, and International Energy Law," contributor, *Texas Journal of Oil, Gas, and Energy Law*, Volume 10.1 and 10.2.
- "Temporary Emergency Jurisdiction Under the UCCJEA: The Bermuda Triangle of Child Custody Determinations," author, *State Bar Section Report: Family Law*, Spring 2014, at 13.
- "The Evolving Landscape of Cybersecurity Disclosures," contributor, *American Bar Association Section of Litigation, Securities Litigation*, July 16, 2013.

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- Dallas Association of Young Lawyers
- American Bar Association, Sections of Litigation, Health Law, and Antitrust
- National Association of College and University Attorneys
- Board Member, The Sandlot Children's Charity

SELECTED CLIENT REPRESENTATIONS

Antitrust Litigation and Investigations

- Secured complete dismissal of federal antitrust claims seeking $250 million in damages against

nation's leading healthcare services companies, including conspiracy and monopolization claims for alleged exclusive dealing and refusal to deal under Sections 1 and 2 of the Sherman Act.
- Defended leading concrete manufacturer in parallel antitrust class actions brought on behalf of thousands of class members that alleged illegal market allocation in violation of local and federal antitrust law.
- Persuaded DOJ to bring no action against leading construction products manufacturer during civil and criminal antitrust investigations.
- Advised clients on mitigating antitrust risk for strategic business decisions like exclusive services agreements, market expansion, and corporate restructuring.

Securities and Other Class Actions

- Defended securities class action for leading financial institutions who underwrote public offerings totaling over $800 million of a publicly-traded freestanding emergency room operator.
- Defended publicly-traded oilfield services firm, certain officers and directors, and a private investment firm in parallel state and federal securities class actions related to the company's IPO of nearly $250 million.
- Defended manufacturer of water filter systems against consumer fraud claims in federal court brought on behalf of a nationwide class of potentially millions of consumers.

Product Liability and Other Complex Litigation

- Secured complete dismissal before the Sixth Circuit Court of Appeals for retailer in a lawsuit that set important limitations on the liability of merchants who have been victimized by data breaches.
- Secured complete dismissal of fraud case in federal district court against manufacturer of work tools.
- Defended serial product liability lawsuits throughout the U.S. against a major manufacturer of highway products.
- Advised clients on mitigating product liability risk for strategic business decisions like corporate transactions, product expansion, and corporate restructuring.

Government Investigations, Internal Investigations, and Other Board Advice

- Persuaded civil and criminal divisions of the DOJ to bring no action against telecommunications services company during fraud investigations.
- Persuaded state Attorney General to bring no action against online travel agency during investigation into potential violations of consumer protection laws.
- Secured no-action termination letter from SEC during investigation of investment adviser's securities trading strategies involving allegations of possible front-running and insider trading.

- Persuaded SEC to take no action against chief financial officer of public company in investigation of restated financials, including allegations of false statements in company filings and aiding and abetting violations of securities laws.
- Secured no-action termination letter from DOJ Civil Rights Division during investigation into client's alleged violations of Title III of the ADA by failing to provide reasonable accommodations for individuals with disabilities at client's public facilities.
- Lead internal investigations for leading financial institution, leading manufacturer, and other corporate clients into highly-sensitive matters with financial and reputational implications.

- Advised boards of Fortune 50 companies on technology usage and risks, including ephemeral messaging applications and personal electronic devices.

AWARDS AND RECOGNITIONS

- Included in the "Ones to Watch" category of *Best Lawyers in America*, Woodward/White, Inc., 2021-2026
- Top Attorney Under 40, Cardozo Society, Jewish Federation of Greater Dallas, 2018

3. Philip Rutledge (Bybel Rutledge LLP)
The Scholar & Regulator: Based in Harrisburg, PA, Philip Rutledge is not just a lawyer; he is a former Chief Counsel for the Pennsylvania Department of Banking and a teacher of law at Oxford University. When a man who teaches the law at the highest level in the world tells you that your filings are compliant, you listen.

EXHIBIT: Philip Rutledge/Bybel Rutledge Advice

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February 5, 2018

By Hand Delivery

Glenn Skreppen, Bureau Director
Bureau of Securities Compliance and Examinations
Pennsylvania Department of Banking and Securities
17 N. Second Street, Suite 1300
Harrisburg, PA 17101

RE: Production of Records Pursuant to Subpoena Issued to Complete Business Solutions Group, Inc. d/b/a PAR Funding ("CBSG")
Docket No. 2017-12-4

Dear Mr. Skreppen:

Enclosed is a USB flash drive containing the information identified by the Pennsylvania Department of Banking and Securities in its subpoena dated January 4, 2018 to CBSG.

Business of CBSG

I have been advised by CBSG that its business plan is to provide working capital to merchant businesses through purchasing an interest in a designated portion of the merchants' future accounts and receivables. Under CBSG's Future Receipts Sales Agreement (a copy of which is enclosed), a merchant agrees to sell a certain amount of its future receipts to CBSG for

an immediate cash payment. The merchant further agrees to pay CBSG a daily amount of the future receipts to fulfill the transaction, with the daily amounts deducted from the merchant's operating account by CBSG pursuant to the terms of its Automatic Collection Program.

CBSG has asserted that the transactions between the merchants and CBSG are not loans, a forbearance of money, or a credit transaction, but rather constitute a purchase and sale of future receipts governed largely by Section 9 of the Uniform Commercial Code which Pennsylvania has adopted at 13 Pa.C.S. §9901 et seq. ("PA UCC").

Under the terms described above, CBSG has enters into Future Receipts Sales Agreements with multiple merchants across the United States. The proceeds from the sale of the promissory notes issued by CBSG has allowed CBSG to have a more diversified portfolio of purchased merchant business receivables which contributes to its growth and fiscal stability.

As the Department will be able to see from the production of subpoenaed documents, CBSG operates a legitimate business that provides an important function in financing operating businesses in Pennsylvania by maintaining an open-end cash flow debt financing for these merchants through a standby agreement to purchase receipts of these merchants for cash.

The source of funds for payment to these merchants has been the sale of non-negotiable, non-transferable term promissory notes issued by CBSG to individuals who met the definition of Accredited Investor in Rule 501 of SEC Regulation D. The source of funds for repayment of the principal and interest on the notes is the amount realized from monies due to the merchant, which right to receipt has been assigned to CBSG.

CBSG has entered to contracts with "finders" who have received compensation for finding individuals who met the definition of Accredited Investor in Rule 501 of SEC Regulation D to purchase notes issued by CBSG. Upon advice of counsel retained in the above-captioned matter, CBSG advises that it has terminated this practice with immediate effect and until CBSG has received further advice and direction from the Department.

As the Department will see from the promptness and completeness of the production accompanying this letter, CBSG desires to comply with all rules and regulations applicable to its activities and is receptive to suggestions by the Department in how it can achieve compliance with regard to its business model. As an example of its desire to cooperate with the Department and aid staff in the review of the subpoenaed documents, CBSG has included a spreadsheet showing the purchaser of the Note, date of purchase and amount of each purchase.

CBSG believes that the documents enclosed herein satisfy the terms of the subpoena with one minor exception. Although CBSG believed at the time that its promissory notes were purchased by individuals who met the definition of Accredited Investor, upon receipt of the subpoena, CBSG went back to each note holder to confirm such status. There are a few of these confirmations outstanding and they will be forwarded to the Department upon receipt by CBSG.

The Promissory Note

The form of promissory note issued by CBSG ("Note") is a non-negotiable, non-transferable term debt instrument, the payment of principal and interest thereon when due is secured by the execution by CBSG of a security agreement in favor of the Note holder which grants the Note holder a security interest in all tangible and intangible personal property of

CBSG, wherever located and whether now owned or hereafter acquired. When the security interest granted by CBSG is properly perfected by the Note holder under the PA UCC, the Note holder will have an interest in the assets of CBSG (ie the contracts binding merchants to sell a certain amount of its future receipts to CBSG) in the event of CBSG defaulting on its obligations under the Note.

Is the Note a Security?

Section 102(t) of the Pennsylvania Securities Act of 1972, as amended (the "1972 Act") defines a "security" to include a "note."

The leading case for determining whether a document denominated as a "note" is a security under the federal securities laws is the opinion of the U.S. Supreme Court in *Reves v Ernst & Young*, 494 U.S. 56 (1990). The Court determined that an instrument denominated as a "note" shall be presumed to be a security and that presumption may be rebutted only by showing that the note bears a strong resemblance (in terms of the four factors enunciated by the Court) to one of the enumerated categories of notes that have been deemed not to constitute securities.

In *Reves*, the Court determined that (1) notes delivered in consumer financing, (2) a note secured by a mortgage on a home, (3) a short-term note secured by a lien on a small business or some of its assets, (4) a note evidencing a "character" loan to a bank customer, (5) short-term notes secured by an assignment of accounts receivable and (6) a note that formalizes an open-account debt incurred in the ordinary course of business are not the type of notes that come within the definition of a "security."

The Notes appear to meet the fifth type of arrangement identified by the Court as not constituting a security. The Notes are short term (ie not exceeding an 18 month maturity) and the Note holders are the beneficiaries of a security interest granted by CBSG in the merchant receipts pledged to CSBG under the Future Receipts Sales Agreements. This security interest

may be perfected by the Note holder under the PA UCC.

Although Pennsylvania courts are not bound by federal court decisions, there is evidence that Pennsylvania courts may derive guidance from federal case law in determining whether the Notes constitute a security under the 1972 Act.

In this regard, the leading case is the Pennsylvania Superior Court opinion in *Martin v. ITM/International Trading & Marketing Ltd.,* 343 Pa.Super. 250 (1985). In *Martin,* the Court stated that it would derive guidance from federal case law in determining whether the agreement in question constituted an "investment contract" under the 1972 Act. Based upon the decision in *Martin,* one would expect that Pennsylvania courts would derive guidance from the *Reves* decision if they were faced with interpreting whether a particular instrument constituted a "note" under the 1972 Act.

Of course, if were determined that the Note did not constitute a security under the 1972 Act, the finders to whom CBSG paid compensation would not come within the jurisdiction of the

1972 Act as they did not represent CBSG in effecting or attempting to effect purchases or sales of securities.

Availability of Rule 506(b) Exemption

Even if it was determined that the Notes were securities under the 1972 Act, it appears that the exemption provided in Rule 506(b) of SEC Regulation D would be available in that the Notes were sold only to Accredited Investors. Non-compliance by CBSG (including failure to file Form D with the SEC) would not make the exemption in Rule 506(b) unavailable under the provisions of Rule 508 of SEC Regulation D. Similarly, a failure to file Form D with the Department under Section 211(b) of the 1972 Act does not create a civil private cause of action pursuant to Section 211(d) thereof. However, CBSG has advised that it stands ready to file Form D with the SEC and the Department upon advice of the Department.

As previously indicated, CBSG has expressed a desire to comply with all applicable requirements to operating its business model and stands ready to cooperate with the Department.

Although I will be commencing my annual teaching in the Master of Laws program at BPP Law School in London, England on February 15, 2018 through March 11, 2018, I will have access to email during this time but not telephone access.

Very truly yours,

BYBEL RUTLEDGE LLP
By: G. Philip Rutledge

cc: Joseph Cole, CFO, CBSG

PAR FUNDING TRIPLE CHECKED ADVICE BY HAVING COUNSEL SPEAK WITH COUNSEL ON CERTAIN ISSUES LIKE THE EMAIL SHOWS BELOW. AND THESE ATTORNEYS ACTUALLY FILED THE FORM D'S FOR PAR FUNDING. PAR FUNDING DID NOT FILE THEIR OWN FORM D'S.

Message

From: Philip Rutledge [Rutledge@bybelrutledge.com]
Sent: 4/15/2020 12:11:23 PM
To: Joe Cole [joecole@parfunding.com]
CC: Berman, Brett [BBerman@foxrothschild.com]; Cohen, Stephen M. [SMCohen@foxrothschild.com]; Taylor, Lauren W. [LWTaylor@foxrothschild.com]
Subject: [EXT] RE: Form D Filing Items for Exchange Offer
Attachments: 4.15.2020 Memo on Updated List of States for Form D Filing for Exchange Offer.pdf; SEC Update Passphrase Confirmation.pdf

Joe:

Based on your email from yesterday, attached is an updated memo which includes a matrix of all the states where copies of Form D need to be filed and the associated filing fees.

I will change Item 14 on Form D to 89.

We are now registered with EFD for filing with the states.

On the SEC issue, I went to EDGAR support and was advised that the attached Update Passphrase Confirmation Form should be filed.

Please correct the contact person and telephone number and sign the form. If you can notarize it, fine. If not, EDGAR support said to indicate no notarization due to COVID-19.

Scan and return to me.

I am told that the SEC will call the phone number to verify the submission so use a phone number where there is a person available who can verify the submission.

Let me know if you have any questions.

Phil

BYBEL RUTLEDGE LLP

From: Philip Rutledge [Rutledge@bybelrutledge.com]
Sent: 4/14/2020 1:27:36 PM
To: Complete Business Solutions, Inc. (joecole@parfunding.com) [joecole@parfunding.com]
CC: Berman, Brett [BBerman@foxrothschild.com]; Cohen, Stephen M. [SMCohen@foxrothschild.com]; Taylor, Lauren W. [LWTaylor@foxrothschild.com]
Subject: [EXT] Form D Filing Items for Exchange Offer
Attachments: 4.14.2020 Memo to CBSG on Form D Filing for Exchange Offer.pdf

Joe:

Attached is a memo indicating the process for filing Form D with the SEC and the several states with respect to the Exchange Offer.

In that regard, please review the "Draft Form D" attached to the memo.

In particular, please confirm that the information in Items 1-5, which was taken directly from the Form D filed by CBSG in February 2019, remains accurate and current.

The other item which needs to be firmed up is the states in which the Form D for the Exchange Offer is to be filed.

In this regard, you should compare the list of states on the EFD Receipt in which the original Form D was filed with the list of states you provided on Friday, April 10, 2020 to come up with a final list.

We are still working with Martin Hewitt on getting the "codes" to be able to file with the SEC (and thereafter with the states) and I will let you know when that has been accomplished.

Please call with any questions.

Phil

BYBEL RUTLEDGE LLP

G. Philip Rutledge
BYBEL RUTLEDGE LLP
1017 Mumma Road, Suite 302
Lemoyne, PA 17043
Tel. 717.731.1700

Message

From: Philip Rutledge [Rutledge@bybelrutledge.com]
Sent: 4/10/2020 10:03:16 AM
To: Cohen, Stephen M. [SMCohen@foxrothschild.com]; Taylor, Lauren W. [LWTaylor@foxrothschild.com]
CC: Berman, Brett [BBerman@foxrothschild.com]; Complete Business Solutions, Inc. (joecole@parfunding.com) [joecole@parfunding.com]
Subject: [EXT] Form D Filings
Attachments: 2.12.19 EFD Filing Receipt for State Form D Filings.pdf

Steve and Lauren:

I wanted to reach out to you concerning effecting the filing of Form D with the SEC and the various states for the exchange offer as well as possibly address the updating of the CBSG's current Form D. Our firm is not equipped to file Form Ds with the SEC or through the EFD system run by NASAA but I suspect that Fox Rothschild may have that capability based on the size of the firm. Also, you have the latest data on the states where the exchange offer is being made.

Attached is the EFD receipt received from Martin Hewitt, Esq. who I believe represented CBSG with respect to the New Jersey C&D Order and who filed the current the Form D on file with the SEC representing the states where the Form D was filed and the fees paid.

https://www.sec.gov/Archives/edgar/data/1739848/000173984819000002/xslFormDX01/primary_doc.xml

Form D for the Exchange Offer

As you know, the Form D for the exchange offer (see Item 10 of Form D) is to be filed within 15 calendar days after the first sale unless the end of the period falls on a Saturday, Sunday or holiday which would move the date to the next succeeding business day.

Each state follows the same pattern for filing except that the time for filing runs from the date of the first sale occurring in that state and there is a fee to be paid to the state. Most states accept filings through the EFD system and several states require such filing to be made through the EFD system (eg New Jersey and Delaware).

Although the terms of the exchange offer state that acceptance is irrevocable once the documents are executed and submitted to CBSG and it could be argued that the date of execution is the date of sale, administratively it might be more consistent to take the position that the date of sale is when CBSG counter-signs the documents.

Another approach could be to make all of the filings (SEC and the states) on the same day. Assuming that the

earliest sale might be today, the 15 day period would end on Saturday, April 25 which means that a filing would not need to be made until Monday, April 27.

Form D Annual Amendment

The Form D filed in February 2019 indicated that the offering (which was marked as "indefinite") would continue beyond one year. In that case, CBSG would be required to an amendment to that Form D on the first anniversary date of the filing of the notice which amendment did not get filed. It should be noted that, under Rule 508, failure to file the amendment as provided under Rule 503 would be deemed an insignificant deviation as to not result in the loss of the claimed exemption.

The question is whether CBSG wants to continue this offering in light of current circumstances.

In either event, consideration should be given to filing the amendment to eliminate the finder information which I understand was not applicable during the prior one year period and/or terminating the offering if that is appropriate.

I am available all day for a call if you want.

Phil

G. Philip Rutledge
BYBEL RUTLEDGE LLP
1017 Mumma Road, Suite 302

G. PHILIP RUTLEDGE BIO:

BYBEL RUTLEDGE LLP

G. Philip Rutledge

Partner

E: rutledge@bybelrutledge.com | **T:** 717.731.8301 | **F:** 717.731.8205
vCard: Download vCard ›

Philip Rutledge is a partner of Bybel Rutledge LLP. As an AV rated lawyer by Martindale Hubbell, his practice focuses on business and corporate law, securities offerings and compliance, regulation of financial intermediaries, and regulatory representation including representation before the SEC, FINRA and state securities regulators.

Mr. Rutledge has a national reputation in securities regulation and was instrumental in shaping various provisions of significant US financial services legislation, including the Securities Markets Improvement Act of 1996, the *Gramm-Leach-Bliley Financial Modernization Act of 1999*, the *Sarbanes-Oxley Act of 2002*, and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*.

When in government, Mr. Rutledge served as an expert witness on behalf of the Pennsylvania Office of the Attorney General in civil securities litigation and has testified as a securities expert before the United States Senate Permanent Subcommittee on Investigations. In private practice, he has been engaged as an expert witness in FINRA arbitration proceedings and in civil litigation.

Practice Areas:

- Business and Corporate Law
- Securities Offerings & Compliance
- Financial Intermediaries
- Regulatory Representation
- International Practice

Bar and Court Admissions

- Supreme Court of the United States
- U.S. Court of Appeals for the Third Circui
- U.S. District Court of the Middle District of Pennsylvania
- Supreme Court of the Commonwealth of Pennsylvania

Education

Centre for Commercial Law Studies, University of London

J.D. The Dickinson School of Law, Carlisle PA

A.B., Albright College, Reading, PA

Other Professional Involvements

- Visiting Professor of Securities Law & Regulation, BPP University Law School, London (2015-present)
- Tutor, Centre for Financial and Management Studies, University of London (2008-present)
- Editorial Advisory Board, ***The Company Lawyer*** (London)
- Full Member, Securities Expert Roundtable (2013-present)
- Member, Securities Regulation Advisory Committee, American Law Institute (2007-present)
- Lecturer, International Symposium on Economic Crime, University of Cambridge, England (1987-present)
- Member, Listings Qualification Hearing Panel, the Nasdaq Stock Market, Inc. (2006-

- Member, Securities Advisory Committee, PA Department of Banking and Securities (2013-present)
- Inns of Court visiting Fellowship, Institute of Advanced Legal Studies, University of London (2000)
- Freedom of the City of London in the Worshipful Company of Pattenmakers
- Fellow, Society for Advanced Legal Studies, University of London
- Member, Board of Editors, Journal of Financial Crime
- Adjunct Faculty, Widener University School of Law, Harrisburg PA (2008-2012).
- Adjunct Faculty, The Dickinson School of Law of the Pennsylvania State University (1988-2008)
- Faculty, FINRA Compliance Program, Wharton School, University of Pennsylvania (2001-2012)
- Editorial Advisory Board, ***The ABA Business Lawyer*** (2007-2009)

Peer Recognition

- Rated AV® (Highest Rating by Martindale Hubbell) *
- Best Lawyers® in America (2011-2021)
- Best Lawyers in America Harrisburg PA Lawyer of the Year – Corporate Law (2016,2017)
- Best Lawyers in America Harrisburg PA Lawyer of the Year – Securities/Capital Markets Law (2014, 2015, 2018-2020).

Recent Professional Presentations

- Presenter, "Fundamentals of Investment Adviser Regulation," Practising Law Institute, New York, NY (2013-present).
- Presenter, "Fundamentals of Broker-Dealers Regulation," Practising Law Institute, New York, NY (2012-present).
- Presenter, "Capital Update," Bybel Rutledge LLP 2019 SEC Seminar, Hershey, PA
- Presenter, "Capital Raising for Community Banks – What's Happening – Why? at What Price?," 2018 M&A and Capital Raising Seminar, Hershey, PA (June 2018)
- Presenter, "Crowdfunding," Business Lawyers Institute, Pennsylvania Bar Institute, Philadelphia, PA (2016, 2015).
- Presenter, "Administration of Criminal Justice in the US," Centre for Development Studies, University of Cambridge, UK (2016).
- Presenter, "Dealing with Serious Crime: The Civil Law," Center for Development Studies, University of Cambridge, UK (2015).
- Presenter, "Securities Law 101: A Primer for Business Counsel," Business Lawyers Institute, Pennsylvania Bar Institute, Philadelphia, PA (November 2014).
- Presenter, "Pitfalls of D&O Insurance," 2013 Business Lawyers Institute, Pennsylvania Bar Institute, Philadelphia, PA (November 2013).

Publications

Books:

- Co-Author, ***Pennsylvania Securities Law: Civil and Administrative Liability***, PBI Press (2005).
- Principal Author, ***Rutledge and Haines: Electronic Markets***, Bloomsbury Publishing, London (2001).
- Author, ***Compendium of Pennsylvania Securities Law***, 2d Edition, 1994, (Annual Suppl.

1995-2004).

Chapters in Books:

- "State Regulation of Investment Advisers," ***Investment Adviser Regulation***, Practising Law Institute (2020).
- "State Regulation of Broker-Dealers and Agents," ***Broker-Dealer Regulation***, Practising Law Institute (2020).
- "State Law Aspects of Sarbanes-Oxley," ***The Practitioner's Guide to the Sarbanes Oxley Act, 2d ed.***, American Bar Association (2009).
- "Tracing of Assets: US Criminal and Regulatory Law," ***International Tracing of Assets***, FT Law & Tax (UK) (Supp. 1997, 1998, 1999).
- "Insider Conflicts in US and Japan - An American Perspective," ***The Fiduciary, the Insider and the Conflict***, Brehon Sweet & Maxwell (UK), 1995.

Articles:

- "US imposes Restrictions on US Investors Purchasing Securities of Certain Chinese Companies and Authorizes Sanctions Against certain Chines Government Officials," ***The Company Lawyer,*** Vol. 42, No. 9 (2021) at 314.
- "Nasdaq's Move to Increase Board Diversity," ***The Company Lawyer,*** Vol. 42, No. 4 (2021) at 107.
- "Internal Investigations and Cooperation Credit," ***The Company Lawyer,*** Vol. 42, No. 3 (2021) 80.
- "Introduction to Corporate Governance in the US," ***The Company Lawyer,*** Vol. 41, No. 9 (2020) at 247.
- "Some US Reactions to Cryptocurrencies," ***The Company Lawyer,*** Vol. 41, No. 4 (2020) at 103.
- "The limits of Delaware's business judgment rule." ***The Company Lawyer,*** Vol. 40, No. 5 (2019) at 158.
- "Extraterritorial application of anti-fraud provision of US securities laws." ***The Company Lawyer,*** Vol. 39, No. 12 (2018) at 418.
- "Financial Stability in the Digital Era: The Migration to Online Lending and the Rise of Private Regulation of Online Financial Transactions with Business Customers," ***Banque de France Financial Stability Review*** (April 2016) at 93.
- "U.S. Supreme Court to rule on applicability of alien tort statute to corporations," ***The Company Lawyer***, Vol. 38, No. 7 (2017) at 224.
- "Overview of Crowdfunding in the United States," ***The Company Lawyer***, Vol 36, No. 8 (2015) at 244.

4. Fox Rothschild LLP
The Litigation & Regulatory Experts: A national powerhouse with a massive footprint in White-Collar Defense and Securities Litigation. They are known for their rigorous approach to commercial law and financial services.

EXHIBIT: Fox Rothschild Advice/Legal Opinion

Message

From: Berman, Brett [BBerman@foxrothschild.com]
Sent: 4/3/2020 4:55:25 PM
To: Philip Rutledge [Rutledge@bybelrutledge.com]
CC: Cohen, Stephen M. [SMCohen@foxrothschild.com]; Joe Cole [joecole@parfunding.com]
Subject: Par Funding -- Amended Note Documents
Attachments: 109137681_7_Par Funding - Amended and Restated Note Purchase Agreement-C2.DOCX; 109169999_3_CBSG Amended and Restated Security Agreement-C2.DOCX; 109169940_3_CBSG Amended and Restated Promissory Note-C2.DOCX; Comparison Result Par Funding - Amended and Restated Note Purchase Agreement-4-1-C2.pdf; [Comparison Result] CBSG Security Agreement-Merchant Growth Income Funding 051019 (compared with CBSG Amended and Restated Security Agreement)-C2.pdf; [Comparison Result] CBSG Promissory Note-Merchant Growth Income Funding 051019 (compared with CBSG Amended and Restated Promissory Note)-C2.pdf

Phil

Per my below email, attached are drafts of the following:

(i) Amended and Restated Note Purchase Agreement;
(ii) Amended and Restated Security Agreement; and
(iii) Amended and Restated Promissory Note

We drafted these from the corporate debt restructure side of the transaction. We need your expertise to review/advise as securities counsel to address the possible securities implications/disclosure obligations/etc.

We will make ourselves available this weekend to work through your comments/recommendations on these issues.

Thanks in advance.

Brett A. Berman, Esq.
Partner
Co-Chair of Litigation Department

Fox Rothschild LLP
ATTORNEYS AT LAW

Firm Website | COVID-19 Resource Center

PA: 2000 Market Street | 20th Floor | Philadelphia, PA 19103
NY: 101 Park Avenue | Suite 1700 | New York, NY 10178

Philip Rutledge

From: Berman, Brett <BBerman@foxrothschild.com>
Sent: Tuesday, July 14, 2020 2:33 PM
To: Philip Rutledge
Cc: Joe Cole
Subject: CBSG

Phil

Hope you are doing well/staying safe.

Question for CBSG on a high level.

Are there any federal or state laws that would prevent a person with a felony conviction from locating sources of funding/dealing with investors for CBSG. You can assume that the federal conviction is for wire fraud and entry of falsely valued goods and is unrelated to any securities violations. You can also assume that the conviction was in the past 5 years. This person would hypothetically represent PAR Funding in interfacing with private investors to solicit capital used in PAR Funding's factoring business and/or dealing with current/prospective investors. Would that pose a problem under the bad boy disqualification provision for Rule 506 of Regulation D under the '33 Act? Are there any other federal or state laws that might apply?

This is for something I am working on and time sensitive.

Thanks.

Brett A. Berman, Esq.
Partner
Co-Chair of Litigation Department

Fox Rothschild LLP

Philip Rutledge

From: Philip Rutledge
Sent: Tuesday, July 14, 2020 3:50 PM
To: Berman, Brett
Cc: Joe Cole
Subject: RE: CBSG

Billing Entry Date: 7/14/2020
BillingProcessing: 1

Brett:

The initial and key issue is whether this individual will receive any compensation in connection with these activities by the payment of commissions or other remuneration based either directly or indirectly upon the capital raised. Indirect remuneration would include entitlements such as percentage of profit-sharing or bonus based upon the amount of capital successfully solicited for PAR by this individual.

If the individual would be receiving compensation for soliciting investors, that would raise agent registration issues at both the federal and state level. My read of the disqualification provisions in Section 3(a)(39) of the Exchange Act would bar this individual from registering as an agent of a broker-dealer as the disqualification includes any "felony" within the last 10 years. The federal safe harbor in Rule 3a4-1 of the Exchange Act relating to associated persons of issuers not deemed to be broker-dealers requires such individual not be subject to a Section 3(a)(39)(F) statutory disqualification

An alternative could be for the individual, if he was receiving compensation for soliciting investors, to register as an issuer agent of PAR with state securities regulators in those states in which he was soliciting investors. The applicable state standard is not the same as Section 3(a)(39) of the Exchange Act as it does not include all felonies but only those enumerated in each state's statute. For example, PA's statute includes, as a basis for denial of an application as an issuer agent, a felony conviction within the last 10 years involving "the making of a false report." The false report is not conditioned on being related to a securities transaction and therefore, the conviction for a false evaluation of goods may suffice to justify a denial.

I don't believe pursuant of any form of agent registration would be particularly viable under these circumstances.

Therefore, the focus should be on demonstrating sufficiently that this individual will not receive any compensation in connection with the solicitation of investors. In this case, most state laws have an exclusion from the definition of agent for which state registration as an agent would not be required in context of a Rule 506 offering. However, the SEC does not have a similar provision other than the safe harbor provision in Rule 3a4-1 which would require that the individual not be subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act which he is.

The bad actor disqualification provisions applicable to Rule 506 offerings became effective on September 23, 2013 and apply to any director, executive officer or other officer of the issuer participating in the offering, general partner or managing member of the issuer, or any beneficial owner of 20% or more of the issuer's outstanding voting equity securities calculated on the basis of voting power and any promoter connected with the issuer in any capacity at the time of the sale of securities.

If the individual would fall into one or more of these categories, the individual would be a bad actor and PAR would be prohibited from relying upon Rule 506 if the individual was convicted within the past ten years of any felony or misdemeanor (a) in connection with the purchase or sale of any security, (b) involving the making of any false filing with the SEC or (c) arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer,

investment adviser or paid solicitor of purchasers of securities. In this regard, it does not appear that the individual's felony conviction relating to falsely valued goods would prohibit PAR from relying on Rule 506 if this individual falls into one of the categories enumerated in the immediately preceding paragraph and is not receiving any compensation or remuneration in connection with soliciting investors in the Rule 506 offering.

If further sales of PAR notes are contemplated, it is important to ensure that the regulatory disclosures previously provided by PAR in context of the exchange offer and any updated information concerning the Texas matter be included in documents provided to the investors.

Please call if you would like to discuss further.

Regards,

Phil

BYBEL RUTLEDGE LLP

G. Philip Rutledge
BYBEL RUTLEDGE LLP

BRETT BERMAN BIO:

Brett A. Berman

PARTNER

bberman@foxrothschild.com

Philadelphia, PA
Tel: 215.299.2842
Fax: 215.299.2150

New York, NY
Tel: 212.878.7945
Fax: 212.692.0940

Biography
Awards & Honors
Events
News

Co-Chair of the firm's national Litigation Department, Brett is a proven trial attorney who represents businesses in a full range of complex commercial litigation in state and federal courts and arbitral venues throughout the United States.

Hard-nosed and pragmatic in his approach, Brett recognizes that the best, most efficient resolution to any dispute is often found outside the courtroom. A skillful negotiator, he is adept at reaching deals that advance his clients' business objectives. At trial, Brett is strategic and relentless in his pursuit of victory.

More than a litigator, Brett is a trusted legal adviser, leveraging his MBA and operational business knowledge to serve many clients as outside general counsel. He also provides borrowers, funders and attorneys with key insights into the rapidly evolving world of litigation finance, serving as a leader of the firm's efforts in this cutting-edge area.

SHOW MORE

Before Fox Rothschild

A former legislative and government Fellow of the prestigious Eagleton Institute of Politics, Brett began his career at Fox as a summer associate in 2005 and clerked for the firm in 2006. In addition, Brett has held such positions as:

- A law clerk in the Subrogation and Recovery department of a large international law firm

SERVICES

- Litigation
- Eminent Domain/Condemnation
- Directors' & Officers' Liability & Corporate Governance
- Financial Services Industry
- Valuation Law
- Real Estate Litigation
- National Coordinating Counsel

- A fellow for a United States Senator and an intern for a United States Congressman
- A fellow in the New Jersey General Assembly Majority Office
- A judicial intern for the Honorable Alan M. Vogelson, Presiding Chancery Judge of the New Jersey Superior Court, Camden County

Bar Admissions

- Pennsylvania
- New Jersey
- New York
- Illinois

Court Admissions

- U.S. District Court, Eastern District of Pennsylvania
- U.S. District Court, District of New Jersey
- U.S. District Court, Eastern District of New York
- U.S. District Court, Southern District of New York

Education

- Rutgers Law School (J.D., with honors)
- Rutgers University, Graduate School of Business, Camden (M.B.A., high honors)
- George Washington University (B.B.A., cum laude)

Memberships

- Pennsylvania Bar Association
- Philadelphia Bar Association

5. Offit Kurman
The Corporate Authority: An Am Law 200 firm recognized as one of the fastest-growing in the U.S. Their Mergers and Acquisitions and Corporate groups are highly regarded for guiding private businesses through complex regulatory landscapes.

EXHIBIT: Offit Kurman Advice

Offit | Kurman
Attorneys At Law

Jason C. Berger, Esquire
(267) 338-1328 (direct dial)
(267) 338-1335 (facsimile)
jberger@offitkurman.com

November 28, 2012

Ms. Lisa McElhone, President
Complete Business Solutions Group, Inc.
1650 Market Street, Suite 3640
Philadelphia, Pennsylvania 19103

Re: Business Loans Offered By Complete Business Solutions Group, Inc.

Dear Ms. McElhone:

In connection with our firm's representation of Complete Business Solutions Group, Inc. ("CBSG"), you have asked us to provide our opinion on specific matters with respect to the business loans extended by CBSG. In this regard, we have reviewed and examined the following documents (in the form attached hereto as Exhibit "A"):

1. Business Loan and Security Agreement.

2. Business Loan and Security Agreement Supplement.

3. Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits).

We have also reviewed a form UCC Financing Statement used by CBSG in each instance a loan is extended, naming CBSG as secured party.

The documents and instruments referred to above are collectively called the "Loan Documents."

In addition, we have reviewed and examined the originals or copies of the following organization and authorization documents:

1. Certificate of Incorporation dated October 20, 2011.

2. By-Laws of Complete Business Solutions Group, Inc.

3. Resolution of the Board of Directors of Complete Business Solutions Group, Inc. adopting the By-laws.

4. Certificate of Good Standing for Complete Business Solutions Group, Inc.

The foregoing documents are sometimes hereinafter referred to collectively as the "Constituent Documents."

Based upon our review of the foregoing documents, we have reached certain opinions (expressed below) which shall be subject to the following qualifications and assumptions:

1. We have made no inquiries or investigations concerning the status, authority to act or authorization of any party participating in CBSG's loan transactions other than CBSG. Therefore, we have specifically assumed (i) the legal capacity of all other natural persons executing any of the Loan Documents; (ii) as to those of the Loan Documents which require execution and delivery by CBSG's borrower, the due authorization, execution and delivery by the borrower in each instance; (iii) as to those of the Loan Documents which require execution and delivery by third parties, the due authorization, execution and delivery by such third parties in each instance; and (iv) the due authorization and execution of a resolution by an authorized officer of CBSG approving the terms of each loan transaction entered into by CBSG.

2. As to the matters of fact material to our opinion(s), we have relied upon the truth, accuracy and completeness of the representations, warranties and certifications made by CBSG in the Loan Documents and the Constituent Documents, without any independent investigation.

3. To the extent we have relied upon original documents or copies thereof, we have assumed that all documents examined by us as originals are authentic and bear genuine signatures, and that all copies of documents examined by us conform to complete and authentic originals.

4. Our opinion is subject to the effects of bankruptcy, insolvency, reorganization, arrangement, moratorium, or other similar laws related to or affecting the rights of creditors generally and the law of fraudulent conveyances.

5. Our opinion is subject to limitations imposed by equitable principals in any proceeding at law or in equity, including limitations upon the enforceability of any of the rights, remedies, covenants, waivers or other provisions contained in the Loan Documents and upon the availability of injunctive relief or other equitable remedies.

6. We have not made or undertaken to make any investigation of (i) the property subject to or intended to be subject to the security interest in the Loan Documents or collateral for the loans offered by CBSG; (ii) the state of title to, or condition of any property that is be subject to the security interest in the Loan Documents or collateral for the loans offered by CBSG; and (iii) the recording of the Loan Documents or the filing of any financing statements which may be necessary to perfect a security interest. We express no opinion with respect to the

adequacy or accurateness of the description of the property or any other property, or any title matter relating to the subject loan(s) or concerning the creation, attachment, existence, priority or perfection of any liens or security interests under the Uniform Commercial Code which may be given or created as collateral for the loans offered by CBSG. As to these matters, we understand that CBSG and/or the borrower in each specific transaction will rely on, *inter alia*, such title insurance protection may be obtain from a title insurance company.

7. We express no opinion as to any matters involving any state or federal securities laws, rules or regulations, ERISA, and/or laws, rules or regulations promulgated by the Commonwealth of Pennsylvania (or other state) related to consumer loans.

8. Whenever our opinion is expressed as being made to the best of our knowledge, it shall be deemed to be limited to our actual knowledge, without our having made any independent investigation or inquiry and no inference as to our knowledge should be drawn from our representation of CBSG.

Based solely upon the factual information provided, our examination of the Loan Documents and the Constituent Documents, and subject to the foregoing qualifications and assumptions and additional qualifications set forth below, we are of the opinion that:

1. CBSG is a corporation, duly organized, validly existing and in good standing under the laws of the State of Delaware.

2. The execution, delivery and performance by CBSG of the Loan Documents and the lending obligations incurred thereunder including the general authorization to extend business loans for the specific purposes described in the Use of Proceeds Certification incorporated in the Business Loan and Security Agreement (a) have been duly authorized by all necessary corporate action of CBSG as applicable, (b) do not contravene the terms of the Constituent Documents, (c) do not (to the best of our knowledge) require the approval or consent of any trustee or the holders of any indebtedness of CBSG, (d) do not (to the best of our knowledge) contravene any law, regulation, rule of order binding on CBSG, and (e) do not (to the best of our knowledge) contravene the provisions of or constitute default under any agreement or instrument to which CBSG is a party or by which CBSG may be bound or affected. In all other respects, to the best of our knowledge, all actions, approvals and consents necessary to authorize the execution, delivery and performance of the Loan Documents by CBSG have occurred or been obtained.

3. To the best of our knowledge, no government approval or filing or registration with any governmental authority (other than the recording of Financing Statements) is required for the execution, delivery and performance by CBSG of the obligations set forth in the Loan Documents or in connection with the transactions contemplated therein.

4. The Loan Documents issued by CBSG, once duly and validly executed and delivered by CBSG and the borrower in each instance, as applicable, constitute legal, valid and binding obligations of the borrower enforceable in accordance with their respective terms and provisions, except that enforcement may be limited by bankruptcy, insolvency, reorganization, arrangement, moratorium, or similar laws, or by equitable principals, related to or limiting the rights of lenders generally.

5. The Financing Statement, once completed with the appropriate identifying information of the borrower/debtor, is in proper form for filing with the Secretary of State for the Commonwealth of Pennsylvania.

6. There is, to the best or our knowledge, no private, judicial or governmental action, lawsuit, claim, proceeding, inquiry or investigation pending or threatened which involves CBSG or the Loan Documents. In addition, to the best of our knowledge, no unsatisfied judgments have been entered or returned against CBSG.

7. The loans offered by CBSG, to the extent they are business loans as defined in 41 P.S. § 301(f)(v) and 10 Pa.Code § 7.2 and are in excess of $10,000.00, and do not violate the civil usury laws of the Commonwealth of Pennsylvania.

8. The Loan Documents will be construed and enforced under the internal laws of the Commonwealth of Pennsylvania applicable with respect to transactions made and to be performed therein and the laws of the United States applicable to transactions in the Commonwealth of Pennsylvania (excluding choice-of-law principles).

We express no opinion with respect to the application of the laws of any jurisdiction other than the Commonwealth of Pennsylvania. Our opinion is based upon and relies upon the current status of law, and in all respects is subject to and limited by future legislation and developing case law.

Offit | Kurman
Attorneys At Law

Our opinion is given for the benefit of CBSG and is intended to be relied upon by CBSG only.

Very truly yours,

Jason C. Berger

JCB/cc
4817-7840-7442, v. 1

Offit | Kurman
Attorneys At Law

Jason C. Berger, Esquire
(267) 338-1328 (direct dial)
(267) 338-1335 (facsimile)
jberger@offitkurman.com

April 25, 2014

Ms. Lisa McElhone, President
Complete Business Solutions Group, Inc.
141 North Second Street
Philadelphia, Pennsylvania 19106

Re: Merchant Cash Advance / Purchase of Receivables Product Offered By Complete Business Solutions Group, Inc.

Dear Ms. McElhone:

In connection with our firm's representation of Complete Business Solutions Group, Inc. ("CBSG"), you have asked us to provide our opinion on specific matters with respect to the merchant cash advance / purchase of receivables product offered by CBSG. In this regard, we have reviewed and examined the following documents (in the form attached hereto as Exhibit "A"):

1. Merchant Agreement.

2. Purchase and Sale of Future Receivables Agreement.

3. Authorization Agreement for Direct Deposit (ACH Credit) and Direct Payments (ACH Debits).

The documents and instruments referred to above are collectively called the "Merchant Documents."

In addition, we have reviewed and examined the originals or copies of the following organization and authorization documents:

1. Certificate of Incorporation dated October 20, 2011.
2. By-Laws of Complete Business Solutions Group, Inc.
3. Resolution of the Board of Directors of Complete Business Solutions Group, Inc. adopting the By-laws.

4. Certificate of Good Standing for Complete Business Solutions Group, Inc.

The foregoing documents are sometimes hereinafter referred to collectively as the "Constituent Documents."

Based upon our review of the foregoing documents, we have reached certain opinions (expressed below) which shall be subject to the following qualifications and assumptions:

1. We have made no inquiries or investigations concerning the status, authority to act or authorization of any party participating in CBSG's cash advance transactions other than CBSG. Therefore, we have specifically assumed (i) the legal capacity of all other natural persons executing any of the Merchant Documents; (ii) as to those of the Merchant Documents which require execution and delivery by CBSG's merchant, the due authorization, execution and delivery by the merchant in each instance; (iii) as to those of the Merchant Documents which require execution and delivery by third parties, the due authorization, execution and delivery by such third parties in each instance; and (iv) the due authorization and execution of a resolution by an authorized officer of CBSG approving the terms of each cash advance transaction entered into by CBSG.

2. As to the matters of fact material to our opinion(s), we have relied upon the truth, accuracy and completeness of the representations, warranties and certifications made by CBSG in the Merchant Documents and the Constituent Documents, without any independent investigation.

3. To the extent we have relied upon original documents or copies thereof, we have assumed that all documents examined by us as originals are authentic and bear genuine signatures, and that all copies of documents examined by us conform to complete and authentic originals.

4. Our opinion is subject to the effects of bankruptcy, insolvency, reorganization, arrangement, moratorium, or other similar laws related to or affecting the rights of creditors generally and the law of fraudulent conveyances.

5. Our opinion is subject to limitations imposed by equitable principals in any proceeding at law or in equity, including limitations upon the enforceability of any of the rights, remedies, covenants, waivers or other provisions contained in the Merchant Documents and upon the availability of injunctive relief or other equitable remedies.

Offit | Kurman
Attorneys At Law

6. We have not made or undertaken to make any investigation of (i) the property subject to or intended to be subject to the security interest in the Merchant Documents or collateral for the cash advances offered by CBSG; (ii) the state of title to, or condition of any property that is be subject to the security interest in the Merchant Documents or collateral for the cash advances offered by CBSG; and (iii) the recording of the Merchant Documents or the filing of any financing statements which may be necessary to perfect a security interest. We express no opinion with respect to the adequacy or accurateness of the description of the property or any other property, or any title matter relating to the subject cash advance(s) or concerning the creation, attachment, existence, priority or perfection of any liens or security interests under the Uniform Commercial Code which may be given or created as collateral for the cash advances offered by CBSG. As to these matters, we understand that CBSG and/or the merchant in each specific transaction will rely on, *inter alia*, such title insurance protection may be obtain from a title insurance company.

7. We express no opinion as to any matters involving any state or federal securities laws, rules or regulations, ERISA, and/or laws, rules or regulations promulgated by the Commonwealth of Pennsylvania (or other state) related to consumer loans.

8. Whenever our opinion is expressed as being made to the best of our knowledge, it shall be deemed to be limited to our actual knowledge, without our having made any independent investigation or inquiry and no inference as to our knowledge should be drawn from our representation of CBSG.

Based solely upon the factual information provided, our examination of the Merchant Documents and the Constituent Documents, and subject to the foregoing qualifications and assumptions and additional qualifications set forth below, we are of the opinion that:

1. CBSG is a corporation, duly organized, validly existing and in good standing under the laws of the State of Delaware.

2. The execution, delivery and performance by CBSG of the Merchant Documents and the financing obligations incurred thereunder including the general authorization to extend cash advances for the specific purposes described in the Merchant Documents (a) have been duly authorized by all necessary corporate action of CBSG as applicable, (b) do not contravene the terms of the Constituent Documents, (c) do not (to the best of our knowledge) require the approval or consent of any trustee or the holders of any indebtedness of CBSG, (d) do not (to the best of our knowledge) contravene any law, regulation, rule of order binding on CBSG, and (e) do not (to the best of our knowledge) contravene the provisions of or

constitute default under any agreement or instrument to which CBSG is a party or by which CBSG may be bound or affected. In all other respects, to the best of our knowledge, all actions, approvals and consents necessary to authorize the execution, delivery and performance of the Merchant Documents by CBSG have occurred or been obtained.

3. To the best of our knowledge, no government approval or filing or registration with any governmental authority (other than the recording of Financing Statements) is required for the execution, delivery and performance by CBSG of the obligations set forth in the Merchant Documents or in connection with the transactions contemplated therein.

4. The Merchant Documents issued by CBSG, once duly and validly executed and delivered by CBSG and the merchant in each instance, as applicable, constitute legal, valid and binding obligations of the merchant enforceable in accordance with their respective terms and provisions, except that enforcement may be limited by bankruptcy, insolvency, reorganization, arrangement, moratorium, or similar laws, or by equitable principals, related to or limiting the rights of lenders generally.

5. The Financing Statement, once completed with the appropriate identifying information of the merchant/debtor, is in proper form for filing with the Secretary of State for the Commonwealth of Pennsylvania.

6. There is, to the best or our knowledge, no private, judicial or governmental action, lawsuit, claim, proceeding, inquiry or investigation pending or threatened which involves CBSG or the Merchant Documents. In addition, to the best of our knowledge, no unsatisfied judgments have been entered or returned against CBSG.

7. The cash advances offered by CBSG, to the extent they are business related as defined in 41 P.S. § 301(f)(v) and 10 Pa.Code § 7.2 and are in

excess of $10,000.00, and do not violate the civil usury laws of the Commonwealth of Pennsylvania.

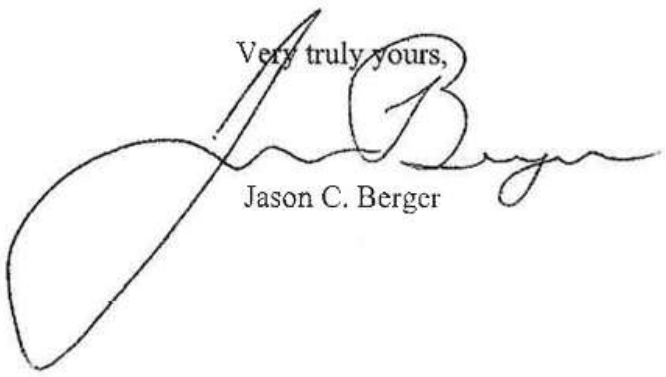
8. The Merchant Documents will be construed and enforced under the internal laws of the Commonwealth of Pennsylvania applicable with respect to transactions made and to be performed therein and the laws of the United States applicable to transactions in the Commonwealth of Pennsylvania (excluding choice-of-law principles).

Offit | Kurman
Attorneys At Law

We express no opinion with respect to the application of the laws of any jurisdiction other than the Commonwealth of Pennsylvania. Our opinion is based upon and relies upon the current status of law, and in all respects is subject to and limited by future legislation and developing case law.

Our opinion is given for the benefit of CBSG and is intended to be relied upon by CBSG only.

Very truly yours,



Jason C. Berger

JCB/lg

The Question for the Reader

When you look at these names, you aren't looking at people who "miss" fraud. You are looking at the peak of legal intelligence.
If these firms—including an Oxford law teacher and former government regulator—reviewed our documents and filed our Form Ds, then the SEC's "witch hunt" is an attack on the entire American legal

profession. If a citizen cannot rely on the advice of an Oxford scholar and the world's largest law firms, then no one is safe.

After **millions of dollars** on legal advice - (**See QuickBooks export documenting payments made to the major law firms that advised Par Funding on how to structure its product as a non-security)** — the result should have been accountability.

Complete Business Solutions Group Inc.

Transaction Detail By Account

January 2011 through December 2020

Accrual Basis

Type	Date	Num	Name	Memo	Clr	Split	Debit	Credit	Balance
Bybel Rutledge LLP									
Check	01/12/2018	4424	Bybel Rutledge LLP	retainer		TD Bank - Oper...	10,000.00		10,000.00
Check	06/13/2018	4837	Bybel Rutledge LLP	draft audit res...		TD Bank - Oper...	585.00		10,585.00
Check	09/25/2018	5027	Bybel Rutledge LLP	additional reta...		TD Bank - Oper...	5,000.00		15,585.00
Bill	11/29/2018	9594	Bybel Rutledge LLP	pa dept of ban...		Accounts Paya...	13,476.00		29,061.00
Bill	11/29/2018	9595	Bybel Rutledge LLP	note purchase...		Accounts Paya...	1,450.00		30,511.00
Check	02/15/2019	5362	Bybel Rutledge LLP	inv 9700		TD Bank - Oper...	948.00		31,459.00
Check	04/26/2019	5491	Bybel Rutledge LLP	inv 9743, pa d...		TD Bank - Oper...	200.00		31,659.00
Check	08/16/2019	5865	Bybel Rutledge LLP	Inv # 10039 - f...		TD Bank - Payr...	2,950.00		34,609.00
Bill	10/16/2019		Bybel Rutledge LLP	inv 10135 - st...		Accounts Paya...	90.00		34,699.00
Bill	10/16/2019		Bybel Rutledge LLP	Inv 10136 - C...		Accounts Paya...	1,350.00		36,049.00
Bill	11/13/2019		Bybel Rutledge LLP	inv 10180 stat...		Accounts Paya...	2,844.00		38,893.00
Bill	11/13/2019		Bybel Rutledge LLP	inv 10181 ohi...		Accounts Paya...	1,600.00		40,493.00
Bill	01/15/2020		Bybel Rutledge LLP	File :358-007: ...		Accounts Paya...	29.44		40,522.44
Bill	02/26/2020		Bybel Rutledge LLP	VA Securities ...		Accounts Paya...	600.00		41,122.44
Bill	04/08/2020		Bybel Rutledge LLP	Bills: 00238+0...		Accounts Paya...	16,978.50		58,100.94
Bill	05/20/2020		Bybel Rutledge LLP	Bills: 00331,0...		Accounts Paya...	23,568.50		81,669.44
Check	06/12/2020	1003	Bybel Rutledge LLP			Empire - Opera...	500.00		82,169.44
Total Bybel Rutledge LLP							82,169.44	0.00	82,169.44
DLA Piper									
Check	06/02/2016	2982	DLA Piper	es equity agre...		TD Bank - Oper...	17,072.00		17,072.00
Check	06/29/2016	3015	DLA Piper	Jacobs invoic...		TD Bank - Oper...	11,000.00		28,072.00
Check	08/10/2016		DLA Piper			TD Bank - Capi...	8,762.12		36,834.12
Check	08/18/2016	3079	DLA Piper	estate plannin...		TD Bank - Oper...	3,684.50		40,518.62
Check	09/21/2016	3118	DLA Piper	3345936		TD Bank - Oper...	5,614.00		46,132.62
Check	11/16/2016	3210	DLA Piper	3356915 / 335...		TD Bank - Oper...	4,399.00		50,531.62
Check	12/28/2016	3295	DLA Piper	estate plannin...		TD Bank - Oper...	1,178.00		51,709.62
Bill	01/27/2017	3401862	DLA Piper	invoice #3401...		Accounts Paya...	15,000.00		66,709.62
Total DLA Piper							66,709.62	0.00	66,709.62

Fox Rothschild LLP								
Bill	07/12/2019		Fox Rothschild LLP	inv # 2376309	Accounts Paya...	2,691.50		2,691.50
Bill	07/31/2019		Fox Rothschild LLP	Inv # 2392162	Accounts Paya...	12,247.00		14,938.50
Bill	08/21/2019		Fox Rothschild LLP	inv #178233	Accounts Paya...	560.92		15,499.42
Bill	09/18/2019		Fox Rothschild LLP	Corporate and...	Accounts Paya...	5,484.00		20,983.42
Bill	10/23/2019		Fox Rothschild LLP	Fleetwood Ser...	Accounts Paya...	27,688.98		48,672.40
Bill	12/04/2019		Fox Rothschild LLP	Inv # 2459183...	Accounts Paya...	33,995.19		82,667.59
Check	12/18/2019		Fox Rothschild LLP	retainer	TD Bank - Capi...	50,000.00		132,667.59
Bill	01/29/2020		Fox Rothschild LLP	Fleetwood	Accounts Paya...	56,465.00		189,132.59
Bill	01/29/2020		Fox Rothschild LLP	Corporate and...	Accounts Paya...	2,223.75		191,356.34
Bill	01/29/2020		Fox Rothschild LLP	Robert Frei	Accounts Paya...	4,397.00		195,753.34
Bill	01/29/2020		Fox Rothschild LLP	Dual Diagnosis	Accounts Paya...	8,297.55		204,050.89
Bill	01/29/2020		Fox Rothschild LLP	hmc INC	Accounts Paya...	9,580.05		213,630.94
Bill	01/29/2020		Fox Rothschild LLP	Sovereign He...	Accounts Paya...	4,069.50		217,700.44
Bill	01/29/2020		Fox Rothschild LLP	Vision Entertai...	Accounts Paya...	5,548.50		223,248.94
Bill	01/29/2020		Fox Rothschild LLP	NLRB	Accounts Paya...	1,476.00		224,724.94
Bill	01/29/2020		Fox Rothschild LLP	Colorado Hom...	Accounts Paya...	1,291.50		226,016.44
Credit Card Charge	02/19/2020		Fox Rothschild LLP		Amex Corp 610...	60,000.00		286,016.44
Bill	03/04/2020		Fox Rothschild LLP	Corporate and...	Accounts Paya...	185,324.52		471,340.96
Credit Card Charge	03/04/2020		Fox Rothschild LLP		Amex Corp 610...	60,000.00		531,340.96
Bill	03/25/2020		Fox Rothschild LLP	Inv #2522868	Accounts Paya...	185,056.20		716,397.16
Credit Card Charge	04/04/2020		Fox Rothschild LLP		Amex Corp 1000	60,000.00		776,397.16
Bill	04/22/2020		Fox Rothschild LLP	April Invoices	Accounts Paya...	210,479.65		986,876.81
Bill	04/29/2020		Fox Rothschild LLP	Inv: 2536843	Accounts Paya...	23,193.00		1,010,069.81
Credit Card Charge	05/04/2020		Fox Rothschild LLP		Amex Corp 1000	60,000.00		1,070,069.81
Bill	05/15/2020		Fox Rothschild LLP	May Invoice	Accounts Paya...	166,729.50		1,236,799.31
Bill	06/03/2020		Fox Rothschild LLP	Updated May I...	Accounts Paya...	90,323.00		1,327,122.31
Credit Card Charge	06/04/2020		Fox Rothschild LLP		Amex Corp 1000	60,000.00		1,387,122.31
Credit Card Charge	07/04/2020		Fox Rothschild LLP		Amex Corp 1000	60,000.00		1,447,122.31
Bill	07/10/2020		Fox Rothschild LLP	July Invoice	Accounts Paya...	198,088.46		1,645,210.77
Total Fox Rothschild LLP						1,645,210.77	0.00	1,645,210.77
Haynes and Boone, LLP								
Bill	11/07/2018	21342...	Haynes and Boone, ...		Accounts Paya...	288.00		288.00
Bill	12/12/2018	21349...	Haynes and Boone, ...		Accounts Paya...	759.17		1,047.17
Bill	12/19/2018	21350...	Haynes and Boone, ...		Accounts Paya...	7,559.88		8,607.05
Check	03/01/2019	5396	Haynes and Boone, ...	Inv 21357703	TD Bank - Oper...	7,086.60		15,693.65
Check	08/30/2019	5910	Haynes and Boone, ...	Inv # 2138558...	TD Bank - Payr...	6,194.00		21,887.65
Bill	03/05/2020		Haynes and Boone, ...	Retainer	Accounts Paya...	20,000.00		41,887.65
Bill	03/09/2020		Haynes and Boone, ...	Inv:21390385...	Accounts Paya...	5,253.40		47,141.05
Bill	05/22/2020		Haynes and Boone, ...	Inv : 2142780...	Accounts Paya...	30,000.00		77,141.05
Bill	06/05/2020		Haynes and Boone, ...	Inv # 21431461	Accounts Paya...	15,862.50		93,003.55
Bill	07/10/2020		Haynes and Boone, ...	Inv # 21435301	Accounts Paya...	8,065.00		101,068.55
Bill	07/17/2020		Haynes and Boone, ...	Confirmed de...	Accounts Paya...	20,000.00		121,068.55
Total Haynes and Boone, LLP						121,068.55	0.00	121,068.55
Lucosky Brookman								
Check	09/19/2018		Lucosky Brookman	retainer	Republic Bank ...	30,000.00		30,000.00
Check	10/31/2018		Lucosky Brookman		Republic Bank ...	27,500.00		57,500.00
Check	12/18/2018		Lucosky Brookman		TD Bank - Capi...	56,943.00		114,443.00
Total Lucosky Brookman						114,443.00	0.00	114,443.00
Martin Hewitt								
Check	02/07/2019		Martin Hewitt	nj sec counsel	Republic Bank ...	5,575.00		5,575.00
Check	02/13/2019		Martin Hewitt	nj sec filing	Bancorp - Capit...	2,780.00		8,355.00

Type	Date	Num	Name	Memo	Clr	Split	Debit	Credit	Balance
Check	02/20/2019		Martin Hewitt	nj sec filing		Bancorp - Capit...	12,500.00		20,855.00
Total Martin Hewitt							20,855.00	0.00	20,855.00
Offit Kurman									
Check	11/01/2012	5021	Offit Kurman			Citizens Bank ...	10,000.00		10,000.00
Check	02/12/2013	1142	Offit Kurman	Invoice 357606		Wells Fargo O...	3,637.53		13,637.53
Check	03/20/2013	1185	Offit Kurman	invoice 36125...		Wells Fargo O...	2,705.00		16,342.53
Check	04/03/2013	1011	Offit Kurman			TD Bank - Oper...	3,074.50		19,417.03
Check	06/05/2013	1110	Offit Kurman			TD Bank - Oper...	225.50		19,642.53
Check	06/13/2013	1122	Offit Kurman	Invoice 36827...		TD Bank - Oper...	225.50		19,868.03
Check	06/13/2013	1122	Offit Kurman	Invoice 36827...		TD Bank - Oper...	8,675.00		28,543.03
Check	07/18/2013	1187	Offit Kurman			TD Bank - Oper...	809.02		29,352.05
Check	08/21/2013	1251	Offit Kurman	Invoice 37771...		TD Bank - Oper...	2,360.00		31,712.05
Check	08/21/2013	1252	Offit Kurman	Invoice 37771...		TD Bank - Oper...	1,000.00		32,712.05
Check	11/04/2013	1375	Offit Kurman	invoice 384968		TD Bank - Oper...	5,000.00		37,712.05
Check	12/10/2013	1440	Offit Kurman			TD Bank - Oper...	5,000.00		42,712.05
Check	01/14/2014	1518	Offit Kurman			TD Bank - Oper...	5,000.00		47,712.05
Check	03/26/2014	1643	Offit Kurman			TD Bank - Oper...	5,000.00		52,712.05
Check	04/08/2014	1668	Offit Kurman			TD Bank - Oper...	5,000.00		57,712.05
Check	05/14/2014	1726	Offit Kurman			TD Bank - Oper...	5,000.00		62,712.05
Check	06/25/2014	1812	Offit Kurman	invoice 410289		TD Bank - Oper...	4,396.00		67,108.05
Check	07/18/2014	1908	Offit Kurman			TD Bank - Oper...	1,980.00		69,088.05
Check	07/23/2014	1859	Offit Kurman	invoice 413394		TD Bank - Oper...	6,957.86		76,045.91
Check	09/18/2014	1962	Offit Kurman	invoice 41824...		TD Bank - Oper...	342.00		76,387.91
Check	09/18/2014	1962	Offit Kurman	invoice 41824...		TD Bank - Oper...	1,896.00		78,283.91
Check	10/22/2014	2018	Offit Kurman	invoice 423592		TD Bank - Oper...	720.00		79,003.91
Check	11/19/2014	2055	Offit Kurman			TD Bank - Oper...	2,200.00		81,203.91
Check	02/19/2015	2209	Offit Kurman	invoice 435612		TD Bank - Oper...	2,500.00		83,703.91
Check	02/19/2015	2210	Offit Kurman	invoice 435592		TD Bank - Oper...	4,239.00		87,942.91
Check	04/15/2015	2301	Offit Kurman	invoice 444743		TD Bank - Oper...	1,800.00		89,742.91
Check	04/15/2015	2301	Offit Kurman	invoice 444741		TD Bank - Oper...	330.00		90,072.91
Check	04/15/2015	2301	Offit Kurman	invoice 444744		TD Bank - Oper...	1,050.00		91,122.91
Check	05/21/2015	2357	Offit Kurman		X	TD Bank - Oper...	0.00		91,122.91
Check	05/21/2015	2359	Offit Kurman	$375.00 - 501...		TD Bank - Oper...	1,375.00		92,497.91
Check	06/12/2015		Offit Kurman			TD Bank - Capi...	35,000.00		127,497.91
Check	07/22/2015	2477	Offit Kurman	invoice 508888		TD Bank - Oper...	240.00		127,737.91
Check	07/29/2015	2491	Offit Kurman			TD Bank - Oper...	4,188.13		131,926.04
Check	01/27/2016	2791	Offit Kurman	Settlement for ...		TD Bank - Oper...	23,000.00		154,926.04
Total Offit Kurman							154,926.04	0.00	154,926.04
TOTAL							**2,205,382.42**	**0.00**	**2,205,382.42**

Instead, it was annihilation. And it was all ignored because the government chose to pretend the legal advice never existed.

This case did not succeed because evidence was lacking.
It succeeded **because evidence was disregarded**.

It sends a chilling message to every American business owner:

Hire the best lawyers.
Pay them millions.
Follow their advice.
Document everything.

And if the government later decides it doesn't like your business model, **your compliance will be treated as irrelevant — and your reliance as guilt**.

When advice of counsel means nothing,
when civil disputes become criminal prosecutions,
when lies under oath are excused but legal records are ignored,

The courtroom stops being a safeguard.

It becomes a formality.

If this can happen here, it can happen to anyone.

And that is why no American should feel safe pretending this is someone else's problem.