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

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

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| IN THE MATTER OF:<br><br>DAN ARLAN NEWBOLD; and<br>DOUBLEVAULT TECHNOLOGIES,<br><br>RESPONDENTS | **RECOMMENDED ORDER ON MOTION FOR DEFAULT**<br><br>Case nos. SD-16-001, SD-16-002 |

BY THE PRESIDING OFFICER:

This adjudicative proceeding was initiated pursuant to a January 5, 2016 Notice of Agency Action and Order to Show Cause. Respondents were required to file a response to the Division's Order to Show Cause within 30 days. Respondents have not filed a response.

The Division alleges that Mr. Newbold made material misstatements and misrepresentations when he sold investment opportunities in his company, Doublevault Technologies, to two investors for a total of $118,500. Mr. Newbold or Doublevault are not registered with the Division of Securities and have never been licensed in the securities industry.

An initial hearing was held on February 3, 2016. Respondents failed to appear. As of the date of this Order, Respondents have made no effort to participate in the proceedings.

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

**RECOMMENDED ORDER**

The Presiding Officer recommends that the Utah Securities Commission accept the allegations outlined in the Division's Order to Show Cause as being true, and find:

1. That the investment opportunities offered and sold by Respondents are securities under Utah Code Ann. § 61-1-13(1)(ee)(i);

2. That in connection with the offer and sale of securities and in violation of Utah Code Ann. § 61-1-1(2), Respondents directly or indirectly made false statements to investors;

3. That in connection with the offer and sale of securities, and in violation of Utah Code Ann. § 61-1-1(3), Respondents engaged in an act, practice, or course of business that operated as a fraud or deceit upon a person; and

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

The Presiding Officer further recommends that the Utah Securities Commission enter a Default Order against Respondents, requiring:

1. That Respondents cease and desist from engaging in any further conduct in violation of Utah Code Ann. § 61-1 et seq;

2. That Respondents pay a fine of $148,125 to the Utah Division of Securities, with $29,625 of the fine due and payable in full upon receipt of the final order and the remaining $118,500 subject to offset for a period of 30 days following the date of the final order on a dollar-to-dollar basis for any restitution paid to investors;

3. That, should Respondents fail to provide proof of restitution payments to investors within the 30-day period following the date of the final order, the full $148,125 fine become immediately due and payable, and subject to collection; and

4. That Respondent Dan Arlan Newbold be permanently barred from associating with any broker-dealer or investment adviser licensed in Utah; from acting as an agent for any issuer soliciting investor funds in Utah; and from being licensed in any capacity in the securities industry in Utah.

Finally, the Presiding Officer recommends that, upon entering the Default Order, the Utah Securities Commission dismiss any further proceedings in this case. This Recommended Order shall be effective on the signature date below.

DATED this 5th day of February, 2016.

UTAH DEPARTMENT OF COMMERCE

Greg Soderberg

Greg Soderberg, Presiding Officer

CERTIFICATE OF DELIVERY

I hereby certify that on the 5th day of February, 2016, the undersigned hand delivered a true and correct copy of the foregoing RECOMMENDED ORDER ON MOTION FOR DEFAULT to the following:

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

Gregory Sederberg

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

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

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|---|---|
| IN THE MATTER OF:<br><br>DAN ARLAN NEWBOLD; and<br>DOUBLEVAULT TECHNOLOGIES,<br><br>RESPONDENTS | **ORDER ON MOTION FOR DEFAULT**<br><br>Case no. SD-16-001, SD-16-002 |

**BY THE UTAH SECURITIES COMMISSION:**

The Presiding Officer's Recommended Order on Motion for Default in this matter is hereby approved, confirmed, accepted, and entered by the Utah Securities Commission.

**ORDER**

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

Respondents are hereby ordered to pay a fine of $148,125 to the Utah Division of Securities. Of this total fine, $29,625 is due and payable immediately upon receipt of this Final Order. The remaining $118,500 is subject to offset during the 30-day period following the date of this Order on a dollar-to-dollar basis for any restitution paid to investors.

Should Respondents fail to provide proof of restitution payments to investors within the 30-day period following the date of this order, the full $148,125 fine becomes immediately due and payable, and subject to collection.

Respondent Dan Arlan Newbold is hereby permanently barred from associating with any broker-dealer or investment adviser licensed in Utah; from acting as an agent for any issuer soliciting investor funds in Utah; and from being licensed in any capacity in the securities industry in Utah.

All further proceedings in this case are dismissed. This dismissal does not relieve Respondents from complying with the terms of the Default Order. This Order shall be effective on the signature date below.

DATED this 24th day of March, 2016

**UTAH SECURITIES COMMISSION:**

Lyle White

Erik Anthony Christiansen

Brent Baker

Gary Cornia

David Russon

## NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

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

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2016 the undersigned served a true and correct copy of the foregoing ORDER ON MOTION FOR DEFAULT by mailing a copy through first-class mail, postage prepaid, to:

DAN ARLAN NEWBOLD
555 CEDAR CIRCLE
BOUNTIFUL, UTAH 84010

DOUBLEVAULT TECHNOLOGIES, INC.
REGISTERED AGENT: EUGENE D. LOVERIDGE
406 W. 10600 S., STE. 130
SOUTH JORDAN, UTAH 84095

and caused a copy to be hand delivered to:

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

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

Division of Securities
Utah Department of Commerce
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, UT 84114-6760
Telephone: (801) 530-6600
FAX: (801)530-6980

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

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| IN THE MATTER OF:<br><br>NATHAN DEWAYNE NEARMAN,<br>NEBULAE CORPORATION,<br>NEBULAE ENTERTAINMENT, INC. and<br>JANUS PROJECT FILM, LLC,<br><br>Respondents. | STIPULATION AND CONSENT ORDER<br><br>Docket No. SD-15-0065<br>Docket No. SD-15-0067<br>Docket No. SD-15-0066<br>Docket No. SD-15-0068 |

The Utah Division of Securities ("Division"), by and through its Director of Enforcement, Dave R. Hermansen, and Nathan Dewayne Nearman, Nebulae Corporation, Nebulae Entertainment, Inc., and Janus Project Film, LLC (collectively, the "Respondents") hereby stipulate and agree as follows:

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

2. On or about December 8, 2015, the Division initiated an administrative action against Respondents, through the issuance of an Order to Show Cause and Notice of Action.

3. The Order to Show Cause alleged that Respondents violated § 61-1-1 (Securities Fraud) and § 61-1-7 (Sale of Unregistered Securities) of the Act, while engaged in the offer and sale of securities in or from Utah.

4. Respondents now seek to enter into this Stipulation and Consent Order ("Order") in settlement of the Division's action.

5. Respondents hereby waive any right to a hearing to challenge the Division's evidence and present evidence on their behalf. Respondents understand that by waiving a hearing, they are waiving the requirement that the Division prove the allegations against them by a preponderance of the evidence, waiving their right to confront and cross-examine witnesses who may testify against them, to call witnesses on their own behalf, and any and all rights to appeal the findings, conclusions and sanctions set forth in this Order.

6. Respondents have read this Order, understand its contents and submit to it voluntarily. No promises, threats or other forms of inducement have been made by the Division, nor by any representative of the Division, to encourage them to enter into this Order, other than as set forth in this document.

7. Respondents acknowledge that this Order does not affect any enforcement action that may be brought by a criminal prosecutor or any other local, state, or federal enforcement authority.

8. Respondents admit the jurisdiction of the Division over them and over the subject matter of this action.

## I. THE DIVISION'S FINDINGS OF FACT

### THE RESPONDENTS

9. Nearman was, at all times relevant to the matters asserted herein, a resident of the state of Utah. Nearman is not registered with the Utah Division of Securities, and has never been licensed in the securities industry in any capacity.

10. Nebulae Corporation was at all times relevant to the matters asserted herein, a Utah corporation as of September 23, 2008. Nearman was listed as the officer and director. Nebulae's status is expired as of January 14, 2013.

11. Nebulae Entertainment, Inc. was, at all times relevant to the matters asserted herein, a Utah corporation as of February 25, 2013. Nearman was listed as the officer and director. Nebulae Entertainment's status is expired as of June 1, 2015.

12. Janus was, at all times relevant to the matters asserted herein, a Utah limited liability company, registered on March 5, 2012. Janus' current status is expired as of March 5, 2013. Nearman was listed as the Registered Agent and Manager. Janus has never been licensed in the securities industry in any capacity.

### GENERAL ALLEGATIONS

13. In or around September or October 2014, while conducting business in or from Utah, Respondents offered and sold investment opportunities in Janus to one Utah investor, and collected a total of $250,000 in connection therewith.

14. The investment opportunity offered and sold by Respondents was an investment contract.

15. Investment contracts are defined as securities under § 61-1-13 of the Act.

16. Respondents made material misstatements and omissions in connection with the offer and sale of a security to the Utah investor identified below.

17. To date, the investor is still owed approximately $250,000 in principal alone.

## BACKGROUND

18. From approximately 2012 to the present date, Nearman offered and sold investment opportunities in a film production project referred to by Nearman as the "Janus Project".

19. Nearman solicited numerous investors, both in and outside of Utah, related to the Janus Project.

20. Over the course of approximately three years, Nearman collected between $1 and $4 million dollars from investors.

21. In or around 2014, Nearman produced a movie trailer for the Janus Project; however the actual film has not been made.

22. Most of the investment money collected to produce the Janus Project has not been returned to investors.

## INVESTOR K.P.

23. K.P. is a Utah resident.

24. In or around September or October 2014, Nearman contacted K.P.'s husband,[1] N.P., explaining he was looking for investors to provide a bridge loan for the Janus Project that would be paid back in approximately one month.

25. Nearman made the following representations regarding the investment opportunity:

[1] N.P. and Nearman were business acquaintances.

a. Nearman needed the money now to make payroll for the individuals involved in the Janus Project;

b. K.P.'s investment money would be used to pay staff because the project was behind on payroll;

c. K.P. would get her investment money back in two weeks;

d. The investment had to happen fast because there was a two-week gap before Nearman would receive $12 million in funding;

e. Nearman had a total of $30 - $40 million in funding;

f. In return for providing $250,000, K.P. would receive $500,000 on October 31, 2014;

g. In the alternative, K.P. could elect to own a percentage of the film;

h. Filming would begin locally in Salt Lake City and would expand to Afghanistan;

i. K.P.'s investment money would be used to bridge the funding gap and $950,000 in new funding would arrive shortly, which would be used to return K.P.'s investment funds;

j. The $950,000 cash assets used to secure K.P.'s loan would be held in an account at Wells Fargo Bank;

k. Nearman had secured a $20 million loan that would be funded prior to October 31, 2014, to pay the debt to K.P. as required by their agreement;

l. In addition, another $30 million was coming in from various sources;

m. The film was about two weeks behind on the shooting schedule because the funding was exhausted and the next source of funding wasn't going to be available for 30

days;

n. K.P.'s funds would act as a band-aid to get them by;

o. Shooting was supposed to begin in Afghanistan in or around March 2015;

p. All the funding was complete and it was just a matter of timing;

q. They needed to cover one payroll before the funding came in; and

r. It was the largest independent film to be funded.

26. K.P. and N.P. attended a site survey for the Janus Project, being held at the Green Pig pub in Salt Lake City, Utah.

27. There were approximately 50 people in attendance including a top lighting specialist in the movie industry.

28. K.P. and N.P. also visited the Janus Project warehouse which contained movie equipment.

29. Based on Nearman's representations, K.P. decided to invest in the Janus Project.

30. On or about October 7, 2014, K.P. wired $250,000 from her account at JPMorgan Chase Bank to the Janus account held at Wells Fargo Bank as per Nearman's instructions.

31. In exchange for her investment, K.P. received a document titled, "Film Financing Repayment Agreement".

32. The document is dated October 7, 2014 and is signed by K.P. and Nearman.

33. K.P. has not received any return on her investment.

34. To date, K.P. is still owed approximately $250,000 in principal alone.

## FIRST CAUSE OF ACTION
## Securities Fraud under § 61-1-1(2) of the Act

35. The Division incorporates and re-alleges paragraphs 1 through 34.

36. The investment contract offered and sold by Respondents is a security under § 61-1-13 of the Act.

37. In connection with the offer and sale of a security to investor K.P., Respondents, directly or indirectly, made false statements, including, but not limited to, the following:

a. Nearman needed the money for expenses and to make payroll for the individuals involved in the Janus Project; when in fact there was no evidence to support that statement;

b. K.P. would get her investment money back in two weeks; when in fact, there was no reasonable basis to make that statement;

c. The investment had to happen fast because there was a two-week gap before Nearman would receive $12 million in funding; when in fact there was no reasonable basis to make that statement;

d. Nearman had a total of $30 - $40 million in funding; when in fact, there was no reasonable basis to make that statement;

e. In return for providing $250,000, K.P. would receive $500,000 on October 31, 2014; when in fact, there was no reasonable basis to make that statement;

f. K.P.'s investment money would be used to bridge the funding gap and $950,000 was due to arrive from other funding sources which would pay K.P. back first; when in

fact, there was no reasonable basis to make that statement;

g. That the $950,000 cash assets used to secure K.P.'s loan would be held in an account at Wells Fargo Bank; when in fact, there was no evidence to support that statement;

h. Nearman had secured a $20 million loan that would be funded prior to October 31, 2014, to pay the debt to K.P. as required by the Agreement; when in fact, there was no reasonable basis to make that statement;

i. In addition, another $30 million was coming in from various sources; when in fact, there was no reasonable basis to make that statement;

j. All the funding was complete and it was just a matter of timing; when in fact there was no reasonable basis to make that statement; and

k. It was the largest independent film to be funded; when in fact there was no reasonable basis to make that statement.

38. In connection with the offer and sale of a security to investor K.P., Respondents, directly or indirectly, failed to disclose material information, including, but not limited to, the following, which was necessary in order to make statements made not misleading:

a. That Nearman had failed to repay previous investors; and

b. With respect to the investment, some or all of the information typically provided in an offering circular, PPM, operating agreement or prospectus, such as:

i. Business and operating history

ii. Financial statements;

iii. Information regarding principals involved in the company;

iv. Risk factors;

v. Conflicts of interest;

vi. Suitability factors for the investment;

vii. Whether Respondents were licensed to sell securities in the state of Utah; and

viii. Whether the offering was registered, federally covered, or exempt from registration in the state of Utah.

**SECOND CAUSE OF ACTION**
**Sale of Unregistered Securities § 61-1-7 of the Act**

39. The Division incorporates and re-alleges paragraphs 1 through 34.

40. The investment contract offered and sold by Respondents is a security under § 61-1-13 of the Act.

41. Respondents offered and sold securities that were not registered by the Division or exempt from registration under § 61-1-14 or § 61-1-15.5 of the Act.

## II. THE DIVISION'S CONCLUSIONS OF LAW

42. Based on the Division's investigative findings, the Division concludes that:

a. The investment opportunity offered and sold by Respondents is a security under § 61-1-13 of the Act.

b. Respondents violated § 61-1-1(2) of the Act by making untrue statements of material facts and/or omitting to state material facts in connection with the offer and sale of a security, disclosure of which were necessary in order to make representations made not misleading.

c. Respondents violated § 61-1-7 of the Act by offering and selling a security that was not registered by the Division or exempt from registration under § 61-1-14 or § 61-1-15.5 of the Act.

## III. REMEDIAL ACTIONS/SANCTIONS

43. Respondents neither admit nor deny the Division's findings of fact and conclusions of law.

44. Respondents agree to the imposition of a cease and desist order, prohibiting them from any conduct that violates the Act.

45. Respondents agree that they will be barred from associating with any broker-dealer or investment adviser licensed in Utah, from acting as an agent for any issuer soliciting investor funds in this state, and from being licensed in any capacity in the securities industry in this state.

46. Pursuant to § 61-1-20(1)(f) of the Act and in consideration of the guidelines set forth in Utah Administrative Code Rule R164-31-1, the Division imposes a joint and several fine of $262,500 against Respondents, $250,000 of which may be offset by payments of restitution to the investor. The fine amount, or restitution offsets, shall be paid in accordance with the following schedule:

a. $50,000 due within five (5) days of entry of this Order;

b. $50,000 due on the first day of the next four (4) consecutive months following payment of the initial $50,000; and

c. One final payment due on the first day of month following the final $50,000

payment, in an amount that covers any portion of the fine that has not been paid to the Division or paid to the investors as restitution.

47. Each dollar paid by Respondents to the investors as restitution shall be credited by the Division toward payment of the fine. Respondents shall send to the Division the cancelled check or confirmation of wire transfer for each payment made to the investors.

48. If the Division finds that Respondents materially violated any term of this Order, thirty days after notice and an opportunity to be heard before an administrative officer solely as to the issue of a material violation, Respondents consent to a judgment ordering the unpaid balance of the fine immediately due and payable.

49. Failure to comply with the payment provisions in the Order included in paragraphs 46 and 47 above may result in the referral of the fine to the State Office of Debt Collection.

50. For the entire time the fine remains outstanding, Respondents agree to notify the Division of any change in mailing address, within thirty days from the date of such change.

## IV. FINAL RESOLUTION

51. Respondents acknowledge that this Order, upon approval by the Utah Securities Commission (the "Commission"), shall be the final compromise and settlement of this matter.

52. Respondents further acknowledge that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.

53. If Respondents materially violate any term of this Order, thirty days after notice and an opportunity to be heard before an administrative judge solely as to the issue of a material violation, Respondents consent to entry of an order in which Respondents admit the Division's Findings of Fact and Conclusions of Law as set forth in this Order. The Order may be issued upon motion of the Division, supported by an affidavit verifying the violation. In addition, the Division may institute judicial proceedings against Respondents in any court of competent jurisdiction and take any other action authorized by the Act, or under any other applicable law, to collect monies owed by Respondents or to otherwise enforce the terms of this Order. Respondents further agree to be liable for all reasonable attorneys' fees and costs associated with any collection efforts pursued by the Division, plus the judgment rate of interest.

54. Respondents acknowledge that the Order does not affect any civil or arbitration causes of action that third parties may have against them arising in whole or in part from their actions, and that the Order does not affect any criminal causes of action that may arise as a result of the conduct referenced herein. Respondents also acknowledge that any civil, criminal, arbitration or other causes of action brought by third parties against them have no effect on, and do not bar, this administrative action by the Division. Respondents acknowledge that a willful violation of this Order is a third degree felony pursuant to §

61-1-21(1) (b) of the Act.

55. The Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect the Order in any way. The Order may be docketed in a court of competent jurisdiction. Upon entry of the Order, any further scheduled hearings are canceled.

Utah Division of Securities:

Date: 03-15-2016

By: Dave R. Hermansen
Director of Enforcement

Respondent Nearman:

Date: 8 March 2016

Nathan Dewayne Nearman

Approved:

Thomas M. Melton
Jennifer Korb
Assistant Attorney General

Respondent Nebulae Corporation

Date: 8 March 2016

By: Nathan D. Nearman

Its: CEO

Respondent Nebulae Entertainment, Inc.

Date: March 8, 2016

By: Nathan D. Nearman

Its: CEO

Respondent Janus Project Film, LLC

Date: 8 March 2016

By: Nathan D. Nearman

Its: President

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement.

2. Respondents cease and desist from violating the Act.

3. Respondents are barred from (i) associating with any broker-dealer or investment adviser licensed in Utah, (ii) acting as an agent for any issuer soliciting investor funds in Utah, and (iii) from being licensed in any capacity in the securities industry in Utah.

4. The Division imposes a total fine of $262,500 against Respondents, jointly and severally. The fine amount, or restitution offsets, shall be paid in accordance with the following schedule:

   a. $50,000 due within five (5) days of entry of this Order;

   b. $50,000 due on the first day of the next four (4) consecutive months following payment of the initial $50,000; and

   c. One final payment due on the first day of month following the final $50,000 payment, in an amount that covers any portion of the fine that has not been paid to the Division or paid to the investors as restitution.

5. If any Respondent materially violates any term of this Order, the unpaid balance of the fine amount shall be imposed and become due immediately.

6. For the entire time the fine remains outstanding, Respondents must notify the Division of any change in mailing address, within thirty days from the date of such change.

DATED this 24th day of March, 2016.

**BY THE UTAH SECURITIES COMMISSION:**

Brent Baker

Lyle White

Erik Christiansen

Gary Cornia

David Russon

Certificate of Mailing

I certify that on the 24th day of March, 2016, I mailed a true and correct copy of the fully executed Stipulation and Consent Order to:

Nathan Dewayne Nearman
nathan.nearman@yahoo.com

Nebulae Corporation
Attn: Diane Thompson
3419 W. 4450 S.
West Haven, Utah 84401

Nebulae Entertainment, Inc.
Attn: Greg F. Johnson, Esq.
4080 S. West Temple
Salt Lake City, Utah 84107

Janus Project Film, LLC
Attn: Nathan Dewayne Nearman
1851 S. Columbia Lane #212
Orem, Utah 84097

Executive Secretary

Division of Securities
Utah Department of Commerce
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, UT 84114-6760
Telephone: (801) 530-6600
FAX: (801)530-6980

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

| | |
|---|---|
| IN THE MATTER OF:<br><br>**JAKE DANIEL MCKITTRICK**<br>JOHN TERRY TIMMERMAN<br><br>Respondents. | STIPULATION AND CONSENT ORDER<br><br>**Docket No. SD-12-0049**<br>Docket No. SD-12-0050 |

The Utah Division of Securities ("Division"), by and through its Director of Enforcement, Dave R. Hermansen, and Jake Daniel McKittrick ("McKittrick" and/or "Respondent") hereby stipulate and agree as follows:

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

2. On or about August 13, 2012, the Division initiated an administrative action against Respondent, through the issuance of an Order to Show Cause and Notice of Agency Action.

3. The Order to Show Cause alleged that Respondent violated §§ 61-1-1(2) (Securities Fraud) and 61-1-3(1) (Unlicensed Activity) of the Act, while engaged in the offer and sale of securities in or from Utah.

4. Respondent now seeks to enter into this Stipulation and Consent Order ("Order") in settlement of the Division's action.

5. Respondent hereby waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf. Respondent understands that by waiving a hearing, he is waiving the requirement that the Division prove the allegations against him by a preponderance of the evidence, waiving his right to confront and cross-examine witnesses who may testify against him, to call witnesses on his own behalf, and any and all rights to appeal the findings, conclusions and sanctions set forth in this Order.

6. Respondent has read this Order, understands its contents and submits to it voluntarily. No promises, threats or other forms of inducement have been made by the Division, nor by any representative of the Division, to encourage him to enter into this Order, other than as set forth in this document.

7. Respondent acknowledges that this Order does not affect any enforcement action that may be brought by a criminal prosecutor or any other local, state, or federal enforcement authority.

8. Respondent admits the jurisdiction of the Division over him and over the subject matter of this action.

## I. THE DIVISION'S FINDINGS OF FACT

### THE RESPONDENTS

9. McKittrick was, at all relevant times, a resident of the state of Nevada. In 1999, McKittrick successfully completed the Series 6 and Series 63 exams. McKittrick was licensed with the state of Utah as a broker-dealer agent from 1999 to 2003. McKittrick has not been associated with a firm and/or licensed in the securities industry since July 16, 2003.

10. John Terry Timmerman (Timmerman) was, at all relevant times, a resident of the state of Nevada. Timmerman has never been licensed in the securities industry in any capacity.

## GENERAL ALLEGATIONS

11. From May 2008 to October 2008, Respondents offered and sold securities to investors, in or from Utah, and collected a total of at least $175,000.

12. Respondents made material misstatements and omissions in connection with the offer and sale of securities to the investors identified below.

13. Investors lost $165,000 in principal alone.

### INVESTOR C.M.

14. In or around June 2008, C.M. took out a home equity line of credit, which he planned to use in financing a real estate project in Park City, Utah.

15. McKittrick, who is related to C.M. through marriage, learned that C.M. had taken out a line of credit and told him about an investment opportunity in Timmerman's company, Diversified Business Specialists, Inc. (DBS).[1]

16. McKittrick then set up a three-way telephone call between C.M., Timmerman, and

[1] Diversified Business Specialists, Inc. was a Nevada corporation that registered with the Nevada Secretary of State's Office on July 28, 1992. As of August 1, 2004, its status changed from active to revoked. Currently, its status is listed as permanently revoked. During its existence, Timmerman served as President of the corporation.

McKittrick, during which Timmerman and McKittrick discussed DBS in greater detail.

17. During this conversation, Timmerman made the following statements:

    a. He had been raising money to set up a utility company, and he needed an additional $105,000 to meet a bank's lending requirements;

    b. C.M.'s money would go toward the closing costs of the loan;

    c. C.M. would be repaid within six weeks;

    d. If the bank funded the loan to DBS, C.M. would receive a return of his principal plus 300% interest; and

    e. If the loan was not funded, C.M. would receive a return of his principal plus 12% interest.

18. McKittrick also reassured C.M. that there was no way he would lose his money from this investment.

19. In response to these statements, C.M. stated that he could not provide $105,000. He could only offer $75,000. In addition, he had already committed this $75,000 to a real estate project in Park City, Utah and would need to have access to it within a few weeks.

20. Timmerman reassured C.M. that the time restriction would not be an issue.

21. On June 6, 2008, Timmerman sent C.M. an email restating the terms established in the prior phone conversation. Specifically, Timmerman stated:

    a. In exchange for the investment, Timmerman would repay C.M. $75,000 in principal plus $225,000 in interest within forty-five days of executing a promissory note and providing the funds;

    b. He had "Fed Approval for this special Economic Enhancement Program;"

c. Bear Stearns "know[s] our cash flow requirements and we have been assured that is not a problem;"

d. If the loan was not funded, an "exit strategy" would be implemented; and

e. The promissory note reflecting this transaction would come from DBS and be personally guaranteed by Timmerman.

22. Based on the representations described above, C.M. invested $75,000 in DBS.

23. On June 9, 2008, C.M. wired $75,000 from his checking account at Mountain America Credit Union in Utah to the DBS account at Nevada State Bank.

24. In exchange for the funds, C.M. received a DBS "corporate note" signed electronically by Timmerman and dated June 8, 2008.

25. Per the arrangement, the note states that DBS and Timmerman agree to pay C.M. $300,000 by July 24, 2008. In the alternative, and in the event the project funding falls through, C.M. will be repaid his principal plus 12%, for a total of $84,000.

26. Following his investment, C.M. contacted Timmerman and McKittrick on several occasions requesting repayment.

27. To date, C.M. has received a return of $10,000, leaving $65,000 in principal alone currently outstanding.

28. Based on a first in, first out analysis, bank records indicate that Timmerman used C.M.'s funds in the following manner:

a. $30,615 transferred to an account for Anthony Mack;[2]

b. $5,680 in cash withdrawals;

[2] The total amount transferred to Anthony Mack's account equals $37,500; however, for purposes of first in, first out analysis, only $30,615 of that amount is reflected in the accounting.

c. $33,700 paid to Saitta Trudeau;

d. $5,000 in an unknown withdrawal;[3] and

e. $5.00 paid as income exchange fee.

INVESTOR K.B.

FIRST INVESTMENT

29. K.B. is related to McKittrick through marriage.

30. In or about spring 2008, McKittrick called K.B. to discuss an investment opportunity in Timmerman's company, DBS.

31. K.B. had some money set aside to pay his taxes and was interested in the investment if he could get his money back by the time his taxes were due.

32. McKittrick assured him that the investment would be short term, the money would be used to help DBS get the last of the funding it needed, and there was no way K.B. would lose his investment.

33. Because of the existing relationship, the statement that the investment would be short term, and K.B.'s knowledge that McKittrick had prior investing experience, he agreed to participate in a three-way telephone call between himself, McKittrick, and Timmerman to learn more about the investment.

34. During that conversation, Respondents made the following statements:

a. The investment would be short term;

b. K.B. would have no difficulty getting his money back prior to the time his taxes were due;

[3] Bank records indicate a $63,000 withdrawal ticket. Paired with transactions to Saitta Trudeau, Anthony Mack, and cash withdrawals, $5,000 is unaccounted for.

c. DBS would use K.B.'s investment to help procure the funding DBS needed to complete a project; and

d. In return for investing, K.B. would receive a return of his funds, plus 100% interest.

35. Based on the Respondents' representations, K.B. invested $5,000 in DBS.

36. Specifically, on May 16, 2008, K.B. wired $5,000 from his account at Moroni Feed Credit Union in Moroni, Utah to the DBS account at Nevada State Bank.

37. In exchange for the funds, K.B. received a DBS "corporate note" signed electronically by Timmerman and dated May 15, 2008.

38. Pursuant to their agreement, the note states that DBS agrees to pay K.B. $10,000 by August 15, 2008.

39. Currently, K.B. has not received a return of any of his $5,000 investment from Respondents.

40. A first in, first out analysis of Timmerman's bank records reflects that the entire $5,000 balance was withdrawn as cash from the account on May 16, 2008.

SECOND INVESTMENT

41. Following the initial investment, Respondents approached K.B. asking for additional funds to cover closing costs on the loan to DBS.

42. K.B. decided to invest an additional $75,000, based on assurances that K.B. would receive his principal plus interest within forty-five days of executing a promissory note and providing the funds.

43. On or about June 9, 2008, K.B. wired $75,000 from his account at Gunnison Valley

Bank, in Gunnison, Utah, to the DBS account at Nevada State Bank.

44. In exchange for the funds, K.B. received a DBS "corporate note" signed electronically by Timmerman and dated June 8, 2008.

45. The note cancels all prior notes executed by DBS and K.B. and states the principal amount as $85,000.[4]

46. The note also states that DBS and Timmerman agree to pay K.B. $340,000 by July 24, 2008, unless the "exit strategy" is implemented, in which case, K.B. will receive a return of his principal plus 12%, for a total of $95,200.

47. Furthermore, the purpose of the funds, as described in the note, is to pay closing costs on the "Project Funding needed by DBS that has been committed by Bear Stearns International Division to fund."

48. Currently, K.B. has not received a return of any of his $75,000 principal for this second investment.

49. A first in, first out analysis of Timmerman's bank records reflects that the funds were used in the following manner:

    a. $6,885 transferred to an account for Anthony Mack;

    b. $47,115 paid to Country Roads;

    c. $20 paid in incoming wire fees; and

    d. $20,980 in cash withdrawals.[5]

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[4] K.B. previously invested $5,000 on May 16, 2008. That amount, combined with the $75,000 invested on June 9, 2008, totals $80,000. The $85,000 principal included in the June 8, 2008 note appears to be an error on Timmerman's behalf.

[5] The total amount of cash withdrawals equals $22,400; however, for purposes of first in, first out analysis, only $20,980 of that amount is reflected in the accounting.

THIRD INVESTMENT

50. Following this second investment, Respondents again approached K.B. for additional funding.

51. As a result, K.B. decided to invest an additional $10,000, based on the representations that he would receive his money plus interest within thirty-eight days of executing a note and providing the funds.

52. On December 24, 2008, K.B. wired $10,000 out of his account at Gunnison Valley Bank, in Gunnison, Utah, to the DBS account at the Nevada State Bank.

53. In exchange for the $10,000, K.B. received a DBS "promissory note" signed electronically by Timmerman and dated December 24, 2008.

54. The note states that DBS and Timmerman agree to pay K.B.[6] $60,000 by January 30, 2009. However, if the "back up plan" is implemented, K.B. will receive his principal plus 20%, for a total of $12,000.

55. Despite their arrangement, K.B. has not received any payments for his three investments, which total $90,000.

56. A first in, first out analysis of Timmerman's bank records reflect that the third investment for $10,000 was used in the following manner:

a. $9,972.83 in cash withdrawals;

b. $10 in wire fees;

c. $5 in maintenance fees;

d. $4 in excessive transaction fees; and

[6] The note actually states that DBS and Timmerman agree to pay T.H.; however, it appears that Timmerman made a mistake and did not change the name from a previous investor.

e. $8.17 transferred to an account for Anthony Mack.[7]

INVESTOR T.H.

57. In or around October 2008, T.H. and McKittrick had a pre-existing relationship, as McKittrick had been managing T.H.'s retirement account.

58. At that time, McKittrick contacted T.H. to discuss an investment opportunity in DBS.

59. In connection with this discussion, McKittrick represented the following:

a. The investment in DBS was safe and there was no way for T.H. to lose his money.

b. If he decided to participate, T.H.'s funds would go toward "interim operating capital prior to senior funding commencing later [that] month on billion dollar project."

c. McKittrick "knows the principals," he "trusts them," he is "heavily involved," and he has "every reason to believe [T.H.'s] money will be protected should [he] decide to invest."

d. Additionally, there were others interested in investing, so if T.H. would like to participate, he would need to act quickly.

60. Based on the representations made by McKittrick, T.H. invested $10,000 in DBS. Specifically, on October 7, 2008, T.H. wired $10,000 from his account at State Bank of Southern Utah, in Utah, to the DBS account at the Nevada State Bank.

61. In exchange for the funds, T.H. received a DBS "capital note" signed electronically by Timmerman and dated October 6, 2008.

[7] The total amount of the transfer to Anthony Mack's account was $25,000; however, for purposes of first in, first out analysis, only $8.17 of that amount is reflected in the accounting.

62. The note states that DBS and Timmerman agree to pay T.H. either $20,000 by November 10, 2008 or $30,000 by December 10, 2008.

63. The note also states that if for some reason "senior funding does not occur through an undisclosed Trading Company," DBS and Timmerman will repay T.H. $12,000 by January 10, 2009.

64. T.H. has not received a return of any of his $10,000 investment.

65. Using a first in, first out analysis of Timmerman's bank account, the funds appear to have been used in the following manner:

a. $2,441.83 transferred to an account for Anthony Mack;[8]

b. $4,500 in cash withdrawals; and

c. $3,058.17 wired to the account of a previous investor, C.M.[9]

## CAUSES OF ACTION

### Securities Fraud under § 61-1-1 of the Act (Investor C.M.)

66. The Division incorporates and re-alleges paragraphs 1 through 65.

67. The investment opportunities offered and sold by Respondents are securities under § 61-1-13 of the Act.

68. In connection with the offer and sale of securities to investor C.M., Respondents, directly or indirectly, made false statements, including, but not limited to, the following:

a. Timmerman would use C.M.'s funds to pay closing costs on the loan for DBS,

[8] The total amount of this transaction was $15,000, but the first $12,558.17 was applied to the balance of $9,078.17 in the account prior to T.H.'s investment.

[9] The total amount of the wire to C.M.'s account was $10,000; however, for purposes of first in, first out analysis, only $3,058.17 of that amount is reflected in the accounting.

when in fact, Timmerman used the funds for personal expenses; and

b. There was no way C.M. could lose his investment, when in fact, Respondents had no reasonable basis for making such a statement.

69. In connection with the offer and sale of a security to investor C.M., Respondents, directly or indirectly, failed to disclose material information, including, but not limited to, the following, which was necessary in order to make statements made not misleading:

a. Details surrounding the economic enhancement program, federal approval of this program, and Bear Stearns' commitment in funding DBS;

b. Details surrounding Bear Stearns' collapse in March 2008, its subsequent acquisition by JPMorgan Chase, and how these changes would impact DBS;

c. That McKittrick expected to receive an equity stake in the company for his role in soliciting investors;

d. That DBS's registration with the Nevada Secretary of State's Office was revoked as of 2004.

e. In 2001, Timmerman was ordered to pay restitution of $47,547.34 for unpaid child support;[10] and

c. Some or all of the information typically provided in an offering circular or prospectus regarding Respondents or an investment in DBS, such as:

i. Financial statements;

ii. Risk factors;

iii. Suitability factors for the investment;

[10] *United States v. John T. Timmerman*, Case No. CR-S-01-0088, United States District Court, Eastern District of California (2001).

iv. Whether the investment was a registered security or exempt from registration; and

v. Whether Respondents were licensed to sell securities.

**Securities Fraud under § 61-1-1 of the Act**
**(Investor K.B.)**

70. The Division incorporates and re-alleges paragraphs 1 through 65.

71. The investment opportunities offered and sold by Respondents are securities under § 61-1-13 of the Act.

72. In connection with the offer and sale of securities to investor K.B., Respondents, directly or indirectly, made false statements, including, but not limited to, the following:

a. Timmerman would use K.B.'s initial investment of $5,000 to help DBS get the funding it needed, when in fact, Timmerman used the funds for personal expenses;

b. Timmerman would use K.B.'s second investment of $75,000 to pay closing costs on the loan for DBS, when in fact, Timmerman used the funds for personal expenses;

c. There was no way K.B. could lose his investment, when in fact, Respondents has no reasonable basis for making such a statement; and

d. K.B. would have no problem getting his money back prior to the time his taxes were due, when in fact, Respondents had no reasonable basis for making such a statement.

73. In connection with the offer and sale of a security to investor K.B., Respondents, directly or indirectly, failed to disclose material information, including, but not limited to, the

following, which was necessary in order to make statements made not misleading:

a. How DBS would make a 100% interest payment in three months on K.B.'s first investment;

b. With respect to the second investment, details surrounding Bear Stearns' commitment and the project funding process generally;

c. Details surrounding Bear Stearns' collapse in March 2008, its subsequent acquisition by JPMorgan Chase, and how these changes would impact DBS;

d. What K.B.'s third investment of $10,000 would be used for;

e. That McKittrick expected to receive an equity stake in the company for his role in soliciting investors;

f. That DBS's registration with the Nevada Secretary of State's Office was revoked as of 2004.

g. In 2001, Timmerman was ordered to pay restitution of $47,547.34 for unpaid child support;[11] and

h. Some or all of the information typically provided in an offering circular or prospectus regarding Respondents or an investment in DBS, such as:

   vi. Financial statements;

   vii. Risk factors;

   viii. Suitability factors for the investment;

[11] *United States v. John T. Timmerman*, Case No. CR-S-01-0088, United States District Court, Eastern District of California (2001).

ix. Whether the investment was a registered security or exempt from registration; and

x. Whether Respondents were licensed to sell securities.

**Securities Fraud under § 61-1-1 of the Act**
**(Investor T.H.)**

74. The Division incorporates and re-alleges paragraphs 1 through 65.

75. The investment opportunities offered and sold by Respondents are securities under § 61-1-13 of the Act.

76. In connection with the offer and sale of securities to investor T.H., Respondents, directly or indirectly, made false statements, including, but not limited to, the following:

a. The investment in DBS was safe and there was no way T.H. would lose his money, when in fact, Respondents had no reasonable basis for making such a statement; and

b. The funds would be used for "interim operating capital prior to senior funding commencing later [that] month on billion dollar project," when in fact, Timmerman used the funds for personal expenses and to repay a prior investor.

77. In connection with the offer and sale of a security to investor T.H., Respondents, directly or indirectly, failed to disclose material information, including, but not limited to, the following, which was necessary in order to make statements made not misleading:

a. How Timmerman and DBS would make a 20% interest payment in the event the "senior funding" does not occur through an "undisclosed Trading Company;"

b. Why the senior funding would not occur, and why the "Trading Company" was undisclosed;

c. That McKittrick expected to receive an equity stake in the company for his role in soliciting investors;

d. That DBS's registration with the Nevada Secretary of State's Office was revoked as of 2004.

e. In 2001, Timmerman was ordered to pay restitution of $47,547.34 for unpaid child support;[12] and

d. Some or all of the information typically provided in an offering circular or prospectus regarding Respondents or an investment in DBS, such as:

i. Financial statements;

ii. Risk factors;

iii. Suitability factors for the investment;

iv. Whether the investment was a registered security or exempt from registration; and

v. Whether Respondents were licensed to sell securities.

**Unlicensed Activity under § 61-1-3(1) of the Act (McKittrick)**

78. The Division incorporates and re-alleges paragraphs 1 through 65.

79. McKittrick was not licensed in the securities industry as a broker-dealer or issuer agent at the time of his involvement in this offering.

80. McKittrick had not been licensed in the securities industry in any capacity since 2003.

81. McKittrick acted as an agent in the offer and/or sale of securities in Utah.

[12] *United States v. John T. Timmerman*, Case No. CR-S-01-0088, United States District Court, Eastern District of California (2001).

82. It is unlawful for a person to transact business in this state as an agent unless the person is appropriately licensed in accordance with the Act.

83. Accordingly, each offer or sale of securities by McKittrick violated § 61-1-3(1) of the Act.

84. Based on the above information, McKittrick violated § 61-1-3(1) of the Act.

**Unlicensed Activity under § 61-1-3(2) of the Act (Timmerman)**

85. The Division incorporates and re-alleges paragraphs 1 through 65.

86. Timmerman, on behalf of DBS, offered McKittrick an equity stake in the company as compensation for his role in soliciting investors in the offering.

87. McKittrick was not licensed in the securities industry as a broker-dealer or issuer agent at the time of his involvement in this offering.

88. It is unlawful for an issuer to employ or engage an agent unless the agent is licensed in this state.

89. Based on the above information, Timmerman, acting on behalf of DBS, violated § 61-1-3(2) of the Act.

**CRIMINAL CHARGES AGAINST RESPONDENT**

90. On May 11, 2012, Respondent was charged criminally in Utah's Third District Court (*State of Utah vs. Jake Daniel McKittrick*, Case No. 121904497) in connection with the conduct described in the Order.

91. On July 20th, 2015, as part of a plea agreement, Respondent entered a guilty plea to one count of Doing Business Without a License (Class B Misdemeanor), was sentenced to 180 days in jail and fined $1,000 (both of which were suspended), was placed on probation for 12 months, and paid a total of $20,000.00 in restitution up-front.

## II. THE DIVISION'S CONCLUSIONS OF LAW

92. Based on the Division's investigative findings, the Division concludes that:

a. The investment opportunities offered and sold by Respondent are securities under § 61-1-13 of the Act.

b. Respondent violated § 61-1-1(2) of the Act by making untrue statements of material facts and/or omitting to state material facts in connection with the offer and sale of securities, disclosure of which were necessary in order to make representations made not misleading.

c. Respondent violated § 61-1-3(1) of the Act by engaging in the offer and sale of securities in or from Utah without being licensed as a broker-dealer or issuer in the state.

## III. REMEDIAL ACTIONS/SANCTIONS

93. Respondent neither admits nor denies the Division's findings of fact and conclusions of law.

94. Respondent agrees to the imposition of a cease and desist order, prohibiting him from any conduct that violates the Act.

95. Respondent agrees to not seek licensure or apply to be licensed by the Division as a broker-dealer agent, investment adviser or investment adviser representative, nor licensure as an agent for any issuer soliciting funds in the State of Utah.

96. Pursuant to § 61-1-20(1)(f) of the Act and in consideration of the guidelines set forth in Utah Administrative Code Rule R164-31-1, the Division imposes a total fine of $5,000.00 against Respondent. The fine amount shall be paid in 24 consecutive monthly payments of $208.33 each, beginning the first day of the month following approval of

the Order by the Utah Securities Commission (the "Commission").

97. If the Division finds that Respondent materially violated any term of this Order, thirty days after notice and an opportunity to be heard before an administrative officer solely as to the issue of a material violation, Respondent consents to a judgment ordering the unpaid balance of the fine immediately due and payable.

98. Failure to comply with the payment provisions in the Order included in paragraph 96 above may result in the referral of the fine to the State Office of Debt Collection.

99. For the entire time the fine remains outstanding, Respondent agrees to notify the Division of any change in mailing address, within thirty days from the date of such change.

## IV. FINAL RESOLUTION

100. Respondent acknowledges that this Order, upon approval by the Utah Securities Commission (the "Commission"), shall be the final compromise and settlement of this matter.

101. Respondent further acknowledges that if the Commission does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.

102. If Respondent materially violates any term of this Order, thirty days after notice and an opportunity to be heard before an administrative judge solely as to the issue of a material violation, Respondent consents to entry of an order in which Respondent admits the Division's Findings of Fact and Conclusions of Law as set forth in this Order. The Order may be issued upon motion of the Division, supported by an affidavit verifying the violation. In addition, the Division may institute judicial proceedings against Respondent in any court of competent jurisdiction and take any other action authorized by the Act, or

under any other applicable law, to collect monies owed by Respondent or to otherwise enforce the terms of this Order. Respondent further agrees to be liable for all reasonable attorneys' fees and costs associated with any collection efforts pursued by the Division, plus the judgment rate of interest.

103. Respondent acknowledges that the Order does not affect any civil or arbitration causes of action that third parties may have against him arising in whole or in part from their actions, and that the Order does not affect any criminal causes of action that may arise as a result of the conduct referenced herein. Respondent also acknowledges that any civil, criminal, arbitration or other causes of action brought by third parties against him have no effect on, and do not bar, this administrative action by the Division. If Respondent materially violates this Order, however, the Findings of Fact and Conclusions of Law set forth in this Order are deemed admitted as described in paragraph 91 above, and may be introduced as evidence against Respondent in any arbitration, civil, criminal, or regulatory actions.

104. Respondent acknowledges that a willful violation of this Order is a third degree felony pursuant to § 61-1-21(1) (b) of the Act.

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105. The Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect the Order in any way. The Order may be docketed in a court of competent jurisdiction. Upon entry of the Order, any further scheduled hearings are canceled.

Utah Division of Securities:

Date: 03-22-2016

By: Dave R. Hermansen
Director of Enforcement

Respondent:

Date: 3/18/16

Jake Daniel McKittrick

Approved:

Jennifer Korb
Assistant Attorney General

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement.

2. Respondent cease and desist from violating the Act.

3. Respondent shall not seek licensure or apply to be licensed by the Division as a broker-dealer agent, investment adviser or investment adviser representative, nor licensure as an agent for any issuer soliciting funds in the State of Utah.

4. The Division imposes a total fine of $5,000.00 against Respondent. The fine shall be paid by Respondent to the Division in 24 consecutive monthly payments of $208.33 each, beginning the first day of the month following approval of the Order by the Commission.

5. If Respondent materially violates any term of this Order, the unpaid balance of the fine amount shall be imposed and become due immediately.

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6. For the entire time the fine remains outstanding, Respondent must notify the Division of any change in mailing address, within thirty days from the date of such change.

DATED this 24th day of March, 2016.

**BY THE UTAH SECURITIES COMMISSION:**

Brent Baker

Lyle White

Erik Christiansen

Gary Cornia

David Russon

**Certificate of Mailing**

I certify that on the 24th day of March, 2016, I mailed a true and correct copy of the fully executed Stipulation and Consent Order to:

Jake Daniel McKittrick

Executive Secretary

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

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

| | |
|---|---|
| **IN THE MATTER OF:**<br><br>**ACADIA CAPITAL ADVISORS, LLC, IARD#142470**<br>**MICHAEL BRENT PETERSEN, CRD#5087824**<br><br>**Respondents.** | **STIPULATION AND CONSENT ORDER**<br><br>**Docket No. SD-15-0046**<br><br>**Docket No. SD-15-0047** |

The Utah Division of Securities ("Division"), by and through its Director of Compliance, Kenneth O. Barton and the Respondents, Acadia Capital Advisors ("ACA") and Michael Brent Petersen ("Petersen") (collectively referred to at times hereinafter as "Respondents"), hereby stipulate and agree as follows:

1. Respondents have been the subject of an investigation by the Division into allegations that they violated the Utah Uniform Securities Act ("Act"), Utah Code Ann. §61-1-1, *et seq.*

2. On or about August 31, 2015, the Division initiated an administrative action against Respondents by filing a Petition to Censure, Bar and Impose a Fine.

3. Respondents hereby agree to settle this matter with the Division by way of this Stipulation and Consent Order ("Order"). If entered, the Order will fully resolve all

claims the Division has against Respondents pertaining to the Petition.

4. Respondents admit that the Division has jurisdiction over them and the subject matter of this action.

5. Respondents hereby waive any right to a hearing to challenge the Division's evidence and present evidence on their behalf.

6. Respondents have read this Order, understand its contents, and voluntarily agree to the entry of the Order set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondents to enter into this Order, other than as described in this Order.

7. Respondents understand that they may be represented by counsel in this matter, understand the role that counsel would have in defending and representing their interests in this case, and hereby knowingly, freely and voluntarily waive their right to have counsel represent them in this proceeding.

## I. FINDINGS OF FACT

Background and Licensing History

8. ACA is a Delaware limited liability company with its principal place of business in Salt Lake County, Utah. During the relevant period, its sole principal, chief executive officer and designated official was Petersen.

9. After filing an initial application in November 2006, ACA and Petersen became licensed in Utah in February 2007 as an investment adviser and investment adviser representative, respectively.

10. Petersen has taken and passed the FINRA Series 7, General Securities Representative Examination, and Series 66, Uniform Combined State Law Examination.

11. From February 2007 until August 2013 Petersen was also licensed in Utah as a broker-dealer agent of Colony Park Financial Services LLC ("CPFS"), CRD#41534.

12. At the end of December 2009, ACA failed to renew its license for the following year, which caused Petersen's investment adviser representative license to likewise expire.

13. Several months later, the Respondents applied to become licensed again. The Division approved ACA's and Petersen's licensing applications in May 2010.

14. On December 17, 2013, the Financial Industry Regulatory Authority ("FINRA") sent emails to investment adviser firms whose licenses would terminate at year end to remind the firms to add monies to the accounts drawn by FINRA to pay renewal fees. That group included ACA.

15. At the end of December 2013, ACA again failed to renew its license. At the time, the Division had a pending audit of Respondents. Neither ACA nor Petersen have been licensed since December 2013.

16. In January 2014, the Division sent reminder emails to investment adviser firms that had failed to renew, including ACA. Respondents made no response and did not seek to renew their licenses.

17. On July 15, 2014, the Division examiner for the pending audit ("examiner") attempted to contact Respondents by telephone using contact information from the period Respondents were licensed. The voicemail system still referred to ACA. The examiner left a message for Petersen.

18. On July 17, 2014, the Division again attempted to contact Respondents by telephone and left another voicemail message. The examiner also sent an email to Petersen at both the

email address used by ACA during the period Respondents were licensed and a personal email address Petersen used to communicate with the Division previously, noting the failure to connect by telephone, and requesting that Petersen call the examiner.

19. On August 4, 2014, the Division again attempted to contact ACA and Petersen by phone.

20. ACA and Petersen did not return any of the Division's telephone calls or emails.

21. On August 6, 2014, ACA filed Form ADV[1] through the Central Registration Depository ("CRD")[2] in order to become licensed in Utah as an investment adviser. However, the Form ADV contained material errors, described further below, and was incomplete.

22. Although Respondent ACA submitted Form ADV, it did not submit FINRA Form U4[3] in order to license its designated official, Petersen, as an investment adviser representative, as required by Utah Admin. Code Rule R164-4-2(C)(1)(b)(i).

23. The Division made further attempts to contact Respondents and left messages on August 7th, 12th, and 18th concerning additional information required before the Division could approve Respondents' licenses. Respondents did not respond.

24. On September 4, 2014, the Division denied ACA's application.[4]

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[1]Form ADV is used by investment advisers to register with the United States Securities and Exchange Commission ("SEC") or with state securities regulators.

[2]CRD is a computerized database maintained by FINRA. CRD contains employment, licensing and disciplinary information on broker-dealers, agents, investment advisers and investment adviser representatives.

[3]Form U4, Uniform Application for Securities Registration or Transfer, is filed through CRD with FINRA and the Division in order for an individual to become licensed as an investment adviser representative.

[4]See Order to Deny, http://securities.utah.gov/dockets/14004301.pdf

25. On June 29, 2015, Respondents filed a new investment adviser application.

2013 Complaint and Audit

26. On August 12, 2013, the Division received a complaint from a client of Respondents, who alleged her account had been managed on a discretionary basis without such authority, and that Petersen's active trading strategies led to losses and high transaction fees.

27. In October 2013, the Division conducted an audit of Respondents, which ultimately revealed that the client's losses were largely due to withdrawals, not Petersen's trading strategies, which aligned with her investment objectives and risk tolerance, and that the transaction fees were reasonable. However, the examiner concluded that Respondents failed to obtain discretionary authority for the complainant's account, as well as the accounts of other clients, despite managing those accounts on a discretionary basis through Petersen's role as a broker-dealer agent of CPFS. Moreover, Respondents engaged in a number of dishonest or unethical business practices, largely involving the failure to maintain proper books and records, but also including misleading advertising.

28. The Division audit further found that despite being unlicensed since December 31, 2013, ACA and Petersen continued to act as an investment adviser and investment adviser representative for at least two clients in 2014.

2009 Audit

29. In March 2009, Division staff conducted an audit of ACA at Petersen's residence. As noted above, ACA failed to renew its license at the end of 2009. During the relicensing process in 2010, Form ADV revisions were made and several additional concerns were

communicated to Respondents at that time, including:

a. books and records required to be maintained under Section 61-1-5 of the Act, including a Form ADV delivery log for clients and prospective clients; and

b. ACA needed to conduct an annual review of Form ADV Parts 1 and 2 to ensure accurate description of its advisory business.

2013 Audit

Incomplete Client Files

30. At the time of the October 2013 audit, Petersen explained that his business had scaled down since he ceased being a broker-dealer agent of CPFS in August 2013, leaving him with five clients and under $1 million in assets under management. Petersen described ACA services as discretionary asset management, primarily consisting of stocks, exchange-traded funds ("ETFs"), and mutual funds. Petersen indicated he would be moving all client accounts to the broker-dealer firm of Interactive Brokers, Inc. ("IBI").

31. In reviewing the five client files, the Division identified significant amounts of missing information such as:

a. client files included initial account paperwork but no other correspondence, notes, statements, reports, or other information regarding the client's accounts;

b. new account documents for one client were missing investor profile information, such as investment preferences, investment objectives, experience, and time horizon;

c. another client's file left blank the type of account, net worth information, tax bracket information, income information, investment preferences, investment

objectives, investing experience and time horizon.

d. another client's paperwork was completely blank except for the signature page.

e. A fourth client had net worth, tax bracket, and income questions marked as "N.R." and were left blank. Investment experience and time horizon questions were also left blank.

f. The fifth client, identified by last name only, had no client file.

32. The information missing from Respondents' client documents is essential for an investment adviser to meet its fiduciary obligation and make recommendations for investments that are in the client's best interest. The examiner further noted heavy exposure to stocks and ETFs for retired clients.

Unauthorized Exercise of Discretion

33. Petersen managed client accounts on a discretionary basis despite the facts that a) client accounts were not set up as discretionary accounts; and b) Petersen had not been given third-party trade authorization on the accounts. Moreover, ACA client contracts provided that a client needed to approve transactions recommended by ACA.

34. As part of the advisory agreement, ACA clients were required to set up brokerage accounts at CPFS. Petersen's capacity as a broker-dealer agent of CPFS enabled him to effect transactions in that capacity so long as clients consented before such transactions. Because none of the accounts were discretionary, Petersen was required to acquire client consent prior to every transaction. However, Petersen's records of obtaining such consent were incomplete and inconsistent.

35. Respondents' correspondence file contained few confirmation emails or notes of any kind demonstrating client consent prior to transactions being entered, and did not have account

records of all of ACA's current and former clients for comparison.

36. The correspondence file, which consisted exclusively of emails, showed only a handful of instances where securities transactions were discussed. Among them:

a. In November 2012 one day before the presidential election Petersen sent emails to two clients concerning strategies depending on the outcome. No particular securities were specified, but Petersen stated if President Obama were re-elected, he recommended moving cash to inverse ETFs. If Mitt Romney were elected, Petersen suggested they "aggressively move back into equities" particularly those of "defense contractors, financials, energy, small caps, and the non-hospital medicals" which would be done through ETFs. Petersen concluded: "As Wednesday may be hectic and I may not have time to contact you individually, I would appreciate your agreement with the overall strategy now."

b. In December 2012 Petersen sent an email to a client recapping post-election transactions and discussing purchase of an inverse ETF that would be done the following day.

c. In April 2013, Petersen sent an email to a client discussing some "defensive actions" that had been taken in the account, then outlined ten (10) transactions that were recently entered. The email concluded by stating "Please indicate your receipt of this communication and your agreement with the above" transactions that had already been effected.

37. In April 2013 Petersen sent an email to a client also discussing "defensive action in reducing your exposure to this asset class (equities) ..." followed by a list of seven (7) transactions. The email concludes by: "Would you please indicate the receipt of this

message and your agreement with the proposed strategy" with respect to transactions already placed.

38. Petersen either failed to document confirmation of client consent before entering transactions, or as he admitted during the Division's on-site examination, Petersen often entered transactions without discussing specifics with the client beforehand.

39. Moreover, the transactions could only have been entered by Petersen acting in the capacity of a broker-dealer agent of CPFS since Respondents did not have discretionary authority to enter transactions at the time. From the lack of records it is unclear whether the transactions were entered by Petersen as a broker-dealer agent – which would be in violation of CPFS policy – or as an investment adviser representative of ACA using Petersen's CPFS access to effectively assert discretionary authority – in violation of the client contracts in effect.[5]

40. With respect to the complaining investor, C.W., client files for C.W. and her daughter O.V. contained five (5) additional documents that were not kept in the correspondence file. Those documents demonstrate the extent to which Petersen obtained client consent and took discretionary authority over accounts through ACA contrary to ACA's Form ADV and without meeting the financial requirements for advisers with discretionary authority:

    a. an undated spreadsheet table showing client withdrawals between March 2010 and July 2013 that Petersen prepared in response to C.W.'s allegations that O.V.'s

[5]After Petersen terminated his license with CPFS, in August and September 2013 he obtained discretionary authority on behalf of ACA for his four advisory clients at the time. The timing of those actions indicates that he was indeed using his CPFS access to manage accounts on a discretionary basis in the absence of authority through ACA to do so.

account sustained losses due to Petersen's management.

b. a March 7, 2010 letter signed by C.W. to confirm that a financial report/plan had been reviewed by C.W. for both C.W.'s and O.V's accounts, and that the client authorized ACA "...to make changes to our account positions as discussed in said report." The letter demonstrates:

   i. Respondents sought discretionary authority outside the ACA client agreement;

   ii. for Respondents to exercise such authority, Petersen would necessarily have used his access as a CPFS broker-dealer agent;

   iii. ACA failed to keep Form ADV current with its business model; and

   iv. ACA failed to meet the financial requirements for advisers with discretionary authority.[6]

c. two emails from Petersen to C.W., the first from March 23, 2010, confirming the purchase of four stocks in O.V.'s Roth IRA; the second from November 7, 2011, confirming liquidation of a mutual fund to purchase an annuity for O.V. These are two of the few records Petersen ever produced confirming transactions with a client *prior* to their entry. In an interview with the Division, C.W. stated that Petersen occasionally sought consent before entering transactions but eventually ceased doing so altogether. The lack of any similar records for other transactions shows at a minimum a failure of record keeping, but also supports the claim that Petersen did not regularly obtain client consent before making trades.

[6]Those requirements are discussed further in paragraph 43 d. ii. below.

41. The Division's analysis of O.V.'s UTMA account (the largest of C.W. and O.V.'s accounts) shows that 217 securities transactions were entered from the inception of the account on February 9, 2010 until the closing of the account on September 17, 2013. Excluding the transactions described in subparagraphs 40 b. and c. above, at least 184 securities transactions were entered without documented client consent,[7] thus substantiating C.W.'s allegations that Petersen failed to obtain client consent.

42. Because Petersen admitted entering transactions without client consent and neither ACA correspondence nor client files included additional documentation of client consent, the examiner concluded Respondents engaged in multiple instances of unauthorized exercise of discretion.

Failure to Maintain Books and Records

43. Overall, ACA failed to maintain numerous books and records as required under the Act, which the Division previously cautioned Respondents about in the 2009 audit. In particular, the 2013 audit found the following deficiencies:

a. *Trading Records.* Respondents failed to maintain records of each purchase or sale of securities in client accounts, as required by 17 C.F.R. §275.204-2(a)(3) of the IA Act, incorporated into the Act through Utah Admin. Code Rule R164-5-1(D)(1).

b. *Form ADV, Amendments and Delivery Log.*

i. ACA had a file for Form ADV, but the file only contained the most recent

[7]If client consent had been obtained, the failure to retain such records would be a violation of 17 C.F.R. §275.204-2(a)(7)(iii) of the 1940 Investment Advisers Act ("IA Act"), which is incorporated in the Act through Utah Admin. Code Rule R164-5-1(D)(1).

Firm Brochure, dated March 31, 2013. ACA should have retained copies of all previous versions of its Form ADV as required by 17 C.F.R. §275.204-2(a)(14)(i) of the IA Act, incorporated into the Act through Utah Admin. Code Rule R164-5-1(D)(1).

ii. Given various changes to ACA's business (e.g. office location, terminated affiliation with CPFS, adding discretionary authority), ACA was required to amend its Form ADV as required by Utah Admin. Code Rule R164-4-3(E)(1)(d).

iii. ACA had no Form ADV delivery log despite the 2009 audit wherein the Division required ACA to create and maintain the log. Petersen provided a copy of the log in January 2010 during the closing of the 2009 audit, but ACA failed to maintain the log sometime thereafter, which constitutes a violation of 17 C.F.R. §275.204-2(a)(14)(i) of the IA Act, incorporated into the Act through Utah Admin. Code Rule R164-5-1(D)(1).

c. *Policies and Procedures Manual.* Although ACA had a policies and procedures manual during the 2009 audit, ACA could not produce a manual during the 2013 audit. Petersen stated that it had been lost during the move from ACA's previous office location (Cottonwood Parkway office suite) to its current office location (Petersen's Cottonwood Heights residence). Failure to maintain a policies and procedures manual constitutes a violation of 17 C.F.R. §275.204-2(a)(17)(i) of the IA Act, incorporated into the Act through Utah Admin. Code Rule R164-5-1(D)(1).

d. *ACA Financials.*

i. ACA did not have any financial statements for the firm, despite the 2009 audit wherein the Division required that ACA provide a copy of its most recent annual balance sheet and income statement as required by 17 C.F.R. §275.204-(2)(a)(6) of the IA Act, incorporated into the Act through Utah Admin. Code Rule R164-5-1(D)(1).

ii. Having assumed discretionary authority in client accounts between August and September 2013, ACA was required to meet the financial requirements of Utah Admin. Code Rule R164-4-4(D)(1) and/or R164-4-5(F)(1)(a), which require maintaining a $10,000 bond or net worth of $10,000. ACA did not have a bond to meet those requirements and did not have any bank account in ACA's name to demonstrate minimal net worth.

iii. Petersen explained ACA had a Key Bank account at one time, but it had been closed a year before the audit. Client fees had since been paid directly to Petersen, but ACA was unable to provide books and records related to the financials of the firm as required by 17 C.F.R. §§275.204-2(a)(1), (2), (4), (5) and (6), incorporated into the Act by Utah Admin. Code Rule R164-5-1(D)(1).

e. *Correspondence.* ACA's correspondence file consisted of email that had been printed. Those documents were in no particular order and appeared to have been printed in preparation for the audit. Some written client correspondence was

found in client files, primarily that of C.W., but ACA kept no documentation of phone calls or other communications provided to clients such as financial reports, which is a violation of 17 C.F.R. §275.204-2(a)(7) of the IA Act, incorporated in the Act by Utah Admin. Code Rule R164-5-1(D)(1).

f. *Advertising and Marketing Files.*

i. Marketing materials were not dated to indicate when the piece was used, and there were no notes about the material's use or approval. In addition, as described below in paragraphs 45-50 the examiner found at least one instance of an advertisement used that was not included in ACA's files, which is a violation of 17 C.F.R. §275.204-2(a)(11) of the IA Act, incorporated into the Act by Utah Admin. Code Rule R164-5-1(D)(1).

Other Violative Conduct

Misleading Client Regarding Qualifications

44. One client interviewed by the Division stated that in soliciting her, Petersen touted his 22 years working on Wall Street[8] and stated he worked out of a "virtual office" in Salt Lake, but his "people" were "back East" and ACA was located "back East." Those statements misrepresent ACA and Petersen's qualifications and services, and misled the client into believing ACA was something other than a one-person firm located in Utah, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(8).

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[8]The first time Petersen was employed in the securities industry in any licensed capacity was in 2006.

Misleading Advertising Materials

45. During the audit of another investment adviser, the Division found two documents of concern pertaining to Respondents in the other adviser's files: an advertisement and performance report, both of which were found in the file of a client who had purchased an annuity and other products from the other investment adviser.

46. The advertisement is written as a press release, dated October 17, 2012, and includes the logo of *The Salt Lake Tribune*, which makes it appear as an article from that newspaper. The headline touts "SALT LAKE AREA WEALTH MANAGEMENT FIRM REPORTS STELLAR CLIENT RETURNS FOR THIRD QUARTER – BEATS MARKET BY 46%". The text of the piece is written in a technical fashion and boasts:
"The Company attributes the third-quarter result to its proprietary I[4TM] investment management technique which, according to DALBAR research of individual investors' historical performance characteristics, ameliorates differences as large as -9.9 (over 300%) between individual and institutional returns."

47. The advertisement is misleading, does not contain full disclosure of terminology, and includes performance reporting that does not meet the standards of 17 C.F.R. §275.206(4)-1 of the IA Act, which is a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(13).

48. By using *The Salt Lake Tribune* logo, ACA sought to lend legitimacy by using the brand of another company, which constitutes a testimonial, in violation of 17 C.F.R. §275.206(4)-1(a)(1) of the IA Act as it "refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser..." Moreover, a search of archived content

shows that no such publication was ever made by *The Salt Lake Tribune*, indicating that the advertisement contains an "untrue statement of a material fact, or which is otherwise false or misleading" in violation of 17 C.F.R. §275.206(4)-1(a)(5) of the IA Act, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(13).

49. Further, in claiming to beat the market by 46 percent, ACA "refers, directly or indirectly, to past specific recommendations of such investment adviser" without providing a list of every transaction with the particular information required by 17 C.F.R. §275.206(4)-1(a)(2) of the IA Act, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(13).

50. Finally, the advertisement was not included in ACA's advertising and marketing file during the Division's on-site examination. The failure to have a complete record of advertisements in the file is a violation of 17 C.F.R. §275.204-2(a)(11) of the IA Act, incorporated in the Act by Utah Admin. Code Rule R164-5-1(D)(1).

Sharing Client Information

51. The second item of concern found in the other investment adviser's files is a performance report printout from a CPFS client account, which Petersen had access to as a broker-dealer agent of CPFS. While some redaction of the holdings had been made, the dates and values are displayed, including a circle drawn around the "+3.4%" performance for the given month. In addition to violations of the performance reporting rules described in paragraph 49 above, disclosing a client's information is also a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(14).

52. The disclosure of client information further violates ACA's own policy and client agreement, which states client information will not be disclosed to any third-party without the prior consent of the client. There was no documentation to show that any such consent was obtained.

53. In addition, like the "press release" there was no record of the performance report in ACA's advertising and marketing file, which is a violation of 17 C.F.R. §275.204-2(a)(11) of the IA Act, incorporated in the Act by Utah Admin. Code Rule R164-5-1(D)(1).

October 2013 Senior Expo Marketing

54. On October 3, 2013, Division staff attended the two-day Utah Senior Expo event, presented by the Salt Lake County Aging and Adult Services at the South Towne Expo Center in Sandy, Utah.

55. At that time, staff from the Utah Department of Insurance ("DOI") who were also present reported that Petersen was handing out business cards and flyers in an attempt to solicit clients at the event. Petersen was speaking to senior attendees at some empty tables at the back of the venue since Respondents did not have a registered booth at the event. DOI staff notified security and a belligerent Petersen was escorted from the venue.

56. The second day of the Senior Expo, Division staff found the vehicles in the parking lot of the South Town Expo Center had been leafleted with flyers by Petersen. The flyer included the following:

    a. The false and misleading statement that ACA/Petersen is "Fully licensed to trade securities and sell insurance."

b. Offering long-term care coverage through a "...market rate, guaranteed investment vehicle, paying a MINIMUM of 3% and up to 8%, from a major 'A' rated financial institution with hyped product features such as "It comes with a money-back guarantee (no surrender charges, ever!)" and "Plus, you get a 10% BONUS on the amount invested."

c. A quote without any source stating "...other than running out of money, the second greatest concern of seniors is relying on their children for LONG TERM CARE...!"

Unlicensed Activity

57. The Division examiner spoke to two clients of Respondents, who both indicated they had remained clients of Respondents in 2014; one client through June 2014, and the other was unsure of the precise date of termination. Both clients stated they transferred their accounts elsewhere due to poor performance.

August 2014 Form ADV Filing

58. The Form ADV filed with the Division in August 2014 contained material errors, including:

a. The Firm Brochure (Form ADV Part 2) submitted is for CPFS, not ACA. CPFS is a broker-dealer, not an investment adviser, and Petersen has not been affiliated with CPFS since August 2013;

b. Part 1A of Form ADV does not indicate ACA has any employees or investment adviser representatives;

c. Petersen's insurance activity is inconsistently reported on Part 1A of Form ADV. In Item 5.B.(5) ACA states it has no employees who are insurance agents, but states ACA is an insurance broker or agent in Item 6.A.(6), and sells insurance products to advisory clients in Item 6.B.(3) and 6.B.(3) of Schedule D. Lastly, ACA fails to disclose the affiliation it has with insurance companies or agencies under Item 7.A.(12);

d. Part 1A of Form ADV indicates ACA sponsors a wrap fee program, which it cannot, since ACA is not a broker-dealer; and

e. ACA incorrectly reports itself as the owner (75% or more) and CEO of ACA, rather than Petersen.

59. In addition, since the September 2014 denial, Petersen has written letters to the Governor, Executive Director of the Department of Commerce, and to the Division's counsel in the Utah Attorney General's Office using long outdated ACA letterhead with an incorrect address. Significantly problematic, the letterhead states "Securities offered through Colony Park Financial Services, LLC, Member FINRA/SIPC. Custody of listed Securities through JP Morgan Chase, NA". As stated herein, Petersen and ACA have had no affiliation with CPFS – or custodian JP Morgan Chase – since August 2013, and ACA is not a member of FINRA and has no SIPC coverage.

60. The nature of the application errors and use of misleading letterhead raise further, serious concerns about Petersen and ACA's ability to run an investment advisory firm in compliance with securities laws, rules and regulations.

## II. CONCLUSIONS OF LAW

Unlicensed Activity under § 61-1-3(3)

61. ACA's investment adviser license and Petersen's investment adviser representative licenses were terminated as of December 31, 2013 for failure to renew. Respondents continued to act in an unlicensed capacity for at least two client accounts after that time and through June 2014, in violation of Section 61-1-3(3) of the Act.

Failure to Maintain Books and Records under § 61-1-5(1)

62. ACA failed to maintain books and records required by the Act, including but not limited to:

a. books and records described in paragraph 43 above;

b. copies of the *Salt Lake Tribune* "press release" and the performance report described in paragraphs. 45-50;

c. trading records of transactions entered for clients, as required by 17 C.F.R. §275.204-2(a)(3) of the IA Act, incorporated into the Act by Utah Admin. Code Rule R164-5-1(D)(1).

Failure to Reasonably Supervise under § 61-1-6(2)(a)(ii)(J)

63. ACA failed to reasonably supervise by, among other things, not establishing, maintaining and enforcing policies and procedures aimed to prevent violations of the securities laws, its failure to renew and maintain licenses, its failure to maintain proper books and records, either approving or not reviewing misleading advertising materials, and allowing unauthorized trading in client accounts, warranting sanctions under Section 61-1-6(2)(a)(ii)(J) of the Act.

Failure to Maintain Bond under Utah Admin. Code Rule 164-4-4 and -5

64. During both the period of time when Petersen exercised unauthorized discretion over client accounts, and in 2013 when he had clients authorize actual discretion, ACA was required to meet the financial requirements of Utah Admin. Code Rule R164-4-4(D)(1) and/or R164-4-5(F)(1)(a), which require maintaining a $10,000 bond or net worth of $10,000. ACA did not have a bond to meet those requirements and did not have any bank account in ACA's name to demonstrate minimal net worth.

Dishonest or Unethical Practices under § 61-1-6(2)(a)(ii)(G)
Unauthorized Trading

65. Petersen used his access as a broker-dealer agent of CPFS to enter transactions in ACA clients' accounts without obtaining prior authorization. Aside from the several documents described herein, ACA was unable to provide records documenting client consent. Petersen did not have discretionary trading authority with CPFS, clients never granted Respondents discretionary authority and ACA's Firm Brochure affirmatively represented all accounts were non-discretionary.

66. Respondents' unauthorized trading constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(4), warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act.

Misrepresenting Qualifications

67. One client interviewed by the Division stated that in soliciting her, Petersen touted his 22 years working on Wall Street and stated he worked out of a "virtual office" in Salt Lake, but his "people" were "back East" and ACA was located "back East."

68. Those statements misrepresent ACA and Petersen's qualifications and services and misled the client into believing ACA was something other than a one-person firm located in Utah, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(8).

Misleading Advertising

69. As described in paragraphs 45-50, *The Salt Lake Tribune* "press release" used by Respondents was false and materially misleading, failed to meet SEC performance-reporting standards, and constitutes dishonest or unethical practices under Utah Admin. Code Rule R164-6-1g(E)(13), warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act.

Disclosing Client Information

70. Petersen disclosed the name, holdings, performance, and values of at least one client account with another client as a means of advertising and bolstering his track record, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(14), warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act.

Failing to Maintain Policies and Procedures

71. As ACA did not maintain any written policies and procedures, ACA failed to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic client account information in violation of Section 204A of the IA Act, which constitutes a dishonest or unethical practice under Utah Admin. Code Rule R164-6-1g(E)(17), warranting sanctions under Section 61-1-6(2)(a)(ii)(G).

## III. REMEDIAL ACTIONS/SANCTIONS

72. Respondents neither admit nor deny the Division's findings and conclusions, but consent to the sanctions below being imposed by the Division.

73. Respondents represent that the information they have provided to the Division as part of the Division's investigation is accurate and complete.

74. Respondents agree to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.

75. Respondents shall withdraw ACA's licensing application no later than March 22, 2016. Respondents agree to be barred from associating with any broker-dealer or investment adviser licensed in Utah, and from acting as an agent for any issuer soliciting investor funds in this state.

76. Pursuant to Utah Code Ann. Section 61-1-20, in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1 and in light of Respondents' financial situation and ability to pay, the Division imposes a fine of $2,500.00, jointly and severally. The fine shall be paid within six (6) months following entry of this Order.

## IV. FINAL RESOLUTION

77. Respondents acknowledge that this Order, upon approval by the Utah Securities Commission, shall be the final compromise and settlement of this matter. Respondents acknowledge that the Commission is not required to approve this Order, in which case the Order shall be null and void and have no force or effect. In the event the Commission does not approve this Order, however, Respondents expressly waive any

claims of bias or prejudgment of the Commission, and such waiver shall survive any nullification.

78. If Respondents materially violate any term of this Order, after notice and an opportunity to be heard before an administrative judge solely as to the issue of a material violation, Respondents consent to entry of an order in which:

a. Respondents admit the Division's Findings of Fact and Conclusions of Law as set forth in this Order; and

b. Respondents' fine shall be $10,000.00, jointly and severally, and become immediately due and payable.

The order may be issued upon ex parte motion of the Division, supported by an affidavit verifying the violation. In addition, the Division may institute judicial proceedings against Respondents in any court of competent jurisdiction and take any other action authorized by the Act or under any other applicable law to collect monies owed by Respondents or to otherwise enforce the terms of this Order. Respondents further agree to be liable for all reasonable attorneys' fees and costs associated with any collection efforts pursued by the Division, plus the judgment rate of interest.

79. Respondents acknowledge that the Order does not affect any civil or arbitration causes of action that third-parties may have against them arising in whole or in part from their actions, and that the Order does not affect any criminal causes of action that may arise as a result of their conduct referenced herein. Respondents also acknowledge that any civil, criminal, arbitration or other causes of actions brought by third-parties against them have no effect on, and do not bar, this administrative action by the Division against them. If

Respondents materially violate this Order, however, the Findings of Fact and Conclusions of Law set forth in this Order are deemed admitted as described in paragraph 78 above, and may be introduced as evidence against Respondents in any arbitration, civil, criminal, or regulatory actions.

80. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way. Upon entry of the Order, any further scheduled hearings are canceled. The Order may be docketed in a court of competent jurisdiction.

Dated this 17 day of March, 2016

K Barton

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

Dated this 17 day of MARCH, 2016

MB Petersen

Michael B. Petersen
Acadia Capital Advisors, LLC

Approved:

Thomas M. Melton
Assistant Attorney General
Counsel for Division

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division's Findings and Conclusions, which are neither admitted nor denied by the Respondents, are hereby entered.
2. Respondents shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Respondents are barred from associating with any broker-dealer or investment adviser licensed in Utah, and from acting as an agent for any issuer soliciting investor funds in this state.
4. Pursuant to Utah Code Ann. Section 61-1-20, in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1 and in light of Respondents' financial situation and ability to pay, the Division imposes a fine of $2,500.00 jointly and severally, which shall be paid within six (6) months following entry of this Order.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this 24th day of March, 2016

Brent R. Baker

Brent Baker

Erik Christiansen

Gary Cornia

David A. Russson

Lyle White

**Certificate of Mailing**

I certify that on the 24th day of March, 2016, I mailed, by certified mail, a true and correct copy of the fully executed Stipulation and Consent Order to:

Michael B. Petersen
Acadia Capital Advisors, LLC
6977 S. Twin Aspen Cove
Cottonwood Heights, UT 84121

Certified Mail # 7015 0640 0004 7575 4876

Executive Secretary

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

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

| | |
|---|---|
| **IN THE MATTER OF:** | **STIPULATION AND CONSENT ORDER** |
| **STEVEN W. THORNE, CRD#1124434**<br>**Respondent.** | **Docket No. SD-15-0055** |

The Utah Division of Securities ("Division"), by and through its Director of Compliance, Kenneth O. Barton, and Respondent Steven W. Thorne ("Thorne" or "Respondent") hereby stipulate and agree as follows:

1. Respondent has been the subject of an investigation by the Division into allegations that he violated the Utah Uniform Securities Act ("Act"), Utah Code Ann. § 61-1-1, *et seq.*, as amended.

2. On or about November 20, 2015, the Division initiated an administrative action against Respondent by filing a Petition to Censure Licensee and Impose a Fine.

3. Respondent hereby agrees to settle this matter with the Division by way of this Stipulation and Consent Order ("Order"). If entered, the Order will fully resolve all claims the Division has against Respondent pertaining to the Petition.

4. Respondent admits that the Division has jurisdiction over him and the subject matter of

this action.

5. Respondent hereby waives any right to a hearing to challenge the Division's evidence and present evidence on his behalf.

6. Respondent has read this Order, understands its contents, and voluntarily agrees to the entry of the Order as set forth below. No promises or other agreements have been made by the Division, nor by any representative of the Division, to induce Respondent to enter into this Order, other than as described in this Order.

7. Respondent is represented by attorney Douglas Griffith and is satisfied with the legal representation he has received.

## I. FINDINGS OF FACT

8. Thorne is a Utah resident who has been licensed in the securities industry since 1983 as a broker-dealer agent of several different broker-dealer firms. He is currently licensed with Wells Fargo Advisors Financial Network, LLC ("WFA"), CRD#11025, where he is also licensed as an investment adviser representative.[1]

9. Thorne has taken and passed the FINRA Series 7, General Securities Representative Exam, Series 63, Uniform Securities Agent State Law Exam, Series 4, Registered Options Principal Exam, and Series 24, General Securities Principal Exam.

10. Records contained in the Central Registration Depository ("CRD")[2] show that in 2005 Thorne was the subject of a customer complaint resulting in a FINRA arbitration matter

[1] At all times relevant in this matter, Thorne acted in the capacity of a broker-dealer agent and not an investment adviser representative.

[2] CRD is a computerized database maintained by the Financial Industry Regulatory Authority ("FINRA"). CRD contains employment, licensing and disciplinary information on broker-dealers, agents, investment advisers and investment adviser representatives.

that was settled by his employing firm for $235,000, of which Thorne personally contributed $47,000.00. That complaint alleged, among other things, "excessive and unsuitable trading" of equities and options.

11. In December 2010, the Division received a written complaint from a client of Thorne's, L.O., concerning investments in non-traditional Exchange Traded Funds ("non-traditional ETFs") recommended by Thorne. The complaint alleged that the investments were unsuitable and caused significant losses in L.O.'s account.

12. In March 2011, the Division conducted an on-site audit of Thorne's branch office. The Division's examination revealed the following:

Referral to Thorne

13. In 2007, L.O. was referred to A.G. Edwards & Sons, Inc. ("A.G. Edwards"), CRD#4, by a former co-worker. The agent who was recommended was no longer at A.G. Edwards and L.O. instead met with Thorne who worked in the same A.G. Edwards branch office.[3]

14. At the time, L.O. was 64 years old and a retired school teacher and administrator. He was seeking to supplement his retirement income with "something secure" with an interest rate that was higher than what he could earn from a bank. He described his overall risk tolerance to Thorne as conservative. L.O. had no prior experience investing other than in his state retirement plan, where he held mutual funds.

15. L.O.'s goal was to use $136,647 from his retirement plan and $50,000 from a recent sale of property to receive steady monthly income of $1,000 to $1,500 over a period of years

[3] In 2008 A.G. Edwards became a part of Wachovia Securities, LLC, which later was acquired by Wells Fargo & Co. WFA is the retail brokerage and wealth management affiliate of Wells Fargo & Co. Thorne's licensing registrations transferred accordingly.

until those monies were exhausted.

16. Thorne suggested that rather than simply withdrawing monies from the account, L.O. instead allow Thorne to invest the monies, and that within five or six years L.O. could begin to receive his desired income stream by withdrawing only the interest earned, leaving the principal intact.

17. In September 2007, L.O. opened an account with Thorne, investing $186,647, consisting of $136,647 in rollover IRA monies ("IRA account") and $50,000 in non-retirement monies ("Trust account").

18. According to new account documents, L.O.'s primary investment objective was "aggressive appreciation" and secondary objective "conservative appreciation". Annual income range was listed as $150,000 to $200,000 per year, and L.O.'s net worth described as between $5,000,000 and $10,000,000.[4] His investment experience was listed as 25 years in stocks and bonds, 40 years in mutual funds, and 28 years with insurance and annuities.

19. Thorne recommended a portfolio developed using an A.G. Edwards asset allocation model. Accordingly, L.O.'s monies were invested in a diversified portfolio of mutual funds.

20. Thereafter, L.O.'s account performed consistent with general market performance and experienced corresponding losses during the financial market declines in the fall of 2008. During the market declines of 2008 into 2009 L.O.'s account value dropped approximately 50%. No income was taken from the portfolio.

[4] L.O. owns a family farm and that figure is presumably based on the estimated values of the property and farm equipment.

Recommendations of Non-traditional ETFs

21. In April 2009, Thorne recommended to L.O. and at least four additional WFA clients a new investment strategy of adding positions of inverse, leveraged non-traditional ETFs.

22. At the time, L.O. was a 66-year-old retired and unsophisticated investor who had never traded the stock market on a daily or near-daily basis. He had never purchased securities using leverage,[5] and had never sold a stock short.[6]

23. Non-traditional ETFs are highly complex products which have risk factors that differ from traditional ETFs and may include leveraging, daily reset, and time decay, all of which effect investment return. Investors holding non-traditional ETFs for more than one trading session – and especially when held for extended periods of time – can expect their performance to greatly differ from the underlying index or benchmark, particularly in volatile market conditions.

24. The investments recommended by Thorne included inverse ETFs, which utilize derivatives for the purpose of profiting from the decline in the value of a benchmark, as well as double and triple-leveraged ETFs, meaning that a 1% move in the underlying index or benchmark would produce a 2% or 3% rise (or fall if inverse) of the investment's value.

25. Non-traditional ETFs are designed to be used by sophisticated investors and held in an account for short periods of time given their unique attributes and significant risks.

26. Thorne failed to understand the unique characteristics of the non-traditional ETFs he

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[5] "Leverage" generally means the use of various financial instruments or borrowed capital, such as margin, to increase the potential return of an investment.

[6] "Selling short" is an investment strategy employed when one believes the current price of a stock will fall and aims to profit from a future fall in the stock's price.

recommended, the risks associated with those products, and how those products could be properly used in an investment portfolio. Consequently, he failed to sufficiently impress upon his clients that non-traditional ETFs were especially unsuitable as long-term investments.

27. As a result, Thorne's clients had little to no understanding of the products, their significant risks, and how their performance could dramatically vary from the benchmarks, particularly when held over a long term.

28. Of the five client accounts reviewed by the Division, most held the products for more than 300 days, and the clients sustained total losses of $131,607.

L.O. Account and Losses

29. Between April 2009 and July 2009, Thorne recommended the purchase of four non-traditional ETFs, that were both inverse and leveraged, to L.O.: Direxion Small Cap Bear 3X ("TZA"), which seeks to return 3 times the inverse (opposite) of the Russell 2000 Index daily performance; ProShares Ultrashort Dow 30 ("DXD"), which seeks to return 2 times the inverse of the Dow Jones Industrial Average daily performance; Proshares Ultrashort QQQ ("QID"), which seeks to return 2 times the inverse of NASDAQ-100 daily performance; and Proshares Ultrashort Financials ("SKF"), which seeks to return 2 times the inverse of Dow Jones U.S. Financials Index daily performance.

30. Thorne believed the financial markets were due for an imminent collapse. Thorne told L.O. that the Obama administration's bailout money was used to "prop up" the stock market and repeatedly told L.O. "a change was coming" and that the market would collapse at any time, bringing profits to L.O. based on those investments.

31. The prospectuses for the ETFs purchased by Thorne all explicitly stated that their performance was managed for daily results, and if held over longer periods of time, such as weeks or months, the shares could differ significantly from the performance of their underlying index or benchmark during the same period.

32. For example, the prospectus for TZA stated:

> The Funds[7] are intended to be used as short-term trading vehicles. The Funds are not intended to be used by, and are not appropriate for, investors who do not intend to actively monitor and manage their portfolios. The Funds are very different than most exchange-traded funds. First, all of the Funds pursue *daily leveraged* investment goals, which means that the Funds are riskier than alternatives that do not use leverage because the Funds magnify the performance of the benchmark on an investment. Second, each of the Bear Funds pursues investment goals which are inverse to the performance of its benchmark, a result opposite of most exchange-traded funds. Third, each Fund offered in this Prospectus seeks *daily leveraged* investment results. The pursuit of daily leveraged investment goals means that the return of a Fund for a period longer than a full trading day will be the product of the series of daily leveraged returns for each trading day during the relevant period.
>
> . . .
>
> The Funds should be utilized only by sophisticated investors who (a) understand the risks associated with the use of leverage, (b) understand the consequences of seeking daily leveraged investment results, (c) understand the risk of shorting and (d) intend to actively monitor and manage their investments. Investors who do not understand the Funds or do not intend to actively monitor and manage the Funds should not buy the Funds.

(emphasis in original).

33. During the same time that Thorne recommended non-traditional ETFs to L.O. and other clients, the securities industry and WFA were taking actions to address the misuse of those products, emphasizing their complicated, speculative and risky nature that made

[7] Besides TZA, the prospectus also pertained to another non-traditional ETF, the Direxion Daily Large Cap Bear 3X ("BGZ"), recommended by Thorne and purchased in the accounts of the four other clients.

them inappropriate for most investors.

34. On June 11, 2009, FINRA released Regulatory Notice 09-31 ("FINRA Notice") which put the securities industry on notice that non-traditional ETFs posed risks distinct from traditional ETFs, and specifically cautioned that, while non-traditional ETFs

> may be useful in some sophisticated trading strategies, they are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis. Due to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective. Therefore, inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.

(FINRA Notice, Executive Summary).

35. The FINRA Notice illustrated by example the unique risks posed by leveraged, inverse products such as those recommended by Thorne, even when meeting their stated objective:

> For example, between December 1, 2008 and April 30, 2009:
>
> - The Dow Jones U.S. Oil & Gas Index gained 2 percent, while an ETF seeking to deliver twice the index's daily return fell 6 percent and the related ETF seeking to deliver twice the inverse of the index's daily return fell 26 percent.
>
> - An ETF seeking to deliver three times the daily return of the Russell 1000 Financial Services Index fell 53 percent while the index actually gained around 8 percent. The related ETF seeking to deliver three times the inverse of the index's daily return declined by 90 percent over the same period.

(FINRA Notice at 2).

36. The FINRA Notice further reminded members of their sales practice obligations under NASD Rule 2310 in determining the suitability of such products:

> This analysis has two components. The first is determining whether the product

is suitable for any customer, an analysis that requires firms and associated persons to fully understand the products and transactions they recommend.

. . .

Once a determination is made that a product is generally suitable for at least some investors a firm must also determine that the product is suitable for the specific customers to whom it is recommended. This analysis includes making reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and 'such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.'

(FINRA Notice at 3).

37. Despite the FINRA Notice, in the five client accounts reviewed by the Division, Thorne made nineteen (19) purchases in non-traditional ETFs in July 2009. In fact, most of Thorne's non-traditional ETF purchase recommendations were made after the FINRA Notice was issued.

38. By July 2009, L.O.'s trust account consisted of 80% ETFs and 20% short term/cash investments. The IRA account consisted of 45% ETFs and 44% short term/cash investments. The investment objective on both accounts remained "long term growth" during that time.

39. In a Compliance Alert ("Alert") distributed to WFA agents on July 29, 2009, WFA adopted new policies regarding the sale of non-traditional ETFs. The Alert discussed the FINRA Notice and further stated:

Non-traditional leveraged and leveraged inverse ETFs are only permitted to be purchased in accounts with a **Trading and Speculation** ("L") investment objective.

> Investment objectives may not be changed to Trading and Speculation for the purpose of purchasing Non-Traditional leveraged and leveraged inverse ETFs when the investment objective is otherwise not appropriate for the client.

> The Firm prohibits holding all Non-Traditional ETFs in any account as a long term investment. These positions are generally designed as intraday trading vehicles.

(Alert, emphasis in original).

40. Despite the prohibition set forth in the Alert, in August 2009, L.O.'s investment objectives were changed by Thorne to "trading and speculation". That information was changed for both the IRA and Trust accounts.

41. Also at that time, WFA prohibited clients holding non-traditional ETFs in any account as a long term investment absent specific client direction, which was required to be verified by a qualified supervisor and documented in the client file.

42. In September 2009 WFA updated its sales materials related to non-traditional ETFs and sent a letter to all clients then-holding non-traditional ETFs. The letter discussed the products' complexity, risks posed, and emphasized such positions should be liquidated by clients who did not understand and could not continually monitor the holdings. In a document that accompanied the letter, entitled "A Guide to Investing in Exchange-Traded Funds", WFA further described how inverse and leveraged ETFs work and their attendant risks. Under "Suitability" the guide states: "Non-traditional ETFs are suitable only for sophisticated and speculative investors who fully understand the complexities of these products and the significant risks involved in their purchase or trade" and for those able "to absorb potentially significant losses" who can "constantly monitor" their accounts.

43. In February 2010, WFA sent a second mailing to clients still holding non-traditional ETFs as long term account positions. That letter unequivocally urged liquidation of those

positions:

> **At this time, we are advising you to sell your non-traditional ETF positions if you cannot monitor your holdings on a daily basis and are not a speculative investor. Speculative investors should be willing to accept the risks inherent in these products, including the loss of principal up to the full value of the investment.**

(emphasis in original).

44. When interviewed by the Division, Thorne stated he was aware of the FINRA Notice and WFA Compliance Alert, as well as the two letters sent to clients as described above. Despite that knowledge, Thorne took no action to liquidate the unsuitable positions taken in his clients' accounts. Instead, he told L.O. and the other clients that if they liquidated the non-traditional ETF positions the clients could not repurchase them in the future. He did not, however, tell them that was because WFA had changed its policies to address the significant risks of loss posed to unsophisticated retail investors.

45. As the overall markets continued to climb, L.O.'s account continued to fall in value. He had frequent conversations with Thorne during that period and voiced his concerns about the decline in value. Thorne told him to "hang on" and that things would "turn around" eventually.

46. In April 2010, L.O. directed Thorne to liquidate all the positions in his accounts to prepare to transfer his monies to another broker-dealer. L.O. also complained to WFA's legal department about Thorne's handling of his account.[8]

47. L.O. sustained losses totaling $37,506, which represents almost 20% of his original investment amount. The longest holding period for non-traditional ETFs was 366 days.

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[8] That complaint was later resolved by WFA for $25,000 in July 2013.

48. In addition, for the vast majority of activity in L.O.'s account, Thorne incorrectly marked trades as unsolicited, indicating that the transactions were initiated by L.O. rather than Thorne.

Other Client Accounts and ETF Losses

49. From May through July 2009 Thorne also recommended inverse leveraged ETFs (BGZ and SKF) to an 84-year-old retiree, J.B., for his IRA account. Like L.O., J.B. had limited investment experience. According to new account documents, his annual income was $50,000-99,000 and net worth between $50,000-99,000. His investment objective was changed by Thorne in August 2009 from "long term growth" to "trading and speculation". Thorne set up a new client account with the "trading and speculation" objective and transferred existing shares in-kind. The longest ETF positions were held for 411 days and the account sustained losses of $28,903.

50. In July 2009 Thorne recommended inverse leveraged ETFs (BGZ, SKF and TZA) to a 75-year-old retiree, R.J. who also had limited investment experience. According to new account documents, his annual income was $50,000-99,000 and net worth between $50,000-99,000. His investment objective was changed by Thorne in August 2009 from "long term growth" to "trading and speculation". Thorne set up a new client account with the "trading and speculation" objective and transferred existing shares in-kind. R.J.'s employment status was reported as self-employed in the education field, even though he was retired. The longest ETF positions were held for 364 days and the account sustained losses of $22,630.

51. Another Thorne client, J.R., was a 64-year-old retiree when Thorne recommended

inverse leveraged ETFs (BGZ and SKF) to her in July 2009. According to new account documents, her annual income was $1,000-25,000 and net worth between $250,000-350,000. Her investment objectives were changed by Thorne in August 2009 from a primary objective of "aggressive appreciation" and secondary objective of "conservative appreciation" to "trading and speculation". The longest ETF positions were held for 309 days and the account sustained losses of $6,617.

52. Investor K.C. was 74 years old and retired when Thorne recommended inverse leveraged ETFs (BGZ, SKF, TZA) in July 2009 and Barclays Bank PLC iPath S&P 500 VIX Short Term Futures ETN ("VXX") in July 2010. His investment objective was changed by Thorne in August 2009 from "moderate growth" to "trading and speculation". Thorne set up a new client account with the "trading and speculation" objective and transferred existing shares in-kind. K.C.'s employment status was reported as self-employed in the unskilled labor field even though he was retired. The longest ETF positions were held for 313 days and the account sustained losses of $35,878.

Inverse Leveraged ETFs were Unsuitable for Thorne's Clients

53. Thorne's five clients were all unsophisticated, elderly retail investors with limited knowledge of the financial markets who did not understand the investment risks associated with inverse, leveraged ETFs. They were not seeking market speculation or implementing a sophisticated daily trading strategy. The products were not being purchased as an intraday, daily, or near-daily holding position. None had any experience short selling stocks, purchasing stock options, or investing using margin, all of which would be experience relevant to understanding the nature of the inverse, leveraged ETF

products recommended by Thorne. All five investors told the Division they relied on Thorne for recommendations and deferred to his judgment in choosing investments.

54. At no time did Thorne communicate to L.O. or the other clients that his recommendations to purchase and hold non-traditional ETFs were inconsistent with the product prospectuses, and FINRA and WFA guidelines on their suitable use.

55. Thorne likewise failed to adopt any process to monitor the holdings as described in the prospectuses, which further demonstrates Thorne's fundamental misunderstanding of the securities, such that his recommendations could not have been made on reasonable grounds.

56. In 2011, during the Division's on-site examination, Thorne admitted he had limited knowledge of the characteristics of non-traditional ETFs during the period he recommended them to investors. He told the Division he did not receive any formal training from WFA on their use, risks, or suitability.[9]

57. During a 2013 interview, Thorne also indicated that in 2009 he did not understand that the products were a day trading instrument, and that accordingly, nor did his clients understand that. Thorne said his knowledge of the products came from television ads, watching the cable television business channel CNBC, and "Googling" them.

58. Thorne further acknowledged in hindsight he would not have suggested the non-traditional ETFs in the five client accounts, and would have liquidated them earlier rather

[9] In May 2012, WFA consented to a FINRA fine of $2.1 million and restitution in the amount of $641,489 as well as remedial undertakings, for violations of NASD/FINRA rules, failing to establish and maintain a reasonable supervisory system including written procedures with regard to non-traditional ETFs and allowing its agents to recommend those products to customers without performing reasonable diligence to understand the risks and features associated with the products.

than holding them for an extended period of time.

## II. CONCLUSIONS OF LAW

59. Under Utah Admin. Code Rule R164-6-1g(C)(3), applicable to agents through (D)(7), it is a dishonest or unethical practice to recommend the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the investor's investment objectives, financial situation and needs, and other relevant information known by the agent.

60. Likewise, NASD Conduct Rule 2310, applicable during the relevant period,[10] required that an agent have reasonable grounds for believing a recommendation is suitable for a client on the basis of facts, if any, disclosed by the customer as to other security holdings, financial situation, and needs. Moreover, prior to executing a recommended transaction, Rule 2310 required that the agent make reasonable efforts to obtain information concerning the client's financial status, tax status, investment objectives, and other information relevant to whether the investment is suitable for an individual. Violation of NASD/FINRA Rules is also a basis for sanctions under Utah Admin. Code Rule R164-6-1g(C)(28), applicable to agents through (D)(7).

61. Further, as described herein, FINRA Regulatory Notice 09-31 alerted securities agents of specific risk and suitability issues presented by leveraged and inverse ETFs, concluding that they "typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets."

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[10] That rule was superseded by FINRA Rule 2111 which became effective in 2012.

62. Thorne's recommendations of leveraged inverse ETFs were unsuitable, warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act, because, among other things:

a. his clients were unsophisticated, retired, and elderly retail investors;

b. his clients were not seeking a speculative, high-risk investment product;

c. the ETF holdings were not part of any sophisticated investing strategy;

d. The ETFs were purchased and held long term contrary to their intended design and purpose as a daily tool as described in their prospectuses, FINRA Notice and WFA guidance; and

e. Thorne didn't understand the products sufficiently to make a suitability determination, particularly as to appropriate use in a portfolio, risk, volatility and divergence from the products' stated objectives and benchmarks when held for more than one trading session.

63. Thorne further engaged in dishonest or unethical practices, warranting sanctions under 61-1-6(2)(a)(ii)(G), by setting new accounts up in order to maintain his clients' positions in unsuitable investments. None of the investors' personal financial situations or goals had changed to justify claiming "trading and speculation" as their investment objective. Furthermore, during his interview Thorne claimed that the WFA "trading and speculation" investment objective – as changed by Thorne or reflected in the new accounts created in 2009 – was actually the same level of risk acceptance as in the original A.G. Edwards accounts but simply a matter of different verbiage. That is false.

64. Finally, Thorne engaged in dishonest or unethical practices warranting sanctions under Section 61-1-6(2)(a)(ii)(G) of the Act by falsely reporting on new account applications

that R.J. and K.C. were employed when they were retired.

## III. REMEDIAL ACTIONS/SANCTIONS

65. Respondent neither admits nor denies the Division's Findings and Conclusions but consents to the sanctions below being imposed by the Division.

66. Respondent represents that the information he has provided the Division as part of its investigation is accurate and complete.

67. Respondent agrees to cease and desist from violating the Act and to comply with the requirements of the Act in all future business in this state.

68. Pursuant to Utah Code Ann. Section 61-1-6 and in consideration of the guidelines contained in Utah Admin. Code Rule R164-31-1, the Division imposes a fine in the amount of $40,000.00. The fine shall be paid in full within thirty (30) days following entry of this Order.

## IV. FINAL RESOLUTION

69. Respondent acknowledges that this Order, upon approval by the Utah Securities Commission ("Commission"), shall be the final compromise and settlement of this matter. Respondent acknowledges that the Commission is not required to approve this Order, in which case the Order shall be null and void and have no force or effect. In the event the Commission does not approve this Order, however, Respondent expressly waives any claims of bias or prejudgment of the Commission, and such waiver shall survive any nullification.

70. If Respondent materially violates any term of this Order, after notice and an opportunity to be heard before an administrative judge solely as to the issue of a material violation,

Respondent consents to entry of an order in which:

a. Respondent admits the Division's Findings of Fact and Conclusions of Law as set forth in this Order; and

b. any payments owed by Respondent pursuant to this Order become immediately due and payable.

The order may be issued upon ex parte motion of the Division, supported by an affidavit verifying the violation. In addition, the Division may institute judicial proceedings against Respondent in any court of competent jurisdiction and take any other action authorized by the Act or under any other applicable law to collect monies owed by Respondent or to otherwise enforce the terms of this Order. Respondent further agrees to be liable for all reasonable attorneys' fees and costs associated with any collection efforts pursued by the Division, plus the judgment rate of interest.

71. Respondent acknowledges that the Order does not affect any civil or arbitration causes of action that third-parties may have against him arising in whole or in part from his actions, and that the Order does not affect any criminal causes of action that may arise as a result of the conduct referenced herein. Respondent also acknowledges that any civil, criminal, arbitration or other causes of actions brought by third-parties against him have no effect on, and do not bar, this administrative action by the Division against him.

72. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way. Upon entry of the Order, any further scheduled hearings are canceled. The Order may be docketed in a court of competent jurisdiction.

Dated this 23 day of March, 2016

Kenneth O. Barton
Director of Compliance
Utah Division of Securities

Dated this 17th day of March, 2016

Steven W. Thorne

Approved:

Thomas M. Melton
Assistant Attorney General
Counsel for Division

Approved:

Douglas Griffith
Counsel for Respondent

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. The Division's Findings and Conclusions, which are neither admitted nor denied by the Respondent, are hereby entered.
2. Respondent shall cease and desist from violating the Act and comply with the requirements of the Act in all future business in this state.
3. Pursuant to Utah Code Ann. Section 61-1-6, and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1, Respondent shall pay a fine of $40,000.00. The fine shall be paid in full within thirty (30) days following entry of this Order.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this 24th day of March, 2016

Brent R. Baker

Brent Baker

Erik Christiansen

Gary Cornia

Gary Cornia

David A. Russson

Lyle White

CERTIFICATE OF MAILING

I certify that on the 24th day of March, 2016, I mailed a true and correct copy of the fully executed Stipulation and Consent Order to:

Douglas Griffith
KESLER & RUST
68 South Main Street, Ste. 200
Salt Lake City, UT 84101
Counsel for Respondent

LeeAnn Cearnal

Executive Secretary

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

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

| | |
|---|---|
| **IN THE MATTER OF:**<br><br>**JOHN ROGERS MARTIN, CRD#1878129**<br><br>**Respondents.** | **ADDENDUM TO CONSENT ORDER**<br><br>**Docket No. SD-09-0028** |

Pursuant to the terms of the Stipulation and Consent Order ("Order") entered in this matter on May 11, 2009, the Utah Division of Securities enters this Addendum to the Order:

1. In the Order, Martin was barred from associating with any broker-dealer or investment adviser licensed in Utah, and from acting as an agent for any issuer soliciting investor funds in Utah.

2. The Order stated that the bar did not preclude Martin from "acting as an agent selling non-variable insurance products (excluding indexed annuities) for an insurance company regardless of whether that company also acts as a broker-dealer or is related to a broker-dealer."

Order ¶ 26, n. 2 (emphasis added).

3. Accordingly, under the bar, Martin was prohibited from acting as an agent selling indexed annuities.

4. At the time the Order was entered, the United States Securities and Exchange

Commission ("SEC") had issued a rule classifying indexed annuities as securities under federal law. That rule was later withdrawn by the SEC following an order by the Court of Appeals for the District of Columbia vacating the rule.[1]

3. As a result, indexed annuities are classified as insurance products rather than securities products. The Division therefore lacks jurisdiction to bar Martin from selling indexed annuities.

4. The Division thus modifies the Order as follows:

   a. the language of footnote 2 "(excluding indexed annuities)" is stricken from the Order.

5. This addendum makes it clear Martin may act as an agent selling indexed annuities and other insurance products not defined as securities provided Martin has the necessary insurance licenses.

6. All other provisions of the Order remain in place.

Dated this 22nd day of March, 2016

Keith M. Woodwell
Director, Utah Division of Securities

[1] For additional information see https://www.sec.gov/rules/final/2010/33-9152.pdf

## ORDER

**IT IS HEREBY ORDERED:**

1. The May 11, 2009 Order is hereby modified as set forth in paragraph 4, above. All other provisions remain in place.

**BY THE UTAH SECURITIES COMMISSION:**

DATED this 24th day of March, 2016

Brent R. Baker

Erik Christiansen

Gary Cornia

David Russon

Lyle White

**CERTIFICATE OF MAILING**

I certify that on the 24th day of March 2016, I mailed a true and correct copy of the Addendum to Consent Order to:

John Rogers Martin
11897 Cottage View Ln
Draper, UT 84020

Executive Secretary

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

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

| | | |
|---|---|---|
| IN THE MATTER OF:<br><br>SAGEMARK CAPITAL, LLC<br>JOHN ROGERS MARTIN, CRD# 1878129<br><br>Respondents. | | STIPULATION AND CONSENT ORDER<br><br>Docket No. SD-09-0027<br>Docket No. SD-09-0028 |

The Utah Division of Securities (the Division), by and through its Director of Enforcement, Michael Hines, and Sagemark Capital, LLC and John Rogers Martin, hereby stipulate and agree as follows:

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

2. Sagemark Capital, Martin, and the Division have agreed to settle this matter by way of this Stipulation and Consent Order (Order).

3. Sagemark Capital and Martin are represented by the law firm of Ray Quinney & Nebeker, and are satisfied with the representation they have received.

4. Sagemark Capital and Martin admit the jurisdiction of the Division over them and over the subject matter of this action.

5. Sagemark Capital and Martin waive any right to a hearing to challenge the Division's evidence and present evidence on their behalf.

## I. THE DIVISION'S FINDINGS OF FACT

From May 2008 to the present the Division has been conducting an investigation of this matter which revealed the following:

6. Sagemark Capital, LLC was registered as a Utah limited liability company on October 18, 2005, and its entity status is currently "active." John Rogers Martin is the manager and registered agent of Sagemark Capital.

7. John Rogers Martin resides in Wasatch County, Utah. At all times relevant to the matters asserted herein, Martin was a registered broker with Lincoln Financial Advisors Corporation (Lincoln). Martin currently holds securities licenses, but has not worked in the securities industry in any capacity since January 2008.

8. In October 2005, while visiting the home of one of his clients (YU), Martin introduced YU to an investment opportunity in Sagemark Capital.

9. Martin recommended that YU invest the money in her Lincoln brokerage account, which amounted to approximately $400,000, in Sagemark Capital.

10. Martin told YU the following about the investment in Sagemark Capital:

    a. This was a rare opportunity for YU to get a return of 1% per month;

    b. YU's principal investment was safe because it was secured by real estate;

    c. YU's money would be invested in real estate;

    d. A good investment amount to start with would be $400,000, because it would provide income sufficient to meet YU's stated goals.

11. Martin recommended that YU liquidate her Lincoln brokerage account into her bank account, and then issue a cashier's check to Sagemark Capital for $400,000.

12. On December 30, 2005, after YU had liquidated her brokerage account and deposited the funds into her checking account, Martin accompanied YU to her bank in Salt Lake County, Utah, at YU's request, to get the funds.

13. While at the bank, YU invested $400,000 in Sagemark Capital, via intra-bank transfer to Sagemark Capital's Wells Fargo bank account.

14. On December 30, 2005, Martin gave YU a Sagemark Capital promissory note, dated December 30, 2005, in the amount of $400,000.

15. The promissory note states that Sagemark Capital will pay YU interest of 1% per month starting February 15, 2005[1], and that the note matures in eight months.

16. Martin signed the promissory note as the managing member of Sagemark Capital.

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[1] The note was issued in December 2005, and therefore the first interest payment date was probably meant to read February 2006 as opposed to 2005.

17. From February 2006 through October 2007, YU received a total of 21 interest payments from Sagemark Capital, for a total of $81,800.64.

18. YU has since received no additional payments of principal or interest from the Respondents.

19. The Respondents currently owe YU a total of $400,000 in principal alone.

## II. The Division's Conclusions

20. The promissory note offered and sold by Sagemark Capital and Martin is a security under the Act.

21. Sagemark Capital and Martin violated § 61-1-1 of the Act by misrepresenting material facts and omitting material facts, 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 offer and sale of a security, including the following:

Misrepresentations

a. The principal investment was safe because it was secured by real estate;

b. YU would receive a return of 1% per month;

c. The investment would be used to purchase real estate, when in fact, Martin invested the funds with other companies.

Omissions

a. Martin filed for bankruptcy in 1989;

b. Some or all of the information typically provided in an offering circular or prospectus regarding Sagemark Capital such as:

i. The business and operating history for Sagemark Capital;

ii. Financial statements for Sagemark Capital;

iii. The market for Sagemark Capital's service(s);

iv. The nature of the competition for the service(s);

v. The current capitalization for Sagemark Capital;

vi. The number of other investors;

vii. The disposition of any investments received if the minimum capitalization were not achieved;

viii. Discussion of pertinent suitability factors for the investment;

xiv. Any conflicts of interest the issuer, the principals, or the agents may have with regard to the investment;

x. Agent commissions or compensation for selling the investment;

xi. Whether the investment is a registered security or exempt from registration;

xii. Whether the person selling the investment is licensed;

xiii. The identities of Sagemark Capital's principals;

xiv. A description of how the investment would make money;

xv. The track record of Sagemark Capital to prior investors;

xvi. The risk factors;

xvii. The liquidity of the investment.

## III. REMEDIAL ACTIONS / SANCTIONS

22. Martin admits that he recommended and placed client YU in an investment not approved by Lincoln.

23. Sagemark Capital and Martin neither admit nor deny the Division's remaining findings and conclusions, and consent to the sanctions below being imposed by the Division.

24. Sagemark Capital and Martin represent that the information they provided to the Division as part of the Division's inquiry into this matter is accurate.

25. If either Respondent materially violates any of the terms of this Order within three years of the entry of this Stipulation and Consent Order, after notice and opportunity to be heard before an administrative officer, a fine of $50,000 shall be imposed against the Respondents, jointly and severally, and become due immediately, pursuant to Utah Code Ann. § 61-1-6(1)(d) and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1.

26. Martin is barred from associating[2] with any broker-dealer or investment adviser licensed in Utah, and from acting as an agent for any issuer soliciting investor funds in Utah.

27. Sagemark Capital and Martin agree to the imposition of a cease and desist order, prohibiting them from any conduct that violates the Act.

## IV. FINAL RESOLUTION

28. Sagemark Capital and Martin acknowledge that this Order, upon approval by the Division Director shall be the final compromise and settlement of this matter. Respondents further acknowledge that if the Division Director does not accept the terms of the Order, it shall be deemed null and void and without any force or effect whatsoever.

29. Sagemark Capital and Martin acknowledge that the Order does not affect any civil or arbitration causes of action that third-parties may have against them arising in whole or in part from their actions, and that the Order does not affect any criminal causes of action that may arise as a result of their conduct referenced herein.

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[2] "Associating" includes, but is not limited to, acting as an agent of, receiving compensation directly or indirectly from, or engaging in any securities-related business on behalf of a broker-dealer, agent, investment adviser, or investment adviser representative licensed in Utah. "Associating" does not include any contact with or receipt of compensation from a broker-dealer, agent, investment adviser, or investment adviser representative licensed in Utah incidental to any business not related to the sale or promotion of securities or the giving of investment advice in the State of Utah. Specifically, "associating" does not include acting as an agent selling non-variable insurance products (excluding indexed annuities) for an insurance company regardless of whether that company also acts as a broker-dealer or is related to a broker-dealer.

30. This Order constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or otherwise affect this Order in any way.

Utah Division of Securities

Date: 4/13/09

By: _____
Michael Hines
Director of Enforcement

Respondent Sagemark Capital, LLC

Date: 4-7-09

By: John Rogers Martin
John Rogers Martin

Its: Manager

Respondent Martin

Date: 4-7-09

John Rogers Martin
John Rogers Martin

Approved:

_____
Jeff Buckner
Assistant Attorney General

Approved:

Maria Heckel
Maria Heckel
Ray Quinney & Nebeker
Counsel for Respondents

## ORDER

IT IS HEREBY ORDERED THAT:

1. The Division has made a sufficient showing of Findings of Fact and Conclusions of Law to form a basis for this settlement.
2. If either Respondent materially violates any of the terms of this Order within three years of the entry of this Consent Order, after notice and opportunity to be heard before an administrative officer, a fine of $50,000 shall be imposed against the Respondents, jointly and severally, and become due immediately, pursuant to Utah Code Ann. § 61-1-6(1)(d) and in consideration of the guidelines set forth in Utah Admin. Code Rule R164-31-1.
3. Martin is barred from associating with any broker-dealer or investment adviser licensed in Utah, and from acting as an agent of any issuer soliciting investor funds in Utah.
4. Sagemark Capital and Martin cease and desist from violating the Utah Uniform Securities Act.

DATED this 20th day of April, 2009.

KEITH WOODWELL
Director, Utah Division of Securities

**BY THE UTAH SECURITIES ADVISORY BOARD:**

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

DATED this 11TH day of MAY, 2009.

Tim Bangerter

Jane Cameron

Laura Polacheck

Laura Polacheck

Mark Pugsley

Craig Skidmore

**Certificate of Mailing**

I certify that on the 13TH day of MAY, 2009, I mailed, by certified mail, a true and correct copy of the Stipulation and Consent Order to:

Maria Heckel (Counsel for Respondents)
Ray Quinney & Nebeker
36 S. State St. #1400
Salt Lake City, UT 84111

Certified Mailing # 7004 1160 0003 0195 9024

Executive Secretary