

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

DEC 12 2008

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES )  
*ex rel.* Irving L. Faught, Administrator, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FARMERS & MERCHANTS BANK, et al. )  
 )  
Defendants, )  
 )  
and )  
 )  
ROBERT LYNN POURCHOT, Trustee of the )  
Robert Lynn Pourchot Trust, et al., )  
 )  
Intervenors. )

Case No. CJ-2006-3311

**DEFENDANTS' REPLY TO INTERVENORS'  
RESPONSE TO DEFENDANTS' MOTION TO COMPEL**

COME NOW Defendants, Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, "Defendants"), and respectfully submits their Reply to Intervenors' Response to Defendants' Motion to Compel. In support hereof, Defendants allege and state as follows:

**I. Intervenors Refused to Provide Dates to Conduct a Meet and Confer**

In order to further delay providing full and complete answers to Defendants' discovery requests, Intervenors initially complain in their response brief that Defendants failed to conduct a "meet and confer" conference prior to filing their motion to compel. Intervenors even accuse Defendants of "falsely" representing to the Court that they attempted in good faith to meet with Intervenors before involving the Court to secure the information. Because of this perceived

deficiency, Intervenors ask the Court to deny the motion and order the parties to conduct a conference to resolve their discovery dispute.

As Intervenors are fully aware, counsel for Defendants attempted<sup>1</sup> months ago to make arrangements with counsel for Intervenors for a “meet and confer” conference. *See Letter from Grant M. Lucky to Messrs. Boccock and Smith*, attached hereto as Exhibit “1.” The undersigned counsel formally requested available dates from opposing counsel to conduct a meet and confer conference “sometime during the next two (2) weeks . . . so that we can move forward in this case.” The letter also reminded Intervenors that they still had not provided verified interrogatory answers, despite being requested to do so as far back as July 2008, and requested that they be provided at the time of the meet and confer conference.

Of course, Intervenors completely ignored the letter<sup>2</sup> and, despite being requested to do so, refused to provide any dates to meet and discuss the issues. Intervenors’ response brief makes no attempt to mention – let alone defend – their actions, presumably because to do so would acknowledge Defendants’ efforts at attempting to conduct a meet and confer conference as well as reveal Intervenors’ lack of cooperation. Moreover, Intervenors have still not provided verified answers to Defendants’ interrogatories. Thus, for Intervenors to assert that Defendants failed to make any attempt to meet and confer prior to filing the motion to compel is simply inaccurate and disingenuous.

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<sup>1</sup> Because the Oklahoma Discovery Code contemplates such conduct from parties, 12 O.S. § 3237(A)(2) does not require that a party conduct a meet and confer conference prior to filing a motion to compel: an *attempt* to conduct such a conference satisfies its requirements.

<sup>2</sup> This was not the first time Intervenors had ignored Defendants’ request for a meet and confer conference – just the first time since the Court ruled on several discovery related issues in August 2008.

## II. Intervenors' Interrogatory Answers Do Not Comply with the Discovery Code

In a motion to compel, the burden is on the responding party (*i.e.*, the Intervenors) to convince the Court that an interrogatory is objectionable. *See* 12 O.S. § 3233(A); *Donahy v. Palm Beach Tours & Transp., Inc.*, 242 F.R.D. 685, 687 (S.D. Fla. 2007) (noting that, under the federal rules, “the onus is on the party resisting discovery to demonstrate specifically how the objected-to request is unreasonable or otherwise unduly burdensome”). Intervenors have failed at this task.

### A. **Business Records**

One of the primary disputes is whether Intervenors may rely upon the business records exception found in 12 O.S. § 3233(C) in order to avoid providing sworn answers to the interrogatories identified by Defendants. In that regard, Intervenors have not produced a single case to challenge the authorities cited by Defendants holding, as one would expect, that a hearing transcript does not constitute a business record, let alone a business record of the Intervenors.<sup>3</sup> *See Continental Illinois National Bank & Trust Co. v. Caton*, 136 F.R.D. 682, 687 (D. Kan. 1991) (finding that Rule 33(c) was not properly employed where the documents designated were deposition transcripts generated through litigation since they are not the kind of records the rule allows a party to designate); *Starlight International, Inc. v. Herlihy*, 190 F.R.D. 587 (D. Kan. 1999) (noting that only business records may be used in lieu of interrogatory answers; thus, one cannot produce deposition transcripts instead of answering an interrogatory). A transcript does not qualify as a business record under § 3233(C) any more than it would qualify as an exception

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<sup>3</sup> Several of the Intervenors did not even testify in the arbitration case against AXA from which the transcript was generated. Therefore, to the extent they rely upon the transcript as providing a full and complete answer to Defendants' discovery requests directed to them, they are mistaken.

to the hearsay rule for business records under 12 O.S. § 2803(6).<sup>4</sup> Intervenors simply ignore this authority, as they must, since they cannot refute it.

Moreover, the other document relied upon by Intervenors – the report prepared by the accounting firm of Baird, Kurtz, and Dobson (“BKD”) – does not qualify as a business record of Intervenors<sup>5</sup> any more than it constitutes a business record of Defendants. “Rule 33(d) targets situations in which the interrogatory would ‘require a party to engage in a burdensome or expensive search into *his own business records* in order to give an answer’” *M&L Business Machine Company, Inc. v. Kloepfer*, 184 B.R. 366, 369 (D. Colo. 1995) (citing the Advisory Committee Notes to Fed.R.Civ.P. 34). Thus, in *M&L*, the court found that it was an improper use of Rule 33(d) for a party to cite to records under his control that were not his own business records. *See also Davis v. Fendler*, 650 F.2d 1154, 1158 n.3 (9<sup>th</sup> Cir. 1981) (“It is apparent that the records [generated by state offices] do not qualify as appellant’s ‘business records.’ A party cannot, under the guise of Rule 33(c), resort to such tactics”). As its name suggests, the BKD report was not generated by Intervenors and, *ipso facto*, cannot be a business record of Intervenors.

**B. This case does not involve allegations of Defendants’ negligence**

Intervenors also object to answering several interrogatories on grounds they are overly broad and irrelevant since this case “*solely involves allegations of negligence against Defendants for their participation in Schubert’s Purported Investment Program.*” *See* Brief, at pp. 11-13 (emphasis added). In reality, nothing could be further from the truth since Intervenors

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<sup>4</sup> In order to qualify as a business record under the Evidence Code, a record must have been kept (1) in the course of a regularly conducted activity, (2) in connection with the conduct of a business, and (3) by a person with a business duty to record the matter. An arbitration hearing transcript does not fall under any of those foundational requirements.

<sup>5</sup> The Intervenors in this case are comprised of persons and/or trusts that do not carry on any business activity.

have not pled a negligence cause of action against Defendants. In fact, Intervenors have previously represented to the parties and this Court that their claim “concerns the liability of [Defendants] under the Oklahoma Securities Act . . .” and, because of that, Intervenors’ “proportionate fault is not applicable in a suit alleging violation of securities laws.” See *Intervenors’ Brief on Admissibility of Investors’ Negligence*, pp. 2-3, attached hereto as Exhibit “2.” Intervenors’ confusion as to the basis of their lawsuit against Defendants certainly discredits and undermines the legitimacy of their objections to interrogatories on grounds of relevance.<sup>6</sup>

In fact, the information sought by Defendants is clearly relevant to the subject matter of this lawsuit. Defendants have requested – but have not received – sworn answers from Intervenors that go to the very heart of Intervenors’ claim against Defendants. Defendants have requested and are entitled to specific answers to a number of questions, including (but not limited to) the material or principal facts they rely upon demonstrating that (1) Intervenors bought a security from Marsha Schubert based upon a false statement; (2) a description of the false statement, including the time, place, and content of the statement; (3) facts demonstrating that Defendants materially participated and/or materially aided in the illegal sale by Marsha Schubert; and (4) evidence that Intervenors sold the security, thereby entitling them to damages under the Oklahoma Securities Act.

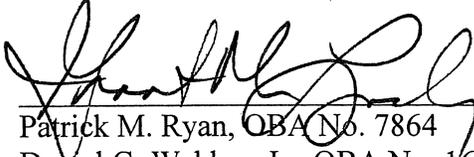
### CONCLUSION

Defendants respectfully request that the Court grant their Motion to Compel and such other relief as this Court may deem just and appropriate.

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<sup>6</sup> If Intervenors are indeed suing Defendants for negligence, not only must their Petition in Intervention be amended, but broad areas of discovery that this Court has previously foreclosed from Defendants should now be permitted.

Respectfully Submitted,



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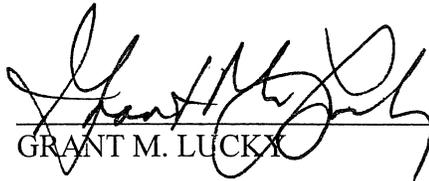
**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>TH</sup> day of December 2008, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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October 27, 2008

Joseph Bocock, Esq.  
Spencer F. Smith, Esq.  
MCAFEE & TAFT  
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Re: *Robert Lynn Pourchot, Trustee of the Robert Lynn Pourchot Trust et al. v. Farmers & Merchants Bank, John V. Anderson, and John Tom Anderson*  
In the District Court of Oklahoma County, State of Oklahoma  
Case No. CJ-2006-10049  
1285.002

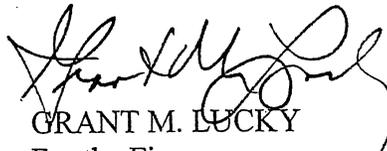
Dear Counsel:

I would like to conduct a "meet and confer" conference with you sometime during the next two (2) weeks. Please provide me with some dates when you are available to discuss your discovery responses so that we can move forward in this case.

Also, as I told you on July 21, 2008, you did not provide me with verified interrogatory answers. Despite my request, you have yet to provide me with verified answers. Please do so by the time of our meet and confer conference.

I look forward to hearing from you soon.

Sincerely,

  
GRANT M. LUCKY  
For the Firm

GML:arm



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STATE OF OKLAHOMA

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PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES, )  
*ex rel.*, Irving L. Faught, Administrator, )

Plaintiffs, )

v. )

FARMERS & MERCHANTS BANK, an )  
Oklahoma banking entity; JOHN V. ANDERSON, )  
Individually, and as Officer and Director of )  
Farmers & Merchants Bank; and JOHN TOM )  
ANDERSON, Individually, and as Officer )  
and Director of Farmers & Merchants Bank, )

Defendants, )

and )

ROBERT LYNN POURCHOT, Trustee of the )  
Robert Lynn Pourchot Trust; DONALD W. ORR, )  
Trustee of the Pourchot Trust; THE WILL )  
FOUNDATION; POURCHOT INVESTMENTS, )  
LP; PHILLIP M. POURCHOT, Trustee of the )  
Phillip M. Pourchot Revocable Trust; RICHARD )  
REYNOLDS; RICHARD REYNOLDS, Trustee of )  
the Richard Reynolds Living Trust; ANNENDA )  
REYNOLDS; STEVEN B. SANDERS; VICKI L. )  
SANDERS; and CRANDALL & SANDERS, INC., )

Intervenors. )

Case No.: CJ-2006-3311

**INTERVENOR'S BRIEF ON ADMISSIBILITY OF INVESTORS' NEGLIGENCE**

COME NOW the Intervenors, Robert Lynn Pourchot, Trustee of the Robert Lynn Pourchot Trust; Donald W. Orr, Trustee of the Pork Chop Trust; the Will Foundation; Pourchot Investments, LP; Phillip M. Pourchot, Trustee of the Phillip M. Pourchot Revocable Trust; Richard Reynolds; Richard Reynolds, Trustee of the Richard Reynolds Living Trust; Annenda Reynolds; Steven B. Sanders; Vicki L. Sanders; and Crandall & Sanders, Inc. (collectively,



“Intervenors”), and submits its brief concerning the admissibility of investors’ negligence in the present case.

### **STATEMENT OF THE CASE AND BRIEF STATEMENT OF FACTS**

This is an action brought by the Oklahoma Department of Securities (“ODS”) against Farmers & Merchants Bank, (“F&M Bank”), Farmers and Merchants Bancshares, Inc. (“Bancshares”), John V. Anderson, individually, as an officer and director of F&M Bank, and as a shareholder of Bancshares, and John Tom Anderson, individually, as an officer and director of F&M Bank, and as a shareholder of Bancshares. In this suit, the ODS seeks an order requiring F&M Bank, John V. Anderson, and John Tom Anderson to make restitution for the benefit of all investors who lost money in the fraudulent investment scheme orchestrated by Marsha Schubert.

Intervenors were investors who lost money in the same fraudulent scheme and are seeking to recover the damages caused by F&M Bank, John V. Anderson, and John Tom Anderson’s aiding and abetting Marsha Schubert’s scheme. Intervenors’ claim in this action concerns the liability of F&M Bank, John V. Anderson and John Tom Anderson under the Oklahoma Securities Act for aiding and abetting the securities fraud schemes of Marsha Schubert.

### **LEGAL AUTHORITY**

Under 71 Okla. Stat. § 1-501:

*It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly: (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, no misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.*

Securities fraud cases are commonly brought against banking institutions. *See Grubb v. FDIC*, 868 F.2d 1151 (10th Cir. 1989) (involving misrepresentations made concerning the loan portfolio in the sale of bank stock). Under most states' securities laws, a bank can be held liable for aiding and abetting a fraudulent scheme. *FDIC v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423 (8th Cir. 1989) (court entered six million verdict against bank for aiding and abetting a fraudulent scheme of its customer); *Adam v. Mount Pleasant Bank & Trust*, 387 N.W.2d 771 (Iowa 1986) (bank's continual coverage of overdrafts in violation of legal lending limit intentionally gave customer false appearance of solvency such as to uphold verdict against bank in favor of those who dealt with customer); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank of Little Rock*, 774 F.2d 909 (8th Cir. 1985) (bank liable for participation in check kiting scheme); *Whitney v. City Bank, N.A.*, 782 F.2d 1106 (2nd Cir. 1986) (holding that bank is liable for actual and punitive damages for aiding a breach of fiduciary duty).

The majority of courts across the country have held that a plaintiff's proportionate fault is not applicable in a suit alleging violations of securities law. *See, e.g., In re Atl. Fin. Mgmt., Inc., Sec. Litig.*, 603 F.Supp. 135 (D.Mass.1985); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375 (Iowa Ct.App.1989); *Duperier v. Tex. State Bank*, 28 S.W.3d 740 (Tex.App.2000); *Toothman v. Freeborn & Peters*, 80 P.3d 804, 815 -816 (Colo.App. 2002). *But see Banks v. Yokemick*, 177 F.Supp.2d 239 (S.D.N.Y.2001); *Landry v. Thibaut*, 523 So.2d 1370 (La.Ct.App.1988). Most courts that have not addressed this issue within the securities law context still recognize the longstanding common law rule that a plaintiff's fault may not reduce an intentional tortfeasor's liability. *See Prosser & Keeton, The Law of Torts* 462 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* §§ 481, 482 (1965). In *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1040 (7th Cir.), cert. denied, 434 U.S. 875 (1977), the Seventh Circuit Court of Appeals held that in a case alleging a violation of Securities Rule 10b-5 by the

defendants, the defendants' defense of the plaintiffs' "failure to exercise due care or diligence ... is not available in an intentional fraud case."

Although Oklahoma courts have not fully analyzed the plaintiff's burden of proving securities fraud under 71 Okla. Stat. § 1-501, courts around the country, with only one exception, have determined that an investor has no independent duty of investigation with regards to the handling of his investment. See *Lloyds of America, Ltd. v. Theoharous*, unpublished opinion, 2005 WL 3115329, (W.D. Okla. 2005); *Kelsey v. Nagy*, 410 N.E.2d 1333, 1336 (Ind. Ct. App. 1980); *Duperier v. Texas State Bank*, 28 S.W.3d 740 (Tex. App.--Corpus Christi 2000) (holding that the Texas securities statute at issue provides no defenses besides assumption of the risk and that a comparative fault defense would abrogate the protections granted by the Texas Securities Act); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375 (Iowa Ct. App. 1989 (Iowa Securities Act does not allow reduction of damages based upon comparative fault) *but see* Louisiana Case.

In *McCracken v. Edward D. Jones & Co.*, the Iowa Supreme Court analyzed Iowa Code § 502.401, which is identically worded to 71 Okla. Stat. § 1-501, the statute at issue in the current suit. This section states, in part, that

it is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly...[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

After determining that the brokerage service defendant violated the provisions in this code, the *McCracken* court noted that the securities laws in Iowa do not allow for the reduction of damages due to alleged fault by the plaintiff, even though the jury determined that the plaintiff should be assigned 35% of the overall liability for its damages.

The United States Supreme Court has repeatedly stressed that a “fundamental purpose” for the creation of Securities Acts, “was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. *Basic v. Levinson*, 485 U.S. 224, 235 (1988); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972). Although the Oklahoma courts have not yet specifically stated this principle, it is very likely that they will follow the rationale stated by the *McCracken* court and many other courts throughout the country which have dealt with the inapplicability of comparative/contributory negligence in the enforcement of securities statutes. See *Washington National Corp. v. Thomas*, 117 Ariz. 95, 102, 570 P.2d 1268, 1275 (Ariz. App. 1977), overruled on other grounds, *State v. Superior Court of Maricopa Co.*, 123 Ariz. 324, 599 P.2d 777 (Ariz. App. 1977), overruled on other grounds by *State v. Gunnison*, 618 P.2d 604 (Ariz. 1980) (holding that contributory negligence is not available as a defense to one who violates the securities statutes); *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (Ariz. App. 1986) (“The statutes do not require investors to act with due diligence...To the contrary, defendants have an affirmative duty not to mislead potential investors.”).

Under well-settled Oklahoma law, the comparative negligence doctrine is specifically limited to negligence causes of action—comparative negligence is completely irrelevant to the analysis of intentional and strict liability torts.<sup>1</sup> 23 Okla. Stat. § 13; *Kirkland v. General Motors Co.*, 1974 OK 52, ¶ 47, 521 P.2d 1353. Thus, contributory negligence is certainly not a defense

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<sup>1</sup> “**In all actions** hereafter brought, whether arising before or after the effective date of this act, **for negligence** resulting in personal injuries or wrongful death, or injury to property, contributory negligence shall not bar a recovery, unless any negligence of the person so injured, damaged or killed, is of greater degree than any negligence of the person, firm or corporation causing such damage, or unless any negligence of the person so injured, damaged or killed, is of greater degree than the combined negligence of any persons, firms or corporations causing such damage.” (emphasis added) 23 Okla. Stat. § 13.

to common law fraud or fraudulent misrepresentation claims. The Oklahoma Supreme Court held in *Graham v. Keuchel*, 1993 OK 6, 52, 847 P.2d 342, 363, that a "jury must be instructed that...negligence...may not be considered as a defense against any form of conduct found to be willful and wanton or intentional." See Oklahoma Civil Jury Instruction 9.17; *Eastern Trading Co., v. Refco.*, 229 F.3d 617, 625 (7th Cir. 2000). The *Graham* court noted that the "apportionment of fault into percentage figures becomes impermissible once a defendant's behavior has been established as willful and wanton misconduct...'negligence' and 'willful and wanton misconduct' differ in kind." *Id.* at ¶46, at 361.

Additionally, under Oklahoma law, a defendant may not raise the affirmative defense of comparative negligence in a suit alleging statutory violations. When determining whether dram shop liability rested on statutory or common law grounds, the Oklahoma Civil Court of Appeals held that because dram shop liability "is of judicial, not statutory origin...[t]he cause of action...sounds in negligence and, therefore, comparative negligence principles govern." *Bennett v. Covergirls*, 1999 OK CIV. APP. 3, 973 P.2d 896 (Okla. Civ. App. 1999); *Brigance v. Velvet Dove Restaurant*, 1986 OK 41 at ¶24, 725 P.2d at 305 (Okla. 1986); 23 O.S.1991 § 13. Thus, the *Bennett* court implicitly held that claims alleging statutory violations are not negligence claims, and thus, any comparative negligence analysis would be improper and irrelevant. *Id.*; see also *Douglas County Bank v. United Financial*, 207 F.3d 473, 479 (8<sup>th</sup> Cir. 2000); *Little v. Gillette*, 354 N.W. 2d 147 (Neb. 1984)(quoting *Foley v. Holtry*, 61 N.W. 120, 123-124 (1894)).

Although Oklahoma law, unlike some other states' statutes<sup>2</sup>, does not specifically assign strict liability to those entities which violate the Oklahoma Uniform Securities Act, the relevant sections of the Act prohibit acts of fraud or deceit, both of which are clearly involve intentional

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<sup>2</sup> For example, Arizona courts impose strict liability for those who make misrepresentations and omissions in violation of its securities statutes. *Garvin v. Greenbank*, 856 F. 2d 1392, 1398 (9<sup>th</sup> Cir. 1998).

conduct. A defendant who is alleged to have committed acts of fraud or deceit under the Act cannot use any alleged negligent acts committed by the plaintiffs to the suit to decrease or eliminate the defendant's overall liability. Since investors have no duty under the Oklahoma Uniform Securities Act to investigate for misrepresentations or omissions, a defendant may not raise the defense of comparative negligence in a suit claiming violations of the Act.

In *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 552 (Ariz. App. 1986), the Arizona Court of Appeals affirmed that an appellant company had violated sections of A.R.S. § 44-1991 & § 44-1992 of Arizona's securities statutes when they implemented a sophisticated scheme to defraud investors by inflating their company's assets and by creating expectations of growth that were completely unfounded. The Defendants argued that the plaintiffs were negligent in that they failed to investigate the false representations, and that had they done so, they would have prevented the loss. *Id.* at 553. In its opinion, the court noted that the Defendants had violated the applicable statute by breaching their affirmative duty not to mislead potential investors. *Id.* The court then noted that the very nature of this affirmative duty "not only removes the burden of investigation from an investor, but places a heavy burden upon the offeror not to mislead potential investors in any way." *Id.* Thus, the issue of whether the investor was contributorily negligent was moot because the court reiterated Arizona does not recognize contributory negligence as a defense to a violation of its securities statutes. *Id.*

In *Besett v. Basnett* an often-cited Florida case regarding the related issue of fraudulent misrepresentation, the court held that the plaintiffs, buyers of land, were entitled to rely upon the truth of the seller's representation that the lot was a particular size, even though its falsity could have been discovered upon a simple investigation. *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980). In its opinion, the Florida Supreme Court noted that although "one should not be

inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter." *Id.* The court cited with approval § 540 of RESTATEMENT (SECOND) OF TORTS (1976) which provides that "the recipient of fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation."

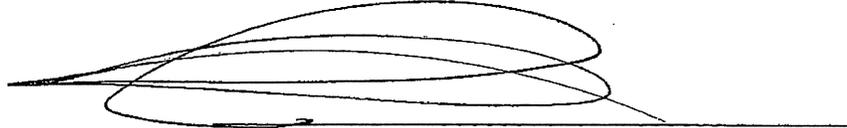
Other courts also recognize that plaintiffs should not be denied recovery for putting their trust in their fiduciaries' representations. In *Little v. Gillette*, the Nebraska Supreme Court held that the plaintiff was entitled to rely on the fraudulently optimistic statements that two realtors made to him regarding the profit potential of a business he was purchasing, holding as irrelevant the defendants' argument that the plaintiff was partially to blame for his failure to independently investigate the veracity of their representations. *Little v. Gillette*, 218 Neb. 271, 276-277, 354 N.W. 2d 147, 154 (1984); *see also Bristol v. Braidwood*, 28 Mich. 191 (Mich. 1873).

For the above-stated reasons, a purchaser of security interests has no duty to investigate a possible fraud being perpetrated upon them and need not verify a security statement's accuracy for the purposes of a comparative negligence analysis. *MidAmerica Federal Sav. and Loan Ass'n v. Shearson/American Exp., Inc.* 886 F.2d 1249, 1256 -1257 (10th Cir. 1989); *see Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522 (7th Cir. 1985) ("An ordinary investor is under no duty to investigate...many people invest large sums in reliance on representations made to them"); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 783 (11th Cir. 1988); *see also Junker v. Crory*, 650 F.2d 1349, 1359 (5th Cir. 1981); *Sanders v. John Nuveen & Co., Inc.*, 619 F.2d 1229 (7th Cir. 1975); *In re Olympia Brewing Co. Sec. Litig.*, 612 F.Supp. 1367 (N.D.Ill. 1985). Instead, the defendant in a suit involving alleged violations of securities laws must rely solely upon its own actions and omissions in crafting its defenses. Thus, a comparative negligence analysis would be completely irrelevant to the resolution of the claims in such a suit.

**CONCLUSION**

The Intervenor respectfully request the Court to consider their brief on the admissibility of the investors' negligence.

Respectfully submitted this 1st day of August 2008.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this **1st day of August 2008**, a true and correct copy of the foregoing was emailed and sent via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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