

A08-1681

State of Minnesota
In Court of Appeals

Geoffrey and Nancy Thompson,

Appellants,

vs.

James Kinney, *et al.*,

Respondents.

APPELLANTS' BRIEF

Christopher P. Parrington (#034090X)
Benjamin R. Skjold (#292217)
SKJOLD-BARTHEL, P.A.
Campbell Mithun Tower
222 South Ninth Street, Suite 3220
Minneapolis, MN 55402
(612) 746-2560

Attorneys for Appellants

Robert Bauer (#227365)
SEVERSON, SHELDON, DOUGHERTY
& MOLENDIA, P.A.
7300 West 147th Street, Suite 600
Apple Valley, MN 55124
(952) 432-3136

Attorneys for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

- I. *Whether the District Court Erred in Denying Appellant's Rule 12.02 Motion to Dismiss?***
- a. The District Court erred in denying Appellants' motion for to dismiss pursuant to Minn. R. Civ. P. 12.02, as Respondents' Amended Complaints fail to state claims against Appellants upon which relief may be granted.
- i. Minn. R. Civ. P. 12.02(e)
 - ii. Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007); and
 - iii. Hauschildt v. Beckingham, 686 N.W.2d 829 (Minn. 2004).
- II. *Whether the District Court Erred in Denying Appellant's Rule 56 Motion for Summary Judgment?***
- a. The District Court erred in denying Appellants' Rule 56 motion for summary judgment and otherwise erred in its application of the doctrine of piercing the corporate veil.
- i. Zank v. Larson, 552 N.W.2d 719 (Minn. 1996);
 - ii. Tom Thumb Food Markets, Inc. v. TLH Properties, LLC, 1999 WL 31168 (Minn. Ct. App. Jan. 26 1999); and
 - iii. Minn. Stat. §§ 302A.11, subd. 29, 322B.03 subd. 30.
- III. *Whether the District Court Abused Its Discretion in Entering a Default Judgment against Appellants?***
- a. The District Court abused its discretion in judgment entering a by default against Appellants.
- i. Minn. R. Civ. P. 55.01; and
 - ii. Hinz v. Northland Milk & Ice Cream Co., 53 N.W.2d 454 (Minn. 1952).

IV. *Whether the District Court Abused Its Discretion in Granting the Receivers' Motion to Expand the Receivership?*

- a. The District Court abused its discretion in extending the Receiver's authority, over non-parties, and to Appellants.
 - i. Minn. Stat. § 576.01;
 - ii. Minn. Hotel Co., Inc. v. Rosa Dev. Co., 495 N.W.2d 888 (Minn. Ct. App. 1993); and
 - iii. O'Leary v. Carefree Living of Am. (Minnetonka), Inc., 1997 WL 435875 (Minn. Ct. App. Aug. 5 1997).

STATEMENT OF THE CASE

This is an appeal of four orders and a judgment entered against Appellants Geoff and Nancy Thompson (the “Thompsons” or Appellants”), in an amount of approximately \$22.2 Million, by the Hennepin County District Court. (See “Order Denying Def. Mot. to Dismiss” at A-00065-98; see also “Order Denying Def. Mot. Summ. Judgment,” at A-000149-169; “Order Granting Pl. Mot. Entry of Judgment,” at A-000170-186; and, “Order Granting Receiver’s Mot. to Expand Receiv’p,” at A-00099-101.) On August 10, 2006, Respondents¹ initiated four separate actions involving a total of 178 individual Respondents against Appellants. On September 18, 2006, the Thompsons responded to Respondents’ Complaints with a motion to dismiss pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure. On November 16, 2006, these four separate actions were consolidated.

Common among each of the Complaints is the allegation of joint and several liability against Appellants, which may be classified into three categories:

- a. A relationship between Respondents and the Thompsons, including:
 1. Breach of Fiduciary Duty;²
 2. Breach of Minn. Stat. § 82.50;³

- b. A representation either made or omitted by the Thompsons to Respondents, including:
 1. Violation of the Uniform Deceptive Trade Practices Act;⁴

¹ This appeal arises out of a consolidated action involving 178 individual Respondents (collectively referred to as the “consolidated Respondents”) divided into four principal Plaintiff categories: Kinney I (A-0001), Kinney II (A-0024), Ahmann (A-0037) and Sober (A-0011), based upon the 4 cases.

² All Respondents.

³ Kinney I and Kinney II Respondents only.

2. Intentional and/or Negligent Misrepresentation;⁵
3. Violation of Minn. Stat. § 325F.68-.70;⁶
4. Violation of Minn. Stat. § 83.23-.24;⁷
5. Violation of Fla. Stat. Ch. 718;⁸
6. Violation of Ill. Stat.Ch. 765;⁹ and

c. Money or property given to the Thompsons by Respondents, including:

1. Civil Theft;¹⁰
2. Accounting;¹¹
3. Violation of Minn. Stat. Ch. 80A.¹²

The only other claims against Appellants include civil conspiracy¹³ and piercing the corporate veil.¹⁴ Based upon these claims, Respondents ask that the Court enter “[a]n award to *each individual Plaintiff* in an amount to be determined at [t]rial.” (A-0009; see also A-00021; A-00035; A-00049.) (emphasis added).

On October 17, 2006, the Thompsons made a motion to dismiss Respondents’ Complaints for failure to state a claim upon which relief could be granted. (CITE.) The District Court denied Appellants’ motion to dismiss against Respondents even though other judges in the District Court dismissed the other plaintiffs’ complaints, prior to consolidation, on the same grounds.

On October 12, 2007, the District Court appointed a Receiver (Cordes & Co.) over named-entities J&J Investments, Progressive Home Services, and Amerifunding. On March 3, 2007, the Reciever filed a motion to expand the receivership to recover funds

⁴ All Respondents.

⁵ Kinney II, Sober and Ahmann Respondents only.

⁶ All Respondents.

⁷ Kinney I, Kinney II and Ahmann Respondents only.

⁸ Kinney I and Ahmann Respondents only.

⁹ Kinney II Respondents only.

¹⁰ Kinney I, Kinney II and Ahmann Respondents only.

¹¹ Sober and Ahmann Respondents only.

¹² Sober Respondents only.

¹³ Kinney II, Sober and Ahmann Respondents only.

from Appellants, who had not been sued by the Receiver or the named-entities over whom the Receiver was appointed. On April 20, 2007, the District Court granted the Receiver's motion, ordering Appellants "and their counsel" to divest \$750,000.00 to the Receiver without first requiring any suit against Appellants or the entities in possession of the subject-money.

On August 30, 2007, Appellants and Respondents filed cross summary judgment motions. On January 3, 2008, the District Court denied all of the summary judgment motions, including Respondents' motion to pierce IPM and J&J's corporate veils to impose personal liability against Appellants, despite the undisputed fact that Appellants were never shareholders or members of IPM or J&J.

On January 3, 2008, the District Court granted judgment by default against the named entities. On April 8, 2008, Respondents apparently filed a motion for entry of judgment against Appellants. On July 23, 2008, the District Court granted judgment by default against Appellants, even though Respondents' summary judgment motion was denied and Appellants answered the Complaints.

Thereafter judgment was entered against Appellants on July 30, 2008, in an amount of approximately \$22.5 Million. This appeal followed.

STATEMENT OF FACTS

I. Facts Pertinent to the Thompson's Rule 12.02 Motion to Dismiss

Respondents' Complaints alleged that these cases involve an "AMP Plan Membership Agreement" ("AMP Plan") Respondents entered into with Defendant

¹⁴ Sober Respondents only.

Progressive Home Services, Inc., a Minnesota corporation, d/b/a IPM Realty (“IPM”). (A-0003; A-0014; A-0027; A-0041.) “Pursuant to the [AMP Plan], Respondents *paid to IPM fees.*” (A-0003; A-0014; A-0027; A-0041.) (emphasis added). Respondents do not allege each one of them entered into any contracts with or provided money to Appellants. The only contracts in this case are between Respondents and IPM, which is the same for any exchange of money. (A-0003; A-0014; A-0027; A-0041.)

According to Respondents’ Complaints, the Kinney I, Kinney II and Ahmann Respondents entered into the AMP Plan with, and paid fees to, IPM based upon information he or she allegedly received from the internet, radio and at seminars. (A-0003; A-0027; A-0041.) The Sober Respondents failed to disclose the source of the information. Each Respondent claims to have entered into the AMP Plan with and paid fees to IPM based upon (1) information regarding the future ability to acquire condominiums from Chicago H&S Hotel Property, LLC (“H&S”), Mayfair House Hotel, LLC (“Mayfair”), Bella Terra Development, LLC (“Bella Terra”), and Brandon Development of Florida, LLC (“Brandon”); (2) information regarding the future provision of disclosures required by Illinois, Florida and Minnesota law; (3) information regarding possession of licenses required by Minnesota law; and (4) the future ability to receive a return of money at Respondents’ request. (A-0003; A-0014; A-0027; A-0041.)

Although each Respondent alleges to have received this information from the radio, internet and seminars, their Amended Complaint fails to identify what information was specifically provided by the Thompsons, including how, when and where. Not only are there no contracts between Respondents and the Thompsons, but Respondents

likewise make no allegations that the Thompsons made any representations to them prior to entering into the AMP Plan with and paying fees to IPM.

II. Facts Pertinent to the Thompsons Rule 56 Motion for Summary Judgment

a. These Respondents have no contracts with the Thompsons and the Thompsons were not Respondents' agent.

Appellants served Interrogatories to each Plaintiff in an attempt to discover the facts underlying Respondents' claims. Respondents' answers confirmed that summary judgment was appropriate. Appellants Interrogatories requested Respondents to identify all agreements, contracts and notes with the Thompsons. In response, Respondents did not identify or produce any agreements, contracts or notes with Appellants, but only agreements, contracts and notes with the named entities. (See Kinney I Ans. Geoffrey Thompson's Ints. at 8-9; Kinney I Ans. Nancy Thompson' Ints. at 8-9; Kinney II Ans. Geoffrey Thompson's Ints. at 23; Kinney II Ans. Nancy Thompson' Ints. at 20; Sober Ans. Geoffrey Thompson's Ints. at 44-50; Sober Ans. Nancy Thompson' Ints. at 42-48; Ahmann Ans. Geoffrey Thompson's Ints. at 18-24; Ahmann Ans. Nancy Thompson' Ints. at 16-23.)

b. Respondents did not pay any money to the Thompson.

The Thompsons' Interrogatories also asked Respondents to identify all damages suffered as a result of the Thompsons' activities, including all money paid to Appellants. In response, Respondents did not identify a single dollar paid to Appellants, which they seek to recover in this case. Although Respondents claim to have made investments into the AMP Plan, CLC, PLP, Hotel 71 and Mayfair, not a single Respondent identifies an instance in which money was paid to Appellants. (See Kinney I Ans. Geoffrey Thompson's Ints. at 7-8; Kinney I Ans. Nancy

Thompson' Ints. at 7-8; Kinney II Ans. Geoffrey Thompson's Ints. at 7-9; Kinney II Ans. Nancy Thompson' Ints. at 7-9; Sober Ans. Geoffrey Thompson's Ints. at 8-15; Sober Ans. Nancy Thompson' Ints. at 8-15; Ahmann Ans. Geoffrey Thompson's Ints. at 9-16; Ahmann Ans. Nancy Thompson' Ints. at 9-15.) Respondents might have paid money to National Real Estate Assignments, LLC ("NREA"), IPM, J&J, Mayfair House Hotel, LLC ("Mayfair"), Brandon Development of Florida, LLC ("Brandon"), Chicago H&S Hotel Property, LLC ("H&S"), and Mitchell Companies, LLC ("Mitchell"), but none paid money to Appellants, personally.

c. Respondents never communicated with Appellants, never received advice from Appellants, and never relied upon any representations from Appellants.

Appellants' Interrogatories also asked Respondents to identify all communications with the Thompsons and representations made by the Thompsons, whether at seminars or otherwise, upon which they relied in investing in IPM and J&J. In response, Respondents did not identify any communications with the Thompsons; did not identify any representations made by the Thompsons, let alone representations upon which they relied in investing with IPM and J&J; and did not identify any seminars at which the Thompsons presented and Respondents were in attendance. (See Kinney I Ans. Geoffrey Thompson's Ints. at 8; Kinney I Ans. Nancy Thompson' Ints. at 8; Kinney II Ans. Geoffrey Thompson's Ints. at 9-22, 23; Kinney II Ans. Nancy Thompson' Ints. at 9-19, 20; Sober Ans. Geoffrey Thompson's Ints. at 16-34, 44; Sober Ans. Nancy Thompson' Ints. at 15-32, 42; Ahmann Ans. Geoffrey Thompson's Ints. at 39-59; Ahmann Ans. Nancy Thompson' Ints. at 37-57.)

In addition, Appellants' Interrogatories requested Respondents to identify all facts indicative of a fiduciary relationship with the Thompsons, such as whether the Thompsons were the Respondents' agent, attorney, accountant, financial advisor or investment advisor. No Respondents identified any facts that demonstrate that Appellants had a fiduciary duty to Respondents, let alone identified Appellants as their attorney, accountant, financial advisor, investment advisor or IPM agent. (See Kinney I Ans. Geoffrey Thompson's Ints. at 13; Kinney I Ans. Nancy Thompson' Ints. at 12; Kinney II Ans. Geoffrey Thompson's Ints. at 38; Kinney II Ans. Nancy Thompson' Ints. at 27; Sober Ans. Geoffrey Thompson's Ints. at 56; Sober Ans. Nancy Thompson' Ints. at 51; Ahmann Ans. Geoffrey Thompson's Ints. at 59-63; Ahmann Ans. Nancy Thompson' Ints. at 57-61.)

d. *The Thompsons were never shareholders, members or officers of the IPM or J&J, which Respondents, alleged to have perpetrated fraud.*

Finally, Appellants' Interrogatories requested Respondents to identify how IPM and J&J were an "alter ego" of Appellants, such as evidence that Appellants were officers, shareholders or members of IPM and J&J, or otherwise used them as a façade for Appellants' personal dealings. In response, Respondents referred to an "organization chart," an e-mail, and the Thompsons' assertion of their Fifth Amendment privilege when asked whether they were "principals" (but not officers, members or shareholders) of IPM or J&J. (See Kinney I Ans. Geoffrey Thompson's Ints. at 12-13; Kinney I Ans. Nancy Thompson' Ints. at 12; Kinney II Ans. Geoffrey Thompson's Ints. at 38; Kinney II Ans. Nancy Thompson' Ints. at 27; Sober Ans. Geoffrey Thompson's Ints. at 61; Sober Ans.

Nancy Thompson' Ints. at 55-56; Ahmann Ans. Geoffrey Thompson's Ints. at 16-18; Ahmann Ans. Nancy Thompson' Ints. at 15-16.) Respondents did not produce articles of incorporation, bylaws, company minutes, share certificates, *or any other documents* identifying Appellants as shareholders, members or officers of IPM or J&J.

III. Facts Pertinent to the District Court's Order Entering Default Judgment against the Thompson The Thompsons

On January 3, 2008, the District Court entered default judgment against IPM, Investment Properties of America, Inc. ("IPA"), NREA, J&J, Amerifunding and Brandon. Default judgment was entered because none of the named entities did not answer Respondents' Complaints. (See A-000149-169.)

In the same Order, the District Court found, *sua sponte*, that despite denying Respondents' summary judgment motions to pierce IPM and J&J's corporate veils, Respondents were entitled to pierce the corporate veils of IPM and J&J to impose personal liability against the Thompsons, even though it was undisputed that the Thompsons were never shareholders or members of IPM or J&J. (A-000161.) The District Court's theory of liability against the Thompsons was that the named-entities should be treated as a single organism because "[t]he Court finds that the IPA/IPM Affiliated Defendants were interrelated entities acting on behalf of one another." (A-000164.) Respondents thereafter asked the District Court to enter "judgment in favor of the Respondents and against Defendants Geoffrey Thompson, Nancy Thompson . . . jointly and severally, for any judgments granted in favor of the Respondents in this action." (A-000188.) The District Court thereafter entered judgment in against the

Thompsons, personally, in an amount of approximately \$22.5 Million, because the named-entities were in default. (See A-000170-186.)

IV. Facts Pertinent to District Court's Order Granting the Receiver's Motion to Expand the Receivership

a. *The State of Minnesota intervenes in only the Sober Case.*

In September 2006, prior to consolidation, the State of Minnesota (the "State") intervened in *only* the Sober Case to assert claims against the following parties: Defendant Joseph A. Cole ("Cole"); Defendant James W. Abbott ("Abbott"); IPM; J&J; and Amerifunding. (See A-000203-214.) The State did not assert claims in any of the other consolidated cases and did not assert claims against the Thompsons. At the same time, the State moved the District Court for the appointment of the Receiver in the Sober Case pursuant to Minn. Stat. § 8.31.

On October 12, 2006, the District Court appointed the Receiver in only the Sober Case, with authority over only J&J, IPM and Amerifunding, but not over Appellants or any of the other parties in the consolidated cases. (A-00051-64.)

In January 2007, the State moved the District Court for leave to dismiss its Complaint in Intervention in the Sober Case. The State's motion reiterated that in September 2006, the State moved the Court for the appointment of Cordes as its receiver in only the Sober Case pursuant to Minn. Stat. § 8.31. (A-000226-238.) Even though the Receiver opposed the State's motion to dismiss, the District Court ultimately granted the motion and dismissed the State's Complaint in Intervention, which was the only pleading requesting the appointment of the Receiver. (See A-000239-243.) Prior thereto, the

Receiver did not file an Answer on behalf of Amerifunding, IPM or J&J, and likewise did not assert cross-claims on behalf of these entities or otherwise assert claims against the other defendants (including Appellants) in this case.

After the State's Complaint in Intervention was dismissed, the Receiver moved the District Court for expansion of its authority over additional entities that were not parties to this case, such as North Fort Meyers, LLC ("NFM"), and Roseville Arms Condominiums, LLC ("RAC"). (A-000102-120.) Despite knowing that NFM and another entity, North Fort Holdings, LLC ("NFH"), had possession of \$750,000.00 the Receiver claimed to belong to IPM and J&J, in its motion the Receiver requested the District Court to order Appellants and their counsel to turn over \$750,000.00 to the Receiver to pay its outstanding attorneys' fees and costs incurred thus in the case. (A-00099-101.)

At the hearing on the Receiver's motion, Appellants requested the Receiver sue Appellants in order to provide due process under the law and notice of the claims pursuant to which they were required to turn over \$750,000.00 as requested in its motion. (A-000132-133.) Counsel for NFM also appeared at the hearing on the Receiver's motion, notified the District Court that a portion of the subject-\$750,000.00 was in his client's possession, and likewise requested the Receiver sue his client before receiving money from his client pursuant to the Receiver's motion, equivalent to a pre-judgment attachment. (A-000122-123.)

On April 20, 2007, the District Court ordered Appellants (not NFM or NFH) "and their counsel, immediately turn over to the receiver all proceeds of that certain redemption transaction dated as of July 31, 2006, in which North Fort Meyers'

membership interest in an entity known as Seminole Bay, LLC, was redeemed for \$750,000.” (A-00099-101.) The District Court ordered the turn over of this money by Appellants and their counsel without first requiring the Receiver to initiate suit against Appellants, NFM or NFH, setting forth the claims pursuant to which the Receiver (or IPM and J&J) is entitled to this money. The District Court erred on numerous occasions in this case and as set forth below, should be reversed accordingly.

ARGUMENT

I. STANDARDS OF REVIEW.

a. Motion to Dismiss under Minn. R. Civ. P. 12.02.

On appeal of a motion to dismiss under Rule 12.02(e), this Court reviews the decisions of the District Court *de novo*. *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007) (emphasis added). . On review, the Court considers “whether the complaint sets forth a legally sufficient claim for relief.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 836 (Minn. 2004). Under such circumstances, the Court does not owe any deference to the District Court’s analysis and application of purely legal issues. *State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 572 N.W.2d 321 (Minn. Ct. App. 1997).

b. Motion for Summary Judgment under Minn. R. Civ. P. 56.

On appeal of a summary judgment motion, the Court must determine whether any genuine issues of material fact exist and whether the District Court erred in applying the law. *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996). The Court views the evidence in a light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “All doubts and factual inferences must be resolved against the moving

party.” *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991). However, where there are no genuine issues of material fact, this Court reviews the decisions of the District Court *de novo*. *Prior Lake American v. Mader*, 642 N.W.2d 729 (Minn. 2002). Under such circumstances, the Court of Appeals does not owe any deference to the District Court’s analysis and application of purely legal issues. *State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 572 N.W.2d 321 (Minn. Ct. App. 1997).

c. Motion for Default Judgment.

On appeal from entry of judgment by default, the Court must determine whether the District Court abused its discretion in granting a default judgment. *Coller v. Guardian Angels Roman Catholic Church of Chaska*, 294 N.W.2d 712, 715 (Minn. 1980).

d. Motion to Expand Receivership.

On appeal of an Order appointing a receiver, the Court must determine whether the District Court abused its discretion. *Minn. Hotel Co., Inc. v. Rosa Dev. Co.*, 495 N.W.2d 888, 891 (Minn. Ct. App. 1993) (citations omitted) (the decision to appoint a receiver under Minn. Stat. § 576.01 lies within the discretion of the trial court.)

II. THE DISTRICT COURT ERRED IN DENYING APPELLANTS’ MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

a. The District Court erred in denying Appellants’ summary judgment motion on Respondents’ piercing the corporate veil claim.

Respondents’ Complaint in the Sober case (but not the other cases) alleges that Appellants are personally liable for the debts of IPM, Amerifunding and J&J. Even

though only one case pled a piercing claim, the District Court erroneously concluded that a piercing claim existed in all Respondents' cases. As such, the District Court denied Appellants' summary judgment motion on a piercing claim in all Respondents' cases.

Whether a person is determined to be a shareholder or member in a corporation or limited liability company arises by operation of law. Minn. Stat. § 302A.011, subd. 29 (“Shareholder’ means a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of a whole or fractional shares of the corporation.”); Minn. Stat. 322B.03, subd. 30 (“Member’ means a person reflected in the required records of a limited liability company as the owner of some governance rights of a membership interest of the limited liability company.”) In order for an action involving a shareholder to lie, the party claimed to be a shareholder must have actually been a shareholder, as defined by section 302A.011, at all times relevant to the cause of action. *See PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1, 6 (Minn. 1990) (finding that a party to a derivative suit must have been a shareholder “as defined in Minn. Stat. § 302A.011” for an action to lie.

In Minnesota, the Courts can pierce the veil of a corporate entity to impose personal liability upon *the entity's shareholders* if: (1) the entity ignores corporate formalities and acts as the alter ego or instrumentality of a shareholder; and (2) the liability limitations of the corporate forum results in injustice or is fundamentally unfair. *Tom Thumb Food Markets, Inc. v. TLH Properties, LLC*, 1999 WL 31168 (Minn. Ct. App. Jan. 26, 1999) (emphasis added) (citing *Victoria Elevator Co., Inc. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979)). The case law related to piercing the veil

of a corporation applies equally to *members of a limited liability company*. *Tom Thumb Food Markets*, 1999 WL 31168 at *3 (emphasis added). However, there is no Minnesota case law allowing a corporate veil to be pierced to impose personal liability on a person that is not a shareholder of the subject-corporation or member of the subject-limited liability company.

The following factors are to be considered by the Courts when considering whether the *shareholders / members* of an entity should be held personally liable for the debts of the entity under a piercing theory:

1. Insufficient capitalization for purposes of the corporate undertaking;
2. Failure to observe corporate formalities;
3. Nonpayment of dividends;
4. Insolvency of debtor corporation at the time of the transaction in question;
5. Siphoning of funds by dominant shareholder;
6. Nonfunctioning of other officers and directors;
7. Absence of corporate records; and
8. Existence of corporation as merely a façade for individual dealings.

Davis v Johnson, 415 N.W.2d 755, 758 (Minn. Ct. App. 1987). Not only must the aforementioned factors be present to pierce a corporate veil, but there must also be an element of injustice of fundamental unfairness. *Id.* “[D]oing business as a corporation to limit personal liability is not wrong; it is a major reason for incorporating.” *Id.*

The District Court erred in imposing personal liability against the Thompsons for the debts of IPM, J&J and Amerifunding. A piercing claim requires that the individuals to be held personally liable were shareholders of the subject-corporation or members of the subject-limited liability company. Respondents’ Complaint does not, however, allege that the Thompsons are shareholders or members of IPM, J&J or Amerifunding, but

instead states that those entities are “vehicle[s] pursuant to which Abbott and Cole (not Appellants] have furthered their fraudulent enterprise.” (A-0002; A-00013; A-00025; A-00039.) As the corporate veils of IPM, Amerifunding and J&J may only be pierced to impose personally liability upon those entities’ members and shareholders, a dismissal of any piercing claims pursuant to Rule 12.20 was appropriate because Respondents’ Complaints do not allege that Appellants were members or shareholders of IPM, Amerifunding or J&J.

Furthermore, Respondents’ Complaints fail to allege any of the other factors necessary for their piercing claim, such as whether IPM, J&J or Amerifunding had insufficient capitalization; whether they failed to observe corporate formalities; whether they failed to pay dividends; whether they were insolvent at the time of the alleged transactions; whether funds were siphoned; whether the officers and/or directors were nonfunctioning; whether there is an absence of corporate records; and whether the entities existed merely as a façade for Appellants. As such, Respondents’ Complaints fail to state a claim of piercing upon which relief can be granted and dismissal under Rule 12.02 was appropriate.

The District Court also erred in determining that piercing the corporate veils of IPM, J&J, and Amerifunding allowed for joint and several liability against Appellants, personally. It is undisputed that Geoff and Nancy have never been shareholders of IPM, or members of J&J or Amerifunding. Respondents opposed Appellants’ summary judgment motion on their piercing claim, even though no documents were presented to

demonstrate that Appellants were shareholders or members of IPM, J&J and Amerifunding, such as:

- A share certificate evidencing Appellants' ownership or membership interest in IPM, J&J or Amerifunding;
- A share register from IPM, J&J or Amerifunding, evidencing Appellants' ownership or membership interest;
- A Subscription Agreement between Appellants, and IPM, J&J or Amerifunding;
- Meeting minutes evidencing the sale of shares or membership units to Appellants;
- Written actions from IPM, J&J or Amerifunding, evidencing the sale of shares or membership units to Appellants;
- Bank records from IPM, J&J or Amerifunding demonstrating the receipt of money from Appellants for their respective ownership or membership interests;
- Tax records from IPM, J&J or Amerifunding identifying Appellants as shareholders or members; or
- Any other corporate documents that demonstrate that Appellants were shareholders of IPM, or members of J&J or Amerifunding.¹⁵

Respondents did not present any of the above-mentioned documents because Appellants have never been members or shareholders in IPM, J&J or Amerifunding. The District Court nonetheless concluded that summary judgment was not appropriate on Respondents' piercing claim because a few documents identify Appellants as "Principals" of IPM, J&J or Amerifunding. However, neither Respondents, nor the District Court, cited any legal authority that a corporate veil can be pierced to hold "Principals" personally liable for the corporate acts, whatever a "Principal" may be. Appellants were never the shareholders or members of IPM, J&J or Amerifunding, and

under Minnesota cannot be held personally liable for those entities' acts under a piercing claim.

b. The District Court erred in denying Appellants' motions to dismiss and for summary judgment on each and every count in Respondents' Complaints.

Even though Respondents admit and the District Court's order suggests that the sole basis for liability against Appellants, personally, is through an unsupported claim of piercing the corporate veils of IPM, J&J and Amerifunding, Respondents' Complaints make numerous direct claims against Appellants, personally, for fraud, misrepresentation, breach of contract, breach of fiduciary duty and violation of various Minnesota, Florida and Illinois statutes. As stated above, the District Court erred in denying Appellants' motion to dismiss and motion for summary judgment on these claims.

i. Breach of Fiduciary Duty

The Complaints allege that Appellants breached their fiduciary duties to and contracts with Respondents. "As a general rule, one party to a transaction has no duty to disclose material facts to the other." *Klein v. First Edina Nat. Bank*, 196 N.W.2d 619, 622 (Minn. 1972). Where a fiduciary relationship does not exist, an action for breach of fiduciary duty cannot be maintained. *Sutton v. Viking Oldsmobile Nissan, Inc.*, 2001 WL 856250, *3 (Minn. Ct. App. July 31, 2001) (citing *Shema v. Thorpe Bros.*, 62 N.W.2d 86, 91 (Minn. 1953)). A breach of fiduciary duty claim is appropriately dismissed even where the evidence demonstrates that a defendant handled a plaintiff's funds and the

¹⁵ All of IPM, J&J and Amerifunding's corporate records and other related documents were provided to the Receiver by Abbott and Cole, as the sole shareholders and members of these entities, and were made available to Respondents accordingly.

plaintiff relied on the defendant's expertise and invited confidence. *Cherne Contracting Corp. v. Wausau Ins. Co.*, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997), *rev. denied* (Minn. Feb. 19, 1998).

A fiduciary relationship exists under Minnesota law “when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.” *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (citing *Stark v. Equitable Life Assur. Society*, 285 N.W. 466, 470 (Minn. 1939)). “Disparity of business experience and invited confidence could [also] be a legally sufficient basis for finding a fiduciary relationship.” *Id.* (citing *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976)).

The District Court erred in denying Appellants' motion to dismiss Respondents' breach of fiduciary duty claim. The Complaints fail to identify any fiduciary relationship between Appellants and Respondents. Respondents entered into the AMP Plan with IPM, not Appellants, according to the Complaints. Likewise, Respondents have no contracts with Appellants according to the Complaints. Finally, Respondents entrusted money to IPM, not Appellants, according to the Complaints. Given the absence of these allegations, there can be no fiduciary relationship between Appellants and Respondents and a claim for breach of fiduciary duty cannot be maintained.

The District Court also erred in denying Appellants' summary judgment motion on this claim. During discovery, Respondents failed to identify any facts that support the existence of a fiduciary relationship with Appellants. For example, Respondents did not

identify any money they paid Appellants. Likewise, Respondents did not identify any contracts with Appellants. Respondents admitted that Appellants were not their IPM agents, attorneys, accountants, financial advisors or investment advisors, which would give rise to a fiduciary relationship. Finally, Appellants could not have reposed any confidence in Respondents, resulting in Appellants' superiority and influence over Respondents, because Respondents never even spoke with or met with Appellants prior to investing with IPM & J&J. Other individuals may have had fiduciary duties to the Respondents, but none existed with respect to Appellants. Given the lack of any fiduciary relationship, summary judgment was appropriate in favor of Appellants on this claim.

ii. Minnesota's Deceptive Trade Practices Act.

Respondents also allege that Appellants engaged in deceptive trade practices. Minnesota's Deceptive Trade Practices Act provides that a person engages in deceptive trade practices when, in part, he or she does one of the following in the course of business, vocation or occupation:

- (1) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
- (2) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; or
- (3) causes a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

Minn. Stat. § 325D.44, subd. 1. In order for Appellants to be liable, they each must have engaged in some act as set forth above. *Id.* Furthermore, proof of reliance is necessary

where the recovery of damages is sought as in this case. *See Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 553 (D.Minn. 1999).

Respondents' Complaint makes no allegations to support a deceptive trade practices claim. For example, Respondents make no allegations that Appellants each engaged in any of the aforementioned practices or otherwise communicated with each and every Respondent before they entered into the AMP Plan with and provided money to IPM. Respondents' Complaints contain no allegations that Appellants made a representation to each and every Respondent, let alone a representation that amounts to a deceptive trade practice under Minnesota law. If such a representation was made, then where in the Complaints are Appellants on notice of what was said, when it was said, where it was said, how it was said, and who received it? Respondents' deceptive trade practices claim should have been dismissed under Rule 12.02.¹⁶

At summary judgment, Respondents were also unable to present any evidence that Appellants engaged in deceptive trade practices. For example, Respondents admit that they never communicated with Appellants, whether electronically, verbally or in writing. Respondents likewise admit that Appellants did not make any representations upon which they relied in investing money with IPM. Respondents also admit that they did not attend any seminars at which Appellants were in attendance, let alone presented. Other defendants may have engaged in deceptive trade practices with respect to these Respondents, but Appellants engaged in no such acts as admitted by Respondents during

¹⁶ Not only did Respondents' Complaints fail to state a claim of deceptive trade practices against Appellants upon which relief can be granted, but the State did not name the Thompsons in its Intervention Complaint asserting identical deceptive trade practices claims.

discovery. Absent a deceptive representation from Appellants, a deceptive trade practices claim cannot survive and Respondents' claims should have been dismissed under Rule 56 as a matter of law.

iii. Consumer Fraud.

Respondents' Complaints also allege that Appellants engaged in consumer fraud. In Minnesota, a party seeking to establish a prima facie case of fraud must make an initial showing of all the elements. *Tousignant v. St. Louis County*, 615 N.W.2d 53, 59 (Minn. 2000). Minnesota requires a "high threshold of proof for such a claim." *Martens v. 3M*, 616 N.W.2d 732, 747 (Minn. 2000). Under the Minnesota Rules of Civil Procedure, a claim of fraud must be pled with particularity. Minn. R. Civ. P. 9.02.

Respondents' consumer fraud claim requires that Appellants acted, used or employed fraud, a false pretense, a false promise, a misrepresentation, a misleading statement or a deceptive practice, with intent that each and every Respondent relied thereon, in order for liability to attach. Minn. Stat. § 325F.69, subd. 1. This requires a showing of each of the following elements: (1) that there was a false representation regarding a past or present fact; (2) that the fact was material and susceptible of knowledge; (3) that the representer knew it was false; (4) that the representer intended to induce the claimant to act; (5) that the claimant was induced to act or justified in acting in reliance on the representation; (6) that the claimant suffered damages; and (7) that the representation was the proximate cause of the damages. *Martens*, 616 N.W.2d at 747 (citations omitted).

Respondents' Complaint fail to allege any facts that would support a consumer fraud claim. For example, Respondents make no allegation that Appellants made a single representation, let alone a knowingly false representation to each and every Respondent, which caused each and every one of them to enter into the AMP Plan with or provide money to IPM. Respondents fail to allege what Appellants represented to each and every Respondent; when they represented it; how they represented it; where they represented it; and how those representations caused each and every Respondent to enter into the AMP Plan with and provide money to IPM. Absent such allegations, with particularity, Respondents' Complaints should not have survived Appellants' motion to dismiss.

At summary judgment, Respondents likewise failed to present any evidence that Appellants engaged in fraud. For example, the first element of Respondents' fraud claim requires a showing that Appellants each made a false representation to each of these Respondents regarding a past or present fact. According to Respondents' discovery, Respondents have never communicated with Appellants; never received a representation from Appellants, let alone a knowingly false representation of a past or present fact upon which they relied; and were not present at any seminars at which Appellants attended, let alone presented.

Some of Respondents claim to have communicated with Appellants, but said communications could not amount to fraud under Minnesota law because Respondents communicated with Appellants after Respondents' money had already been paid to IPM, which are the damages of which Respondents complain. Absent a false representation from Appellants prior to Respondents' investment with IPM, upon which Respondents

each relied, their claim for fraud cannot be maintained and summary judgment should have been granted accordingly.

iv. Intentional/Negligent Misrepresentation.

Some of the Complaints allege that Appellants engaged in intentional and negligent misrepresentations. In Minnesota, the elements of a claim of intentional misrepresentation are the same as those for a claim of fraud, as set forth above. *See Trenholme v. QRS Diagnostic, LLC*, 2006 WL 2601664 (Minn. Ct. App. Sept. 12, 2006) (citing *Nat'l Union Fire Ins. Co. v. Evenson*, 439 N.W.2d 394, 398 (Minn. Ct. App. 1989)). For the same reasons Respondents' claims of fraud fail, their claims of intentional misrepresentation fail to state a claim against Appellants upon which relief can be granted and should have been dismissed pursuant to Rule 56; namely Respondents' failure to allege false representations with particularity, and their later admissions that they never communicated with Appellants and did not rely upon any representations made by Appellants in paying money to IPM or J&J.

With regard to negligent misrepresentation, "[o]ne who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Bonhiver v. Graff*, 248 N.W.2d 291, 298-99 (1976). In order for Appellants to be liable under this claim, they must have supplied false information to each and every Respondent for his or her guidance in a business

transaction. *Id.* Furthermore, each and every Respondent must have relied upon the false information supplied by Appellants in order to recover any damages. *Bonhiver*, 248 N.W.2d at 299.

In this case, the District Court erred in finding that these Respondents' Complaints identify any information, let alone false information, that Appellants each supplied to *any* Respondent for guidance in a business transaction. Furthermore, Respondents did not provide any money to Appellants according to the Complaints; Respondents paid fees to IPM in connection with the AMP Plan. Respondents' Complaints provides nothing more than bald assertions and conclusions of law, rather than factual allegations to support their claims, which should not have survived a motion to dismiss. *See e.g., Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) (citations omitted); *see also N. Trust Co. v. Peters*, 69 F.3d 123 (7th Cir. 1995) (citations omitted). Respondents failed to state a claim that Appellants intentionally and/or negligently misrepresented anything to each and every Respondent and their Complaints should have been dismissed under Rule 12.02.

At summary judgment, Respondents likewise failed to present any evidence that Appellants engaged in negligent misrepresentations. For example, Respondents admitted, during discovery, that they never communicated with Appellants; thus, Appellants did not provide any information to Respondents, let alone false information for their guidance in a business transaction. Respondents also admit that they did not rely on any information or representations of Appellants in paying money to IPM or J&J. Respondents did not even attend a seminar at which Appellants were present. Appellants did not supply any false information to Respondents for their guidance in a business

transaction and cannot be liable for intentional or negligent misrepresentation as a matter of law. As such, the District Court erred in denying Appellants summary judgment motion on these claims.

v. Conspiracy.

Respondents' Complaints also allege that Appellants are liable for engaging in a conspiracy with the other defendants "to defraud [Respondents] through the marketing, advertising, soliciting and sale of memberships in the AMP Plan Membership and the CLC and have inveigled an amount to be determined at trial from Respondents." (A-00020; A-00035; A-00049.) In Minnesota, "[c]onspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means." *Lipka v. Minn. School Employees Assoc., Local 1980*, 537 N.W.2d 624, 632 (Minn. Ct. App. 1995) (citations omitted). A claim of conspiracy involves a combination of persons. *Id.* Furthermore, "if the underlying claim fails, the conspiracy claim likewise fails." *Id.* (citation omitted); *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997) (citing *Harding v. Ohio Cas. Ins. Co.*, 41 N.W.2d 818, 824 (Minn. 1950)). Under such circumstances, a claim of conspiracy is properly dismissed for failure to state a claim. *D.A.B.*, 570 N.W.2d at 172.

The District Court erred in determining that Respondents' Complaints identified anything done by Appellants, which could amount to participation in a civil conspiracy under Minnesota law. As stated above, there was no fraud by Appellants; therefore, the underlying claim and conspiracy claim must fail. Furthermore, Respondents fail to allege how Appellants marketed, advertised, solicited and sold memberships in the AMP Plan

and CLC to each and every Respondent. If Appellants did engage in a conspiracy, then when did they market, advertise, solicit and sell memberships to each and every Respondent; how did they market, advertise, solicit and sell memberships to each and every Respondent; and where did they market, advertise, solicit and sell memberships to each and every Respondent. There was no conspiracy alleged in Respondents' Complaint; therefore, the District Court erred in denying Appellants' motion to dismiss.

The District Court also erred in denying Appellants' summary judgment motion on Respondents' conspiracy claim. Notwithstanding the failure of Respondents' underlying fraud claim, during discovery Respondents admitted that they never communicated with, received or relied upon a representation from or attended a seminar at which Appellants presented; therefore, Appellants did not market, advertise, solicit or sell memberships to Respondents. As such, Respondents' conspiracy claim fails as a matter of law and the District Court erred in denying summary judgment accordingly.

vi. Civil Theft.

Some of Respondents' Complaints allege that Appellants engaged in civil theft in violation of Minn. Stat. § 604.14. Specifically, Respondents allege that J&J's possession of the money provided by Respondents constitutes civil theft by Appellants. In Minnesota, "[a] person who steals personal property from another is civilly liable to the owner of the property for its value when stolen plus punitive damages of either \$50 or up to 100 percent of its value when stolen, whichever is greater." Minn. Stat. § 604.14, subd. 1.

The District Court erred in denying Appellants' motion to dismiss, as neither have ever been in possession of any Respondents' money according to the Complaints. Pursuant to the AMP Plan, Respondents paid fees to IPM, not Appellants, Respondents' Complaints do not make a single allegation of Appellants possessing Respondents' money. As the Complaints fail to allege any facts that Appellants are "in wrongful possession of Respondents' earnest money," they have not committed civil theft as a matter of law and the Complaints should have been dismissed pursuant to Rule 12.02.

The District Court also erred in denying Appellants motion for summary judgment on Respondents' civil theft claims. Appellants have not engaged in civil theft because they have never been in possession of Respondents' money. Not a single one of these Respondents paid money to Appellants according to Respondents' discovery responses. Furthermore, Respondents are not members of IPM or J&J as set forth above and as acknowledged by Respondents and the District Court's order denying summary judgment. Given that Appellants have never possessed Respondents' money, they likewise have never been in wrongful possession of Respondents' money as required for their civil theft claim to survive. As such, the District Court erred in denying Appellants motion for summary judgment.

vii. Violation of Minn. Stat. §§ 83.23-.24.

Some of Respondents' Complaints allege that Appellants violated Minnesota Statutes, Section 83.23-83.24. Specifically, Respondents allege that Appellants advertised the sale of condominium units in the Florida Properties in violation of Minn.

Stat. § 83.23. Respondents further allege that Appellants failed to deliver a public offering statement as required by Minn. Stat. § 83.24

In Minnesota, “[i]t is unlawful for any person to offer or sell an interest in subdivided lands in this state unless the interest is registered under this section or the subdivided land or the transaction is exempt under section 83.26.” Minn. Stat. § 83.23, subd. 1. Furthermore, persons offering to sell such land must deliver a public offering statement to each person to whom an offer is made or concurrently with: (a) the first written offer other than offer by means of a public advertisement; or (b) any payment pursuant to a sale, whichever occurs first. Minn. Stat. § 83.24, subd. 1.

The District Court erred in denying Appellants’ motion to dismiss Respondents’ claims for relief under Minn. Stat. §§ 83.23-.24. According to the Complaints, the land allegedly advertised for sale was the condominium units in the Florida Properties, located in Brandon and Seminole Bay, Florida. Brandon was the owner/seller of condominium units at the Pointe at Kings Avenue (“Kings Pointe”) in Brandon, Florida; Bella Terra is the developer of property located in Seminole Bay, Florida. As this land is located in Florida, Appellants clearly did not offer or sell an interest in subdivided lands in this state (Minnesota) as must be registered under Minnesota law. *See* Minn. Stat. § 83.23, subd. 1.

Even if the subject land was located in Minnesota, rather than Florida, the Complaints still fail to allege facts that would subject Appellants to liability. For example, Respondents do not allege that Appellants owned the Florida properties or were otherwise in a position to offer or sell that land. In addition, Respondents fail to identify any actions or statements by either Appellants that constitutes “an offer” to sell

subdivided land as required by Minn. Stat. § 83.23, subd. 1. Respondents' Complaints fail to allege that Respondents violated sections 83.23 or 83.24 and should have been dismissed pursuant to Rule 12.02 accordingly.

The District Court also erred in denying Appellants summary judgment motion on the same claim. Respondents admitted, during discovery, that they either did not communicate with Appellants at all, or did not communicate with Appellants prior to investing their money into IPM. If Respondents never communicated with Appellants, then they likewise were never offered or sold, an interest in subdivided lands in Minnesota, as required for liability under section 83.23. Furthermore, if Appellants never offered to sell such land to Respondents, they could not have had an obligation to deliver a public offering statement to Respondents to whom they never made an offer, as required for liability under section 83.24. Other defendants may have sold or offered to sell subdivided lands to Respondents, but Appellants never made any such offers or sales and as such cannot be liable under these respective sections. Appellants did not violate Minn. Stat. §§ 83.23 or 83.24 and summary judgment should have been entered in their favor accordingly.

viii. Violation of Fla. Stat. Ch. 718.

Some of the Complaints allege that Appellants violated chapter 718 of the Florida Statutes. Specifically, Respondents allege that Appellants failed to disclose and provide to Respondents, copies of the declaration, bylaws, projected operating budget, floor plans and street addresses. As a result, Respondents allege that they are entitled to a rescission and full return of the money they provided to IPM.

Florida Statutes, section 718.503, provides certain *disclosure requirements for developers* of real property in the State of Florida. Fla. Stat. § 718.503 (emphasis added). For example, *a developer* must disclose certain language in a contract for the sale of a residential unit of more than five (5) years. Fla. Stat. § 718.503(1)(a) (emphasis added). Likewise, *a developer* must provide copies of a declaration; documents creating the association; the bylaws; the ground lease; the management contract; the estimated operating budget; a copy of the floor plan; and other documents identified by the Florida legislature. See Fla. Stat. § 718.503(1)(b) (emphasis added). Finally, a “*unit owner who is not a developer . . . shall comply with the provisions of [Fla. Stat. § 718.503(2)] prior to sale of his or her unit,*” by providing the following to a prospective purchaser of his or her condominium unit: the declaration of condominium; the articles of incorporation of the association; the bylaws and rules of the association; financial information required by Fla. Stat. § 718.111; and a document entitled “Frequently Asked Questions and Answers” as required by Fla. Stat. § 718.504. Fla. Stat. § 718.503(2)(a) (emphasis added).

A “developer” is defined by Florida law as:

a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy, nor does it include a cooperative association which creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion. A state, county, or municipal entity is not a developer for any purposes under this act when it is acting as a lessor and not otherwise named as a developer in the association.

Fla. Stat. § 718.103(16).

Appellants were not developers of the Florida Properties as defined by Fla. Stat. § 718.103(16). Respondents' Complaints even identify Brandon as the owner and Bella Terra as the developer of the Florida Properties. Therefore, any developer disclosure requirements belong to Bella Terra and/or Brandon, as the developer/owner of the Florida Properties. Furthermore, Respondents' Complaints make no allegation that Appellants offered to sell or sold to Respondents, condominium units in the Florida Properties as the owner of those units. As Appellants were not the owners of the Florida Properties, they have no disclosure obligations as set forth in Fla. Stat. § 718.503(2). Respondents' Complaints failed to state a claim against Appellants upon which relief could be granted and should have been dismissed pursuant to Rule 12.02 accordingly.

The District Court also erred in denying Appellants' summary judgment motion on the same claim. As stated above, Appellants had no disclosure obligations under Florida law because they were not the developers or prior owners of the Florida Properties or any condominium units therein. Likewise, Respondents admitted during discovery that they never communicated with Appellants; therefore, Appellants did not sell or offer to sell units in the Florida Properties to Respondents. Other defendants may have been the developers or owners of condominium units in the Florida Properties, and as such sold or offered to sell the same to Respondents, but Appellants engaged in no such acts and should have been dismissed from this claim pursuant to their summary judgment motion.

ix. Violation of Minn. Stat. § 82.50.

Some of the Complaints allege that Appellants violated Minnesota Statutes, Section 82.50. Specifically, Respondents allege that Appellants violated Minn. Stat. § 82.50 by failing to “make certain that all earnest monies were deposited for Respondents benefit in an Authorized Escrow Account.”

Minnesota Statutes, Section 82.50, provides in pertinent part that:

All trust funds received by a broker or the broker’s salespeople or closing agents shall be deposited forthwith upon receipt in a trust account, maintained by the broker for such purpose in a bank, savings association, credit union, or an industrial loan and thrift company with deposit liabilities designated by the broker or closing agent, except as such money may be paid to one of the parties pursuant to express written agreement between the parties to a transaction.

Minn. Stat. § 82.50, subd. 1 (emphasis added). Section 82.50 further provides that the broker, salesperson or closing agent in receipt of trust funds shall not commingle said funds with his or her personal funds, and shall maintain certain trust account records. *See* Minn. Stat. § 82.50 , subds. 4 & 11. In order for liability to attach under section 82.50, the individual must be the broker to the transaction *and received* said trust funds. *See generally*, Minn. Stat. § 82.50 (emphasis added). Absent the receipt of any such trust funds by the broker, broker’s salespeople or closing agent, a violation of Minn. Stat. § 82.50 cannot be maintained.

Respondents’ Complaints failed to allege a claim of violation of section 82.50 upon which relief can be granted. For example, Respondents entered into the AMP Plan *with IPM*, according to the Complaints. Pursuant thereto, Respondents paid fees *to IPM*,

according to the Complaints. Respondents did not provide any money to Appellants for which they could be obligated to deposit in accordance with Minn. Stat. § 82.50. Furthermore, Respondents do not allege that Appellants were real estate brokers, let alone the brokers with whom each individual Respondent dealt in entering into the AMP Plan with and providing money to IPM. Absent any of these allegations, Respondents' Complaints fail to state a claim of violation of Minn. Stat. § 82.50 upon which relief can be granted and should have been dismissed pursuant to Rule 12.02.

The District Court further erred in denying Appellants summary judgment motion on this claim. For example, Respondents admitted, during discovery, that none of them provided any money, let alone earnest money, to Appellants. Likewise, Respondents do not claim to have been damaged as a result of paying earnest money to Appellants according to discovery. Respondents may have provided earnest money to the other defendants for which liability would attach, but Appellants have not violated Minn. Stat. § 82.50 and summary judgment should have been entered in their favor accordingly.

x. Accounting.

Some of the Complaints request an accounting of IPM, from Appellants. As set forth in Respondents' Complaints, all funds allegedly provided by Respondents were provided to IPM. Therefore, the only party capable of providing such an accounting is IPM, over which Appellants have no dominion or control (because they are not officers, shareholders or members), and which should have been accomplished through the appointment of the Receiver in the Sober case. Appellants never received any funds from

Respondents and, therefore, are incapable of providing such an accounting and this claim should have been dismissed pursuant to Rule 12.02 or Rule 56.

xi. Violation of Minn. Stat. Ch. 80A

One of Respondents' Complaints alleges that Appellants sold securities to Respondents in violation of Minn. Stat. Ch. 80A. Specifically, Respondents allege that Appellants violated Chapter 80A by offering to sell or selling promissory notes in exchange for a commission.

In Minnesota, "[i]t is unlawful for any person who receives, directly or indirectly, any consideration from another primary for advising the other as to the value of securities or their purchase or sale," to engage in certain prescribed conduct. Minn. Stat. § 80A.02, subd. 1. Likewise, "[i]t is unlawful for any person to effect any transaction in, or to induce the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance, including any fictitious quotation." Minn. Stat. § 80A.03. "It is [also] unlawful for any person to offer or sell any security in this state unless (a) it is registered under sections 80A.01 to 80A.31 or (b) the security or transaction is exempted under section 80A.15 or (c) it is a federal covered security." Minn. Stat. § 80A.08. Finally, "[i]t is unlawful for any person to transact business in this state as a broker-dealer or agent unless licensed under this chapter." Minn. Stat. § 80A.04, subd. 1. "Security" is defined by Chapter 80A to include any note. Minn. Stat. § 80A.14, subd. 18(a).

The District Court erred in not dismissing this claim pursuant to Rule 12.02. For example, Respondents' Complaint makes no allegations that Appellants were in any way

involved with the sale of securities to each and every Respondent. Furthermore, the Complaint makes no allegation that Appellants are parties to any securities with each and every Respondent, or otherwise advised each and every Respondent with regard to his or her alleged purchase thereof as prohibited by Minn. Stat. § 80A.02, subd. 1. The Complaint also makes no allegation that Appellants received, directly or indirectly, any consideration from Respondents for advising them as to the value of securities or their purchase thereof.

The Complaint makes no allegation that Appellants did anything to effect Respondents' transactions with IPM, or to induce them to purchase any security, let alone by means of any manipulative, deceptive or other fraudulent devise or contrivance, including a fictitious quotation.. The Complaint fails to identify any alleged offers to sell or sale of securities by Appellants to each and every Respondent, as prohibited by Minn. Stat. § 80A.08. Finally, the Complaint does not allege that Appellants transacted business with Respondents as the "broker-dealer" for IPM, or that Appellants transacted business as an unlicensed "broker-dealer," as prohibited by Minn. Stat. § 80A.04, subd. 1. Respondents' Complaint fails to allege any facts for which Appellants could be liable to each and every Respondent under Minn. Stat. Ch. 80A and should have been dismissed pursuant to Rule 12.02 accordingly.

The District Court also erred in denying Appellants summary judgment motion. For example, Respondents admit that they never communicated with Appellants or attended a seminar at which Appellants were present. If Respondents never communicated with Appellants regarding their Promissory Notes, then Appellants could

not have “advised” Respondents on their purchase of the Promissory Notes. Furthermore, Respondents admit that they never provided any money to Appellants, and that Appellants are not parties to their Promissory Notes or otherwise signed them on behalf of the any of the other defendants. As such, Appellants have not violated Minn. Stat. Ch. 80A and their summary judgment motion should have been granted accordingly.

xii. Violation of Ill. Stat. Ch. 765.

Finally, one of Respondents’ Complaints allege that Appellants violated chapter 765 of the Illinois Statute. Specifically, Respondents allege that Appellants failed to disclose and provide copies of the declaration, bylaws, projected operating budget, floor plans and street addresses.

Illinois Statutes, chapter 765, provides certain disclosure requirements for the sellers and developers of condominium projects in the State of Illinois. 765 Ill. Comp. Stat. § 605/22. For example, a seller of a condominium unit must provide the prospective buyer with the declaration; the bylaws of the association; a projected operating budget; and a floor plan. 765 Ill. Comp. Stat. § 605/22(a)-(d). Chapter 765 imposes additional disclosure requirements on developers. 765 Ill. Comp. Stat. § 605/22(e). Finally, chapter 765 imposes different disclosure requirements upon the seller of a condominium unit in the event of a resale. 765 Ill. Comp. Stat. § 605/22.1.

The District Court erred in denying Appellants’ motion to dismiss this claim. For example, there are no allegations in the Complaint that Appellants were the sellers or developers of Hotel 71 or any of the individual condominium units therein. According to the Complaint, H&S is the owner and developer of Hotel 71 as defined by Illinois law.

See 765 Ill. Comp. Stat. § 605/2(q). The Complaint also identifies Mitchell as the principle of or entity that operates control of H&S and entered into agreements regarding Hotel 71. Appellants were not developers, owners or sellers of Hotel 71 and, therefore, had no disclosure requirements as set forth in Illinois' Condominium Act.

Not only are Appellants not developers, owners or sellers of Hotel 71 according to the Complaint, but Respondents' Complaint makes no allegation that Appellants owned, offered to sell or sold Hotel 71 condominium units to any Respondents as the owner of those individual units. As Appellants were not owners of Hotel 71 condominium units, they had no disclosure obligations as set forth in 765 Ill. Comp. Stat. § 605/22.1. As Respondents' Complaint fails to state a claim against the Thompsons upon which relief can be granted, dismissal pursuant to Rule 12.02 was appropriate.

The District Court also erred in denying Appellants' summary judgment motion on this claim. Notwithstanding that Appellants were not the sellers or developers of Hotel 71 or any of the individual condominium units therein, but Appellants likewise did not own, offer to sell or sell Hotel 71 condominium units to Respondents as the owner of those individual units given that they never even communicated with Respondents. As Appellants were not owners of Hotel 71 condominium units, they had no disclosure obligations as set forth in 765 Ill. Comp. Stat. § 605/22.1. Therefore, Appellants did not violate the Illinois' Condominium Act and summary judgment was appropriate as a matter of law.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENTS' REQUEST FOR A DEFAULT JUDGMENT AGAINST APPELLANTS.

The District Court held Appellants personally liable for the default judgments of IPM, J&J and Amerifunding pursuant to an apparent request by Respondents. Rule 55.01 of the Minnesota Rules of Civil Procedure allows the Court to enter default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend within the time allowed therefor by these rules or by statute, and that fact is made to appear by affidavit.”

However, where a party serves responsive pleadings and otherwise defends against an action, entry of default judgment is inappropriate as a matter of law. *See Hinz v. Northland Milk & Ice Cream Co.*, 53 N.W.2d 454, 455 (Minn. 1952). A default judgment is erroneously entered where the “party in default shows that he (a) is possessed of a reasonable defense on the merits, (b) has a reasonable excuse for his failure or neglect to answer, (c) has acted with due diligence after notice of the entry of judgment, and (d) that no substantial prejudice will result to the other party.” *Id.* at 456.

Hinz should control this situation. Appellants answered Respondents' Complaints and were intimately involved in their defense. For two years, Appellants engaged Respondents in the legal process. Although the Minnesota Rules of Civil Procedure allow a District Court to grant default judgment as a sanction for a party's failure to comply with a court order to provide discovery, there is nothing in the record to indicate that the failure to respond to discovery was the basis of the default judgment. *See* Minn. R. Civ. P. 37.02.

Despite the legal obstacles for an entry of default judgment, the District Court entered judgment by default against Appellants on July 23, 2008. However, Appellants were not in default due to their answers to Respondents' Complaints. Furthermore, to the extent Appellants were held personally liable for IPM, J&J and Amerifunding's default, the only basis for such a ruling would be under a piercing claim, which could not be sustained under Minnesota law and was rejected by the District Court when it denied Respondents' summary judgment motion. Under any theory of liability, the District Court eschewed the Rules of Civil Procedure to arrive at its unjustly, yet intended result. The District Court's conduct denied the Appellants the fundamental fairness guaranteed them by the legal process and failed to provide the Appellants any notice that they may be subject to the same default as the defendant entities, despite a lack of any legal connection with those entities. As such, this Court should reverse the District Court's entry of default judgment against Appellants for the default judgments of IPM, J&J and Amerifunding.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE RECEIVER'S MOTION TO EXPAND THE RECEIVERSHIP.

- a. The Receiver had no standing to move the District Court for relief because it was not a party.**

It is undisputed that Cordes was appointed as a Receiver in only the Sober Case pursuant to the motion of the State, who only intervened in that case. Cordes was appointed as a receiver in the Sober Case pursuant to the State's statutory authority in Minn. Stat. § 8.31, subd. 3c. Appellants never stipulated to the appointment of the Receiver in any case, let alone over Appellants. Following the State's withdrawal in the

Sober case by way of its dismissal of its Complaint in Intervention, Cordes' status as receiver should likewise have been dismissed.

Section 8.31 of the Minnesota Statutes provides the Office of the Attorney General with certain statutory power and authority. According to subdivision 3c:

The courts of this state are vested with jurisdiction to appoint an administrator *in actions brought by the attorney general* under this section, for purposes of (1) monitoring, maintaining, or winding up the affairs of the business, or (2) collecting, administering, and distributing judgments *obtained by the attorney general* for the benefit of persons.

Minn. Stat. § 8.31, subd. 3c (emphasis added). This was the sole authority under which the State moved the District Court for the appointment of the Receiver in the Sober Case.

Under Minn. Stat. § 8.31, the District Court is only vested with jurisdiction to appoint a receiver *in actions brought by the attorney general*. (emphasis added). In January 2007, the District Court granted the State's motion to dismiss its Complaint in Intervention. Thereafter, there no longer existed any *actions brought by the attorney general* and, therefore, there no longer existed any jurisdiction for the District Court to appoint the Receiver under Minn. Stat. § 8.31, subd. 3c. Following the State's dismissal, the Receiver's authority likewise should have been dismissed or, at the very least, the authority of the District Court to expand the receivership should have ceased.

Notwithstanding, in February 2007, Cordes moved the District Court for its appointment as a receiver over additional, unnamed entities NFM, IPA and RAC. At the same time, Cordes moved the District Court for an order requiring Appellants to turn over \$750,000.00 to Cordes without any pending suit by or against the same. At the time

of its motion, Cordes was not an independent party to the Sober Case and had not made an appearance on behalf of J&J, Progressive or Amerifunding. Likewise, NFM, IPA and RAC were not parties to any of the consolidated cases,¹⁷ including the State's dismissed Complaint in Intervention, which likewise did not name Appellants as defendants. There was absolutely no relationship between Cordes, Appellants, NFM, IPA and RAC, let alone a pending suit pursuant to which pre-trial relief might be appropriate.

Following its dismissal, the State no longer had an action in which the Receiver may be appointed under Minn. Stat. § 8.31. Cordes is not a party to the Sober Case and did not have standing under Minn. Stat. § 8.31 to move the District Court for its own appointment as a receiver following dismissal of the State. More importantly, in October 2007, Cordes initiated a separate suit against Appellants, on behalf of IPM, J&J and Amerifunding, which it has since decided to dismiss. Following the State's dismissal, there existed no action brought by the attorney general and no standing for Cordes to request or jurisdiction for the District Court to appoint Cordes as a receiver over NFM, IPA, RAC and Appellants pursuant to Minn. Stat. § 8.31.

Equally important, the State only intervened in and moved the District Court for the appointment of the Receiver in the Sober Case. In its motion, Cordes sought the recovery of approximately \$750,000.00, which it believed NFM and Bella Terra invested in the Seminole Bay project, which was the subject of the consolidated case entitled Mark

¹⁷ Not only did Cordes, on its own initiative (despite not being a party to any of the above-captioned cases), ask the District Court to appoint it as receiver over three entities that were not parties to any of the above-captioned cases, and two parties that were not named as defendants to the State's Complaint in Intervention, but it did so without ever serving a Notice of Motion and Motion upon NFM, IPA or RAC as required under the Minnesota Rules of Civil Procedure and Minnesota General Rules of Practice for the District Court.

A. Ahmann, et al. v. Joseph A. Cole, et. al., Old Ct. File No. 27-CV-06-15411 (“Ahmann Case”), and not the Sober Case. The Seminole Bay project was not the subject of the Sober Case, which is the only case in which Cordes could arguably (albeit incorrectly) claim to have involvement. Therefore, Cordes was not a party to any of the consolidated cases and did not make an appearance on behalf of IPM, J&J or Amerifunding in those cases, but moved the District Court for its appointment over NFM and Appellants, against whom it had not initiated suit independently or on behalf IPM, J&J or Amerifunding, to obtain money to pay its own absurd fees and expenses, rather than satisfy IPM, Amerifunding or J&J’s creditors. The District Court erred in granting the Receiver’s motion and ordering Appellants and their counsel to turn over \$750,000.00 to Cordes without ever being sued by Cordes or any of its receivership entities.

b. Cordes failed to satisfy the requirements for its appointment under Minn. Stat. § 576.01.

Cordes’ dismissal as a Receiver in the Sober Case should have taken effect when the District Court granted the State’s motion to dismiss its Complaint in Intervention. Following said dismissal, any party that deemed it necessary and appropriate for the appointment of Cordes as a receiver in their case, could have petitioned the District Court for said relief pursuant to Minn. Stat. § 576.01. However, Cordes’ prosecutorial conduct as a Receiver appointed under Minn. Stat. § 8.31 should have ceased after there no longer existed any more actions brought by the Attorney General in this case.

Minnesota law provides additional authority (beyond Minn. Stat. § 8.31) for the appointment of a receiver in a civil case. According to section 576.01 of the Minnesota

Statutes, which requires a heightened standard, a receiver may be appointed by the District Court in the following cases:

Before judgment, on the *application of any party to the action* who shall show an apparent right to property which is the subject of such action and is in the possession of an adverse party, and the property, or its rents and profits, are in danger of loss or material impairment, except in cases wherein judgment upon failure to answer may be had without application to the district court.

Minn. Stat. § 576.01, subd. 1(1) (emphasis added). The appointment of a receiver is not a matter of right, however, and a party requesting the appointment must make an equitable showing. *State Mut. Life Assurance Co. of Am. v. Frantz Klodt & Son, Inc.*, 237 N.W.2d 354, 355 (Minn. 1975). Such a showing “usually will consist of evidence of waste, mortgagor insolvency, and inadequate security. The court should proceed cautiously where there is no overriding need for the receiver or where the party requesting his appointment has an adequate remedy at law.” *Id.* In order to show an imminent danger of loss and an inadequate remedy at law, the moving party must show *by clear and convincing evidence* that (a) the person in possession is insolvent; (b) the person in possession is committing waste; and (c) the value of any security is inadequate to protect the alleged debt. *Rosa Dev. Co.*, 495 N.W.2d at 892 (emphasis added) (citing *Brown v. Muetzel*, 358 N.W.2d 725, 728 (Minn. Ct. App. 1984)). “Without this showing a court should not exercise its discretionary authority to grant a request for the appointment of a receiver.” *Id.*

In this case, the District Court erred in granting Cordes’ motion for appointment over NFM and Appellants, for several reasons. First, section 576.01 provides that the

District Court may appoint a receiver in any of the above-captioned consolidated cases upon the application of any party to the action, but not a receiver who needs to find ways to satisfy its absurd fees and expenses previously incurred. Minn. Stat. § 576.01, subd. 1(1) (emphasis added). Cordes, however, was not a party to the any of the consolidated actions, whether independently or on behalf of IPM, J&J or Amerifunding. Furthermore, none of the parties to the consolidated actions submitted an application to the District Court for the appointment of Cordes as a receiver over NFM, IPA, RAC or Appellants; the motion was made only by Cordes. Cordes lacked standing to move the District Court for its own appointment as a receiver under Minn. Stat. § 576.01 because it was not a party to any of these actions.

Even if Cordes was a party to the consolidated actions, it failed to satisfy the substantive requirements for its appointment under Minn. Stat. § 576.01. First, Cordes' entire motion was based upon *beliefs* of Thomas Plumb as set forth in his affidavit, not direct evidence of any wrongdoing by NFM, IPA, RAC, or the Thompsons. The beliefs of Mr. Plumb, who was serving more as a prosecutor for Respondents as evidenced by his *ex parte* communications with and production of documents to their counsel, rather than as an agent of IPM, Amerifunding or J&J, cannot amount to clear and convincing evidence as required for the appointment of a receiver under section 576.01. *See Rosa Dev. Co.*, 495 N.W.2d at 892.

Finally, Cordes failed to demonstrate that the Thompsons, as compared with NFM or another entity, were in possession of any money, let alone money to which J&J, IPM,

or Amerifunding were entitled.¹⁸ Likewise, Cordes failed to demonstrate the Thompsons were insolvent or committing waste. Essentially, Cordes asked the District Court to order the Thompsons to turn over funds that Mr. Plumb “believed” they possessed, even though the State was voluntarily dismissed and Cordes was not a party to any of the consolidated actions, individually or on behalf of Progressive, Amerifunding or J&J. Cordes did not demonstrate by clear and convincing evidence that the property it sought to recover was in danger of loss or material impairment and, therefore, was not entitled to its own appointment as a receiver under Minn. Stat. § 576.01.

c. Cordes’ request for “other relief” in its motion should also have been denied.

In addition to asking for its appointment as a Receiver over NFM, IPA, RAC and the Thompsons, Cordes also asked the District Court for other relief. Specifically, Cordes requested an order instructing the Thompsons to act in a certain manner and authorizing and instructing it with respect to the assertion of certain claims against the Thompsons. In doing so, Cordes attempted to circumvent the law applicable to motions for injunctive relief or pre-judgment attachment by asking the District Court for such relief in its motion.

Cordes essentially asked the District Court to issue an order granting injunctive relief in favor of Cordes and against the Thompsons, amounting to a prejudgment attachment. Cordes failed, however, to even attempt to establish the requirements for a

¹⁸ If J&J, IPM or Amerifunding had a valid claim for the recovery of the \$750,000.00 they claimed to be in the possession of the Thompsons, then why did J&J, IPM or Amerifunding, themselves or through Cordes, not initiate a cross-claim or separate case against the Thompsons for the recovery of this money at the time of Cordes’ motion. Furthermore, if there was any validity to such claims, then why did Cordes request the Thompsons to stipulate to a

temporary injunction as set forth in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (1965), namely the likelihood of success on the merits. If Cordes, individually or on behalf of IPM, Amerifunding or J&J, had any valid claims against the Thompsons for the relief it sought in its motion, then it should have been required to initiate such an action (either separately or through cross-claims), and demonstrate a likelihood of success as required for injunctive relief under Minnesota law. Cordes eventually took such action by initiating a separate suit against Appellants in October 2007, but just recently decided to voluntarily dismiss that case and is no longer pursuing any claims against Appellants on behalf of IPM, J&J or Amerifunding. Cordes should not have been able to receive what essentially amounts to a pre-judgment attachment or temporary injunctive relief without first satisfying the necessary requirements for such relief under Minnesota law. See *O'Leary v. Carefree Living of Am. (Minnetonka), Inc.*, 1997 WL 435875, *2 n.4 (Minn. Ct. App. Aug. 5, 1997) (citing Minn. Stat. § 570.025, subd. 2). Now, following Cordes' dismissal of its later action against Appellants, Cordes should be required to return this money as it would had it sought and received a temporary injunction.

d. Cordes should have been required to post a bond.

Even though Appellants disputed Cordes' appointment as a Receiver with authority over them pursuant to its own motion, at the very least Cordes should have been required to post a bond as security prior to its appointment. Under Minnesota law, a receiver is required to post a bond prior to its appointment. Minn. Stat. § 576.01, subd. 2; *Rosa Dev. Co.*, 495 N.W.2d at 893. Typically, a bond posted by a receiver serves the

dismissal of their claims against the Thompsons in a separate suit that was ultimately filed on behalf of IPM, J&J

purpose of “preserve[ing] the property the receiver handles and assures the distribution according to the court’s order.” *Minn. Hotel Co., Inc.*, 495 N.W.2d at 893. Minnesota law also requires that the person seeking the receivership post a bond “to indemnify parties against a wrongful appointment of a receiver.” *Id.* (citing *Griggs, Cooper & Co. v. Lauer’s, Inc.*, 119 N.W.2d 850, 854 (Minn. 1962)).

In this case, Cordes asked the District Court to order that \$750,000.00 and the assets of NFM, IPA and RAC be turned over to its possession because it was appointed as the Receiver in the Sober Case pursuant to the State’s action, which no longer existed at the time of Cordes’ motion. Cordes did not make any showing that J&J, IPM or Amerifunding had any right to said money or other assets of NFM, IPA, RAC or Appellants, as evidenced by its failure to initiate claims against them at the time of its motion and its recent decision to dismiss all such claims asserted in a separate action. Furthermore, it appeared that Cordes’ top priority in gathering the alleged assets of IPM, Amerifunding and J&J was to collect enough money to pay its outstanding fees and expenses, including those of its legal counsel, which at the time of its motion exceeded \$350,000.00, rather than satisfying creditors, including Appellants, who had and still have valid claims of contribution and indemnification against IPM and J&J.

Once Cordes took possession of the money and other assets it “believes” (without pursuing such a suit) allegedly belongs to IPM, Amerifunding or J&J, it is entirely likely that said money was used to pay off Cordes’ fees and expenses, and thereafter would not be recoverable in the event this Court determines that the receivership was improper or

and Amerifunding, in October 2007?

that one of the creditors have an interest in the same. The use of this money to pay the fees and expenses incurred by Cordes and its legal counsel will irreparably harm other entities and individuals who have an interest in said money and other assets of IPM, Amerifunding and J&J. As a result, Cordes should have been required to post a bond of at least \$750,000.00 prior to its receipt of these funds pursuant to the District Court's order.

CONCLUSION

Based upon the foregoing, Appellants Geoff and Nancy Thompson respectfully request that this Court reverse the District Court's orders denying their motion to dismiss and motion for summary judgment; reverse the District Court's inexplicable entry of default judgment against Appellants and reverse the District Court's Order granting the Receiver's Motion to Expand the Receivership.

SKJOLD • BARTHEL, P.A.

Dated: November 5, 2008

Christopher P. Parrington (#034090X)
Benjamin R. Skjold (#292217)
222 South 9th Street, Suite 3220
Minneapolis, MN 55402
[P]: 612-746-2560
[F]: 612-746-2561

*Attorneys for Appellants Geoff and Nancy
Thompson*

CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Office Word version 2003, which reports that the brief contains 1,096 lines and 12,908 words.

SKJOLD • BARTHEL, P.A.

Dated: 11/5/08

Christopher P. Parrington (#034090X)
Benjamin R. Skjold (#292217)
222 South 9th Street, Suite 3220
Minneapolis, MN 55402
[P]: 612-746-2560
[F]: 612-746-2561

*Attorneys for Appellants Geoff and Nancy
Thompson*