A06-1233

# State of Minnesota
# In Court of Appeals

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Charles Risdall, Len Dozier, and John Risdall, in his capacity as personal representative of the Estate of Mary Risdall,

Respondents,

v.

Christopher C. Brown and funeral.com, inc.

Appellants.

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## SUPPLEMENTAL BRIEF AND APPENDIX OF APPELLANTS CHRISTOPHER C. BROWN AND FUNERAL.COM, INC.

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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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**THE TRIAL COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT PM1 AND PPM2 SHOULD BE INTEGRATED UNDER THE FIVE-FACTOR INTEGRATION TEST.**

This Supplemental Brief is being filed pursuant to the Court's Order dated August 14, 2008. In presenting this case on appeal to this Court, Appellants Christopher C. Brown and funeral.com, inc. (Appellants) explained, in detail, the district court's error in concluding, as a matter of law, that PPM1 and PPM2 are integrated under the five-factor test set forth in Note to Rule 502(a) of Regulation D, which test is also contained in Securities Act Release No. 4552. In granting summary judgment to Respondents, the trial court did not view the facts of record in a light most favorable to Appellants, the non-moving party. When the facts are so viewed, the trial court's grant of summary judgment cannot stand. The grant of summary judgment should be reversed and the case remanded for a determination on the merits.

For the reasons set out in Appellants' initial brief to this Court and in its reply brief, the facts of record do not support the grant of summary judgment to Respondents. Rather than simply repeat in this Supplemental Brief that which is said in those briefs, Appellants specifically direct this Court's attention to those briefs previously filed with this Court. Pursuant to this Court's directions, those relevant pages and the Appendix are being filed with and are attached to this Supplemental Brief. Specifically, Appellants rely on their Statement of Facts and Statement of the Case as stated in their initial brief, pages 2-15 (Supplemental Appendix [S.A.] 12-25), the Standard of Review stated on pages 15-16 (S.A. 25-26), and the argument in opposition to summary judgment for the issue on

remand, which is at pages 29-41 of its initial brief to this Court (S.A. 27-39). Appellants similarly rely on pages 1-3 and 12-21 of their Reply Brief (S.A. 41-43, 44-53). Appellants also rely on the Appendix filed with those briefs (attached hereto in full behind Appendix to Supplemental Brief).

### A. The Purpose of Integration Is Not Applicable to These Facts.

As stated in Appellants' briefs, the integration doctrine, conceptually, was promulgated to thwart unscrupulous issuers from splitting one offering into several to avoid registration. In this case, there is no evidence Appellants split their offerings to avoid registration. Rather, Respondents, the investors in PPM1, are attempting to take advantage of an inadvertent error by funeral.com that had no impact whatsoever on the investment decisions made by those investors. In order to give Respondents the relief they desire, it is necessary for the Court to ignore the fact that Respondent investors (a) acknowledge they were given access to full and complete information regarding funeral.com, (b) attested they were experienced and knowledgeable in financial and business matters and capable of evaluating the merits and risks of investing in the shares, and (c) understood the investment was highly speculative and involved a high degree of risk. (A. 127, 132, 139, 145, 151.) Respondents are asking the Court to apply the integration rule in a way it was never intended to be used.

As explained by the Committee on Federal Regulation of Securities in their article *Integration of Securities Offerings: Report of the Task Force on Integration*, 41 Bus. Law 595 (1984), a concern with the integration concept is that, too strictly applied, it could

cause numerous sales to be integrated when their registration would not significantly enhance investor protection and could seriously impair the issuer's capital formation and operating plans. *Id.* at 596. If the integration concept is used in the way Respondents want to use it in this case (by ignoring, among other things, that the offerings under PPM1 and PPM2 were not part of a single plan of financing and not made for the same general purpose), the concept could indeed make it much more difficult for future issuers to raise money and implement their operating plans, as no issuers would be able to raise additional monies through an offering before the six-month safe harbor period had run.

The fact is that Appellants here believed at the time of the first offering that no additional offerings would be needed. (A. 61, 63.) As time passed, though, circumstances changed. (A. 63.) An issuer may need to make an additional offering for different purposes before the six-month safe harbor period ends. Regardless of how different the second offering is from the first offering, however, the risk would always exist that an investor from the first offering might decide, in hindsight, such as Respondents did here, that their investment decision was a poor one and seek to undo their purchase by claiming simply because the offerings were both conducted within a six-month period they are the same offering and should be integrated. To find integration here is contrary to the very purpose of the doctrine of integration.

The facts of record, when viewed in a light most favorable to Appellants and when further viewed in light of the reason for the integration test, mandate reversal of the grant of summary judgment to Respondents.

### B. Respondents Are Not Entitled to Summary Judgment.

As stated in the briefs previously filed with the Court, the problem with the integration factors and their application is neither the SEC nor the courts have provided express guidance on how to weigh these factors when analyzing the integration question. In *SEC v. Ishopnomarkup.com, Inc.*, 2007 WL 2782748 (E.D.N.Y. 2007) (S.A. 1), a case cited by the Minnesota Supreme Court in *Risdall v. Brown-Wilbert*, 753 N.W.2d 723, 734 n. 7 (Minn. 2008), the New York federal district court, applying the five-factor integration test, granted summary judgment to the SEC only after the district court concluded that the defendant had failed to proffer <u>any</u> evidence which might raise a genuine issue of material fact as to <u>any</u> of the five factors. *Id.* at *5 (emphasis added). (S.A. 4.)

Here, unlike the defendant in *Ishopnomarkup.com, Inc.*, Appellants did present evidence which raises a genuine issue of material fact as to the application of the five integration factors and precludes integration as a matter of law. Appellants have presented facts, ignored by the trial court, which show

- the offerings or sales are not part of a single plan of financing.
  (Appellant's Brief, pp. 33-34 [S.A. 31-32]; Reply Brief, pp. 16-19 [S.A. 48-51]).
- the offerings or sales were not made for the same general purpose.
  (Appellant's Brief, pp. 34-35 [S.A. 32-33]; Reply Brief, pp. 16-19 [S.A. 48-51]).
- the sales or offerings do not involve issuance of the same class of securities.
  (Appellant's Brief, pp. 35-37 [S.A. 33-35]; Reply Brief, pp. 18-19 [S.A. 50-51]).
- timing does not support integration.
  (Appellant's Brief, pp. 38-39 [S.A. 36-37]).
- consideration is not a determining factor.
  (Appellant's Brief, pp. 37-38 [S.A. 35-36]).

Viewing the facts of record in a light most favorable to Appellants, the trial court committed error in granting summary judgment to Respondents.

## CONCLUSION

Appellants respectfully request that the judgment be reversed and the case remanded for further proceedings.

Dated: September 10, 2008

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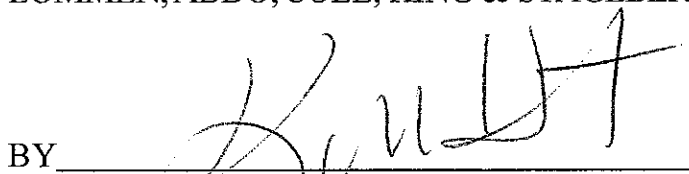

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