THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2008-CP-24-01221

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

BRIEF OF APPELLANT

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Statement of the Case

This case is primarily a legal malpractice case arising from Respondents' (hereinafter collectively referred to as "T&A") representation of the Appellant (hereinafter referred to as "RFT") during the closing of two investment real estate lots situated in a subdivision in Greenwood County The Complaint was filed on October 20, 2008 Therein, RFT alleged two basic types of malpractice (1) T&A's representation of both parties at the closing while subject to a conflict of interest and (2) T&A's misrepresentation of, and failure to disclose, material facts relating to the developer (hereinafter referred to as LGD) of the subdivision and to the timing of various aspects of the closing After having been granted an extension of time in which to respond to the Complaint, T&A timely filed their Answer on January 21, 2009 Therein, they denied the material allegations of the Complaint and asserted affirmative defenses alleging the unconstitutionality of punitive damages, failure to state sufficient facts to constitute a cause of action as to each of RFT's causes of action, and comparative negligence

The case was tried to a jury from June 28, 2010, through July 2, 2010 At the close of all of the evidence on July 2, 2010, the trial court denied RFT s motion for a directed verdict and T&A's motion for a directed verdict on the First Cause of Action for legal malpractice The trial court then held that RFT's Second Cause of Action was entirely duplicative of the First Cause of Action, merged the Second Cause of Action into the First Cause of Action, and did not charge the jury on breach of fiduciary duty T&A's motion for a directed verdict on the Third Cause of Action under SCUTPA was granted by the trial judge based upon his decision that SCUTPA does not apply to the legal profession The trial judge also directed a verdict on the Fourth Cause of Action upon the ground that the sale of lots to RFT did not constitute the sale of a security

On July 2, 2010, the jury returned a verdict in favor of T&A on the sole cause of action before them, the malpractice cause of action, finding specifically that T&A's conduct was not negligent Following the jury's rendering of their verdict, RFT requested, and was granted, an additional ten (10) days in which to move for judgment notwithstanding the verdict and/or for a new trial RFT timely filed post-trial JNOV and new trial motions on July 15, 2010 By order filed October 6, 2010, the trial judge denied both motions Because judgment had been rendered on the jury's verdict in favor of T&A, there is no monetary award at stake in this appeal The notice of appeal was timely served on T&A on October 22, 2010 RFT was granted an extension until June 1, 2011, in which to file its Initial Brief and Designation of Matter to Be Included in the Record on Appeal

Argument and Citation of Authority

In lieu of providing a single Statement of Facts relating to this appeal, Appellant (hereinafter "RFT") will set forth separate statements for each of the issues presented for review RFT will then discuss why those facts, when considered in light of relevant precedent, require reversal of the Order below

I T&A COMMITTED MALPRACTICE AS A MATTER OF LAW BY REPRESENTING BOTH RFT AND THE SUBDIVISION DEVELOPER AT THE CLOSING (Issue I)

In order to prevail on its First Cause of Action for legal malpractice, RFT was required to prove the following elements

> (1) the existence of an attorney-client relationship, (2) breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of client's damage by the breach

Holy Lock Distributors Inc v R L Hitchcock, 340 S C 20, 26, 531 S E 2d 282, 285 (2000) The existence of an attorney-client relationship between RFT and T&A is not in dispute, as T&A have admitted that they represented at the closing both RFT, as buyer, and the developer, Lake Greenwood Developers, LLC, ("LGD") as seller [1] Thus, in answering the first two questions on appeal, this brief will address the final three elements of a legal malpractice cause of action

A Standards for Decision

In this appeal the Court is requested to grant jnov on the First Cause of Action for Legal Malpractice or, in the alternative, to grant RFT a new trial on that claim RFT also requests the Court to reverse the trial court's order improperly merging the Second Cause of Action for Breach of Fiduciary Duty into the First Cause of Action, to reverse the trial court's orders

[1] Adams testimony R p 603 lines 9 13 Attorney Representation Disclosure Form, Plaintiff's Exhibit (PX) 9 R p 731

directing verdicts on the Third Cause of Action for violation of SCUTPA and on the Fourth Cause of Action for Aiding and Abetting Securities Fraud, and to grant a new trial on these claims

1 Failure to Grant RFT's Motion for Judgment <u>Notwithstanding the Jury's Verdict</u>

RFT understands that in connection with its motion for JNOV, if there are conflicting legal inferences arising from the evidence, any such conflict must be resolved in favor of the non-moving party *Burns v Universal Health Services Inc* , 361 S C 221, 232, 603 S E 2d 605, 611 (Ct App 2004) Thus, a "motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict " *Id* The appellate court will reverse a trial court's denial of JNOV "only when there is no evidence to support the ruling or the ruling is controlled by an error of law " *Id* (*citing Hinkle v Nat Cas Ins Co* , 354 S C 92, 579 S E 2d 616 (2003))

In the discussion which follows, RFT will show that the record is devoid of any evidence which directly or inferentially can support the trial court's denial of the JNOV motion and that the ruling is controlled by errors of law

2 <u>New Trial Motion</u>

The standard to be applied by an appellate court in reviewing a trial court's denial of a motion for a new trial is, with one exception, the same as the standard governing the denial of a motion for JNOV Thus, an order denying a new trial to RFT may only be reversed upon a finding that the order is "wholly unsupported by the evidence or the conclusion reached was controlled by an error of law " *Folkens v Hunt*, 300 S C 251, 254-55, 387 S E 2d 265, 267 (1990) An exception to the general rule just stated exists under the "thirteenth juror" doctrine which

> entitles the trial judge to sit, in essence, as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts "

Norton v Norfolk Southern Reg Co, 350 S C 473, 478, 567 S E 2d 851, 854 (2002) (*quoting Folkens*, 300 S C at 254, 387 S E 2d at 267)) Thus, under the thirteenth juror doctrine, a new trial can be granted if the trial judge believes that the jury's verdict is contrary to a preponderance of the evidence 350 S C at 482 & n 7, 567 S E 2d at 856 & n 7

RFT respectfully contends that in this case, the jury's verdict was "wholly unsupported" by the facts and that, even if it were possible to inferentially establish material factual conflicts (which it wasn't), the evidence weighs overwhelmingly in favor of RFT The trial court therefore erred by not granting a new trial on the malpractice cause of action

3 <u>Orders Granting Directed Verdicts</u>

RFT also requests the Court to review orders of the trial court which effectively granted directed verdicts in favor of T&A on the Second, Third, and Fourth Causes of Action RFT believes that the trial court's orders disposing of those Causes of Action were all controlled by errors of law Absent such errors, however, the Court will review "the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the non-moving party ," and will reverse a lower court when the evidence reveals factual issues *O Leary-Payne v R R Hilton Head II Inc*, 371 S C 334, 347, 638 S E 2d 96, 100 (Ct App 2006) Thus, the Court will reverse an order directing a verdict only when there is no evidence to support the trial court's ruling that there were no factual disputes *Id*

RFT believes that the orders granting directed verdicts and merging causes of action were all infected by errors of law and that, in any event, it was impossible to find that there were no disputes as to the facts based on the trial record

B Statement of Facts Relating to Conflict of Interest Issue

RFT contracted to purchase Lot Nos 28 and 31 in a subdivision known as Planters Row for a total purchase price for the two lots of $570,000 00 [2] Planters Row was being developed by Lake Greenwood Developers, LLC ("LGD"), which was managed by William Gilbert ("Gilbert") Mr Gilbert handled all of the negotiations between LGD and RFT,[3] and it was he who selected T&A to close the transaction Prior to the closing, Gilbert had done business with Respondent Adams for over twenty years, and Adams and whichever law firm he was with at the time had done most, if not all, of the many closings in which Gilbert had been involved [4] In fact, T&A performed the vast majority of closings in Planters Row, as well as a number of loan closings for LGD [5]

The closing which T&A performed was a very complicated one In fact, Respondent Adams characterized it as a "very rare" transaction [6] Not only were T&A charged with the preparation of the deed, HUD-1, and other normal closing documents, they prepared a second mortgage granted by LGD to RFT on 21 other lots,[7] a mortgage subordination agreement,[8] and other forms to be signed by RFT in order to release lots from its second mortgage as they were sold [9] T&A were required at the closing to explain to RFT's manager, David Roatch ("Roatch"),

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[2] HUD 1 Settlement Statement PX 11 R p 734

[3] Gilbert testimony R p 345 line 10 - p 346 line 13

[4] R p 346 lines 14 20 R p 348 lines 5 11

[5] *Id*

[6] Adams testimony, R p 606 lines 8 11

[7] R p 613, lines 8 16

[8] PX 8 R p 725

[9] R p 623 lines 1 8

how the second mortgage operated in conjunction with the mortgage subordination agreement and the lot release forms which had been signed [10] In addition, the actual contracts which were being signed were unique in that they provided for a separate buy-back agreement which gave LGD the right to re-purchase the lots under certain circumstances, and which gave RFT the right to require LGD to re-purchase the lots after the first year or after the second year, at RFT's election, at prices which greatly exceeded the original purchase prices [11] During the closing, it became necessary for RFT and LGD to renegotiate the buy-back agreement, and Respondent Adams was present for those negotiations [12]

Further complicating T&A's duties at this closing was the fact that, unbeknownst to RFT, LGD did not then own the two lots which it had contracted to sell [13] Those lots were owned by third parties, the Grimshaws and the Robertsons, who had purchased the lots 18 months earlier subject to buy-back agreements [14] When they elected to exercise their buy-backs, LGD was financially unable to perform [15] In order to assist LGD in selling the lots to RFT, T&A organized a "flip transaction,"[16] pursuant to which LGD's purchases from Grimshaw and Robertson were closed simultaneously with the sale of the same lots to RFT The simultaneous

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[10] In addition Adams advised Roatch that the mortgage subordination was no big deal and to go ahead and sign it Roatch Testimony, R App (Appendix to Record on Appeal) p 9 lines 7 10

[11] Buy back Agreement PX 7 R p 723

[12] Adams testimony R p 622 lines 21 25

[13] Roatch testimony R App p 3 lines 4 14 p 10 lines 16 25 Grimshaw deed PX 35 R p 745 Robertson deed PX 42 R p 756 W Gilbert testimony R p 362 line 25 p 363 line 4

[14] Grimshaw Buy Back PX 36 R p 749 Robertson Buy Back PX 43 R p 766

[15] W Gilbert testimony R App p 15 lines 2 6

[16] According to the Supreme Court a flip transaction [is one] where proceeds from the second transaction are used to fund the initial transaction In re *Barbare* 360 S C 560 567 68, 602 S E 2d 382 385 86 (2004)

closings[17] were necessary to allow LGD to use RFT's $570,000 00 in order to re-purchase the lots from the owners, thereby enabling LGD to deed the lots to RFT [18] None of these facts relating to the simultaneous closings, the "flip" transaction, or uses of RFT's funds were disclosed to RFT [19]

Because of how the closing was structured, T&A necessarily knew that the closing effectively substituted RFT for the Grimshaws and Robertsons in buy-back obligations on which LGD had already once defaulted Thus, T&A were aware that the closing created a situation in which RFT and LGD potentially, if not probably, would be in conflict with each other

When the closing did take place, the sole communication between T&A and RFT which mentioned the word "conflict" was the Attorney Representation Disclosure form ("ARD")[20] which Mr Roatch was required to sign on behalf of RFT in order for the closing to proceed While the ARD did use the word "conflict" twice, it never used the term "conflict of interest," nor could it have possibly been read as an acknowledgement by RFT that any conflict of interest to which T&A may have been subject was waived Thus, by stating that "*should* a *controversy* arise between the Buyer and the Seller during or after closing ," the ARD did not address *attorney conflicts of interest* and reflected a clear implication that no controversy (and, thus, no conflict) then existed Similarly, language in the ARD which states that T&A "will withdraw from representing both the Seller and the Purchaser if any actual conflict arises between the parties " again referred only to *party* conflicts and not to attorney conflicts and implied that no conflict existed on the closing date Finally, the ARD stated that the parties "acknowledge

[17] Compare dates on RFT HUD 1 PX 11 R p 734 and on Grimshaw HUD 1 PX 38, R p 753

[18] W Gilbert testimony R App p 15 lines 2 17

[19] Roatch testimony R App p 10 line 20 – p 11 line 11

[20] PX 9 R p 731

that there is no conflict" This acknowledgement, of course, does not reflect which type of conflict — party or attorney — was referred to, and necessarily assumed that a non-lawyer would be able to recognize a *lawyer s* conflict of interest without guidance or explanation from the lawyer

Respondent Adams, on the other hand, testified that he did not advise Mr Roatch about conflicts because, in Adams' view, there were none [21] Thus, Adams never took the time to explain to Mr Roatch what an attorneys' conflict was nor to explain the potential effects of a conflict upon an attorney's loyalty, upon confidentiality, upon the attorney-client privilege, or upon the lawyer's independent personal judgment in behalf of each client at the closing [22] Deprived of any meaningful information about the existence of a potential conflict or about the effects which a conflict can have upon the lawyer's representation of the client, there was no possible way for Mr Roatch to have waived or consented to Respondent's conflict in behalf of RFT And while Mr Roatch may have acknowledged in the ARD that he was unaware of any conflict *between RFT and LGD*, he clearly did not acknowledge that T&A were not subject to a conflict of interest by virtue of their representation of both parties during a complicated, non-garden-variety closing Thus, undisputed facts in this case establish that T&A were subject to a conflict of interest by virtue of their dual representation of RFT and LGD at the closing, that this conflict of interest was never disclosed, and that it was not consented to

As RFT argues below, these facts entitled it as a matter of law to JNOV or a new trial on the issue of whether T&A engaged in malpractice by representing both RFT and LGD while subject to a conflict of interest

[21] Adams testimony, R p 603 lines 17 20

[22] R p 604 lines 10 17 The ARD contains no explanations of any nature See PX 9 R p 731

C T&A Engaged ın Malpractıce by Representıng Both RFT and LGD at the Closıng While Subject to an Unwaıvable Conflıct of Interest

RFT submıts that T&A could not have ethıcally represented both LGD and ıt at the closıng because T&A were subȷect to an unwaıvable conflıct of ınterest and because, even assumıng the conflıct could have been waıved, ıt was neıther dısclosed nor consented to

1 T&A Had a Conflıct of Interest

In *State v Buyer s Servıce Co Inc* , 292 S C 426, 432, 357 S E 2d 15, 18 (1987), the South Carolına Supreme Court recognızed that conflıcts of ınterest are "ınherent" ın real estate closıngs because "the adverse ınterests ın real estate transactıons make ıt extremely dıfficult for the attorney to maıntaın a proper professıonal posture toward each party " Sımılarly, the Court of Appeals quoted approvıngly from S C Bar Ethıcs Advısory Opınıon No 94-08 for the proposıtıon that "ıt ıs clear that ın real estate transactıons the Purchaser, Seller, and Lender often have competıng, ıf not dırectly conflıctıng, ınterests " *McNaır v Raınsford*, 330 S C 332, 345, 499 S E 2d 488, 495 (Ct App 1998) These pronouncements do no more than to state the obvıous

South Carolına courts are not the only ones to recognıze that a conflıct of ınterest ıs ınherent ın a real estate closıng where the attorney represents both partıes *See, e g State Bar of Arızona v Arız Land Tıtle & Trust Co* , 366 P 2d 1, *after rehearıng*, 371 P 2d 1020 (Arız 1962), cıted by the Court ın *Buyer s Servıce*, *Crest Investment Trust Inc v Comstock*, 327 A 2d 891, 905 (Md App 1974), *In re Camp*, 40 N J 588, 194 A 2d 236, 239-41 (1963) As explaıned ın the latter case

> Sınce respondent represented both buyer and seller, a conflıct of ınterest as defined by Canon 6 ımmedıately appeared Even wıthın the lımıted area of marketable tıtle, a sıtuatıon may exıst whıch casts doubt on the advısabılıty

> of acceptıng tıtle The buyer's attorney would be under a duty to request the seller to correct the sıtuatıon, whereas the seller mıght properly contend that the tıtle was marketable, notwıthstandıng the buyer's assertıon It would certaınly be most dıfficult for one attorney under such cırcumstances to represent both clıents "wıth undıvıded loyalty "

194 A 2d at 239-40 The same court also noted that

> "(A) clandestıne conflıct of ınterest exısts when an attorney employed by a seller prepares all legal ınstruments, certıfies and closes tıtle, wıthout advısıng the purchaser fully of the relatıonshıp whıch exısts, and that hıs ınterests mıght be better protected by hıs engagement of ındependent counsel "

Id at 240 (*quotıng* New Jersey Ethıcs Advısory Opınıon No 7, 86 N J L J 405 (1963)) Fınally, the South Carolına Court of Appeals also explıcıtly recognızed ın the *McNaır* case that a closıng attorney ıs subȷect to a conflıct of ınterest ın representıng both buyer and seller

In thıs case, T&A dıd not explaın ın the Tıtle Opınıon Letter that ın order for good tıtle to be conveyed, mortgages on each of the propertıes needed to be satısfied, and the letter dıd not call attentıon to the exıstence of those mortgages [23] In addıtıon, RFT's buy-back agreement gave LGD the optıon to repurchase the propertıes under certaın cırcumstances,[24] and that optıon constıtuted a cloud on the tıtle [25] The presence and effect of the optıon were also not dısclosed ın the tıtle opınıon letter As a result, there was a potentıal dıspute between RFT and LGD whıch should have been dısclosed and explaıned, but was not

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[23] PX 10 R p 732

[24] Adams testımony, R p 614, lınes 1 11

[25] *Maupın v Hunn* 678 S W 2d 180 182 (Tex App 1984) (' optıon agreement created cloud on plaıntıff's tıtle ') *Kıle v Int l Truck & Eng Corp* 399 F Supp 2d 829 833 34 (M D Tenn 2005) (optıon hampered property s marketabılıty)

RFT therefore submits that under the above authorities and reasoning, T&A were subject to a conflict of interest as a matter of law In addition, Plaintiff's expert, John Freeman, also unequivocally confirmed the presence of the conflict [26] The only real issue was as to whether T&A committed malpractice by continuing to represent the RFT notwithstanding the conflict

2 T&A's Conflict of Interest Was Not Waivable

Where, as in this case, a lawyer is subject to a "concurrent" conflict of interest,[27] she may not undertake concurrent representation of two or more clients unless she reasonably believes that she will be able to provide competent and diligent representation to each affected client RPC 1 7(b)(1) The question becomes one of determining how to assess whether the lawyer could reasonably believe that the conflict of interest will not affect her ability to provide proper unbiased representation to each client The courts of South Carolina have not yet articulated a test for making this determination The Court of Special Appeals of Maryland, however, accepted a definition of unwaivable conflict as one "which a disinterested lawyer would advise a client not to waive " *Fairfax Savings F S B v Weinberg and Green*, 112 Md App 587, 637, 685 A 2d 1189, 1213 (Ct Spec App 1996) (citation omitted) The court further instructed that "the hypothetical disinterested lawyer must use an objective test and not base his or her decision on his subjective belief as to the fairness of a particular lawyer " 112 Md App at 637, 685 A 2d at 1214 The same court later quoted the following language with approval

> "'[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved

[26] Freeman testimony R p 469 line 16 p 475 line 17

[27] A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer s responsibilities to another client Rule 407 SCACR, Rule of Professional Conduct 1 7(a)(2) (hereinafter referred to as RPC ___)

cannot properly ask for such agreement or provide representation on the basis of the client's consent '"

Klupt v Krongard, 126 Md App 179, 210, 728 A 2d 727, 742 (Ct Spec App 1999) (citation omitted), *see, also*, RPC 1 7(b), cmt [12] (also recognizing that "some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation based on the client's consent ")

RFT submits that under the circumstances of this case, no disinterested lawyer could have possibly concluded that RFT should have agreed to the dual representation As will be discussed in more detail below, every lawyer is subject to a strict duty to disclose to her clients all material information regarding the subject of the representation Both before and during the closing, T&A were aware of LGD's financial problems that led to the necessity for employing the "flip" transaction [28] RFT submits that since such information would unquestionably have been material to its decision to proceed with the closing, T&A owed a duty to RFT, as a matter of law, to disclose the flip transaction and the reasons for its use T&A also should have disclosed that they had a long-standing business relationship with Gilbert [29] On the other hand, because the disclosure of such information would have undoubtedly killed the deal, T&A had a duty *to LGD* not to disclose the information, thereby creating an unwaivable conflict

RFT therefore submits that no disinterested lawyer could possibly have recommended to RFT that it consent to or waive T&A's conflict of interest, thereby confirming that the conflict was not waivable That being the case, T&A committed malpractice by asking RFT to consent

[28] Adams awareness of LGD s financial problems is discussed in detail below at pages 16 21

[29] *See McNair* 330 S C at 348 499 S E 2d at 496 (explaining that a lawyer who has represented one or more clients for a long period of time might have difficulty being impartial between that client and one to whom the lawyer has only been recently introduced) W Gilbert Testimony R p 346 line 20 – p 373 line 11

to the conflict, by failing to advise RFT to obtain separate counsel,[30] and by representing RFT while they were subject to the conflict of interest *Matter of Harper*, 326 S C 186, 193, 485 S E 2d 380 (1997) (attorneys have a duty to "take every possible precaution to ensure that clients are fully aware of the need for independent and objective advice ") The trial court therefore erred by not granting JNOV to RFT on that issue

3 T&A Failed to Disclose the Conflict

The law is also clear on the point that before an attorney may lawfully represent both buyer and seller in a real estate closing, he must make full disclosure of the conflict to both parties, to include "the implications of common representation and the advantages and risks involved " *McNair v Rainsford*, 330 S C 332, 344, 499 S E 2d 488, 494 (Ct App 1998), *accord Bankers Trust of South Carolina v Bruce*, 283 S C 408, 419, 323 S E 2d 523 (Ct App 1984) (requiring "full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment in behalf of each client "), Rule of Professional Conduct 1 7, Cmt [16] ("possible effects [of dual representation] on loyalty, confidentiality and the attorney-client privilege") The concept that a conflict along with all potential effects and risks must be fully disclosed is not a new one to the law As the Supreme Court of New Jersey explained almost one-half a century ago

> Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel The full significance of the representation of conflicting interests should be disclosed to the client so that he may make an intelligent decision before giving his consent

[30] Freeman testimony R p 482 line 3 – p 483 line 23

In re Camp, 194 A 2d at 240 In his testimony, Respondent Adams admitted that he never disclosed any conflict of interest to Mr Roatch because, according to him, he did not think there was one This testimony is uncontradicted by any other evidence or inferences that may be drawn from the trial record

T&A attempted to prove that the ARD form was all that was needed in the way of disclosure However, as explained above, there is not a single word in that form which can be read as stating that T&A had a conflict In fact, the form spoke only of T&A's duty to withdraw from representing both parties "were a dispute to arise", and thereby inferred that there was no conflict Moreover, Mr Roatch was required to sign the ARD as an acknowledgment that there was no conflict [31]

In fact, the term "conflict of interest" appeared nowhere in the entire document While it does mention conflicts *between the parties*, it says nothing about whether or not T&A had a conflict of interest as a result of their representation of both parties Thus, it is indisputable that no conflict of interest was disclosed and, thus, that potential risks and adverse effects of a conflict were not discussed A jury could not rationally have reached any other conclusion

4 Plaintiff Never Validly Consented to the Dual Representation

Under the version of RPC 1 7 which was in effect when Plaintiff purchased its investment in Planters Row, a lawyer could undertake dual representation only if "each affected client gives informed consent confirmed in writing " RPC 1 7(b)(4) (emphasis added) And as explained by the Court of Appeals

[31] How could a non lawyer possibly know that a lawyer had no conflict of interest? Indeed [a] client is not responsible for recognizing the conflict In re SRC Holdings Corp 364 B R 1 47 48 (D Minne 2007) (*citing Manoir Electroalloys Corp v Amalloy Corp* 711 F Supp 188 195 (D N J 1989))

> each client must consent to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment in behalf of each client The consent obtained from each client after full disclosure of the possible effect of multiple representation must be an informed consent

Bankers Trust of South Carolina v Bruce, 283 S C at 419, 323 S E 2d at 530 (Ct App 1984) Informed consent, in turn, requires disclosure by the lawyer to the client of all of the potential risks and implications of the representation Although South Carolina appellate courts have not addressed exactly what is subsumed by the phrase "informed consent", many other courts have Thus, it has been recognized that the lawyer

> must explain to [the clients] the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel

Image Tech Servs, Inc v Eastman Kodak Co, 820 F Supp 1212, 1216-17 (N D Cal 1993), *accord Unified Sewerage Agency Etc v Jelco Inc*, 646 F 2d 1359, 1345-46 (9th Cir 1981), *In re SRC Holding Corp*, 364 B R 1, 47-48 (D Minne 2007), *Florida Insurance Guaranty Ass n, Inc v Corey Canada Inc*, 749 F Supp 255, 259 (S D Fla 1990) As well, the "lawyer bears the duty to recognize the legal significance of his or her actions in entering a conflicted situation and fully share that legal significance with clients " *SRC Holding Corporation*, 364 B R at 48

Respondent's contention that the ARD fully satisfied their disclosure obligations is frivolous Indeed, it is simply not possible to infer from Mr Roatch's acknowledgment that there was no conflict *between RFT and LGD* that Roatch was also acknowledging that T&A did not have any actual or potential conflict Knowing nothing of T&A' relationship with LGD or all of the legal ramifications of the document he was about to sign, Mr Roatch could not possibly have known if Defendants had a conflict of interest or if a conflict potentially could arise *A fortiori*, he could not have consented to that which had not been disclosed to him and about which he knew nothing This is another conclusion that a rational, unbiased jury would have had to have reached

D RFT Suffered Losses Which Were Proximately Caused By T&A's Undertaking Dual Representation While Subject to a Conflict

By representing RFT and LGD at the closing T&A placed themselves in a position in which they could not make disclosures of material facts to RFT which, as explained below, they were under a duty to make, without damaging the interests of LGD Their knowledge and their duty of disclosure dictated that they decline to represent RFT, but they did not do so Instead, they remained in the case and assisted LGD, to RFT's detriment, by orchestrating the unethical "flip transaction " Had T&A respected their conflict of interest and resigned, RFT would have been in a position to hire separate counsel and thereby to ferret out the details of the flip transaction and the existence of certain material facts which would have counseled against going forward with the lot purchases Thus viewed, T&A' ignoring of the conflict and proceeding with dual representation was a *sine qua non* to consummation of a closing which resulted in a loss to Plaintiff in excess of $400,000 00

II T&A COMMITTED MALPRACTICE AS A MATTER OF LAW BY FAILING TO DISCLOSE MATERIAL INFORMATION TO RFT, BY PROVIDING FALSE AND MISLEADING DOCUMENTATION TO RFT, AND BY CLOSING A DECEPTIVE FLIP TRANSACTION (Issue II)

It is RFT's position that the trial court should have granted a directed verdict or JNOV in its favor on RFT's claim that T&A committed malpractice by failing to disclose material information to RFT, by creating and disseminating false and misleading documents relating to the closing, and by structuring the closing in the form of a "flip" transaction, a form which the

Supreme Court has recognized as being unlawful As the following Statement of Facts will show, these wrongful acts were proved by evidence which is uncontradicted

A **<u>Statement of Facts Relating to T&A's Nondisclosures, False and Misleading Documents, and Employment of a Flip Transaction</u>**

In early 2006, nearly one year after beginning operations, LGD found itself in dire need of working capital because it did not have sufficient funding to complete subdivision infrastructure and amenities [32] After initial sales in 2005 to friends and relatives of LGD's management and owners, there were few, if any, sales of lots in Planters Row until 2006 In order to stimulate sales, LGD concocted a scheme wherein certain lots would be listed for sale for $235,000 00 [33] In order to stimulate interest at that price, however, Gilbert and LGD were forced to provide other incentives [34] Thus, LGD informed prospective purchasers that if they purchased one of the lots, they would receive a 10% discount from the developer, making the actual net sales price $211,500 00, all of which could be financed with no down payment [35] Lenders would be informed that the contract price was $235,000 00, however [36] The final loan amount would be $211,500 00, which LGD would then accept in full payment for the lot [37] By means of this trick, LGD was able to offer and to provide 100% financing to purchasers without alerting lenders who had provided financing under the mistaken belief that the loan-to-value ratio was 90%, not 100%

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[32] W Gilbert Testimony R p 349 line 17 p 350 line 6

[33] *Id* at p 348 line 23 p 349 line 8

[34] *Id*

[35] Email from W Gilbert to Elaine Lester dated 3/9/06, PX 63 R p 782

[36] *Id*

[37] S Gilbert Testimony R p 296 lines 7 24 discussing PX 63

As reflected by emails which they received from Gilbert and his son, T&A were fully aware of LGD's deceptive tactics [38] In fact, T&A's assistance was necessary in order to make the scheme work Thus, T&A prepared HUD-1 Settlement Statements which falsely showed the contract price to be the $235,000 00 listing price, instead of the actual $211,500 00 net sales price [39] In addition, T&A prepared affidavits of consideration which were filed along with deeds to the lots and falsely reflected cash consideration of $235,000 00 [40]

The deceptive provision of 100% financing was not enough, by itself, to stimulate sales in Planters Row As a result, as a further incentive, LGD offered to make such sales subject to buy-back agreements whereby, after one year, a purchaser could require LGD to repurchase her lot for $250,000 00, thereby providing her with a $38,500 00, or 18%, profit on the actual selling price of $211,500 00 [41] Again, T&A had been made fully aware of the buy-back program

In the early part of 2006, LGD's 100% financing and "guaranteed" buy-back program resulted in only six (6) additional sales of lots in Planters Row,[42] most of which were closed by T&A Other than these six sales, there were virtually no other lot sales during the remainder of 2006 and into early 2007 [43] It was at this time that Gilbert's scheme started to unravel

[38] Adams Testimony R p 619 line 18 p 621 line 20 discussing PX 63 R p 782

[39] *Id* p 617 line 4 - p 619 line 17

[40] *Id*

[41] E g Grimshaw Buy Back PX 36 R p 749 Robertson Buy Back PX 43 R p 766

[42] W Gilbert Testimony R p 347 line 14 p 348 line 16 discussing an email dated April 17 2007 to Courtney Furman PX 27, R p 738

[43] Courtney Furman testified that he did not believe that LGD had any sales in 2007 R p 338, line 21 – p 349 line 1 In addition in an email from W Gilbert to Furman dated April 17 2007 Gilbert states that there were six buy back lots in 2006 R p 368 lines 7 12 discussing PX 27, R p 738

Three of the sıx purchasers elected to exercıse theır buy-backs [44] LGD dıd manage to perform under one of the buy-back agreements, but was unable to perform the other two, whıch related to the sales to Grımshaw and Robertson of Lot Nos 28 and 31 ın Planters Row [45] Those were the same lots ultımately sold to Plaıntıff at the closıng orchestrated by T&A

Closıngs were scheduled for LGD's repurchases of Lots 28 and 31, and T&A were chosen by Gılbert to perform those closıngs When LGD proved unable to perform the buy-backs,[46] the closıngs were postponed In order to avoıd beıng sued by Grımshaw and Robertson, LGD was forced to enter ınto extensıon agreements wıth them [47] The Grımshaw extensıon provıded that ın the event LGD dıd not repurchase the Grımshaw lot by October 30, 2007, LGD would suffer a $25,000 00 penalty agaınst the re-purchase prıce The Robertson extensıon sımılarly provıded that ıf LGD dıd not repurchase the Robertson lot by November 14, 2007, LGD would be requıred to pay Robertson an addıtıonal sıx month's finance charge By the tıme of the closıng of RFT's purchase of Lots 28 and 31, T&A were fully aware of why the closıngs of the Grımshaw and Robertson re-purchases were cancelled back ın the sprıng, of the extensıon agreements, of the deadlınes, and of the penaltıes for LGD's non-performance [48]

[44]Gılbert testımony R p 368 lınes 7 16

[45]Gılbert testımony, R p 380, lıne 7 – p 382, lıne 1, dıscussıng PX 37 R p 750, p 385 lıne 15 – p 388, lıne 19 dıscussıng PX 44 R p 767

[46] Furman testımony, R p 331 lıne 2 – p 332 lıne 4

[47] Grımshaw Extensıon Agreement PX 37 R p 750 Robertson Extensıon Agreement PX 44 at p 3 ¶9(a) R p 767

[48]Adams eıther dırectly or through hıs paralegal had receıved a letter and emaıls advısıng hım that ıf the buy back s were not satısfied by the deadlınes set forth ın the extensıon agreements LGD would ıncur substantıal monetary penaltıes and that LGD could not meet the deadlınes wıthout RFT s money PX 17 R p 736 Gılbert testımony R p 364 lınes 15 24, PX 18 R p 737, Gılbert testımony R p 365 lıne 25 – p 366 lıne 12

By August 2007, the financial picture for LGD was worsening A fourth lot purchaser, the Carrs, elected to exercise their buy-back agreement [49] Again without the funds to perform, LGD was required to borrow $225,000 00 in order to repay the Carrs T&A closed both the loan from the bank to LGD and the repurchase by LGD of the Carrs' lot [50] So, LGD's position in the autumn of 2007 was that it was out of cash and facing deadlines on the Robertson and Grimshaw buy-backs

Unfortunately for RFT, it was at about this time that Mr Roatch began to seriously consider investing in Planters Row Having no reason to believe that Planters Row or LGD were in any trouble,[51] Mr Roatch began discussions with a sales agent, Jan Bradshaw, and Gilbert regarding such an investment [52] After several weeks, it was agreed that RFT would purchase lots 28 and 31 from LGD at agreed purchase prices of $290,000 00 for Lot 28[53] and $280,000 00 for Lot 31 [54] In addition, RFT received a buy-back agreement pursuant to which it could require LGD to repurchase the lots for $640,000 00 after one year and for $700,000 00 after two years [55] RFT was to receive one $40,000 00 "interest" payment at closing, and another one at the end of the first year Finally, RFT was to receive a second mortgage on 21 other lots owned by LGD in order to secure LGD's performance of the buy-back [56] LGD and Bradshaw characterized the

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[49] Adams testimony R p 615 line 12 – p 616 line 5 Gilbert testimony, R p 363, lines 5 10

[50] Adams testimony R p 615 line 16 – p 616 line 5

[51] Roatch testimony, R App p 4 lines 16 20 p 6 lines 2 4

[52] *Id* p 204 line 16 – p 210 line 8 R App p 2

[53] Contract of Sale dated September 25 2007 PX 5 R p 711

[54] Contract of Sale dated September 25 2007 PX 6 R p 717

[55] PX 7 R p 723

[56] *Id*

deal offered to Mr Roatch as one with little risk and "guaranteed" buy-backs and with an exceptional return on RFT's investment [57]

After several communications between T&A and others in which the importance of the October 30, 2007, deadline was stressed, a closing was scheduled for that day at T&A's office Again, T&A served as closing attorneys

The closing did take place on October 30, 2007, as scheduled Mr Roatch was unaware that any other transactions were dependent upon RFT's closing on Lots 28 and 31 [58] He was not told that RFT's funds would be used to satisfy the Robertson and Grimshaw buy-backs,[59] nor was he informed of the financial problems being experienced by LGD [60] Nothing in the record indicates that T&A informed him of the extensive business dealings they had had in the past with Gilbert and LGD Indeed, other than at various civic events, Mr Roatch had never even seen Adams prior to the closing Roatch testimony, R p 225, lines 15-20

T&A's orchestration of the closing was masterful They held a signed deed from Grimshaw conveying the property to LGD,[61] and they arranged to obtain a signed deed from Robertson on the day of RFT's closing [62] Mr Roatch presented a cashiers check in the amount of $570,000 00 at the closing,[63] which T&A deposited in their escrow account [64] They then

[57] Email from Bradshaw to Roatch dated September 21, 2007 PX 3 R p 703 Bradshaw to Roatch email dated September 26 2007 PX 4 R p 705

[58] Roatch testimony, R App p 10 line 16 – p 11 line 11

[59] Roatch testified that he did not become aware of the Grimshaw and Robertson closings until August 7 2008 R p 264, lines 15 24 R App p 12 line 20 – p 13 line 1 Adams testimony R p 610 lines 6 11

[60] Roatch Testimony R App p 4 lines 5 20

[61] *See* Grimshaw deed dated 3/29/06 PX 35 R pp 745 48 Adams testimony R p 581 lines 8 24

[62] *See* Robertson deed dated 4/14/06 PX 42 R pp 762 65 Adams testimony R p 581 line 25 – p 582 line 4

[63] Lester testimony R p 428 lines 14 20

dısbursed $250,000 00 to Grımshaw and hıs lender[65] and $250,000 00 to Robertson and hıs lender [66] The HUD-1 whıch T&A prepared for RFT, however, showed the entıre proceeds of the check goıng to LGD, ınstead of showıng that Grımshaw and Robertson were gettıng $500,000 00 of the $570,000 00 [67] Sımılarly, the Grımshaw and Robertson HUD-1's both falsely reflected that the buy-back monıes were comıng from LGD [68] Thıs "flıp transactıon" was effectıvely concealed by the false HUD-1's

Mr Roatch testıfied very clearly that ıf he had known of LGD's financıal hıstory and problems, of LGD's ınsolvency and resultıng ınabılıty to perform the Grımshaw and Robertson buy-backs,[69] of T&A' use of RFT's funds ın order to cure LGD's defaults on those buy-backs,[70] or of T&A' orchestratıon of a "flıp transactıon" as part of theır efforts on behalf of LGD, he certaınly would not have completed the purchases of Lots 28 and 31 [71] Expert testımony reflected that, the lots were worth a total of only $109,500 00 on the date of trıal [72] Mr Roatch valued the lots at only $25,000 00 each based on a foreclosure sale R App p 14, lınes 1-8

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[64] *Id*

[65] Grımshaw HUD 1 PX 38 R p 753 Adams testımony R p 598 lınes 3 14

[66] Adams testımony R p 622 lınes 2-20

[67] RFT HUD 1 PX 11, R p 734

[68] See fn 59 60 supra

[69] Roatch testımony R App p 4 lınes 5 20

[70] *Id* p 231 lıne 23 – p 232 lıne 6

[71] *Id* p 232 lınes 7 14 p 232 lıne 22 – p 233 lıne 22

[72] Report of Martın and Assocıates at PX 72 at p 38 R p 786

B T&A Violated their Duty to Truthfully Disclose Material Facts

The authorities discussed in this section stand for two elementary legal principles (1) that a lawyer is subject to a duty to his client to make a full and complete disclosure of all material information relating to the subject of the representation and (2) that an incomplete or partial disclosure does not satisfy the duty of full disclosure, nor does it create any duty of due diligence on the part of the client

1 The Duty of Full Disclosure

Legal analysis of T&A's duty of disclosure begins with recognition of the fact that

> [t]he relationship between an attorney and a client is *highly* fiduciary in its nature and of a *very* deliberate, exacting and confidential character, requiring *a high degree* of fidelity and good faith

Ellis v Davidson, 358 S C 509, 521, 595 S E 2d 817, 823 (Ct App 2004) (emphasis added) Once a fiduciary relationship has been established, all information which is significant and material must be disclosed *Moore v Moore*, 360 S C 241, 251, 599 S E 2d 467, 472 (2004) Thus, as a fiduciary, a lawyer is subject to "a duty of full disclosure of all material facts known to [her] that might affect [the client's] rights " *Montgomery v Kennedy*, 669 S W 2d 309, 313 (Tex 1984) The great breadth of a lawyer's duty of disclosure was made clear by the Supreme Court in the following words

> In view of the trust placed in attorneys by their clients and attorneys' often superior expertise in complicated financial matters, *attorneys must take every possible precaution to ensure that clients are fully aware of the risks inherent in a proposed transaction* and of the need for independent and objective advice

Matter of Harper, 326 S C at 193, 485 S E 2d at 380 (emphasis added)

RFT submits that there is no issue as to whether T&A owed a duty to disclose material facts to them T&A' expert, Mr Tighe, did not testify that they were not subject to a duty of disclosure Respondent Adams did not deny that he had such a duty [73] RFT's expert, Mr Freeman, testified unequivocally that T&A were subject to an absolute duty of disclosure [74] Thus, the only real issues were as to whether the facts which were not disclosed were material, whether T&A met their duty of disclosure, and whether some lack of due diligence by RFT somehow excused T&A from their duty to make disclosures

2 The Facts Which Were Not Disclosed, Individually and Collectively, Were Material

In *Anthony v Padmar Inc* , this Court defined the term "material fact" as follows

> a fact is considered material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available "

320 S C 436, 450, 465 S E 2d 745, 752 (Ct Ap 1995) (*quoting Shell Petroleum Inc v Smith*, 606 A 2d 112, 114 (Del 1992)) The Court explained further that in order for information to be material,

> it need not be shown that [disclosure] would have changed the way [plaintiffs] voted on the sale or their overall view of the transaction, rather, it is enough to show that the fact in question would have been relevant to [plaintiffs] in making a decision "

Id RFT submits that the undisclosed facts in this case were indisputably material to its decision to invest in Planters Row

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[73] In fact Adams testified that nothing in the ARD form states that he was relieved from disclosing relevant information to Mr Roatch R p 605 lines 1 10

[74] Freeman testimony R p 483 line 10 – p 491 line 18

Quite obviously, information which indicates that LGD was not able to pay its debts when they became due would have been relevant to any prospective investor One does not take $570,000 00 in funds held in trust for his or her mother[75] and gamble them on a developer with shaky finances Similarly, anyone contemplating the purchase of investment lots from a developer for $280,000 and $290,000 would consider the following facts to be important to their decision that the developer had sold those same lots *with buy-backs* less than 18 months earlier for only $211,500 each, that the developer was purchasing those same lots for $250,000 00 each on the same day it was selling them for $280,000 and $290,000, and that the only reason the developer was paying $250,000 for each lot was because it was liable for that amount on buy-back agreements with the sellers Indeed, the fact that the prior owners wanted out of Planters Row and were willing to accept substantially less for their lots than RFT was paying would have alerted RFT that it was not getting such a good deal and that lots in Planters Row were not all that desirable as investments Additionally, RFT, as would have any reasonable investor, considered *very* material the fact that its money was being used to pay an indebtedness that LGD could not afford to pay, instead of being used to enhance Planters Row in some way

The fact that RFT's purchase had to be consummated on or before October 30, 2007, in order to enable LGD to avoid penalties to be paid to the sellers would also have been important to any investor Obviously, had that fact been disclosed, it would have informed him that LGD did not have the funds needed in order to avoid the penalties and was desperate for RFT's funds for that purpose More importantly, it would have informed him that LGD had twice defaulted on similar types of buy-back agreements into which RFT was about to enter

[75] Mr Roatch testified that RFT was charged with managing trust assets in order to produce income for his mother who is the trustee of the trust R p 199 line 6 – p 200 line 14

Knowledge as to the history and amount of previous legal services provided by Adams to Gilbert and LGD over a twenty-year period would also have raised obvious questions as to T&A's ability to be totally impartial in the transaction [76]

Mr Roatch testified that had he received full disclosure of the facts surrounding the transaction, RFT would not have made the investment On the other hand, not a single witness testified that the undisclosed facts discussed above would not "have changed the total mix of information" available to Mr Roatch nor that they would not have been relevant to his decision Mr Freeman testified unequivocally that T&A violated their standard of care by not making those disclosures

Thus, absent some defense excusing T&A from making the disclosures, the only conclusion possible from the evidence is that T&A breached their standard of care by not doing so

3 **T&A's Due Diligence Defense**

Rather than trying to prove that it adequately disclosed all of the material facts discussed above, T&A argued without supporting authority instead that it disclosed sufficient facts to put RFT on notice of the undisclosed and misleading facts, thereby imposing a duty of due diligence upon RFT T&A then attempted to argue that if RFT had exercised due diligence, it somehow would have learned all of the true facts There are several problems with this defense

First, it ignores the fact that under South Carolina law, a client has no duty to exercise diligence in order to discover facts which her attorney has a duty to disclose to her Stated differently, a client has an absolute right to trust that her attorney is doing his job properly with a view to protecting her interests Thus, in *Epstein v Howell*, this Court held that parties have a

[76] Gilbert s selection of T&A to close this transaction was certainly not coincidental random or without purpose

right to expect a fiduciary to perform his duty of full disclosure notwithstanding the facts that they did not trust the fiduciary and that "they might have ascertained the falsity of the representation had they investigated" 308 S C 528, 531, 419 S E 2d 379, 382 (Ct App 1992) Thus, a client has a right to rely upon his attorney to faithfully perform her duties "without fear the attorney is not acting in the client's best interests" *True v Montieth*, 327 S C 116, 120, 489 S E 2d 615, 617 (1997) And, as Mr Freeman recognized in his testimony, partial and misleading disclosures are no substitutes for full disclosure and cannot impose a duty of due diligence on the clients [77] T&A's second problem with its due diligence defense is that even assuming *arguendo* that RFT had a duty of due diligence, they offered no evidence tending to prove that the exercise of due diligence would have uncovered any of the true material facts They offered no evidence or law reflecting which actions Mr Roatch should have undertaken, as to what he would have discovered had he done those things, nor as to how the newly discovered information should have or could have impacted his decision There was a total failure of proof which would have rendered the due diligence defense irrelevant, even if it had been legally available

Third, T&A's argument that they made RFT aware of sufficient facts to relieve them of their disclosure duties is based upon an abject misunderstanding of what those duties actually were They base this argument on two documents which they say they provided to Mr Roatch prior to the closing (and which Mr Roatch denied receiving)[78] – a copy of the deed to be signed at closing and T&A's title opinion letter The deed contained a derivation which reflected that the Robertson lot was conveyed to LGD on October 30, 2007, the date of the RFT closing and

[77] Freeman testimony R p 484, line 22 – p 489 line 15 The duty owed by lawyers and other fiduciaries is to fully disclose all known information that is significant and material *Anthony v Padmar Inc* 320 S C at 449 465 S E 2d at 752

[78] Roatch testimony R App p 7 line 9 – p 8 line 22

that the Grimshaw lot was conveyed on October 26, 2007[79] The title opinion letter merely referred to the fact that in order for LGD to have conveyed good title to RFT, LGD must have "good and sufficient general warranty deeds" which had been properly executed and recorded[80]

T&A apparently believed that all they had to do in order to satisfy their duty of disclosure was to present these documents to Mr Roatch and then to gamble that prior to the closing he would study them, fully understand them, draw all of the inferences which were properly deducible therefrom, and, then, based on the documents and those inferences be able to connect the dots which would then lead him to discover all of the other undisclosed material facts not mentioned in those documents Based upon this view of their alleged duties, T&A essentially take the position that if Mr Roatch did not read or understand these legal documents, or did not make the correct inferences, or did not connect all of the dots, it was not their fault

Needless to say, there is no way to square T&A's position with their duty of full disclosure First, RFT submits that as *its* attorney at the closing, T&A had a duty to explain all of the documents which were being signed and to insure that Mr Roatch fully understood all of the implications of those documents If important facts should have been inferred from those documents, T&A had a duty to insure that Mr Roatch made all of the proper inferences and accurately connected the dots T&A did not attempt to do any of those things Finally, as Mr Freeman testified, the deed derivation and title opinion letter were nothing more than misleading partial disclosures which no lay person could reasonably be expected to fully comprehend without the help of a lawyer[81]

[79] RFT Deed DX 1, R p 858

[80] PX 10 R p 732

[81] Freeman testimony R p 488 line 2 – p 489 line 15

For any closing attorney to expect a lay client to discover all material facts regarding a transaction simply by reading a deed and a title opinion letter is unreasonable as a matter of law Moreover, no lay client should be charged with a duty to correctly infer negative facts from documents prepared *by his lawyer* Indeed, the title opinion letter and deed are precisely the types of things which would have been studied by an independent lawyer had T&A performed its duty to affirmatively advise Mr Roatch to hire one

For all of the above reasons, RFT submits that even assuming that there were evidence on the record which would establish an absence of diligence on its part is investigating the transactions prior to closing, such evidence could not legally serve as a defense to T&A's failure to perform its duty of full disclosure

4 The ARD Form Did Not Relieve T&A from their Duty of Disclosure

T&A argued at trial that language in the ARD form stating that they were not hired to give substantive advice, but were hired to paper and to conduct the closing, relieved them of any affirmative duty of disclosure There are several serious flaws in this argument

First, while the ARD states that T&A were not hired in order to negotiate or to provide substantive advice, that is exactly what they did Adams negotiated with LGD's lender regarding the terms of a subordination agreement to be signed by RFT At the closing, a section of the buy-back agreement was negotiated and changed He advised Mr Roatch as to the meaning and effect of the subordination agreement, and recommended that he sign it He advised Mr Roatch as to the meaning and effect of the lot release forms which he prepared and had Mr Roatch sign in advance

Second, while the ARD form arguably might be appropriate for use in a garden-variety residential closing It certainly was not appropriate in this complicated investment real estate transaction which Respondent Adams himself characterized as "very rare" This was not a simple transaction in which one party received a deed and the other received cash and after which neither had further responsibilities to the other In addition, there was the buy-back agreement which provided rights to, and imposed duties upon, both parties to be exercised and performed both during *and after* the closing There were also the second mortgage securing LGD's performance of the buy-back, the subordination agreement subordinating RFT's mortgages to the lien of LGD's first mortgage lender, and the lot releases which allowed LGD to sell lots consistently with the requirements of the first mortgage Finally, there was the undisclosed "flip transaction" which could not have occurred without T&A's timing and orchestration skills For T&A to even suggest that the ARD form shielded them from rendering advice or making disclosures in connection with this "very rare" transaction is ludicrous T&A, in short, were far more than mere scriveners *See McNair*, 330 S C at 348-49, 499 S E 2d at 496-97

Third, the fact that the ARD mentions certain tasks which RFT believed, at the time of signing the form, would not be performed and then provides a *non-exclusive* list of tasks which would be performed in no way limits T&A's duty to make disclosures Indeed, providing advice and providing information are separate and distinct activities [82] Providing advice involves advising a person on how to do something Providing information, on the other hand, is just that – making information available to that person and then leaving it totally up to that person to decide how to use the information Not one word in the ARD addresses T&A's duty to disclose material information

[82] Freeman testimony R p 484 lines 13 21

Fourth, fiduciary duties are normally not waivable, especially in dealings between lawyer and client Thus, for T&A to take the position that the ARD form relieved them from their fiduciary duty to make full disclosure makes no sense Even if the form stated in clear language that the client relieved the attorney of any duty of disclosure (which T&A's form did not), it would be legally incapable of imposing a waiver on the clients especially where, as in this case, there had been no attempt to advise the client as to the nature of an attorney's fiduciary responsibilities or to explain the meaning or effect of the form

Fifth, even if the form were effective in relieving T&A from their duty of disclosure (which it wasn't), it would not relieve them from affirmative inaccuracies in the HUD-1's and the deed affidavits

For the above five reasons, RFT submits that T&A' ARD form was ineffective to relieve them of any of the duties which RFT claims to have been violated

C T&A Committed Malpractice by Drafting and Signing False and Misleading HUD-1 Settlement Statements And Affidavits of True Consideration

The HUD-1 Settlement Statement which T&A prepared for Plaintiffs is, on its face, false and misleading In addition, Adams admitted that affidavits of true consideration which he prepared did not state the true cash consideration paid for Lots in Planters Row but stated what T&A claimed was the fair market value, which was actually just the original list price of the property Under settled statutory and case law, the preparation of both the HUD-1's and the affidavits violated the Rules of Professional Conduct and constituted malpractice

1 Preparation of False and Misleading HUD-1's Constituted Malpractice

As explained above, T&A prepared false and misleading HUD-1's for LGD's purchases of the lots from Grimshaw and Robertson and for RFT's simultaneous purchase of those lots from LGD The South Carolina Supreme Court has provided clear notice to closing attorneys in this state of the need to insure accuracy in HUD-1 Settlement Statements A perfect example comes in the Supreme Court's opinion in *In re Barbare*, 360 S C 560, 602 S E 2d 382 (2004), which was decided three years before the subject closing In that case, the attorney closed two transactions on the same day, which simultaneous closings the Court described as "a 'flip transaction' where proceeds from the second transaction are used to fund the initial transaction " 360 S C at 567-68, 602 S E 2d at 385-86 The Court took pains to explain that the HUD-1 in the first transaction was inaccurate because it improperly showed cash coming from borrower (buyer) when actually it should have shown the cash coming from "other than borrower" in the 200 column of the HUD-1 form 360 S C at 568, 602 S E 2d at 386 Identically in this case, the Robertson and Grimshaw HUD-1's showed all of the cash coming from LGD, rather than showing it coming from a source other than LGD in the 200 column of the HUD-1 In *Barbare*, the Court also found the HUD-1 in the second transaction in which the developer sold the lots it had just purchased to be inaccurate because it reflected all of the proceeds of sale going to the developer, instead of most of the proceeds going to the party from which the developer had just bought the real estate *Id* Again, these facts in the *Barbare* case are identical to those in this case

In *Barbare*, the Court found that the lawyers' conduct violated a number of the Rules of Professional Conduct, to include Rule 4 1(a) (knowingly making a false statement of material fact to a third person), Rule 4 1(b) (failing to disclose facts when necessary to avoid assisting a fraudulent act by a client), and Rule 8 4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) 360 S C at 572, 602 S E 2d at 388 The continued careless and intentional preparation of HUD-1's was of such great concern to the Supreme Court that it admonished the Bar as follows

> The Court is troubled by the recent number of real estate transactions which have been the subject of misleading, fraudulent, and/or criminal schemes Inaccurate HUD-1 Settlement Statements and other closing documents contribute to these deceptive activities Respondent's misconduct derives principally from his inaccurate representations on HUD-1 Settlement Statements These misrepresentations have subjected respondent to both federal criminal penalties and the current disciplinary action by this Court
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> * * * *
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> According to the parties in this matter, a large number of attorneys are not passing closing funds through their trust accounts and, at the same time, not identifying the funds as paid outside of closing on closing documents Not only does this practice fail to accurately record the actual transaction for the buyer and seller, but it is misleading to lenders In an attempt to eliminate this and other deceptive practices, we emphasize that costs and credits in connection with a real estate transaction must be shown on the settlement statement and that the settlement statement must reflect all amounts paid, by whom paid, and to whom paid Any charges or amounts paid outside of the closing must be reflected as such on the settlement statement (i e , "POC")

360 S C at 573-74, 602 S E 2d at 388-89 These warnings were repeated by the Court in *In re Lathan*, 360 S C 326, 338, 600 S E 2d 902, 908-09 (2004) RFT submits that as experienced closing attorneys, T&A are charged with knowledge of the *Barbare* and *Nathan* decisions

Leaving no doubt that Defendants' preparation of false and misleading HUD-1's violated their standard of care is the Supreme Court's decision in *In re Johnson*, 375 S C 499, 654 S E 2d 272 (2007) There, the attorney was again involved in closing a "flip transaction " The Court described the inadequacies in the HUD-1 as follows

> Specifically, the HUD-1 Settlement Statement did not show a concurrent transaction in which Hoy purchased the same property In essence, there was a transaction between Hoy and the seller of foreclosed properties (usually the bank that had foreclosed on the property) and, concurrently, a transaction where Hoy was selling the same property to a third party buyer While Hoy paid for his purchase with a business check drawn on his corporate account, respondent should have known that the short amount of time between Hoy's purchase and his sale enabled Hoy to use the same incoming funds from the second transaction to fund his purchase of the property in the first transaction Respondent acknowledges that the HUD-1 Settlement Statement in the sales transaction by Hoy should have reflected that the funds from the sale were being applied to the initial acquisition by Hoy and the "due seller" line should have been reduced by a like amount

375 S C at 503 n 2, 654 S E 2d at 274 n 2 It is also significant that numerous persons have suffered felony convictions under 15 U S C §1014 for making false statements in HUD-1's *See, e g , U S v Allen,* 2010 WL 125467 at *4 (11th Cir 2010) (HUD-1 falsely reflected that all of buyer's monies were being paid to Seller), *U S v Gemmill,* 2007 WL 2032927 at *11 (E D Pa 2007) ("All seller financial assistance to buyer must be revealed and disclosed on the HUD-1 settlement sheet forms ," and seller must be identified as source of funds) *U S v Gisham,* 146 F 3d 6(1st Cir 1998), *U S v Behenna,* 1995 WL 3731 (1st Cir 1995) [83] RFT submits that in light of this federal precedent and of the Supreme Court's clear warnings in the *Barbare Nathan* and *Johnson* opinions, it could hardly be more clear that T&A violated their standard of care by preparing false and misleading HUD-1's [84]

[83] 18 U S C §1014 prohibits persons from knowingly mak[ing] any false statement or report for the purpose of influencing in any way the action of any institution the accounts of which are insured by the Federal Deposit Insurance Corporation upon any application or loan Defendants submitted HUD-1 s to lenders in connection with the sales by LGD to the Grimshaws and the Robertsons

[84] In addition Mr Freeman emphasized the importance of accuracy in HUD 1 s and opined clearly that T&A violated their standard of care by authoring false and misleading HUD 1 s Freeman testimony R p 490, line 10 – p 494 line 17

2 Defendants Committed Malpractice by Drafting False and Misleading <u>Affidavits of True Consideration</u>

Section 12-24-10 et seq of the South Carolina Code of Laws imposes a recording fee on deeds reflecting the sale of real estate, the amount of the fee to be based upon the "value" of the real estate as determined pursuant to §12-24-30 That section, in turn, provides that "the term 'value' means the consideration paid in money or money's worth for the realty " The statute also provides that in lieu of using the amount of money or the "money's worth" in determining the consideration paid, taxpayers may elect to use the fair market value of the realty being transferred Obviously, when the consideration paid is all in money, there is no reason to use surrogates such as the fair market value of the money's worth or of the property being transferred in order to determine how much was actually paid for the real estate Once the value (consideration paid) for the real estate is determined, §12-24-70 requires that a "responsible person connected with the transaction" must sign an affidavit showing the "value" of the property as determined under §12-24-30 Section 4 of the standard affidavit of consideration used in South Carolina requires the person signing the affidavit under oath to check whether the deed recording fee "(a) is computed on the consideration paid or to be paid in money or money's worth of $______________________ " or "(b) is computed on the fair market value of the realty which is $___________________"[85] Regarding the affidavits flowing from the Grimshaw and Robertson purchases of Lots 28 and 31 in 2006, T&A entered the list prices of $235,000 00 for each lot as the consideration paid in money or money's worth, and not the actual consideration paid in money of $211,500 00

[85] *See e g* Grimshaw Deed PX 35 R p 745

Respondent Adams testified at trial that rather than using cash consideration, he used the fair market values of the lots to determine the amount of the recording fee That testimony is demonstratably false For example, on the Grimshaw affidavit[86] §4(a), "money or money's worth" is checked and $235,000 is typed in the blank space for the dollar amount Section 4(b), the fair market value of the realty, was not checked and no dollar amount was inserted Thus, the deed affidavit shows that the fair market value of the land was *not* used and, thus, that the deed falsely overstated the money consideration actually paid by Grimshaw, which was $211,500 00 and not $235,000 00

Regarding harm caused by the inflated deed affidavits, RFT introduced undisputed expert testimony that falsified deed affidavits resulted in subsequent appraisals also being inflated [87] Evidence in the record showed that the appraisals of lots 28 and 31 were based in part upon the value of Lot 26 for which the deed affidavit reflected the list price of $235,000 as the cash consideration,[88] not the actual selling price which was $23,500 00 less [89] The phony deed affidavit inflated the appraisals of the lots which were performed for RFT and, therefore, caused RFT to pay more than it would have paid had there been an accurate affidavit for the lot used as a comparable

RFT therefore submits that undisputed and uncontradicted evidence on the record establishes that T&A engaged in malpractice by preparing and notarizing false deed affidavits

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[86] *Id*

[87] Wright testimony R p 313 line 19 – p 315 line 8

[88] Adair Deed PX 47 R p 778

[89] Adair Contract, PX 46, R p 771

D T&A Committed Malpractice by Closing A "Flip Transaction" Without Disclosing All Facts Relating to the Transaction to RFT

"Flip transactions" are presumptively unethical under *In re Latham* *In re Barbare*, and *In re Johnson*, discussed above, at least where they are not fully disclosed to and consented to by all parties In a more recent case, the Supreme Court also directly recognized that "participating in a flip transaction would constitute misconduct " *In re Faysoux*, 381 S C 637, 642, 675 S E 2d 428, 431 (2009)

The "flip transaction" in this case was the mechanism by which T&A concealed from RFT how its funds would be used by LGD, how much LGD paid for the lots which were resold to RFT, and the fact that LGD needed RFT's funds to pay debts which it could not afford to pay

E RFT Suffered Damages Which Were Proximately Caused by T&A's Conduct

RFT made a decision to invest $570,000 00 in Planters Row That decision was induced by Respondent's non-disclosure of material facts about LGD's financial condition, by their preparation of a false and misleading HUD-1 which misrepresented how RFT's money would be paid out and which did not disclose other relevant facts about how the closing was structured, and by a failure to communicate T&A's long business relationship with LGD and Gilbert But for these acts and omissions of T&A, RFT would not have consummated a transaction whereby it entrusted $570,000 00 to a company which was, unknown to RFT, experiencing serious financial difficulties That LGD might fail in the not-too-distant future following the closing certainly could have been foreseen by T&A, given LGD's past defaults on similar contracts

As a proximate and foreseeable result of T&A's breaches of duty, RFT lost $570,000 00 less the current values of the lots of $25,000 00 each (testimony of Mr Roatch as landowner, R

App p 14, lines 2-8), for a total loss of $520,000 00 plus pre-judgment interest at 8 75% per annum

III THE TRIAL COURT ERRED BY MERGING THE SECOND CAUSE OF ACTION INTO THE FIRST CAUSE OF ACTION (Issue III)

The trial court decided that RFT's Second Cause of Action for Breach of Fiduciary Duty was identical to, and thus redundant of, the First Cause of Action for Malpractice Based upon that decision, the court merged the Second Cause of Action into the First Cause of Action and refused to charge the jury on breach of fiduciary duty In effect, the trial court directed a verdict on the Second Cause of Action, which was error

No South Carolina appellate court has *ever* held that breach of fiduciary duty claims are always entirely duplicative of legal malpractice claims This Court recognized in *Doe v Howe* that there is a split of authority in other jurisdictions 367 S C 432, 448 n 27, 626 S E 2d 25, 33 n 27 (2006) Nonetheless, by sending the case back for further factual development, the Court also recognized that there may be situations in which a fiduciary duty claim is not totally subsumed by a malpractice claim Moreover, in *Smith v Hastie*, 367 S C 410, 420, 626 S E 2d 13, 18 (Ct App 2007), the Court reversed the trial court's dismissal of claims for breach of fiduciary duty and legal malpractice in part upon its finding that "even in the absence of any unethical conduct, Hastie failed to fulfill his fiduciary responsibilities to Smith "

Thus, it is possible, for example, for a jury to find for the defendant on a malpractice claim because it did not believe the plaintiff's expert, but still find for plaintiff on fiduciary duty claim for which expert testimony was not required Similarly, not all acts of negligence will violate fiduciary duties An unintentional, innocent error in drafting a document may constitute professional negligence but not a breach of fiduciary duty On the other hand, a lawyer who performs legal and non-legal services for a client is in a fiduciary relationship with the client because of the lawyer-client relationship, however, while malfeasance of the non-legal services may give rise to a breach of fiduciary duty, it might *not* constitute legal malpractice

Regarding this case, it was within the realm of possible outcomes that the jury could have found in favor of T&A on the malpractice claim, but against them on the fiduciary duty claim, and vice versa One big difference between the two causes of action is that while a malpractice claim normally requires expert testimony as to the lawyer's standard of care and breach thereof, a breach of fiduciary duty claim requires no expert testimony Thus, conceivably, a jury could disbelieve RFT's experts, and yet still find in favor of the RFT on the fiduciary duty claim Similarly, while the Rules of Professional Conduct do constitute admissible evidence of the standard of care in a legal malpractice claim, they often do not constitute evidence of fiduciary duties Thus, while evidence of a violation of the RPC, such as was present in this case, might support a verdict for legal malpractice, it would not necessarily constitute evidence of a breach of fiduciary duty

For the above reasons, the merging of the First and Second Causes of Action and the failure to charge the jury on breach of fiduciary duty require a reversal of the trial court and remand for a new trial on that cause of action

IV <u>SCUTPA APPLIES TO THE LEGAL PROFESSION (Issue IV)</u>

The trial court granted a directed verdict on RFT's Third Cause of Action for violation of SCUTPA, S C Code Ann §39-5-20(a) (1985) on the sole ground that the legal profession was exempt from coverage thereunder and, then, based upon that holding, denied RFT's Motion for a New Trial The defense that the legal profession was exempt from coverage was not pleaded in

T&A's Answer As a result, it should not have served as a ground for a directed verdict, and the trial court should be reversed for that reason

More importantly, the reasoning for the trial court's order was in direct conflict with appellate decisions which are controlling on the issue Thus, in *Taylor v Medenica*, 324 S C 200, 217, 479 S E 2d 35 (1996), the Supreme Court held that the "provision of *any* service constitutes commerce within the meaning of the UTPA The statute does not exclude professional services from its definition " (emphasis in original) Similarly, this Court, in referring to the coverage of the SCUTPA, pronounced that "[t]here is no question but [t]hat legal services come within the definition of this statute " *Camp v Springs Mortgage Corp* , 307 S C 283, 285, 414 S E 2d 784 (Ct App 1991)

In its order denying RFT's post-trial motions, the trial court explained that it believed the legal profession to be exempt from SCUTPA because it was supervised by the Supreme Court [90] This finding directly conflicts with other cases holding that mere supervision is not enough to support the exemption under S C Code Ann § 39-5-40(a) (1985), but that the conduct involved must be permitted or allowed by the government agency *Unauthorized* conduct is not covered *Dema v Tenet Physician Serv –Hilton Head Inc* , 383 S C 115, 123 n 6, 678 S E 2d 430, ___n 6 (2009)

RFT therefore respectfully submits that the trial court's orders granting a directed verdict in favor of Defendant[91] and denying a new trial on the Third Cause of Action[92] should be reversed and that claim remanded for a new trial

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[90] Order dated October 6 2010 R p 4

[91] Oral Order dated July 2 2010 R p 675 line 14 – p 676 line 24

[92] See fn 90 supra

V THE SALES OF INVESTMENT REAL ESTATE IN PLANTERS ROW TO RFT INVOLVE THE SALES OF SECURITIES (Issue V)

The trial court directed a verdict on RFT's Fourth Cause of Action for aiding and abetting a securities violation because the court did not believe RFT's investment in Planters Row constituted a security A new trial was denied based on that reasoning [93] The trial court made this ruling despite uncontradicted testimony from Professor John P Freeman, an expert in securities transactions, that the sale involved the sale of an investment contract and an evidence of indebtedness, both of which fall within the definition of a "Security" stated in §35-1-102(29) of the Securities Act [94]

In his testimony, Mr Freeman explained that evidence in the trial record established that the investment in Planters Row was an investment contract He noted that the lots were marketed and sold as investments [95] He also noted that RFT invested $570,000 00 which Mr Roatch understood would be used in order to improve Planters Row along with monies of the developer, and that Mr Roatch expected profits in the form of an increase in the value of the lots resulting solely from the success of LGD in developing Planters Row [96] These facts meet all of the factual pre-requisites for an "investment contract" under the test articulated by the South Carolina Supreme Court as follows

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[93] Order dated October 6 2010 R p 4 The trial court treated the issue of whether the sale of a security was involved as a question of law As RFT has since learned this too was error *See, e g* , *State v Ribadeneira* 817 P 2d 1105 110 (Ka App 1991) *Consolidated Management Group LLC v Dept of Corp* 75 Cal Rept 3d 795 804 (Ct App 2008) The issue was one for the jury

[94] Section 35-1-102(29) reads in pertinent part as follows Security means any evidence of indebtedness investment contract S C Code Ann § 35 1 102(29)(Cum Supp 2010) Freeman testimony R p 494 line 19 – p 495 line 5

[95] *Id see also* PX 3 R p 703 PX 79 R p 857

[96] Freeman testimony, R p 497, lines 12 20

> an investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others *See Teague v Bakker*, 35 F 2d 978, 986 (4th Cir 1994) The test is a flexible one, "capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits " *Howey*, 328 U S at 299, 66 S Ct 1100

Majors v South Carolina Securities Commission, 373 S C 153, 163, 644 S E 2d 710, 716 (2007) (*quoting Securities and Exchange Commission v W J Howey Co* , 328 U S 223, 298-99 (1946))

The United States Court of Appeals for the Tenth Circuit found that a transaction nearly identical to the one at issue in this case constituted an investment contract and, thus, a security under the same test applied by our Supreme Court in *Majors* *McCown v Heidler*, 527 F 2d 204 (10th Cir 1975)

> We note that without the substantial improvements pledged by Heidler Corporation and Timberlake the lots would not have a value consistent with the price which purchasers paid *See Continental Marketing Corp v SEC*, 10 Cir , 387 F 2d 466, 470-71, cert denied 391 US 905, 88 S Ct 1655, 20 L Ed 2d 419 The utilization of purchase money accumulated from lot sales to build the promised improvements brings the scheme within the 'common enterprise' definition We also note that in applying the second test of the Howey case, 'reliance of the investor solely upon the efforts of the promoter,' it has been widely held that this reliance of the investor on the promoter need not be total The Ninth Circuit in SEC v Glenn W Turner Enterprises, Inc held the test to be
>
> (W)hether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise
>
> ****

> It may be, in the instant case, that an investor who purchased a Timberlake lot, not to build thereon but to hold solely as an investment, could be relying upon the managerial efforts of Heidler Corporation and Timberlake for the management and appreciation of this investment That other lot purchasers may be interested solely in obtaining a site on which to build their home merely indicates the duality of this 'investment/ownership package

Id at 211 (citations omitted)

RFT is aware that in order to satisfy the second element of an investment contract, an investment in a common enterprise, the South Carolina Supreme Court, unlike the Fourth Circuit, requires a showing of "strict vertical commonality" Majors, 373 S C at 165, 644 S E 2d at 717 Strict vertical commonality requires that the fortunes of RFT and of LGD be tied to each other *Id* In this case, RFT's and LGD's fortunes were clearly intertwined At trial, there was testimony which indicated that success of RFT's investment was virtually totally dependent upon LGD's ability to complete the infrastructure and amenities in Planter's Row and that, indeed, LGD's own success was dependent upon its attainment of those objectives In addition, RFT received second mortgages on 21 lots which T&A claimed to have been worth over $3,000,000 00 It is at least inferable that, if RFT's lots did not appreciate as expected due to LGD's failures and if RFT foreclosed on its second mortgage, LGD's opportunity to recover additional profits from Planter's Row would come to an end In addition, LGD's success in Planters Row was contingent upon RFT's not exercising the buy-back agreement, given that without additional time to generate sales, an additional $600,000 to $700,000 in obligations would likely put LGD out of business At the same time, RFT's ability to recover on the buy-back agreement was dependent upon the successful completion of Planters Row In short, LGD could not have been successful unless RFT was successful, and vice versa Strict vertical commonality was therefore present, and the sales to RFT were investment contracts

In addition, the buy-back agreement and the second mortgage on 21 other lots also constituted "evidences of indebtedness" within the meaning of §35-1-102(29) of the Securities Act [97] As explained by the Supreme Court of Texas while interpreting similar language in that state's Blue Sky Law

> "Evidence of indebtedness" is another term taken from the Federal Securities Act of 1933, 15 U S C s 77b(1) (1971) It has been defined to mean "all contractual obligations to pay in the future for consideration presently received " *United States v Austin* 462 F 2d 724, 736 (10th Cir), cert denied, 409 U S 1048, 93 S Ct 518, 34 L Ed 2d 501 (1972)

Searcy v Comm Trading Corp , 560 S W 2d 637, 641-42 (Tex 1978) (*interpreting* Vernon's Ann Tex Civ St Art 581-4(A)) The *Searcy* court continued by explaining

> Although the market fluctuations determined the amount to be paid or whether an amount was due, the options were represented as an obligation of CTC to pay money on certain contingencies The automatic repurchase feature converted CTC's obligation from one to buy or sell futures contracts to one to pay a monetary return at some future time We hold that this brings the commodity options within the definition of an "evidence of indebtedness " *King Commodity Co of Texas v State*, 508 S W 2d 439, 445 (Tex Civ App Dallas 1974, no writ), Long, The Naked Commodity Option Contract As A Security, 15 Wm & Mary L Rev 211, 240-41 (1973)

Id at 642 The buy-backs in this case, like the automatic repurchase feature in *Searcy*, converted LGD's obligation "to one to pay money at some future time " Thus, the transactions at issue in

[97] Freeman testimony R p 498 lines 9 25

this case involved the sale of an evidence of indebtedness, and, thus, the sale of a security whether an investment contract was present or not

RFT therefore contends that the trial court erred by directing a verdict on the Fourth Cause of Action because there were two types of securities involved – an investment contract and an evidence of indebtedness RFT therefore believes that it is entitled to a new trial on the securities cause of action, particularly in view of the fact that the issue of whether the sale of a security was involved was for the jury

<u>Conclusion</u>

Based upon the above Argument and Citation of Authority and the entire Record on Appeal, Appellant RFT Management Company, LLC, requests the Court to grant the following relief

A Reversing the trial court's order denying Appellant's Motion for JNOV on the First Cause of Action for Legal Malpractice, entering judgment in favor of Appellant in the amount of $520,000 00, and remanding the case to the trial court for computation of pre-judgment interest

B Alternatively, reversing the trial court's order insofar as it denied Appellant's Motion for a New Trial on the First Cause of Action for Legal Malpractice, C Reversıng the trıal court's order denyıng Appellant's Motıon for a New Trıal on the Second, Thırd, and Fourth Causes of Actıon, and remandıng those claıms to the trıal court for re-trıal

Respectfully submıtted,

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November 8, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

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RFT MANAGEMENT CO , LLC

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

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CERTIFICATE OF COUNSEL

The undersigned attorney for the Appellant hereby certifies pursuant to Rule 211(a), SCACR, that Appellant's Brief and Appellant's Reply Brief comply with Rule 211(b)

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PROOF OF SERVICE

I certify that I have served the Brief of Appellant and the Reply Brief of Appellant on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606

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