E-FILED
1/31/2019 3:47 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

VICTOR POTEET; MICHAEL CLOFINE; GENE SALKIND; and THE WORKSHOP, LLC,	)	
Plaintiffs,	)	
vs.	)	**No. 15-1264-BC**
DAVID BROWN LEVY; RICH DELUCA; PRIME 100 BUSINESS CONSULTANTS; THOMAS NILSEN; TNT CONSULTING, LLC; TRIUMPH MOVIE, LLC, PITCH DARK ENTERTAINMENT, LLC, DAVID KLEIMAN; DOUGLAS BEN GREGG; and TOTAL SERVICES MANAGEMENT CORPORATION,	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT TWO OF THE SECOND AMENDED COMPLAINT; (2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT THREE OF THE SECOND AMENDED COMPLAINT; (3) DISMISSING PLAINTIFF POTEET'S COUNT THREE CLAIMS AS TO THOMAS NILSEN AND TNT CONSULTING, LLC; (4) DISMISSING COUNT THREE CLAIMS OF PLAINTIFFS CLOFINE, SALKIND AND THE WORKSHOP, LLC AS TO ALL THE DEFENDANTS; AND (5) REFERRING CASE TO MEDIATION TO BE COMPLETED BY 3/29/19

Table of Contents

Overview and Status Of Lawsuit

This lawsuit was filed by four individuals who entered into investment contracts and who each invested $50,000 to $120,000 in the production of a motion picture about the challenges facing a high school student with cerebral palsy. The film was to be produced by Defendant Pitch Dark and Defendant Levy, and was to be called "Triumph." The Plaintiffs allege that the movie was a fraudulent investment scheme which all of the Defendants participated in to wrongfully obtain money from the Plaintiffs.

The Plaintiffs seek to recover compensatory damages in excess of $2 million dollars, treble damages in excess of $ 6 million dollars, and $40 million dollars in punitive damages. In addition, the Plaintiffs seek recovery of their reasonable attorneys' fees and costs, and for the Court to rescind their investment contracts.

The causes of action asserted by the Plaintiffs in their *Second Amended Complaint* filed January 26, 2017 are

1. Writ of Attachment Tenn. Code Ann. § 29-6-101, *et. seq.* (Against Defendants Levy and Triumph Movie);

2. Declaratory Judgment Tenn. Code Ann. § 29-14-101, *et. seq.* (Against All Defendants);

3. Violation of the Tennessee Securities Act Tenn. Code Ann. § 48-1-101, *et. seq.* (Against All Defendants);

4. Violation of the Tennessee Consumer Protection Act Tenn. Code Ann. § 47-18-101, *et. seq.* (Against All Defendants);

5. Common Law Fraud And Fraudulent Inducement (Against All Defendants);

6. Civil Conspiracy (Against All Defendants);

7. Conversion (Against Defendants Levy, DeLuca, Triumph Movie, Pitch Dark, Kleiman, Gregg, and TSM); and

8. Breach of Contract (Against Defendants Levy and Triumph Movie).

The status of the Defendants is that some have been dismissed from the case and some have had default judgments entered against them. The prime alleged wrongdoer, David Levy, filed for bankruptcy on December 10, 2015. In that matter, the Plaintiffs obtained the movie and all rights to it. Then, on April 14, 2016, the bankruptcy court entered an order granting Plaintiffs in this action relief from the bankruptcy automatic stay to pursue their claims against Defendant Levy in this Court. On February 7, 2018, a default judgment was entered against Defendant Levy. In addition to Defendant Levy, default judgments have been entered against Defendants Triumph Movie, LLC, Pitch Dark Entertainment, LLC and Douglas Gregg, and Defendant David Kleiman was voluntarily dismissed. The remaining Defendants in the litigation are Rich DeLuca, Prime 100 Business Consultants, Total Services Management Corporation, Thomas Nilsen and TNT Consulting, LLC. As to the remaining Defendants the case is presently before the Court on the Plaintiffs' motion for partial summary judgment.

Pending Motion For Partial Summary Judgment

The Plaintiffs seek entry of judgment on Counts Two and Three of the *Second Amended Complaint*. The two Counts concern Plaintiffs' claims of securities violations.

Count Two seeks a declaratory judgment that the investment contracts in this case were securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

Count Three asserts violations of the Tennessee Securities Act, Tennessee Code Annotated section 48-1-101, *et. seq.*, alleging that Defendant DeLuca and Nilsen made material misrepresentations in connection with the sale of the alleged securities.

Defendants Prime 100 Business Consultants and Total Services Management Corporation are businesses associated with Defendant DeLuca, and TNT Consulting, LLC ("TNT") is associated with Defendant Nilsen. These associated businesses are included in Plaintiffs' motion for summary judgment on Counts Two and Three.

In opposition to Plaintiffs' motion for partial summary judgment, on Count Two the Defendants deny that the investment contracts in issue constitute securities, and as to Count Three, the Defendants deny that they had sufficient contact with Plaintiffs and participation in the events in issue to be held liable for violations of the Securities Act.

Summary Judgment Ruling And Order To Mediate

After considering the undisputed material facts, the applicable law and the arguments of Counsel, the Court grants summary judgment on Count Two of the Second Amended Complaint, and as to Count Three, Plaintiff Poteet's summary judgment motion is granted as to all the Defendants except Thomas Nilsen and TNT Consulting, LLC. Further, as to Count Three the summary judgment motion of the other Plaintiffs, Clofine, Salkind and The Workshop, LLC, is denied. Finally, the summary judgment

rulings inherently require dismissal of all the Plaintiffs' Count Three Claims against Defendants Nilsen and TNT Consulting, LLC, and require dismissal of the Count Three Claims of Plaintiffs Clofine, Salkind and The Workshop, LLC against Defendants DeLuca, Prime 100 Business Consultants, and Total Services Management Corporation.

Accordingly, the following rulings on the Plaintiffs' partial motion for summary judgment are entered.

1. Count Two – Summary Judgment – It is ORDERED that Plaintiffs' partial motion for summary judgment is granted against all Defendants as to Count Two – Declaratory Judgment of the *Second Amended Complaint*. As a matter of law, the Court declares that the investment contracts at issue in this case constituted securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

2. Count Three – Poteet Summary Judgment – It is further ORDERED that Plaintiff Victor Poteet's motion for partial summary judgment is granted against Defendants Rich DeLuca, Prime 100 Business Consultants and Total Services Management Corporation as to Count Three – Violation of the Tennessee Securities Act of the *Second Amended Complaint* – and is denied as to Thomas Nilsen and TNT Consulting, LLC.

3. Count Three – Summary Judgment Plaintiffs Clofine, Salkind, The Workshop, LLC – It is additionally ORDERED that Plaintiffs Michael Clofine, Gene Salkind and The Workshop, LLC's motion for partial summary judgment is denied against Defendants Rich DeLuca, Prime 100 Business Consultants, Total Services Management Corporation, Thomas Nilsen and TNT Consulting, LLC as to Count Three – Violation of the Tennessee Securities Act of the *Second Amended Complaint*.

4. Dismissal of Claims – It is also ORDERED that Plaintiffs Michael Clofine, Gene Salkind and The Workshop, LLC's Count Three of the *Second Amended Complaint* is dismissed with prejudice as to Defendants Rich DeLuca, Prime 100 Business Consultants, Total Services Management Corporation, Thomas Nilsen and TNT Consulting, LLC. Plaintiff Victor Poteet's Count Three of the *Second Amended Complaint* is dismissed with prejudice as to Defendants Thomas Nilsen and TNT Consulting, LLC.

5. Referral To Mediation – Finally, as provided in the April 23, 2018 Case Management Order, all the Plaintiffs and Defendants Rich DeLuca, Prime 100 Business Consultants, Total Services Management Corporation, Thomas Nilsen and TNT Consulting, LLC are referred to mediation to be completed by March 29, 2019.

The undisputed material facts, law and analysis on which these rulings are based are as follows.

Summary Judgment Standard

In deciding the pending motions the Court has applied the following standard issued by the Tennessee Supreme Court in *Rye v. Women's Care Center of Memphis*, 477 S.W.3d 235, 264-265 (Tenn. 2015).

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. . . . [A] moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] … supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material

> facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party [emphasis in original].

In addition, "Summary judgment should be granted when the nonmoving party's evidence at the summary judgment stage is 'insufficient to establish the existence of a genuine issue of material fact for trial.' *Rye*, 477 S.W.3d at 264 (citing Tenn. R. Civ. P. 56.04). If the moving party does not meet its initial burden of production, the nonmoving party's burden is not triggered and the motion for summary judgment should be denied. *Town of Crossville Hous. Auth.*, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citations omitted)." *Jackson v. CitiMortgage, Inc.*, No. W201600701COAR3CV, 2017 WL 2365007, at *5 (Tenn. Ct. App. May 31, 2017). Furthermore, "[w]hen ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment." *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009).

Count Two – Declaratory Judgment

With regard to Count Two of the *Second Amended Complaint*, the Plaintiffs seek in their summary judgment motion for entry of a declaratory judgment, pursuant to Tennessee Code Annotated section 29-14-101, *et. seq.* that the investment contracts at

issue in this case "were securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980."

All the parties agree that the standard for determining whether a particular investment constitutes an "investment contract", and thus a security under Tennessee law, is governed by the *Hawaii Market* test adopted by the Tennessee Supreme Court in *King v. Pope*, 91 S.W.3d 314 (Tenn. 2002). Under this test, an investment contract exists if these four elements are present.

> (1) An offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

Id. at 321.

In opposition to summary judgment, the Defendants assert various undisputed facts in support of their position that the contracts at issue were not investment contracts within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

- Minimal Contact Of Defendants With Plaintiffs – The record shows that the only alleged investor Defendant DeLuca had contact with prior to any of the Plaintiffs entering into the "Triumph" movie contract, was Plaintiff Victor Poteet. Furthermore, the "Triumph" movie contract Plaintiff Victor Poteet eventually signed was reviewed, revised, finalized and presented to Plaintiff Poteet by Defendant David Brown Levy and Plaintiff Poteet's legal counsel prior to the signatures on the contract. As for the other Plaintiffs, the record shows that none of the Defendants had any contact with Plaintiffs Clofine, Salkind and the Workshop in a manner where they offered, solicited, presented or accepted money

or payment for the "Triumph" movie contract from these Plaintiffs before they allegedly entered into the contracts.

- No Payments Made To The Defendants – The record reveals that no payments were made by any of the Plaintiffs to these Defendants for their investment. In fact, Plaintiff Poteet and Plaintiff Clofine did not furnish initial value to anyone. Plaintiff Poteet's wife, Julie Poteet, was the one that provided the payment form an account solely in her name. Plaintiff Clofine admitted that it was Plaintiff Salkind that provided $100,000 in funds to the movie project, with none of those funds coming from Plaintiff Clofine.

- Plaintiffs' Participation In The Movie Production –The contracts provided each Plaintiff with the right to consult with the Producer with regards to the lead cast, final script, and distribution and prevented the contracts from being assigned by Defendant Levy and Triumph Movie, LLC to anyone else without Plaintiff's permission. Additionally, each Plaintiff was granted under the "Credits" one executive producer credit in the main titles of the Picture and in paid advertising. The record further reflects that Plaintiff Poteet traveled to and was on site for the move production nearly every day during the filming the first two to three weeks and he and his wife and children had an acting role in the film. Plaintiff Workshop's contract gave it powers over any material transaction by Defendant Levy and Triumph Movie, LLC including, but not limited to, any merger or acquisition, additional financing, investments, venture capital, hiring and retention of employees and advisors, adoption of the budget, and production and marking strategies. Furthermore, the Plaintiffs now own one hundred percent (100%) of the rights to the movie free and clear after purchasing it in bankruptcy.

After filtering the above facts through the *Hawaii Market* test adopted by the Tennessee Supreme Court in *King*, the Court finds these facts are not material under the law and that the undisputed facts asserted by the Plaintiffs establish the essential elements for the Court to conclude as a matter of law that the contracts at issue were investment contracts within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

First, as to elements one and three – whether an offeree furnishes initial value to an offeror, and the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise – these elements are established by the record because it is undisputed that all of the Plaintiffs signed contracts and invested money in the movie.

In opposition, the Defendants argue that because the Plaintiffs did not provide the money *directly* to the Defendants, but rather to former Defendant David Brown Levy, no value was furnished. Also, the Defendants argue that because some of the Plaintiffs admitted that they did not even know or have contact with some of the Defendants, it is impossible for the Plaintiffs to have been induced by these Defendants. These arguments fail as a matter of law with respect to deciding the Count Two claims of whether the contracts in issue constitute securities. Defendants' opposition is relevant, as analyzed below, to the Count Three claims of liability of each Defendant for violations of the Securities Act.

Elements one and three of the *Hawaii Market* test do not require that the offer to invest and subsequent investment be made by each Plaintiff with the actual money received directly by each Defendant. Rather, the test merely requires proof that an offer was made to the Plaintiffs and that the Plaintiffs furnished initial value to "an" offeror. In determining whether a particular investment is an investment security as defined by the *Hawaii Market* test, it is irrelevant and immaterial whether the each Defendant was in actual privity with each Plaintiff on each element. The "offeror" who induces the

furnishing of initial value by the Plaintiffs could be any of the Defendants or even, as in this case, former Defendant David Brown Levy. That is because the issue being determined at this point is not liability of the individual Defendants but the nature of the investment contract to determine whether it is a security.

In this case the investment contract required the Plaintiffs to provide initial value – money – which they did – to an entity offering the contract – which occurred. Thus, in terms of the nature of the contract, elements one and three of the *Hawaii Market* test are established.

The other argument the Defendants assert concerning elements one and three is based upon facts that the money invested by two of the Plaintiff investors was provided to them by others in the nature of a gift or advance. In finding that these facts are immaterial, the Court adopts the following arguments from *Plaintiff's Reply Memorandum In Support of Motion For Summary Judgment*:

> Defendants' assertion that the investment funds of Victor Poteet and Michael Clofine were provided by Victor's wife, Julie, and co-Plaintiff Gene Salkind, respectively, is of no consequence and can be dispensed with in short order. As a preliminary matter, with respect to Victor Poteet, Defendants' assertion is factually incorrect. Both Victor and Julie Poteet testified in their depositions that the source of funds for Victor Poteet's investment was a family savings account (Victor Poteet Dep., p. 59, lines 5-24; Julie Poteet Dep., p. 7, lines 1-16). As Victor Poteet testified, he signed the investment contract and he was personally liable to provide the investment funds. Victor Poteet Dep., p. 59, lines 13-15.
>
> Clofine's investment funds were initially advanced by Salkind, and later repaid to Salkind by Clofine. Clofine Dep., p. 16, line 17 – p. 17, line 2. Like Victor Poteet, Clofine signed the investment contract and was personally liable for the investment funds. Second Amended Complaint, Exhibit N.

> Even assuming *arguendo*, in the face of this uncontroverted evidence, that Victor Poteet and Clofine's investment funds came from a third party, that alleged fact is neither relevant nor material to the securities law issues. Both Victor Poteet and Clofine (along with The Workshop, LLC and Salkind) signed investment contracts. They were obligated to – and did – perform under those contracts. Whether the source of funds was a bank, a business colleague, or someone else is immaterial. Otherwise, any investment contract in which, for instance, a bank provided funding to the investor would require that the bank be joined as a party, an obviously absurd result.
>
> Defendants do not dispute the investments by The Workshop, LLC and Salkind.

Plaintiff's Reply Memorandum In Support of Motion For Summary Judgment, pp.2-3 (Oct. 26, 2018) (footnote omitted).

The Court therefore concludes that elements one and three of the *Hawaii Market* test have been established.

As to element two, the Defendants do not dispute that a portion of the initial value provided by the Plaintiffs was subjected to the risks of the enterprise. Defendants Nilsen and TNT Consulting, LLC state in their papers that "[t]he contracts that each Plaintiff signed made it clear that there were risks involved, and that they accepted those risks and could afford to take them." *Defendants TNT Consulting, LLC And Thomas Nilsen's Reply In Opposition To Plaintiffs' Motion For Summary Judgment*, p. 4 (Oct. 18, 2018). Nevertheless, Defendants Nilsen and TNT Consulting argue that because the Plaintiffs were able to "purchase the movie free and clear" in bankruptcy, the "Plaintiffs have completely mitigated all risks of the enterprise by taking it over completely." While this fact may be true, it is irrelevant to the determination of the second *Hawaii Market* test

element. Whether the Plaintiffs have ultimately mitigated their damages does not change the undisputed fact that at the time of the investment, a portion of the initial value provided by the Plaintiffs was subjected to the risks of the enterprise. The summary judgment record is clear that the second element of the *Hawaii Market* test has been met.

Finally, as to element four – whether the offeree received the right to exercise practical and actual control over the managerial decisions of the enterprise – the undisputed material facts on summary judgment establish that none of the Plaintiffs received the right to exercise practical and actual control over the managerial decisions of the enterprise.

The arguments presented by the Defendants on this element regarding the contractual provisions that referenced "consulting" with the Producer do not establish practical and actual control required for element four. Having input on the film is not the equivalent to "practical and actual control over the managerial decisions of the enterprise." The citations to the facts of record referenced by the Defendants only indicate that the Plaintiffs would be allowed to *participate* in the production of the film via their input and consultation. Nothing in any of the provisions of the investment contracts provides the Plaintiffs with absolute veto power or final decision-making authority over the enterprise.

Similarly, the fact that Plaintiff Poteet was present on set and had a role in the film with his family does not meet the requirement of actual managerial control over the

enterprise. Mere participation, input and consultation in the film is not "practical and actual control over the managerial decisions of the enterprise."

The Court also adopts the legal arguments on this element of the *Hawaii Market* test on pages 4-8 of the *Plaintiff's Reply Memorandum In Support of Motion For Summary Judgment*. For all these reasons, element four of the *Hawaii Market* test has been satisfied.

In addition to concluding that all four elements of the *Hawaii Market* test have been satisfied, the Court is also guided by the Tennessee Supreme Court's statements in *King* that the *Hawaii Market* test's purpose is to provide a "flexible" test for defining what constitutes an investment contract because the ultimate purpose of Tennessee's blue sky laws[1] is to protect investors.

[1] In *Green v. Green*, the Tennessee Supreme Court explained the history of "blue sky laws" in our country and in Tennessee.

> Laws regulating securities and transactions involving securities can be traced back to 1285 during the reign of Edward I. Robert F. Miller, *Procedures Under the Tennessee Securities Laws,* 28 Tenn. L.Rev. 303, 303 (1961) ("Miller"). The modern state laws regulating securities and transactions in securities originated in 1911 when Kansas enacted the first of what is now commonly referred to as "blue sky laws."[18] James M. Bartos, *United States Securities Law: A Practical Guide* § 3.7.1, at 120 (2006); 2 Jerry W. Markham, *A Financial History of the United States* 59 (2002). Tennessee's first blue sky law was enacted in 1913. Every state has now enacted a blue sky law.
>
> > FN 18. The term "blue sky law" originated to describe state legislation aimed at speculative investment schemes that had "no more basis than so many feet of 'blue sky.' " *Hall v. Geiger–Jones Co.*, 242 U.S. 539, 550, 37 S.Ct. 217, 61 L.Ed. 480 (1917).
>
> The Tennessee General Assembly replaced virtually all of the 1913 blue sky law when it enacted the Securities Act of 1955. The 1955 blue sky law was a modified version of a uniform law promulgated in 1951 by the Investment Bankers Association of America. Miller, 28 Tenn. L.Rev. at 304. It preceded by one year the adoption by the National Conference of Commissioners on Uniform State Laws of its first Uniform Securities Act

In adopting the *Hawaii Market* test, the *Brewer* court noted that *DeWees* mandated liberal construction of securities laws to protect the public and that the *Hawaii Market* test better serves the remedial purpose of Tennessee's securities laws by embracing not only "obvious and commonplace" investment schemes, but also "'the countless and variable schemes devised by those who seek the money of others on the promise of profits.'"

****

The appropriate test for defining an "investment contract" under Tennessee law is the *Hawaii Market* test adopted in *Brewer*. First, the General Assembly has stated that the Tennessee Securities Act of 1980 should be interpreted "to effectuate its general purpose to protect investors" and "to coordinate the interpretation and administration of this Act with related federal and state regulation." 1980 Tenn. Pub. Acts, ch. 866, § 25. As noted by the *Brewer* court, the *Hawaii Market* test better serves the remedial purpose of Tennessee's securities laws by embracing not only "obvious and commonplace" investment schemes, but also " 'the countless and variable schemes devised by those who seek the money of others on the promise of profits.' " *Brewer*, 932 S.W.2d at 14 (quoting *Howey*, 328 U.S. at 299, 66 S.Ct. 1100). As previously explained, state and federal regulations serve different purposes. While the federal test is tailored to federal law, the *Hawaii Market* test adopted in *Brewer* is more in keeping with the

---

in 1956. The language of Section 101 of the 1956 Uniform Securities Act defining the practices prohibited by the Act was drawn largely from Securities and Exchange Commission Rule 10b–5, which, in turn, was based on Section 17(a) of the Securities Act of 1933. However, Section 101 differed from Section 17(a) and Rule 10b–5 in one significant respect—it covered the purchase as well as the sale of any security. 1956 Uniform Securities Act § 101 cmt., 7C U.L.A. 749.

The General Assembly modernized Tennessee's blue sky law again when it enacted the Tennessee Securities Act of 1980. In doing so, the General Assembly declared that the law should "be so construed to effectuate its general purpose to protect investors, to coordinate the interpretation and administration of this Act with related federal and state regulation, and to require full and fair disclosure in all securities transactions." Act of Apr. 16, 1980, ch. 866, § 25, 1980 Tenn. Pub. Acts 1170, 1228. The Tennessee Securities Act of 1980 contains many of the provisions found in the Securities Law of 1955. Its sections defining the violations of the statute contain language similar to the 1956, 1985, and 2002 versions of the Uniform Securities Act, as well as Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934,[26] and Rule 10b–5.

293 S.W.3d 493, 505–06 (Tenn. 2009) (certain footnotes omitted).

> public policy espoused by this Court in *DeWees* because it presents a more flexible definition of "investment contract."
>
> ****
>
> We reiterate and reaffirm our statement in *DeWees,* that securities laws "are remedial in character, designed to prevent frauds and impositions upon the public, and consequently should be liberally construed to effectuate the purpose of the acts." 390 S.W.2d at 242. Since the Tennessee Securities Act of 1980 was enacted *324 with the goal of protecting investors, this Court's primary concern is with the investors of this state. This Court also believes that the danger in adopting the stricter *Howey-Forman* test for "investment contract" is that it allows unscrupulous promoters to circumvent the law. Thus, we find that the *Hawaii Market* test as adopted in *Brewer* is the test better suited to protect investors.

King v. Pope, 91 S.W.3d 314, 321; 322; 323–24 (Tenn. 2002).

Given this remedial policy to protect investors and that the undisputed material facts establish all four elements of the *Hawaii Market* test, the Court grants summary judgment to the Plaintiffs on Count Two – Declaratory Judgment of the *Second Amended Complaint* – and declares as a matter of law that the investment contracts at issue in this case were securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

Count Three – Violation of the Tennessee Securities Act

Having concluded that the investment contracts at issue in this case were securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980, the Court next turns to whether the undisputed material facts establish that the Defendants violated the Tennessee Securities Act.

In support of their motion for summary judgment on Count Three, the Plaintiffs argue that the undisputed facts establish that the Defendants violated the Tennessee Securities Act because (1) none of the Defendants was registered to sell securities in violation of Tennessee Code Annotated section 48-1-109(a); and (2) the actions of the Defendants in selling the investment contract securities to the Plaintiffs constituted fraud and misrepresentation in violation of Tennessee Code Annotated section 48-1-121.[2]

Registration Requirement Under TENN. CODE ANN. § 48-1-109

In opposition to the first alleged violation that the Defendants were not registered pursuant to Tennessee Code Annotated section 48-1-109(a), the Defendants argue that they were not required to be registered because (1) the investment contracts were not securities; and (2) even if the investment contracts were securities, the investment contracts were exempt from registration because of the Plaintiffs' status as "accredited investors." As a matter of law, both of these arguments fail.

First, the Court, as detailed above, has already determined that the investment contracts at issue were securities within the meaning of the Federal Securities Act of 1933 and the Tennessee Securities Act of 1980.

[2] In their initial filings on summary judgment, the Plaintiffs argued that the failure to register the investment contracts was an additional and independent violation of the Tennessee Securities Act. After the Defendants established in their opposition to summary judgment that the Plaintiffs were "accredited investors", and as such, the investment contracts were not required by law to be registered, the Plaintiffs appear to have abandoned this argument as a ground for a violation of the Tennessee Securities Act, acknowledging in their *Reply Memorandum In Support Of Motion For Summary Judgment* that these investment contracts were exempt from registration. Accordingly, the Court has not ruled on this issue.

Second, as to the argument that the registration was not required because the Plaintiffs were "accredited investors" and therefore the investment contracts were exempt from registration requirements, even if this were true, it does not provide a defense to the individual requirement in Tennessee Code Annotated section 48-1-109(a) for a broker-dealer and/or agent[3] to be registered. Under Tennessee law, even assuming the

[3] The term "agent" and "broker-dealer" are defined in Tennessee Code § 48-1-102(3)-(4).

> (3) "Agent" means any individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities from, in, or into this state. A partner, officer, director, or manager of a broker-dealer, or a person occupying similar status or performing similar functions, is an agent only if such person otherwise comes within this definition or receives compensation specifically related to purchases or sales of securities from, in, or into this state. "Agent" does not include such other persons not within the intent of this subdivision (3) as the commissioner may, by rule, exempt from this definition as not in the public interest and necessary for the protection of investors;
> (4) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others, or any person engaged in the business of buying or selling securities issued by one (1) or more other persons for such person's own account and as part of a regular business rather than in connection with such person's investment activities. "Broker-dealer" does not include:
> (A) Issuers, except to the extent provided in § 48-1-110(f);
> (B) An agent;
> (C) An institutional investor;
> (D) A person who has no place of business in this state and who is registered as a broker-dealer with the securities and exchange commission or the Financial Industry Regulatory Authority (FINRA) or any successor regulatory entity if:
> (i) The person effects transactions in this state exclusively with or through:
> *(a)* The issuers of the securities involved in the transactions;
> *(b)* Other broker-dealers; or
> *(c)* Institutional investors; or
> (ii) During any period of twelve (12) consecutive months, the person does not effect more than fifteen (15) transactions in securities from, in, or into this state (other than to persons specified in subdivision (4)(D)(i)); or

investment contracts were properly classified as exempt from registration, "the statutory language of Tennessee Code Annotated section 48–2–109(a) establishes that a person selling an exempt security must be registered as a broker-dealer or agent." *State v. Casper*, 297 S.W.3d 676, 686–87 (Tenn. 2009).

Relationship Of Registration Requirement To Liability For Fraud And Misrepresentation

Having concluded the Defendants' defenses concerning registration are without merit, the Court next turns to whether the Plaintiffs have established on summary judgment that the actions of the Defendants constituted fraud and misrepresentation pursuant to Tennessee Code Annotated section 48-1-121. The relationship between this statutory misconduct and registration is that if the summary judgment record establishes that the Defendants violated Tennessee Code Annotated section 48-1-121, then the Defendants failure to register as broker-dealers and/or agents would constitute an independent violation of the Tennessee Securities Act. If, however, the summary judgment record does not establish that the Defendants violated Tennessee Code Annotated section 48-1-121, then the failure to register is not a violation of the Act because, by law, the Defendants were not acting as a broker-dealer and/or agent with regard to this sale. *See, e.g.*, 79A C.J.S. *Securities Regulation* § 516 (footnotes omitted) ("Under statutes regulating traffic in securities such as the Uniform Securities Act, it is

---

> (E) Such other persons not within the intent of this subdivision (4) as the commissioner may by rule exempt from this definition as not in the public interest and necessary for the protection of investors;

TENN. CODE ANN. § 48-1-102(3)-(4) (West 2019).

generally required that persons who act or transact business as agents, brokers, broker-dealers, dealers, or salespersons comply with provisions as to registration and conduct of business. However, a person is not subject to registration requirements where his or her acts are not such as to bring him or her within the scope of an applicable statutory definition or where he or she comes within the scope of an applicable exclusionary provision.").

Fraud And Misrepresentation Claims Under TENN. CODE ANN. §§ 48-1-121 & 48-1-122

In the *Second Amended Complaint*, the Plaintiffs assert that the Defendants have violated Tennessee Code Annotated section 48-1-121 which provides liability for any person who commits fraud or misrepresentation "in connection with the offer, sale or purchase of any security in this state, directly or indirectly…."

> (a) It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly, to:
>
> > (1) Employ any device, scheme, or artifice to defraud;
> >
> > (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
> >
> > (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> (b) It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise, in this state, to:

> (1) Employ any device, scheme, or artifice to defraud the other person;
>
> (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person; or
>
> (3) Take or have custody of any securities or funds of any client except as the commissioner may by rule permit or unless the person is licensed as a broker-dealer under this part.

(c) It is unlawful for any person to make or cause to be made, in any document filed with the commissioner or in any proceeding under this part, any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(d) The commissioner may, after notice and opportunity for a hearing under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, impose a civil penalty against any person found to be in violation of this section, or any rule or order adopted or issued under this section, in an amount not to exceed ten thousand dollars ($10,000) per violation, or in an amount not to exceed twenty thousand dollars ($20,000) per violation if an individual who is a designated adult is a victim.

TENN. CODE ANN. § 48-1-121 (West 2019).[4]

[4] If a person violates Tennessee Code Annotated section 48-1-121, civil liability is available for such violation in a private right of action pursuant to Tennessee Code Annotated section 48-1-122.

> (a)(1) Any person who:
>
> > (A) Sells a security in violation of §§ 48-1-104 -- 48-1-109, 48-1-110(f), or of any condition imposed under § 48-1-107(f), or any rule, or order under this part of which the person has notice; or
> >
> > (B) Sells a security in violation of § 48-1-121(a) (the purchaser not knowing of the violation of § 48-1-121(a), and who does not carry the burden of proof of showing that the person did not know and in the exercise of reasonable care could not have known of the violation of § 48-1-121(a));
>
> shall be liable to the person purchasing the security from the seller to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, less the amount of any income received on the security, upon the tender of the

In addition to Tennessee Code Annotated section 48-1-121, Tennessee Code Annotated section 48-1-122(g) imposes secondary liability on (1) a "person who directly or indirectly controls a person" liable under the Tennessee Securities Act or (2) a person who "materially aided in the act or transaction constituting the violation" of the Tennessee Securities Act.[5]

> (g) Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer, or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the person who would be liable under this subsection (g) proves that the person who would be liable did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

TENN. CODE ANN. § 48-1-122(g) (West 2019).

In their application of the foregoing law in their motion for summary judgment, the Plaintiffs' theory of the Defendants' liability for fraud and misrepresentation is that they acted "with scienter in connection with the offer to sell these securities as part of Defendant Levy's scheme to induce the investments of Plaintiffs, upon which Plaintiff

---

> security, or, if the purchaser no longer owns the security, the amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and interest at the legal rate from the date of disposition.

TENN.CODE ANN. § 48-1-122(a)(1) (West 2019).

[5] "The [Tennessee Securities Act] imposes secondary liability on 'persons' who 'directly or indirectly…control any person liable under any provision of the securities laws,' as well as 'every broker-dealer or agent who materially aids in the act or transaction constituting the violation.'" *Cannon v. GunnAllen Fin., Inc.*, No. 306-0804, 2007 WL 2351313, at *3 (M.D. Tenn. Aug. 14, 2007) (citing § 48-2-122(g); *Nichols v. Merrill Lynch*, 706 F.Supp. 1309, 1348 (M.D.Tenn.1989) (citing § 48-2-122(g))) (footnote omitted).

Poteet, Plaintiff Clofine, Plaintiff Salkind and Plaintiff Workshop reasonably relied in making their investment, resulting in economic loss that was caused by the material misrepresentations and omissions." *Second Amended Complaint*, p. 36, ¶ 99 (Jan. 26, 2017).

The undisputed facts the Plaintiffs assert are that the Defendants are in violation of the Tennessee Securities Act because they conspired to promote an illegal enterprise.

> The elements of civil conspiracy in Tennessee are well settled. There must be "(1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury." Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006). Each of these elements is met in this case. As demonstrated in the Statement of Undisputed Material Facts, the Defendants had a common plan to promote investment in Triumph, which was an unlawful purpose since the film production was based on fraudulent premises. Even if the Court finds that the purpose of the film was lawful, Defendants clearly employed unlawful means to achieve that purpose, by (1) selling securities without being registered to do so; (2) selling unregistered securities that were not exempt from registration; and (3) making fraudulent representations as to the alleged participation of actor Kevin Spacey and the return on investment. This fraudulent conspiracy has resulted in the complete loss of the funds invested by Plaintiffs, causing severe injury to them.
>
> As to the underlying fraud, even if an individual co-conspirator did not commit the particular fraudulent act, once the conspiracy is established, "[T]he acts of a conspirator in furtherance of an illegal agreement with his co-conspirator are attributed to that co-conspirator." *Chenault v. Walker*, 36 S.W.3d 45, 52-53 (Tenn. 2001). Thus, Defendant Levy's fraud with respect to Kevin Spacey is imputed to all Defendants. The fraud of each of the Defendants who offered securities in violation of the Act is imputed to all other Defendants.
>
> ****
>
> Defendants next claim that they had contact only with Victor Poteet in the case of DeLuca, and with none of the Plaintiffs in the case of Nilsen.

> Again, this fact is neither material nor relevant to the securities law claims. The undisputed facts show that there was a common enterprise among Levy, DeLuca, and Nilsen to promote investments by Plaintiffs, among others, in the form of the investment contracts at issue. DeLuca admitted receiving compensation of $25,000 from Levy for his efforts. DeLuca Dep., p. 50, line 3. Nilsen promoted the enterprise as well, running false advertisements seeking to lure investors to the project. Nilsen Dep., p. 20, line 14 – p. 22, line 2. Nilsen, in fact, deliberately used the word "investor" to lure people to the project. *Id.* The undisputed facts establish an enterprise to promote these investment contracts, in which both DeLuca and Nilsen were active participants.

Memorandum Of Law In Support Of Motion For Summary Judgment, pp.9-10 (Nov. 1, 2017); *Plaintiffs' Reply Memorandum In Support Of Motion For Summary Judgment*, p. 3 (Oct. 26, 2018).

In opposition, the Defendants argue that the summary judgment record presents undisputed material facts that they were not involved, either directly or indirectly, in the sale of these investment contracts.

In analyzing these Count Three summary judgment issues, the Court shall separate the Defendants into two groups: (1) Thomas Nilsen and TNT Consulting, LLC and (2) Rich DeLuca, Prime 100 Business Consultants and Total Services Management Corporation, based upon the different relationships each Defendant had with each Plaintiff, and provide the analysis in that format.

The Nilsen Defendants – Summary Judgment Denied; Claims Dismissed

The Plaintiffs argument in support of summary judgment on Count Three of the *Second Amended Complaint* is that Defendant Nilsen conspired in the enterprise by "promot[ing] the enterprise as well, running false advertisements seeking to lure investors

to the project." *Plaintiff's Reply Memorandum In Support Of Motion For Summary Judgment*, p. 3 (Oct. 26, 2018).

While civil conspiracy and/or aiding and abetting[6] may be viable theories of liability under Tennessee Code Annotated section 48-1-121 and 48-1-122 as proof that a person's indirect or direct conduct was "in connection with the offer, sale or purchase of any security" and/or that a person "materially aids in the act or transaction constituting the violation" of the Tennessee Securities Act, the present summary judgment record contains no facts of any such direct, indirect or material aid on the part of Defendant Nilsen.

First, there is the Affidavit of Thomas Nilsen. It asserts that Defendants Thomas Nilsen and TNT Consulting, LLC (the "Nilsen Defendants") can not be liable to the Plaintiffs for violation of the Tennessee Securities Act because Defendant Nilsen never had *any* contact or communication with *any* of Plaintiffs.

> 11. Before Plaintiffs signed their contracts with Triumph Movie, LLC, I had never met any of the Plaintiffs or their representatives.

[6] In *As You Sow v. AIG Fin. Advisors, Inc.*, the Middle District of Tennessee alluded to the fact that an aiding and abetting claim is a "related theory of liability under" the Tennessee Securities Act.

> A related theory of liability under the TSA is that the Defendants aided and abetted Stokes' TSA violations. Plaintiffs note that other State courts have imposed as secondary liability, consistent with the Uniform Securities Act and on parties without the necessity of showing material or culpable participation. *See e.g., Foster v. Jesup and Lamont Secs. Co.*, 482 So.2d 1201, 1207 (Ala.1986); *Kirchoff v. Selby*, 703 N.E.2d 644, 651 (Ind.1998); *Taylor v. Perdition Minerals Group, Ltd.*, 766 P.2d 805, 808–10 (1988); *Mitchell v. Beard*, 256 Ark. 926, 513 S.W.2d 905, 907 (1974); *Steenblik v. Lichfield*, 906 P.2d 872, 879 (Utah 1995).

584 F. Supp. 2d 1034, 1045, 2008 WL 2677530 (M.D. Tenn. 2008).

> 12. Before Plaintiffs signed their contracts with Triumph Movie, LLC, I had never had any contact or communication of any kind with the Plaintiffs or their representatives, either oral or written.
>
> 13. I never provided any information to any Plaintiff about the Triumph movie, nor did I solicit any investment of any kind from the Plaintiffs at any time, before or after they signed their contracts.
>
> 14. I never asked for and never received any money from any of the Plaintiffs, or from any Defendant.
>
> 15. I played no role of any kind in the preparation of, or delivery, of the contracts of the Plaintiffs.

Affidavit of Thomas Nilsen, p. 2, ¶¶ 12-15 (Oct. 18, 2018).

The above sworn statements are reiterated in Defendant Nilsen's responses to the Plaintiffs' Statements of Undisputed Material Fact. Additionally, Defendant Nilsen states that his role in the project was the exact same as the Plaintiffs – as an investor in the movie project who ultimately lost out on his investment just like the Plaintiffs, quoting Defendant's responses as follows.

> 11. Defendant Levy took numerous steps to promote the enterprise, including:
>
> ****
>
> C. Enlisting Defendant Nilsen to assist in promotion of the enterprise. Second Amended Complaint, ¶ 53, Exhibit M; Answer of Defendant Nilsen and TNT Consulting, ¶ 53.
>
> **RESPONSE: Disputed. After Plaintiffs and Defendant Nilsen had already entered into their contracts, and the movie production was nearing completion, Defendant Levy asked Nilsen if he knew of anyone that may like to be a part of the movie. Nilsen never has any discussions with anyone in the promotion of the movie, as he discovered shortly thereafter that Kevin Spacey would not be in the movie. Defendant Nilsen had the same kind of interest in the movie as the Plaintiffs, and had invested his own funds into the movie.**

****

15. Defendant Nilsen took steps to promote the enterprise, including:

A. Being enlisted by Defendant Levy to induce investors to invest funds in the enterprise based on false pretenses. Second Amended Complaint, ¶ 53; Answer of Defendants Nilsen and TNT Consulting, ¶ 53; Exhibit M.

RESPONSE: Disputed. Defendant Nilsen did not induce any investor to invest funds into the movie, including Plaintiffs. Defendant Nilsen himself invested funds into the movie. Plaintiffs' logic would lead to the conclusion that Defendant Nilsen invested $50,000.00 of his own money in the movie, knowing it was a fraud, to his own detriment. Plaintiffs admitted they have never met Mr. Nilsen, that they have had no communication of any kind with Mr. Nilsen, that Mr. Nilsen never solicited an investment in the movie from them, that they were not induced to do anything by Mr. Nilsen, and that they did not pay any money to Mr. Nilsen or to anyone else at his direction. (Clofine dep. p. 23-24; Salkind dep. p. 9, 11; Farrell/Workshop dep. p. 10-13; Poteet dep. p. 6, 14, 15, 17).

B. Advertising for investors to invest in the enterprise, relying upon the false statement that actor Kevin Spacey was "starring" in Triumph; *Id*.

RESPONSE: Admitted that, after Plaintiffs had entered into their contracts, Mr. Nilsen made a post on LinkedIn with information provided by David Levy about the movie. Mr. Nilsen took the post down several days later after finding out that Mr. Spacey would not be in the movie. Mr. Nilsen received no responses or inquiries from anyone on the post, and none of the Plaintiffs were aware of the post.

C. Promising investors that the investment was "no risk." Second Amended Complaint, Exhibit M; Answer of Defendants Nilsen and TNT Consulting, ¶ 53.

RESPONSE: Admitted that Mr. Nilsen's post contained this information he received from David Levy.

D. Holding himself out as a "producer" at Defendant Pitch Dark Studios. Second Amended Complaint, ¶ 53; Answer of Defendants Nilsen and TNT Consulting, ¶ 53.

RESPONSE: Admitted. All Plaintiffs were also given the same title.

E. Falsely stating on LinkedIn as of October 19, 2015, that Defendant Nilsen had "Just started shooting a new movie in Nashville starring Kevin Spacey . . . . Investors: ROI [Return on investment] upside here vs LA is huge and pre-locked. 120% in 6 mos personally guaranteed and 1st rights, then 5-20% 'equity' in all movie revenue (SAG [Screen Actors Guild] tracked) from day1 for life. Netflix, Showtime, international, US theatres. Sundance inclusion. etc." *Id*.

RESPONSE: Admitted that Mr. Nilsen's post contained this information he received from David Levy. The post was taken down several days later without a single inquiry from anyone. Defendants again note that Defendant Nilsen lost his own money investing in the film.

Defendants TNT Consulting, LLC And Thomas Nilsen's Response To Plaintiff's Statement Of Undisputed Material Facts, pp. 5-6, 7-9, ¶¶ 11(C) & 15 (Oct. 18, 2018).

Next there are the undisputed material facts from the deposition testimony of the Plaintiffs themselves which establish that (1) Defendant Nilsen never communicated with any of the Plaintiffs either orally, in writing or in person and (2) Defendant Nilsen never solicited, offered, sold, or induced any of the Plaintiffs to invest in the project. *See Plaintiff's Notice of Filing*, *Deposition of Victor Poteet*, pp.6; 14-15; 17; 23-27; 37 (Oct. 26, 2018); *Defendants' Submission of Referenced Pages of Depositions, Deposition of Michael Clofine*, pp. 17; 23-24; 30 (Oct. 18, 2018); *Defendants' Submission of Referenced Pages of Depositions, Deposition of Gene Salkind*, pp. 6; 9; 11 (Oct. 18, 2018); *Defendants' Submission of Referenced Pages of Depositions, Deposition of Thomas Farrell*, pp. 8; 10-13 (Oct. 18, 2018).

Additionally, all of the Plaintiffs admitted that they were introduced to the investment opportunity by someone else.

- Plaintiff Victor Poteet testified he was introduced to the investment by Defendant DeLuca. *Plaintiff's Notice of Filing, Deposition of Victor Poteet*, pp.23-27; 37 (Oct. 26, 2018); *see also Second Amended Complaint*, p. 7, ¶ 23 (Jan. 26, 2017).

- Plaintiff Michael Clofine testified he was introduced to the investment by RJ Mitte, Melinda Esquibel and former Defendant David Levy. *Defendants' Submission of Referenced Pages of Depositions, Deposition of Michael Clofine*, pp. 17; 30 (Oct. 18, 2018); *see also Second Amended Complaint*, pp. 17-19, ¶¶ 54-56 (Jan. 26, 2017).

- Plaintiff Gene Salkind testified he was introduced to the investment by Plaintiff Michael Clofine. *Defendants' Submission of Referenced Pages of Depositions, Deposition of Gene Salkind*, p. 6 (Oct. 18, 2018); *see also Second Amended Complaint*, p. 19, ¶ 57 (Jan. 26, 2017).

- Plaintiff The Workshop, LLC, through the deposition of its manager Thomas Farrell, testified that The Workshop, LLC was introduced to the investment by Plaintiff Michael Clofine. *Defendants' Submission of Referenced Pages of Depositions, Deposition of Thomas Farrell*, p. 8 (Oct. 18, 2018); *see also Second Amended Complaint*, p. 20, ¶ 62 (Jan. 26, 2017).

The only apparent alleged wrongdoing alleged by the Plaintiffs relates to Defendant Nilsen's conduct *after* the Plaintiffs were induced to invest their money in the project by other people. These facts, however, are insufficient to establish liability. According to Defendant Nilsen, and not refuted by the Plaintiffs in any of their filings on summary judgment, *after* the Plaintiffs invested in the project and *after* Defendant Nilsen invested in the project himself, former Defendant David Brown Levy asked Defendant Nilsen if he would post an advertisement seeking additional investors in the project.

> I never made any contact with any person about investing in the movie. David Levy expressed the need for one more executive producer for the movie. I have business listings on BizBuySell and placed an ad there under "movie production." After only 2 or 3 days, and with no responses from anyone, I realized that anyone else coming into the movie would dilute my investment, just as the plaintiffs contend. I took the ad down after that short

> period before having any contact, correspondence, or conversation with anyone.

Notice of Filing Of Defendant Thomas Nilsen, With Exhibits, Exhibit 14 to Thomas Nilsen Deposition (Aug. 10, 2018).

The above facts of Defendant Nilsen temporarily posting an investing advertisement, even if true, do not establish any causal nexus between the Nilsen Defendants and these Plaintiffs that fits within the scope of Tennessee Code Annotated section 48-1-121 or 48-1-122. Despite the breadth of these sections, they still require proof of facts that Defendant Nilsen engaged in some conduct either "directly or indirectly" that was "in connection with the offer, sale or purchase of any security in this state" or that "materially aid[ed]" in a Tennessee Securities Act violation that harmed these Plaintiffs. As established above through all of Plaintiffs testimony, Defendant Nilsen never communicated with any of the Plaintiffs either orally, in writing or in person and Defendant Nilsen never solicited, offered, sold, or induced any of the Plaintiffs to invest in the project.

In sum, the Plaintiffs have put forth no evidence of any facts that could even plausibly connect Defendant Nilsen to some common civil conspiracy enterprise such that Defendant Nilsen should be held liable for a violation of the Tennessee Securities Act.

Without any contact/communication with Defendant Nilsen, there is a complete lack of any facts supporting the Plaintiffs' theory of liability under Tennessee Code Annotated section 48-1-121 or 48-1-122. The summary judgment record establishes

absolutely no causal link between the harm suffered by the Plaintiffs in this case and any conduct by the Nilsen Defendants. There is no nexus connecting these Defendants to a violation of Tennessee's blue sky law to these Plaintiffs that could sustain a claim for either primary or secondary liability under the Tennessee Securities Act. The Plaintiffs clearly admit that Defendant Nilsen in no way contributed to or participated in their investment in the movie project with Defendant Levy.

This conclusion is consistent with numerous other jurisdictions interpretation of the scope of similar blue sky laws.

> Whether a person materially aids in the sale is a question of fact, based on the individual circumstances in each instance. A person may materially aid in the sale without having knowledge of the violation for which he or she may be liable under the blue sky laws. However, a statutory requirement of "reckless disregard for the truth or the law," as an element for liability for aiding a securities violation, means an alleged aider is subject to liability as a secondary violator only if it rendered assistance to the primary violator in the face of a perceived risk that its assistance would facilitate untruthful or illegal activity by the primary violator, which does not mean that an aider must know of the exact misrepresentations or omissions made by the primary violator, but does mean that the aider must be subjectively aware of the primary violator's improper activity.
>
> The term "materially aid" is not defined in the blue sky laws, but may be equated with aiding and abetting liability, as defined by federal law. The delivery of a prospectus and promotion of the buyer's participation in a venture may constitute material aid in the sale of an unregistered security. ***However, where a sales agent has never met with nor communicated with the buyer, no recovery may be had against the sales agent.***
>
> A broker-dealer materially aids in the sale of securities by its unregistered agent by providing the agent with the broker-dealer's manuals, credentials, and sales literature. A business broker and its employee who solicit investors through newspaper advertisements, show purchasers a misleading financial statement, draft an agreement for sale of unregistered securities,

> and fail to divulge a corporation's insolvency to the purchaser, are liable for having materially aided in the sale of unregistered securities.

69A AM. JUR. 2D SECURITIES REGULATION—STATE § 151 (footnotes omitted) (emphasis added).

Here, there is no disputed question of fact as to whether Defendant Nilsen materially aided in the sale in question because, as admitted by the Plaintiffs themselves, Defendant Nilsen had no contact and/or communication with any of the Plaintiffs and did not induce any of the Plaintiffs into investing in the project. The undisputed material facts establish that that Defendant Nilsen was an investor himself in the "Triumph" movie and made a $50,000 investment in the project personally after the Plaintiffs had already made their investment.

For all these reasons, summary judgment is denied as to the Plaintiffs' Count Three of the *Second Amended Complaint* against the Nilsen Defendants.

Additionally, even though the Nilsen Defendants did not independently seek summary judgment on Count Three of the *Second Amended Complaint*, the Court determines Count Three of the *Second Amended Complaint* necessarily requires dismissal as the result of denial of the Plaintiffs' motion for summary judgment. Based on the undisputed admissions by these Plaintiffs, there are no set of facts in which the Nilsen Defendants could be held liable for Count Three of the *Second Amended Complaint.* "Trial courts also have the authority to grant summary judgment *sua sponte*, but 'only in rare cases and with meticulous care' when 'the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no

genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law.'" *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 791 (Tenn. Ct. App. 2007) (quoting *Thomas v. Transport Ins. Co.*, 532 S.W.2d 263, 266 (Tenn.1976). These conditions of meticulous care and a full and fair opportunity have been fulfilled in this case for the Court to grant summary judgment *sua sponte* to dismiss the Count Three claims against Thomas Nilsen and TNT Consulting, LLC.

The DeLuca Defendants – Summary Judgment Granted For Plaintiff Poteet And Denied As To Other Plaintiffs With Dismissal Of Claims

As to Defendants DeLuca, Prime 100 Business Consultants and Total Services Management Corporation (the "DeLuca Defendants"), they argue that Defendant DeLuca "only had contact with Plaintiff Victor Poteet, by e-mail, prior to the Poteet entering into the 'Triumph' movie contract" and "DeLuca had no contact with Plaintiffs Clofine, Salkind and the Workshop in a manner where he offered, presented or accepted money or payment for the 'Triumph' movie contract from the Plaintiffs before they allegedly entered into the contracts."

> 11. Defendant Levy took numerous steps to promote the enterprise, including:
>
> A. Signing the Investment Contracts on behalf of himself and Defendant Triumph Movie, LLC. Second Amended Complaint, Exhibits I, N, O, and P.
>
> B. Enlisting Defendant DeLuca to assist in promotion of the enterprise, in exchange for "brokerage fees" Answer of Defendant Levy, 21;

Answer of Defendant DeLuca to Plaintiff Poteet's Interrogatory No. 15.

C. Enlisting Defendant Nilsen to assist in promotion of the enterprise. Second Amended Complaint, 53; Answer of Defendants Nilsen and TNT Consulting, 53.

D. Responding To Requests for additional information from potential investors Documents produced by Defendant DeLuca ("DeLuca Documents"), No. DL0204-DL0205 (copies attached as Exhibit I).

Response: Undisputed as to Defendant Levy. Disputed as to Defendant DeLuca and Nilsen. DeLuca only had contact with Plaintiff Victor Poteet, by e-mail, prior to the Poteet entering into the "Triumph" movie contract, via e-mail. See Depo. TR of Victor Poteet, p. 22, lines 21-25 and p. 23, lines 1-21; and Affidavit of Rich DeLuca ¶ 5. The alleged investment contract, however, Poteet eventually signed was reviewed, revised, finalized and presented to Poteet by Defendant David Brown Levy and, most significantly, Poteet's legal counsel Tim Kappel prior to Poteet's signature on the contract. See Depo. TR. of Victor Poteet, p. 7, lines 16-25 and p. 8, lines 1-23; Depo. TR. of Victor Poteet, p. 45, lines 6-25 and p. 46, lines 1-17; Depo TR of Timothy Kappel p. 26, lines 14-25 and p. 27, lines 1-3; and Affidavit of Rich DeLuca ¶ 11. DeLuca had no contact with Plaintiffs Clofine, Salkind and the Workshop in a manner where he offered, presented or accepted money or payment for the "Triumph" movie contract from the Plaintiffs before they allegedly entered into the contracts. In fact, Plaintiff Michael Clofine testified under oath in his deposition that Melinda Esquibel and David Brown Levy introduced him to the "Triumph" movie. See Depo. TR p. 27, lines 9-13 and p. 30, lines 9-13; and Affidavit of Rich DeLuca, ¶¶ 5, 11 and 12. Clofine further stated that DeLuca did not introduce the "Triumph" movie to him, did not present the "Triumph" movie to him, did not make an offer to him to invest in the ["]Triumph" movie, did not induce him to invest in the "Triumph" movie, and finally did not accept or take any money from him in relation to the "Triumph" movie. See Depo. TR of Michael Clofine p. 29, lines 17-25 and p. 30, lines 1-8. Similarly, Plaintiff Gene Salkind stated in his deposition under oath that he had no contact whatsoever with DeLuca in his dealing with the "Triumph" movie production and, further, it was Plaintiff Michael Clofine who in fact brought him in and supplied him with all information for "Triumph" movie project. See Depo. TR of Gene Salkind p. 14, lines 15-25 and p. 15, lines 1-7; and Depo. TR of Gene Salkind p. 15, lines 8-22. Finally,

Tom Farrell, owner and agent for Plaintiff the Workshop, stated in his deposition that he was introduced to the "Triumph" movie contract and investment by Plaintiff Michael Clofine agreeing that "Clofine…solicited…and brought [him] into the Triumph movie project." See Depo TR of Thomas Farrell p. 14, lines 10-18; p. 16, lines 24-25; and p. 17, lines 1-3. Farrell further stated under oath that he does not know the name DeLuca, has never met DeLuca, has never communicated with DeLuca, was never asked to invest in the "Triumph" movie by DeLuca, and never paid any funds or money to DeLuca. See Depo. of Thomas Farrell p. 17, lines 4-25 and p. 18, lines 1-3. The content of the documents cited by Plaintiffs are undisputed.

****

13. Defendant DeLuca took numerous steps to promote the enterprise including:

A. Providing voluminous information to potential investors, including Plaintiff Poteet. DeLuca Documents, Nos. DL0083-1115; DL0180-DL0213; DL0659-DL0661 (copies attached as Exhibit 2).

B. Running advertisements seeking investors. Second Amended Complaint, 24, 30; Exhibits A and D; Answer of Defendant DeLuca, Prime100, and Total Services Management Corporation, 24, 30.

C. Providing investors to Defendants Levy and Triumph Movie, LLC, Deluca Document No. DL0089.

D. Enlisting his business associate, Defendant Gregg, to assist in efforts to obtain investors. Exhibit 2.

Response: Undisputed as to providing information to Plaintiff Poteet and supplying information the request of Levy to seek investors. Disputed as to providing investors to Defendant Levy and Triumph movie as well as Defendant Gregg. Defendant Levy. Disputed as to Defendant DeLuca and Nilsen. DeLuca only had contact with Plaintiff Victor Poteet, by e-mail, prior to the Poteet entering into the "Triumph" movie contract, via e-mail. See Depo. TR of Victor Poteet, p. 22, lines 21-25 and p. 23, lines 1-21; and Affidavit of Rich DeLuca ¶ 5. The alleged investment contract, however, Poteet eventually signed was reviewed, revised, finalized and presented to Poteet by Defendant

David Brown Levy and, most significantly, Poteet's legal counsel Tim Kappel prior to Poteet's signature on the contract. See Depo. TR. of Victor Poteet, p. 7, lines 16-25 and p. 8, lines 1-23; Depo. TR. of Victor Poteet, p. 45, lines 6-25 and p. 46, lines 1-17; Depo TR of Timothy Kappel p. 26, lines 14-25 and p. 27, lines 1-3; and Affidavit of Rich DeLuca ¶ 11. DeLuca had no contact with Plaintiffs Clofine, Salkind and the Workshop in a manner where he offered, presented or accepted money or payment for the "Triumph" movie contract from the Plaintiffs before they allegedly entered into the contracts. In fact, Plaintiff Michael Clofine testified under oath in his deposition that Melinda Esquibel and David Brown Levy introduced him to the "Triumph" movie. See Depo. TR p. 27, lines 9-13 and p. 30, lines 9-13; and Affidavit of Rich DeLuca, ¶¶ 5, 11 and 12. Clofine further stated that DeLuca did not introduce the "Triumph" movie to him, did not present the "Triumph" movie to him, did not make an offer to him to invest in the ["]Triumph" movie, did not induce him to invest in the "Triumph" movie, and finally did not accept or take any money from him in relation to the "Triumph" movie. See Depo. TR of Michael Clofine p. 29, lines 17-25 and p. 30, lines 1-8. Similarly, Plaintiff Gene Salkind stated in his deposition under oath that he had no contact whatsoever with DeLuca in his dealing with the "Triumph" movie production and, further, it was Plaintiff Michael Clofine who in fact brought him in and supplied him with all information for "Triumph" movie project. See Depo. TR of Gene Salkind p. 14, lines 15-25 and p. 15, lines 1-7; and Depo. TR of Gene Salkind p. 15, lines 8-22. Finally, Tom Farrell, owner and agent for Plaintiff the Workshop, stated in his deposition that he was introduced to the "Triumph" movie contract and investment by Plaintiff Michael Clofine agreeing that "Clofine…solicited…and brought [him] into the Triumph movie project." See Depo TR of Thomas Farrell p. 14, lines 10-18; p. 16, lines 24-25; and p. 17, lines 1-3. Farrell further stated under oath that he does not know the name DeLuca, has never met DeLuca, has never communicated with DeLuca, was never asked to invest in the "Triumph" movie by DeLuca, and never paid any funds or money to DeLuca. See Depo. of Thomas Farrell p. 17, lines 4-25 and p. 18, lines 1-3. The content of the documents cited by Plaintiffs are undisputed.

Defendants Rich DeLuca, Prime100 Business Consultants And Total Services Management Corporation's Responses To The Plaintiffs' Statement Of Undisputed Material Facts, pp. 7-9, ¶¶ 11 & 13 (Oct. 19, 2018).

In support of summary judgment against the DeLuca Defendants, the Plaintiffs argue that Defendant DeLuca's deposition testimony establishes that he promoted, solicited and offered the investment to Plaintiff Victor Poteet as a part of an overall scheme to defraud and "admitted receiving compensation of $25,000 from Levy for his efforts." *Plaintiff's Reply Memorandum In Support Of Motion For Summary Judgment*, p. 3 (Oct. 26, 2018). As to Defendant DeLuca's lack of contact/communication with the other Plaintiffs, on summary judgment the Plaintiffs argue that the DeLuca Defendants are nevertheless liable because Defendant DeLuca's actions were taken in furtherance of an overall fraudulent civil conspiracy/scheme with the other Defendants for which the acts of other Defendants can be attributed to the DeLuca Defendants.

On this issue the Court finds that the summary judgment record and the Plaintiffs' statement of undisputed material facts establish that Defendant DeLuca violated the Tennessee Securities Act as to Plaintiff Victor Poteet but not as to the other Plaintiffs.

Plaintiff Poteet

The undisputed material facts establish that Defendant DeLuca participated directly in the offer, sale and purchase of the investment contract to Plaintiff Poteet. Defendant DeLuca does not dispute that he contacted Plaintiff Poteet and provided him information regarding the investment opportunity that was given to Defendant DeLuca from David Levy. Furthermore, a review of the e-mail correspondence attached in support of the Plaintiffs' motion for summary judgment establishes that Defendant DeLuca acted as the go-between with Plaintiff Poteet and David Levy in luring Plaintiff

Poteet to invest in the "Triumph" movie. *See also Notice of Filing Of Defendant Rich DeLuca, With Exhibits*, DeLuca Depo. p. 42, lines 2-4 (Aug. 10, 2018). A sampling of the e-mail correspondence evidencing Defendant DeLuca's direct participation in the solicitation, offer and sale of the investment contract can be found at Bates numbers DL0089-DL0090; DL0109-DL0115; DL0180-DL0213; DL0659.

Defendant DeLuca's defense is that while he may have solicited the investment from Plaintiff Poteet nevertheless "[t]he alleged investment contract…Poteet eventually signed was reviewed, revised, finalized and presented to Poteet by Defendant David Brown Levy and, most significantly, Poteet's legal counsel Tim Kappel prior to Poteet's signature of the contract." These facts, the Court concludes, are immaterial in defending against liability under Tennessee's securities law. As detailed in the e-mail correspondence and admitted by Defendant DeLuca in his deposition, his role in soliciting Plaintiff Poteet's investment was not insignificant. Defendant DeLuca played an extensive and active role in soliciting the offer and sale of the investment contract which fits clearly within either Tennessee Code Annotated section 48-1-121 or 48-1-122's standard for liability and is consistent with law from other states interpreting blue sky laws similar to Tennessee's and their scope of liability.

> Direct sellers ordinarily are liable to direct purchasers, whether these persons are acting for themselves or on behalf of others.
>
> The sales agent having immediate contact with the investor ordinarily is liable under the blue sky laws, even if the sales agent is not the person in receipt of the funds used to purchase the securities. Thus, it is not necessary that the person complete the sale, only that the person solicited the sale, participated in the negotiations, or induced the sale.

69A AM. JUR. 2D SECURITIES REGULATION—STATE § 148 (West 2019) (citations omitted).

In addition to the direct contact with Plaintiff Poteet, it is also undisputed that the DeLuca Defendants received compensation from David Brown Levy for their role in promoting this enterprise.

> 18. Defendants DeLuca and Total Services Management received payments for their services in promoting this enterprise totaling at least $25,000. Answer of Defendant DeLuca to Plaintiff Poteet's Interrogatory No. 15.
>
> **Response: Undisputed.**

Defendant Rich DeLuca, Prime100 Business Consultants And Total Services Management Corporation's Responses To Plaintiffs' Statement Of Undisputed Material Facts, p. 11, ¶ 18 (Oct. 19, 2018); *see also Notice Of Filing Of Defendant Rich DeLuca, With Exhibits*, DeLuca Depo., pp. 45, line17 – 54, line 5 (Aug. 10, 2018).

The pervasiveness of Defendant DeLuca's contact with Plaintiff Poteet combined with the undisputed fact that he and his companies received compensation for bringing Plaintiff Poteet on board as an investor establish liability under Tennessee Code Annotated sections 48-1-121 and 48-1-122 and is consistent with Tennessee's liberal approach to interpreting the Tennessee Securities Act as remedial to protect investors. *See, e.g., State v. Casper*, 297 S.W.3d 676, 684 (Tenn. 2009) (citations omitted) ("The parallel systems of securities regulations 'were adopted to serve different purposes. Like Tennessee, states enacted securities regulation to protect investors. Federal securities regulations, on the other hand, were enacted to serve the broader purpose of protecting the integrity of the increasingly nationalized market.'"); *As You Sow v. AIG Fin.*

Advisors, Inc., 584 F. Supp. 2d 1034, 1042, 2008 WL 2677530 (M.D. Tenn. 2008) (quoting *King v. Pope*, 91 S.W.3d 314, 324 (Tenn. 2002) (footnote omitted) ("As stated earlier, the Tennessee Supreme Court requires the TSA to be "liberally construed" so as to protect investors."); *Hardcastle v. Harris*, 170 S.W.3d 67, 88 (Tenn. Ct. App. 2004) (citations omitted) ("Tennessee's securities statutes are remedial and should be construed broadly to effectuate their purpose.").

The Court therefore concludes that summary judgment is appropriate in favor of Plaintiff Poteet against the DeLuca Defendants on Count Three – Violation of the Tennessee Securities Act of the *Second Amended Complaint*.

Plaintiffs Clofine, Salkind, and The Workshop, LLC

As to the DeLuca Defendants alleged liability to Plaintiffs Michael Clofine, Gene Salkind and The Workshop, LLC for violation of the Tennessee Securities Act, the Court denies the motion for summary judgment. As analyzed above with regard to the Nilsen Defendants, there is no proof in the summary judgment record that (1) the DeLuca Defendants had any contact/communication with Plaintiffs Clofine, Salkind and The Workshop, LLC, either orally, in writing or in person and/or that (2) the DeLuca Defendants ever solicited, offered, sold, or induced any of the Plaintiffs to invest in the project. Rather, the sworn testimony from these Plaintiffs is that they were introduced to the investment by other people. *See Defendants' Submission of Referenced Pages of Depositions, Deposition of Michael Clofine*, pp. 17; 30 (Oct. 18, 2018); *see also Second Amended Complaint*, pp. 17-19, ¶¶ 54-56 (Jan. 26, 2017); *Defendants' Submission of*

Referenced Pages of Depositions, Deposition of Gene Salkind, p. 6 (Oct. 18, 2018); *see also Second Amended Complaint*, p. 19, ¶ 57 (Jan. 26, 2017); *Defendants' Submission of Referenced Pages of Depositions, Deposition of Thomas Farrell*, p. 8 (Oct. 18, 2018). Based upon this undisputed proof, there can be no causal link or nexus connecting the DeLuca Defendants to these Plaintiffs.

For this reason, as with the Nilsen Defendants, dismissal is appropriate as to the Count Three Claims of Plaintiffs Michael Clofine, Gene Salkind and The Workshop, LLC that the DeLuca Defendants violated the Tennessee Securities Act.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, fax, or efiling as applicable to:

James W. White
Attorney for the Plaintiffs

M. Todd Jackson
Attorney for Thomas Nilsen, and TNT Consulting, LLC

David Brown Levy
Pro Se Defendant

Douglas Ben Gregg
Pro Se Defendant

Steven G. Fuller
Attorney for Total Services Management Corporation, Rich Deluca, Prime 100 Consultants