

DISCOVERY CONTROL PLAN

1. Discovery in this suit should be conducted pursuant to Rule 190.4 (Level 3) of the Texas Rules of Civil Procedure.

PARTIES

2. Plaintiff Avin A. Hubenak ("Hubenak") is an individual residing in Fort Bend County, Texas.

3. Defendant Capital One, N.A., individually and as successor-in-interest to Hibernia National Bank ("Capital One") is a national banking association and can be served with process by delivering a citation, along with a copy of this petition, to its registered agent in Texas, Corporation Service Company, d/b/a CSC-Lawyers Incorporating Service Company, 701 Brazos Street, Suite 1050, Austin, Texas 78701.

4. Defendant Applied Capital Management Group, LLC ("ACM") is a Texas limited liability company with its principal place of business in San Antonio, Texas. ACM can be served with process by delivering a citation, along with a copy of this petition, to its registered agent in Texas, William T. Bach, 8531 N. New Braunfels, Suite 212, San Antonio, Texas 78217.

5. Defendant New Opportunities, Inc. ("New Opportunities") is a Texas corporation with its principal place of business in San Antonio, Texas. New Opportunities can be served with process by delivering a citation, along with a copy of this petition, to its registered agent in Texas, James W. Hale, 8531 N. New Braunfels, Suite 105, San Antonio, Texas 78217.

6. Defendant Alamo Fidelity Services, Inc. ("AFS") is a Texas corporation with its principal place of business in San Antonio, Texas. AFS can be served with process by delivering

a citation, along with a copy of this petition, to its registered agent in Texas, James W. Hale, 8531 N. New Braunfels, Suite 105, San Antonio, Texas 78217.

7. Defendant Provident Capital Indemnity, Ltd. ("Provident") is a Costa Rican company or corporation that regularly conducts business in Texas, but does not maintain a registered agent for service of process in Texas. Provident's principal place of business is in Oficinas Ejecutivas San Rafael, San Rafael Heredia, Costa Rica. Pursuant to Section 17.044(b) of the Texas Civil Practice & Remedies Code, the Secretary of State of Texas is an agent for service of process in any proceeding that arises out of the conduct of Provident doing business in the State of Texas. Under Rule 108a of the Texas Rules of Civil Procedure, service of process may be affected upon a party in a foreign country if service of the citation and petition is made in the manner provided by Rule 106 or pursuant to the terms and provisions of any applicable treaty or convention. Accordingly, Provident may be served by mailing or delivering two copies of the citation and this petition to the Secretary of State of Texas as agent for service on Provident. The Secretary of State of Texas is requested to mail a copy of the citation and petition by certified mail, return receipt requested, to:

PROVIDENT CAPITAL INDEMNITY, LTD.
c/o Minor Vargas Calvo
Oficinas Ejecutivas San Rafael
San Rafael-Heredia, Costa Rica

8. Defendant A & O Resource Management, Ltd. is a Texas limited partnership with its principal place of business in Houston, Texas. A & O Resource Management, Ltd. can be served with process by delivering a citation, along with a copy of this petition, to its general partner, Shepherd Capital Management, c/o Russell E. Mackert, 5555 West Loop South, Suite 605, Bellaire, Texas 77401.

9. Defendant A & O Resource Management, LLP is a Texas limited liability company with its principal place of business in Houston, Texas. A & O Resource Management, LLP may be served with process by delivering a citation, along with a copy of this petition, to its general partner, Shepherd Capital Management, c/o Russell E. Mackert, 5555 West Loop South, Suite 605, Bellaire, Texas 77401.

10. Defendant Christian M. Allmendinger (“Allmendinger”) is an individual residing in Houston, Texas and may be served with process at his residence, 209 Glenwood Drive, Houston, Texas 77007-7012.

11. Brent Oncale (“Oncale”) is an individual residing in Houston, Texas and may be served with process at his place of business, 1 Riverway, Suite 470, Houston, Texas 77056.

12. Jim Schuppenhauer (“Schuppenhauer”) is an individual residing in San Antonio, Texas and may be served with process at his place of business, New Opportunities, Inc., 8531 N. New Braunfels, Suite 105, San Antonio, Texas 78217.

13. William T. Bach (“Bach”) is an individual residing in San Antonio, Texas and may be served with process at his residence, 15722 Dawn Crest, San Antonio, Texas 78248-1741.

14. James W. Hale (“Hale”) is an individual residing in San Antonio, Texas and may be served with process at his place of business, 229 Fleetwood Drive, San Antonio, Texas 78232.

15. Minor Vargas Calvo (“Vargas”) is an individual residing in Costa Rica who regularly conducts business in Texas, but does not maintain a registered agent for service of process in Texas. Vargas’ principal place of business is in Oficinas Ejecutivas San Rafael, San Rafael Heredia, Costa Rica. Pursuant to Section 17.004(b) of the Texas Civil Practice & Remedies Code, the Secretary of State of Texas is an agent for service of process in any proceeding that arises out of the conduct of

Vargas doing business in the State of Texas. Under Rule 108a of the Texas Rules of Civil Procedure, service of process may be affected upon a party in a foreign country if service of the citation and petition is made in the manner provided by Rule 106 or pursuant to the terms and provisions of any applicable treaty or convention. Accordingly, Vargas may be served by mailing or delivering two copies of the citation and this petition to the Secretary of State of Texas as agent for service on Vargas. The Secretary of State of Texas is requested to mail a copy of the citation and petition to Vargas at:

Minor Vargas Calvo
Oficinas Ejecutivas San Rafael
San Rafael-Heredia, Costa Rica

16. Defendant Pacific Life Insurance Company (“Pacific Life”) is a California corporation with its principal place of business in Newport Beach, California. Pacific Life can be served with process by delivering a citation, along with a copy of this petition, to its registered agent, National Registered Agents, Inc., 2875 Michelle Drive, Suite 100, Irvine, CA 92606.

17. Defendant Ramey & Flock, P.C. is a Texas corporation with its principal place of business in Tyler, Texas. Ramey & Flock, P.C. can be served with process by delivering a citation, along with a copy of this petition, to its registered agent, Tracy Crawford, 100 E. Ferguson Street, Suite 500, Tyler, Texas 75702-5750.

JURISDICTION AND VENUE

18. This Court has personal jurisdiction over all parties. The damages and relief sought are within the jurisdictional limits of this Court.

19. Venue is proper in Harris County, Texas pursuant to Sections 15.002(a)(1) and (4), and 15.035 of the Texas Civil Practice & Remedies Code.

FACTS

20. In 2004, after working 29.5 years for Chevron, Plaintiff Avin Hubenak decided to accept an early retirement package. In connection with his retirement, Hubenak transferred the entire balance of his Chevron retirement funds to an IRA at Hibernia Bank. At the time of the transfer, Mr. Hubenak's IRA had a balance in excess of \$1.4 million.

21. Prior to and after his retirement from Chevron, Hubenak was a customer of Hibernia National Bank in Sugar Land, Texas, which was subsequently acquired by Capital One, N.A. Hubenak had several accounts at Hibernia and sought and received investment services and advice from Hibernia through its employees and agents. During 2004, Defendant Chris Allmendinger was employed by Hibernia and assigned as Hubenak's personal banker.

22. At or about the time of his retirement, Hubenak sought and received investment services and advice from Allmendinger, acting on behalf of Hibernia, regarding an appropriate investment for his \$1.4 million IRA, which represented substantially all of Hubenak's retirement savings. Hubenak told Allmendinger that it was extremely important that the IRA funds be invested in something totally safe and secure because said funds would be needed to support Hubenak and his wife through their retirement years.

23. Allmendinger, acting on behalf of Hibernia, recommended that Hubenak invest his IRA funds in a product offered by A & O Resource Management, LLP and/or A & O Resource Management, Ltd. (collectively "A & O") called a "Life Settlement." Allmendinger and A & O represented that a Life Settlement involved a buyer (in this case, Hubenak) purchasing an interest in a life insurance policy from an insured and becoming the new owner and beneficiary under the policy. More specifically, Allmendinger and A & O represented to Hubenak that in return for

investing \$1.4 million in a Life Settlement in December 2004, Hubenak would receive \$2,240,000 on January 22, 2009, yielding a guaranteed rate of return of approximately 12% per annum. Significantly, it was further represented to Hubenak that the Life Settlement was backed by a bond that would pay the guaranteed return of \$2,240,000 on January 22, 2009 in the event the insured was still alive on that date. In no event was Hubenak to be responsible for paying the premiums associated with the Policy after the January 22, 2009 maturity date of the Life Settlement.

24. In addition to the foregoing, Allmendinger (as an employee of Hibernia and on behalf of A & O) made the following express representations to Hubenak in connection with the investment of his IRA funds in a Life Settlement:

- a. Hubenak would become “the sole owner and beneficiary of the life insurance policy,” thus creating a “direct relationship” between Hubenak and the life insurance company, putting him “in full control of [his] asset”;
- b. Hubenak would receive a “profitable, secure, long-term financial return”;
- c. Hubenak would receive “above average returns” that were “compounded annually”;
- d. Hubenak would benefit from the “strength of the life insurance industry”; and
- e. Hubenak would not be subjected to the “risk of stock or bond markets.”

25. In December 2004, and in reliance on the representations, promises, guarantees and failures to disclose set forth herein, Hubenak agreed to invest \$1.4 million of his IRA funds in a Life Settlement in return for a guaranteed payment of \$2,240,000 on January 22, 2009. In furtherance of the fraudulent scheme described herein, Hubenak was told that his IRA could not directly own an interest in a life insurance policy, and therefore, Hubenak was advised that his investment would be through Alamo Fidelity Services, Inc., but made and held for the benefit of his IRA.

Unbeknownst to Hubenak, AFS is owned and controlled by Defendants Jim Schuppenhauer and James W. Hale. Hubenak transferred \$1.4 million out of his IRA, which was used by AFS to purchase a 44.8% interest in Pacific Life Insurance Policy No. VF50018070 in the amount of \$5 million, naming Roseanne Comstock as the insured (the "Policy").

26. In connection with the Life Settlement investment in the Policy, Jim Schuppenhauer, acting on behalf of Applied Capital Management Group, LLC and/or New Opportunities, Inc., caused a "First Written Demand Financial Guaranty Bond," Bond No. FWD28827-FGB50018070, to be issued by Provident Capital Indemnity, Ltd. in the amount of \$5 million to protect and guaranty the investment (the "Bond"). As represented to Hubenak, the purpose of the Bond was to insure prompt payment on the maturity date (January 22, 2009) of the guaranteed investment return in the event the insured, Roseanne Comstock, had not passed away prior to that date. Thus, it was critical that the Bond company chosen to secure the investment be a highly reputable, legitimate, licensed and solvent Bonding company. Unfortunately for Hubenak, and as described in more detail below, Provident was none of those things.

27. The Defendants who brought Provident into this transaction were negligent and failed to comply with their duties to Hubenak to confirm Provident was a reputable, legitimate, licensed and solvent Bonding company. Provident Capital Indemnity, Ltd. has never been registered with the Texas Securities Commission as a dealer or agent. On November 6, 2006, the Texas Department of Insurance issued Order No. 06-1154 ordering Provident to cease and desist engaging in the unauthorized business of insurance in connection with the issuance of Bonds securing Life Settlement investments similar to the one made the subject of this suit. On January 17, 2008, the Texas Securities Board also issued a cease and desist order directed to Provident and related to a Life

Settlement investment similar to the one at issue in this case. More recently, on November 6, 2008, the Texas State Securities Board issued a warning to consumers about investments in Life Settlements with Bonds issued by Provident, a Costa Rican firm that has twice before been the subject of cease and desist orders by Texas regulators. Finally, the state of Florida obtained a receivership and injunctive relief against Provident for, among other things, unlawfully engaging in the insurance business in Florida. Defendant Minor Vargas Calvo is believed to be the principal and owner of Provident Capital Indemnity, Ltd.

28. As stated above, the maturity date of the Life Settlement investment in the Policy was January 22, 2009. As of that date, the insured under the Policy was still alive, thereby triggering the obligation of Provident to make payment under the Bond. Despite repeated demands, Hubenak has not received any portion of the guaranteed return of \$2,240,000. In addition, Hubenak has not received a plausible explanation for the failure to pay him his money. It has now become clear that Hubenak has been the victim of a fraudulent and illegal scheme designed to steal his retirement funds.

29. In January 2009, the purported owners of the Policy, including AFS, entered into an Escrow Agreement with the law firm of Ramey & Flock, P.C. serving as the escrow agent. The purpose of the Escrow Agreement was to facilitate the payment by Provident of the amount due under the Bond (\$5 million), the disbursement of those funds to the purported owners of the Policy, and the transfer of ownership of the Policy to Provident. Hubenak is a third party beneficiary of the Escrow Agreement and the Bond. Provident has breached its obligations under the Escrow Agreement and the Bond and has wholly failed to pay any of the amounts due under those contracts.

CAUSES OF ACTION

30. All allegations set forth in this petition are incorporated into each cause of action.

A. Fraud and Fraudulent Inducement

31. As described herein, Hubenak was fraudulently induced to enter into the Life Settlement investment in the Policy. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale made material misrepresentations to Hubenak and/or failed to disclose material information, in order to induce Hubenak to invest his IRA funds in the Policy.

32. In addition, Defendants' conduct as described herein constitutes common law fraud.

33. Hubenak seeks recovery of all damages proximately caused by the fraudulent inducement and common law fraud. Alternatively, Hubenak seeks rescission of the Life Settlement investment in the Policy. Hubenak is also entitled to recover exemplary damages as a result of Defendants' fraudulent conduct.

B. Negligent Misrepresentation

34. The conduct described herein constitutes negligent misrepresentation under Texas law. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale made misrepresentations in the course of their business or in the course of a transaction in which they had a pecuniary interest. The misrepresentations were made for Hubenak's guidance and constitute misstatements of fact. Defendants did not use reasonable care in communicating the information. Hubenak justifiably relied on the misrepresentation in entering into the Life Settlement investment in the Policy.

35. The negligent misrepresentations described herein have been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Hubenak

is also entitled to recover exemplary damages as a result of Defendants' negligent misrepresentations.

C. Breach of Fiduciary Duty/Aiding and Abetting

36. A formal and/or informal fiduciary relationship existed between Hubenak and each of Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale. The acts and omissions described herein constitute breaches of the fiduciary duties owed by these Defendants to Hubenak. In addition, these Defendants owed Hubenak a fiduciary duty of full disclosure and failed to disclosed material information relating to the transaction in question. These Defendants also knowingly participated in and aided and abetted each other in breaching their respective fiduciary duties owed to Hubenak.

37. The breaches of fiduciary duty described herein have been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Hubenak is also entitled to recover exemplary damages as a result of Defendants' breaches of fiduciary duty.

D. Breach of Contract/Third Party Beneficiary

38. Hubenak entered into a contract with Defendants Capital One, Allmendinger, Oncale, A & O, and AFS, whereby in return for Hubenak's investment of \$1.4 million in December 2004, Hubenak would receive a guaranteed return of at least \$2,240,000 on January 22, 2009. The Defendants have breached this contract.

39. Hubenak is a third-party beneficiary of the Escrow Agreement and the Bond issued by Provident. Provident has breached both contracts.

40. The breaches of contract described herein have been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Hubenak is also

entitled to recover his reasonable and necessary attorneys' fees incurred in connection with his contract claims.

E. Conversion

41. Hubenak, through his IRA, is the rightful owner of 44.8% of the Policy and its proceeds. Defendants Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale have wrongfully and maliciously exercised dominion and control over Hubenak's superior ownership rights in the Policy and its proceeds.

42. The conversion described herein has been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdiction limits of this Court. Hubenak is also entitled to recover exemplary damages as a result of Defendants' conversion.

F. Violations of the Texas Theft Liability Act and Texas Penal Code

43. Hubenak, through his IRA, is the rightful owner of 44.8% of the Policy and any proceeds thereof. Defendants Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale have committed civil theft pursuant to the Texas Theft Liability Act, Texas Civil Practice & Remedies Code § 134.001, *et. seq.*, by misappropriating Hubenak's ownership interest in the Policy. Under the Texas Theft Liability Act, "theft" is defined as "unlawfully appropriating property . . . as described by section 31.03 of the Texas Penal Code." *See* Tex. Civ. Prac. & Rem. Code § 134.002(2). More specifically, Section 31.03 of the Texas Penal Code provides for liability if a person, without the owner's effective consent, unlawfully appropriates property with intent to deprive the owner of property. Accordingly, the Defendants named above have violated the Texas Theft Liability Act, and Hubenak is entitled to the return of the ownership of his interest in the Policy and its proceeds.

44. The violations of the Texas Theft Liability Act and Texas Penal Code set forth herein have been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Hubenak is also entitled to recover uncapped exemplary damages as a result of Defendants' theft.

G. Violations of the Texas Insurance Code

45. Defendants have violated 28 Texas Administrative Code § 3.1701, *et. seq.*, and Texas Insurance Code § 1111, *et. seq.*, by failing to register as Life Settlement Providers with the Texas Department of Insurance, by engaging in business with Life Settlement Providers who were not registered with the Texas Department of Insurance, by failing to disclose commissions for Life Settlement sales and business, by providing a commission for a Life Settlement sale to a financial planner, and/or by failing to adhere to various other disclosure and reporting requirements.

46. The violations of the Texas Insurance Code described herein have been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court.

H. Negligence and Gross Negligence

47. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale owed Hubenak a duty to act in accordance with the standards applicable to the banking, financial services, insurance and securities industries. These Defendants failed to exercise reasonable care in connection with the sale and administration of the Life Settlement investment in the Policy. The industry standard of care is set forth by the rules of the NASD, the NYSE, state statutes, and other laws. Defendants were obligated to provide Hubenak with competent, professional banking and investment management services in accordance with those industry rules, regulations, customs and practices. Defendants' conduct as described herein

constitutes numerous breaches of their duties and obligations to Hubenak, including without limitation, the failure to comply with the following rules:

- a. NASD Conduct Rule 2100 (High Standards of Commercial Honor/Equitable Principles of Trade);
- b. NASD Conduct Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices);
- c. NASD Conduct Rule 2210 (d) (Standards Applicable to Communications with the Public);
- d. NASD Conduct Rule 2310 (Suitability and Fair Dealing with Customers);
- e. NASD Conduct Rule 2440 (Fair Prices and Commissions);
- f. NASD Conduct Rule 3010 (Supervision);
- g. NASD Notice to Members 97-19 (Heightened Supervisory Recommendations);
- h. NYSE Rule 342 (Supervision);
- i. NASD Conduct Rule 3110 and NYSE Rule 405 (New Account Information and Knowing Your Customer);
- j. NYSE Rule 401 (Good and Ethical Business Practices);
- k. The Standards of conduct, which, on information and belief, as set forth in Defendants' compliance and policy manuals.

48. The negligence and gross negligence described herein has been the proximate cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Because Defendants acted with reckless disregard for the rights and welfare of Hubenak and were grossly negligent in connection with the transaction at issue, Hubenak is also entitled to recover exemplary damages.

I. Violations of Section 33A(1) of the Texas Securities Act

49. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale have each violated Section 33A(1) of the Texas Securities Act, which provides as follows: “A person who offers or sells a security in violation of Section 7, 9 (or a requirement of the Commissioner thereunder), 12, 23C, or an order under 23A or 23-2 of this Act is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.” Accordingly, Hubenak brings this action for rescission and/or all damages in the maximum amount permitted by Texas law.

J. Violations of Section 33A(2) of the Texas Securities Act

50. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale violated Section 33A(2) of the Texas Securities Act, which provides as follows: “A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.” Accordingly, Hubenak brings this action for rescission and/or all damages in the maximum amount permitted by Texas law.

K. Liability of Control Persons and Aiders

51. Defendants Allmendinger, Oncale, Schuppenhauer, Bach and Hale are each liable insofar as they are “control persons and aiders.” The Texas Securities Act provides that a “person

who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer or issuer, and to the same extent as if he were the seller, buyer, or issuer . . .”

52. The Texas Securities Act further provides that a “person who directly or indirectly with the intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were a seller, buyer, or issuer.”

53. Accordingly, Hubenak is entitled to recover judgment against each of the Defendants named above, jointly and severally, for actual damages proximately caused by violations of the Texas Securities Act.

L. Violations of the Texas Deceptive Trade Practices Act

54. Hubenak is a consumer as that term is defined under the DTPA. Defendants Capital One, Allmendinger, Oncale, A & O, AFS, ACM, New Opportunities, Schuppenhauer, Bach and Hale violated the DTPA when they engaged in false, misleading, or deceptive acts or practices that Hubenak relied on to his detriment, engaged in an unconscionable action or course of action that, to Hubenak’s detriment, took advantage of his lack of knowledge, ability, experience, or capacity to a grossly unfair degree, and violated Chapter 541 of the Texas Insurance Code.

55. The Defendants’ DTPA violations were the producing cause of actual damages to Hubenak in excess of the minimum jurisdictional limits of this Court. Further, Defendants acted intentionally, entitling Hubenak to recover treble damages under Section 17.50(b)(1) of the DTPA. Hubenak is also entitled to recover his reasonable and necessary attorneys’ fees and costs under Section 17.50(d) of the DTPA.

M. Conspiracy

56. The Defendants conspired to accomplish an unlawful purpose and had a meeting of the minds to unlawfully misappropriate Hubenak's IRA funds and/or his ownership interest in the Policy and its proceeds. In committing the wrongful acts alleged herein, each of the Defendants has pursued, or joined in the pursuit of, a common course of conduct, and acted in concert with and conspired with one another, in furtherance of their common plan or design. In addition to the wrongful conduct alleged as giving rise to primary liability, the Defendants further aided and abetted and/or assisted each other in breach of their respective duties. Thus, Hubenak has suffered damages on account of the Defendants' aiding and abetting, acting in concert, and conspiracy to commit the wrongful acts described herein.

N. Alter Ego/Disregard of Corporate Entities

57. Defendants A & O Resource Management, LLP, A & O Resource Management, Ltd., Chris Allmendinger and Brent Oncale are alter egos of each other. The corporate form of the A & O entities was used as a sham to perpetrate a fraud against Hubenak, was used to evade existing legal obligations, was used to protect against the discovery of a crime and to justify a wrong, and the A & O entities were inadequately capitalized (because capital was taken from the companies and used to create and support Allmendinger's and Oncale's extravagant lifestyles) with the effect of creating an injustice. The separate identities of these corporations, entities and individuals must be disregarded, and they must be treated as one entity to prevent use of the corporate fiction as an unfair device to inflict injustice on Hubenak.

58. Defendants Applied Capital Management Group, LLC, New Opportunities, Inc., Alamo Fidelity Services, Inc., Jim Schuppenhauer, William T. Bach, and James W. Hale are alter

egos of each other. The corporate form of AFS, ACM, and New Opportunities were used as a sham to perpetrate a fraud against Hubenak, were used to evade existing legal obligations, were used to protect against the discovery of a crime and to justify a wrong, and were inadequately capitalized with the effect of creating an injustice. The separate identities of these corporation, entities and individuals must be disregarded, and they must be treated as one entity to prevent use of the corporate fiction as an unfair device to inflict injustice on Hubenak.

59. Provident Capital Indemnity, Ltd. and Minor Vargas Calvo are alter egos of each other. The corporate form of Provident was used as a sham to perpetrate a fraud against Hubenak, was used to evade existing legal obligations, was used to protect against the discovery of a crime and to justify a wrong, and was inadequately capitalized with the effect of creating an injustice. The separate identities of Provident and Minor Vargas Calvo must be disregarded, and they must be treated as one entity to prevent use of the corporate fiction as an unfair device to inflict injustice on Hubenak.

O. Declaratory Judgment

60. As shown herein, various disputes have arisen regarding the rights, status and obligations of the parties with respect to the Life Settlement investment and the Policy. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, Hubenak seeks a declaratory judgment as follows:

- a. that Hubenak is the owner of an undivided 44.8% interest in the Policy and its proceeds;
- b. that Hubenak is entitled to no less than 44.8% of the proceeds of the Policy;
- c. that Hubenak is not obligated to pay any premiums that may be necessary to keep the Policy in force;

- d. that the Policy may not be cancelled or terminated;
- e. that the payment of Hubenak's share of the proceeds of the Policy shall be made directly to Hubenak's IRA;
- f. that AFS' purported interest in the Policy and its proceeds are held in trust for the benefit of Hubenak; and
- g. any funds received by Ramey & Flock, P.C., as escrow agent, attributable to Hubenak's 44.8% interest in the Policy and its proceeds shall be held in trust for the benefit of Hubenak and immediately paid to his IRA.

INJUNCTIVE RELIEF

61. Hubenak will suffer immediate and irreparable harm unless Defendants are ordered to immediately take all steps necessary to protect and preserve his interest in the Policy and its proceeds, including the payment of all premiums necessary to keep the Policy in force, and unless Defendants are enjoined from taking any action adverse to Hubenak's ownership interest in the Policy and its proceeds.

62. Hubenak requests the Court grant a temporary injunction to preserve his ownership interest in the Policy and its proceeds, and to prevent Defendants from taking any action adverse to Hubenak's ownership interest in the Policy and its proceeds, including requiring one or more of the Defendants to pay all premiums necessary to keep the Policy in force, and/or prohibiting Pacific Life from cancelling the Policy or transferring ownership of the Policy or its proceeds, until this suit is resolved by judgment.

CONSTRUCTIVE TRUST/DISGORGEMENT

63. As a result of the Defendants' fraud, negligent misrepresentations, breaches of fiduciary duty, knowing participation in and aiding and abetting breaches of fiduciary duty, and conspiracy, Hubenak is entitled to a constructive trust on the Policy and its proceeds as well as

gorgement of all profits, monies or economic benefits received or obtained by Defendants as a result of their wrongful conduct as described herein.

EXEMPLARY DAMAGES

64. The Defendants' fraud, negligent misrepresentations, breach of fiduciary duty, knowing participation in, and aiding and abetting breaches of fiduciary, conversion, theft, gross negligence and conspiracy were aggravated by the kind of willfulness, wantonness, and malice for which the law allows the imposition of exemplary damages. Therefore, Hubenak is entitled to recover exemplary damages from each of the Defendants in an amount to be determined by the jury.

CONDITIONS PRECEDENT

65. All conditions precedent to Hubenak's right to recover herein have been performed or have occurred.

ATTORNEY'S FEES

66. Pursuant to Sections 37.009 and 38.001, *et. seq.*, of the Texas Civil Practices and Remedies Code, and the DTPA, Hubenak is entitled to recover his reasonable and necessary attorneys' fees and costs incurred in this case.

JURY TRIAL DEMANDED

67. Pursuant to Rule 216 of the Texas Rules of Civil Procedure, Hubenak demands a jury trial and submits herewith the appropriate jury fee.

PRAYER

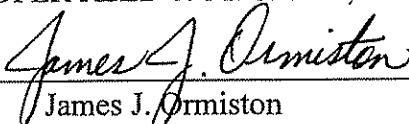
68. Hubenak respectfully requests that each of the Defendants be cited to appeal and answer herein, and upon final trial hereof, he be granted judgment against Defendants for:

- a. rescission and/or all actual damages proved at trial;

- b. exemplary damages in the amount to be determined by the jury;
- c. treble damages under the DTPA;
- d. declaratory relief as set forth herein;
- e. injunctive relief as set forth herein;
- f. imposition of a constructive trust in favor of Hubenak on his interest in the Policy and its proceeds;
- g. disgorgement of all profits, monies or other economic benefits received or obtained by Defendants as a result of their wrongful conduct;
- h. prejudgment and post-judgment interest at the maximum amount allowed by law;
- i. reasonable and necessary attorneys' fees;
- j. costs of court; and
- k. all other relief, in law or in equity, to which Hubenak may be entitled.

Respectfully submitted,

LOOPER REED & MCGRAW, P.C.

By 

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