

Denver District Court Denver County, Colorado 1437 Bannock Street Denver, Colorado 80202	
Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado, v. Defendant: LIFE PARTNERS, INC., a Texas Corporation, LIFE PARTNERS HOLDINGS, INC., a Texas Corporation, SCOTT PEDEN, SCOTT BEEMER, ERIC COX, LOWRY LYNEE DAVIS, GARY HANSON, TIM HARPER, KENNETH KELLER, MIKE LOWE, LARRY MIKELSON, JOHN ROTH, RALPH SIEBERT, AND BRIAN PARDO	<p align="center">▲ COURT USE ONLY ▲</p> <hr/> Case No.: 07CV5218 Ctrm:5
<p align="center">ORDER RE: PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT</p>	

THIS MATTER comes before me upon consideration of three motions: (1) Plaintiff's Motion for Partial Summary Judgment as to Claims Pursuant to § 11-51-301, C.R.S. ("Unregistered Securities Motion"); (2) Plaintiff's Motion for Partial Summary Judgment as to claims Pursuant to § 11-51-401, C.R.S. ("Unlicensed Representative Motion"); (3) Defendant Life Partners Holding Inc.'s Motion for Summary Judgment ("LPHI's Motion for Summary Judgment"). I have reviewed the Motions and the entire case file and the responses filed. I make the following findings of fact, conclusions of law and enter the following **ORDER**:

Summary judgment is a drastic remedy and is not warranted except upon a clear showing that there is no genuine issue as to any material fact. *Hatfield v. Barnes*, 168 P.2d 552 (Colo. 1946); *Greenwood Trust Co. v. Conley*, 938 P.2d 1141 (Colo. 1997). A motion for summary judgment is warranted when there are no genuine issues of facts and the issues become one of law for the court to resolve. *Enger v. Walker Field, Colo. Pub. Airport Auth.*, 508 P.2d 1245 (Colo. 1973). The moving party is entitled to summary judgment as a matter of law when there are pleadings, affidavits, depositions, admissions on file showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *O.C. Kinney, Inc. v. Paul Hardeman, Inc.*, 379 P.2d 628 (Colo. 1963).

A viatical settlement is a sale of an insured's beneficial interest in his or her own life insurance policy. Fred Joseph, Securities Commissioner for the State of Colorado ("Plaintiff") asserts that Scott Beemer, Eric Cox, Lowry Lynne Davis, Gary Hanson, Kenneth Keller, Mike

Lowe, Larry Mickelson, John Roth, Ralph Siebert, Tim Harper, ("Sales Agent Defendant") sold viatical settlements to Colorado investors and received commissions from Life Partners Inc. ("Defendant LPI"). The Plaintiff also asserts that Life Partners Holding Inc. ("Defendant LPHI") participated in the sale of viatical settlements in Colorado. Additionally, the Plaintiff asserts that Scott Peden and Brian Pardo ("Defendant Officers") acted as agents for Defendant LPI and Defendant LPHI in the sale of viatical settlements.

The Plaintiff asserts that Sales Agent Defendants offered viatical settlements on behalf of Defendant LPI, Defendant Officers and Defendant LPHI. All Sales Agent Defendants contracted directly with Defendant LPI through the use of a Life Partners Inc. Licensee Agreements and were paid commissions directly by the Defendant LPI for the sale of viatical settlements. The Sales Agent Defendants offered the viatical settlements through seminars in Colorado and in one instance through radio advertisements promising a 16% return on the settlement. Additionally, the Plaintiff asserts that Defendant LPI acted as a purchaser's agent, which entailed assisting investors in identifying, assessing and acquiring valid life insurance policies. Defendant LPI hired doctors to evaluate insurance policies before purchasing the policy. Also, after Defendant LPI performed the evaluation process, Defendant LPI would then purchase the insurance policy and split or fractionalized the policy and provide the shares of the policy to one or more marketing groups to sell to investors. The Plaintiff further asserts that since 2004 the Defendants collectively have obtained more that \$11,500,000 from approximately 114 Colorado investors to purchase viatical settlements.

The Plaintiff further asserts that Defendant LPHI, the parent company of Defendant LPI, was involved in the sale of viatical settlements in Colorado. The Plaintiff asserts that many of the Sales Agent Defendants did not perceive any noticeable differences between Defendant LPI and Defendant LPHI because some forms provided by Defendant LPI appeared as though they were for Defendant LPHI. Moreover, Sales Agent Defendant, Eric Cox stated that in 2005 he knew of no separation between Defendant LPI and Defendant PHI.

The Sales Agent Defendants and Defendant LPI have failed to assert any facts to contradict the facts asserted by the Plaintiff set forth in Plaintiff's Unregistered Securities Motion and Unlicensed Representative Motion. An affirmative showing of specific facts, uncontradicted by any counter affidavits requires the trial court to conclude that no genuine issues of material fact exist. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002 (Colo. App. Ct. 2004). Defendant LPHI and Defendant Officers have asserted facts to contradict the facts asserted in Plaintiff's Unregistered Securities Motion and Unlicensed Representative Motion. Also, the Plaintiff has asserted facts that contradict the facts set forth in Defendant LPHI's Motion for Summary Judgment.

THEREFORE, Plaintiff's Unregistered Securities Motion and Unlicensed Representative Motion are **GRANTED** in part. Judgment will be entered in favor of the Plaintiff and against the Defendant LPI and the Sales Agent Defendants for violating § 11-51-301, C.R.S. and § 11-51-401, C.R.S. Permanent injunctive relief is granted against Sales Agent Defendants and Defendant LPI from selling unregistered viatical settlements in Colorado. The Plaintiff's Unregistered Securities Motion and Unlicensed Representative Motion are **DENIED** against

Defendant LPHI and Defendant Officers. Lastly, Defendant LPHI's Motion for Summary Judgment is **DENIED**. Damages for the **Granted** motions will be in abeyance of any further proceedings in this case.

1) Plaintiff's Unregistered Securities Motion

The Sales Agent Defendants and Defendant LPI sold Unregistered Securities in Colorado

Under § 11-51-301, C.R.S., "it is unlawful for any person to offer to sell or sell any security in the state unless it is registered under this article or unless the security or transaction is exempted under § 11-51-307, § 11-51-308, or 11-51-309." Whether a particular transaction involves a security depends not on the name or the form of the instrument, but on the substantive economic realities underlying the transaction. *See Griffin v. Jackson*, 759 P.2d 839 (Colo. App. Ct. 1988). The statutory definition of "security" in pertinent part states: "'Security' means any ... certificate of interest or participation in any profit-sharing agreement; ... transferable share; investment contract; ... or, in general, any interest or instrument commonly known as a 'security'...." Section 11-51-201(17), C.R.S.2001. Under Colorado law, a "security" includes an "investment contract" covered under the Securities Act of 1933 ("Act"). *Feigin v. Digital Interactive Associates, Inc.*, 987 P.2d 876 (Colo. App. Ct. 1999).

An investment contract under the Act means a contract, transaction, or scheme by which a person (1) invests his or her money (2) in a common enterprise (3) with the expectation of profits from the efforts of others. *See Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Feigin v. Digital Interactive Associates, Inc.*, (applying *Howey* test). These third-party efforts must be significant, that is, essential managerial efforts that affect the success or failure of the enterprise. *See Securities & Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir.1973).

The viatical settlements offered and sold by the Sales Agent Defendants are securities under the Act. The Sales Agent Defendants marketed and sold the viatical settlements on behalf of Defendant LPI pursuant to a license agreement. Moreover, Colorado residents invested money in a common enterprise. The investment vehicle was a common enterprise because Defendant LPI purchased an insurance policy and split or fractionalized the policy and provided the shares of the policy to sell to investors. Lastly, Colorado investors had an expectation of profits from efforts by Defendant LPI because Colorado investors relied on Defendant LPI's expertise in the selection of the viators and policies acquired. Indeed, Defendant LPI hired doctors to evaluate insurance policies before purchasing the policy. Moreover, the likelihood of success or failure of the investment depends upon which policies Defendant LPI selected. In fact, the duration of the viator's life alone has the most significant impact on the potential profit of the investment. Lastly, none of the exemptions under § 11-51-307, § 11-51-308, or § 11-51-309 apply to the viatical settlements in this case.

A genuine issue of material fact exists about Defendant LPHI's involvement

There is a genuine issue of material fact about Defendant LPHI's involvement in the sale of unregistered securities in Colorado. The Plaintiff's motion asserts that Sales Agent Defendant, Eric Cox, did not believe there was a difference between Defendant LPHI and Defendant LPI. But the Defendant's motion asserts that LPHI and LPI are separate independent entities and LPHI is a passive holding company. Whether Defendant LPI and Defendant LPHI are separate entities is a dispute of material fact because without being able to determine Defendant LPHI's status, the Court cannot determine whether Defendant LPHI was involved in the sale of unregistered securities in violation of § 11-51-301, C.R.S.

A genuine issue of material fact exists about Defendant Officer's involvement

There is a genuine issue of material fact about the Defendant Officer's involvement in the sale of unregistered securities in Colorado. The Plaintiff's motion asserts that the Defendant Officers facilitated the sales of unregistered securities on behalf of both Defendant LPI and Defendant LPHI. But the Defendant's motion disputes the Defendant Officer's involvement in the sale of unregistered securities for both Defendant LPI and Defendant LPHI. Additionally, it is unclear what the Defendant Officer's involvement was on behalf of Defendant LPHI because there is a material dispute over Defendant LPHI's involvement in this case.

2) Plaintiff's Unlicensed Representative Motion

The Sales Agent Defendants are unlicensed representative

The Sales Agent Defendants violated § 11-51-401, C.R.S. Under § 11-51-401, C.R.S., it is unlawful to transact business as a broker-dealer or sales representative without being licensed, or exempt from licensing under § 11-51-402, C.R.S. The burden of pleading and proving an exemption or exception to licensing falls upon the party claiming the exemption or exception. *See* § 11-51-605, C.R.S. Here, the Defendants collectively did not raise any exemptions or exceptions.

A person acts as a sales representative when they effect or attempt to effect purchases or sales of securities, or are authorized and acting on behalf of an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. § 11-51-201 (14), C.R.S. The Commissioner must show that the (a) the defendant (b) offered or sold (c) a security (d) in or from this state, and (e) that such defendant was authorized to act and acted on behalf of a broker-dealer or issuer in exchange for commissions while (f) the defendant was not licensed to do so as required under the Colorado Securities Act.

The Sales Agent Defendants entered into Master Licensee Agreements for Viatical Settlements with Defendant LPI. The Sales Agent Defendants offered sold Defendant LPI's viatical investment to Colorado investors. Also, the Sales Agent Defendants offered to sell the viatical settlements through seminars and in one instance, through radio advertisement promising a 16% return. The viatical settlements offered by the Sales agent defendants were never registered with the State of Colorado.

LPI is an issuer and employed the unlicensed Sale Agent Defendants

LPI constituted an issuer under the Colorado Securities Act and violated § 11-51-401(2), C.R.S. The term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of offering them for sale. § 11-51-201(10), C.R.S. To prevail on a claim that an issuer employed an unlicensed sales representative, the Commissioner must show that the issuer "employed or otherwise engaged an individual to act as a sales representative" in the state of Colorado and that such person was not licensed. *See* § 11-51-401(2), C.R.S. In this case, Defendant LPI was the party who obtained the viatical settlements and fractionalized the securities for purposes of offering them for sale. Defendant LPI then employed the Sales Agent Defendants to act as sales representatives for the securities, in the state of Colorado, and the Sales Agent Defendants were not licensed.

A genuine issue of material fact exists about whether Defendant LPHI is an issuer

There is a dispute of material fact whether LPHI was an issuer under the Colorado Securities Act. The Plaintiff's motion asserts that Sales Agent Defendant Eric Cox did not believe there was a difference between LPHI and LPI. But the Defendant's motion asserts that Defendant LPHI and Defendant LPI are separate independent entities and Defendant LPHI is a passive holding company. Whether Defendant LPI and Defendant LPHI are separate entities is a dispute of material fact because without being able to determine Defendant LPHI's status, the Court cannot determine whether Defendant LPHI was an issuer under the Colorado Securities Act or if Defendant LPHI employed or engaged individuals in violation of § 11-51-401(2), C.R.S.

A genuine issue of material fact exists about the Defendant Officer's involvement

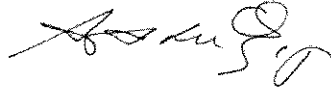
There is a dispute of material fact whether the Defendant Officers were agents of the issuers under the Colorado Securities Act. The Plaintiff's motion asserts that the Defendant Officers were agents of the issuers because the Defendant Officers were substantially involved in the sales process and are liable for the actions of both Defendant LPI and Defendant LPHI. But there is a material dispute over the Defendant Officer's involvement with both Defendant LPI and Defendant LPHI. Additionally, there is a material dispute over whether Defendant LPHI's was an issuer.

3) Defendant LPHI's Motion for Summary Judgment is Denied

Defendant LPHI's Motion for Summary Judgment is denied because there is a genuine issue of material fact as to whether Defendant LPHI was an issuer under the Colorado Securities Act or sold unregistered securities in Colorado. As result of this issue, it is unclear whether Defendant LPHI participated in the purchase or sale of unregistered securities in Colorado. Defendant LPHI's Motion for Summary Judgment is denied.

Done this 2nd day of December, 2008.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert L. McGahey, Jr.", written in a cursive style.

Robert L. McGahey, Jr.
District Judge

Cc: Counsel (by e-filing)