FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

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PATRICIA PRESLEY, COURT CLERK
by ______________ DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator,	]	
Plaintiff,	]	
vs.	]	Case No. CJ-2010-5268
Firstar Financial Group of Central Oklahoma, L.L.C., an Oklahoma limited liability company; John Joseph Hamilton, an individual; and Robin L. Peck, an individual,	]	
Defendants.	]	

APPLICATION TO VACATE ORDER GRANTING TEMPORARY RESTRAINING ORDER AND ORDER FOR ACCOUNTING

Pursuant to 12 O.S. § 1394 and Local Rule Numbers 10 and 37 of the Official Court Rules of the Seventh Judicial and Twenty-Sixth Administrative Districts, Defendant Firstar Financial Group of Central Oklahoma, L.L.C., ("Firstar") and Defendant John J. Hamilton ("Hamilton," and together with Defendant Firstar, the "Defendants") hereby submit this Application to Vacate the Order granting a Temporary Restraining Order and Order for Accounting (the "TRO") entered in this matter on June 24, 2010, along with the attached affidavit. In support, the Defendants would show as follows.

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INTRODUCTION

In its Application for Temporary Restraining Order, Order for Accounting and Temporary Injunction ("ATRO"), the Oklahoma Department of Securities ("ODOS") sought the TRO based upon two programs: 1) the alleged "Firstar Investment Program" – herein called the "CD Program," as the term "investment" misrepresents the nature of the program, and 2) the alleged "A&O Bonds."

ODOS has been aware of these two programs for over two and a half years. ODOS investigated these programs in late 2007 early 2008, and late 2008. ODOS deposed Defendant Hamilton and subpoenaed and obtained hundreds of original documents from Defendant Hamilton in January 2008 and September 2008. Now, two and a half years after becoming aware of these programs, and two and a half years after investigating these programs, deposing Defendant Hamilton, and obtaining hundreds of original documents, ODOS has sought the TRO alleging that there is an emergency relating to these programs and that the public will suffer irreparable harm if the Defendants are not instantly enjoined from continuing these programs.

The Defendants hereby petition the Court to vacate the TRO entered in this matter on June 24, 2010 for two reasons. First, with regard to the CD Program, no irreparable harm has been or is being suffered upon the public, and, the CD program is not a security pursuant to 71 O.S. § 1-101 et *seq*. subject to ODOS oversight, or is, *at most*, a security exempt from registration pursuant to 71 O.S. § 1-201(3)(b) as an FDIC insured CD. Second, with regard to the A&O Bonds, the last alleged sale of an A&O Bond by Defendant Hamilton occurred over two and a half years ago in late 2007. Such bonds in fact no longer exist, and Defendant Hamilton could not offer or sell one if he wanted to. Thus, there can be no irreparable injury caused upon the public or ODOS, based upon continued violations of the Act, when there have been no alleged sales since late 2007 and when there can be no sales because the A&O Bands no longer exist.

In this regard, the Defendants hereby petition the Court to vacate the TRO entered in this matter on June 24, 2010.

A. Legal Standard: Temporary Restraining Order Without Notice

ODOS brought the ATRO pursuant to the Oklahoma Securities Act, 71 O.S. §§1-101 - 1-701 (the "Act"). Section 1-603 of the Act grants ODOS the power to seek a temporary restraining order through the court system if the Administrator believes that a person has engaged or is about to engage in a violation of the Act, or is engaging in a dishonest or unethical practice or course of business that materially aids a violation of the Act. ODOS sought the TRO "to halt further violations of the Act, to protect the rights of the Department in its obligation to safeguard the public interest, to prevent any dissipation of loss of investor funds and property, and to remedy acts that defendants have already committed." ATRO, pg. 1.

The Court granted a temporary restraining order without notice to the Defendants and the TRO was entered on June 24, 2010. Courts have the power to grant a temporary restraining order "without written or oral notice to the adverse party or the attorney for the adverse party only if: (1) it clearly appears from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the attorney for the adverse party can be heard in opposition; ... ." 12 O.S. § 1384.1(B)(1). "Injury or detriment is irreparable when it is incapable of being fully compensated for in damages or where the measure of damages is so speculative that it would be difficult if not impossible to correctly arrive at the amount of the damages." *Inergy Propane, LLC V. Lundy*, 2009 OK CIV APP 8, ¶42, 219 P.3d 547. The ATRO argued that the TRO was necessary to "halt further violations of the Act, to protect the rights of the Department in its obligation to safeguard the public interest, to prevent any dissipation or loss of investor funds and property, and to remedy acts that Defendants have already committed" ATRO, pg. 1. The TRO granted the ATRO stating that "[t]he irreparable injury to be suffered by Plaintiff is the continued violations of the Act by Defendants if not temporarily restrained."

A party subject to a temporary restraining order may seek relief by applying to the court for an order to vacate the temporary restraining order pursuant to 12 O.S. § 1394, and the Defendants hereby seek to vacate the TRO pursuant to the same.

ARGUMENTS AND AUTHORITIES

The Defendants hereby petition the Court to vacate the TRO entered in this matter on June 24, 2010 for two reasons. First, with regard to the CD Program, no irreparable harm has been or is being suffered upon the public. The CD program is not a security pursuant to 71 O.S. § 1-101 et *seq*. subject to ODOS oversight, or is, *at most*, a security exempt from registration pursuant to 71 O.S. § 1-201(3)(b) as an FDIC insured CD. Second, with regard to the A&O Bonds, the last alleged sale of an A&O Bond by Defendant Hamilton occurred *over two and a* *half years ago in late 2007*. As ODOS is aware, such bonds in fact no longer exist, and Defendant Hamilton could not offer or sell one if he wanted to.

In this regard, the Defendants hereby petition the Court to vacate the TRO entered in this matter on June 24, 2010.

A. The CD Program

The ATRO incorrectly describes the structure and nature of the CD Program and makes several materially incorrect factual statements relating to the same such that this alleged program, as described in the ATRO, is entirely dissimilar to the actual CD Program. ***Contrary to the claims and implications made in the ATRO***, there are no "Firstar interests," there are no "Firstar investors," all promotional incentive rates and the promotional incentive structure is fully disclosed both in advertisements and in person (and acknowledged by CD purchasers if they purchase a CD), individuals are not required to hear a seminar, presentation, or other sales pitch in order to purchase a CD, individuals do not pay any funds whatsoever to either of the Defendants, individuals only pay funds to an FDIC insured bank and purchase FDIC insured CDs, CDs are not purchased by or through either Defendant, neither Defendant receives any commission, fee, or other compensation in any form from individuals who purchase CDs, no such individuals open any sort of account or investment account with Firstar relating to the purchase of a CD, ***every single individual who purchased a CD received a rate of return equaling or exceeding the advertised rate***, and the promotional incentive is ***paid by Defendant Firstar to CD purchasers by check prior to the client's purchase of any CD or paid directly to the bank at the time of the CD purchase.***[1]

In essence, the CD Program is simply a marketing plan to help generate client leads and generate word of mouth advertising by Defendant Firstar. Ultimately, the alleged program is not a security pursuant to 71 O.S. § 1-101 et *seq*. subject to ODOS oversight, or is, *at most*, a security exempt from registration pursuant to 71 O.S. § 1-201(3)(b) as an FDIC insured CD.

1. Structure and Facts of the CD Program

The structure of the CD Program is as follows. Newspaper advertisements are placed in the Daily Oklahoman. Advertisements specifically contain disclosures such as "rate will be provided by the local FIRSTAR office as a Promotional Incentive," or "promotional incentive may be included to obtain yield," or "...Minimum deposits may apply; rate and deposit subject

[1] See, Exhibit 1, Affidavit of Defendant John J. Hamilton; CD Program, ¶¶ 1-26.

to availability; subject to change without notice; penalty for early withdrawal;... FIRSTAR Financial Group is not a state or federally insured institution. Insurance products, including fixed annuities, are not guaranteed by any bank, federal agency, or the FDIC." *See*, Exhibit 1; CD Program, ¶ 2.

Individuals who inquire about the CD Program are met at the local Firstar office, or in one instance, an individual's home. At no time is any individual required to listen to any marketing or sales presentation, lecture, seminar, or other sales presentation in order to inquire about or purchase a CD. At no time is any individual required to purchase any security, insurance product, or any other product whatsoever in order to inquire about or purchase a CD. *See*, Exhibit 1; CD Program, ¶¶ 4-6.

Individuals are met by a representative licensed by the Oklahoma Insurance Department (a "Representative"), and further disclosures as to the CD program are made in every meeting. Every individual who purchases a CD fills out a Bonus Disclosure form with the Representative which expressly discloses and details the bank rate, the amount invested, the Promotional Incentive amount added (the "Promotional Incentive"), and overall rate of return. On the Bonus Disclosure form, every CD purchaser expressly states, by initial and signature, that he or she understands the Promotional Incentive structure, is aware of the bank rate, is aware of the advertised (overall) rate, and is aware that the Promotional Incentive provides them with the advertised rate of return by paying them the difference between the advertised rate and the bank rate. *See*, Exhibit 1; CD Program, ¶¶ 7-8.

Every CD purchaser has filled out a Bonus Disclosure form for every CD purchase, with the exception of approximately 5-10 individuals, due to a new Representative not having learned the system at the time of the CD purchase. However, all of such individuals were advised orally at the time of purchase of the Promotional Incentive structure, and, after finding out that they did not fill out Bonus Disclosure forms Defendant Hamilton contacted these individuals to verify that they were aware of the details of the CD Program and their transaction. All of them represented to Defendant Hamilton that they understood the Promotional Incentive structure and all of them, to the Defendants' knowledge received a return rate equal to or greater than the advertised rate. *See*, Exhibit 1; CD Program, ¶ 9.

Any individual who decides to purchase a CD upon meeting a Representative writes a check to the bank, and never to Firstar. Firstar then, in every instance of an individual

purchasing a CD, <u>writes a check to the individual in an amount that gives such individual a rate of return on their CD equal to the advertised rate, or, writes a check directly to the bank selling the CD to be added to the individual's CD purchase amount at the time of the transaction</u>. To be clear, Firstar never takes any funds from the CD purchasers, and writes every CD purchaser a check (or writes a check directly to the bank) to provide the advertised rate of return prior to, or at the time of, the CD purchase. In no instance that the Defendants are aware of has any individual not received a return equal to the advertised rate. At no time are any CD purchaser's funds at risk because at the time that an individual purchases an FDIC insured CD from a bank, such person has a check in hand from Firstar which provides the advertised return rate on the CD. *See*, Exhibit 1; CD Program, ¶¶ 10-15.

As an example, if an individual wanted a three (3) month $10,000.00 CD (APY), and the Firstar advertised rate was 4.1%, with the underlying bank rate being 2%, Firstar would, at the time of purchase, issue a check payable to the individual that would result in the advertised overall yield of 4.1%. In this example, the overall return that the individual would receive at the 4.1% advertised rate would be $10,100.96 ($100.96 in profit), and the overall return that the individual would receive at the 2% bank rate would be $10,049.63 ($49.63 in profit). Thus in this example, ***at the time of the CD purchase***, Firstar would issue a check in the amount of $51.33 ($100.96 - $49.63) to the CD purchaser, or directly to the bank to be added to the CD purchase, in order for the CD purchaser to receive a total return equaling the advertised CD rate.

That individual has the option to add the Firstar Promotional Incentive check the originally desired CD amount and purchase an FDIC insured $10,051.33 from the bank, or, he may keep the CD amount at $10,000.00. In either case, the individual takes the check from Firstar and uses it however they see fit.[2] ***Further, in several instances, individuals have decided to cancel the CD purchase after opening a CD account and have taken the checks written to them by Firstar and used the funds for some other purpose (Firstar does not, and has never, asked for a return of the Promotional Incentive).*** *See*, Exhibit 1; CD Program, ¶¶ 16-19.

The CD Program is not a method by which the Defendants earn any money, commissions, fees, or any other form of compensation from those individuals who purchase a CD. In essence, the CD Program is simply a marketing plan to generate potential client leads and

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2 If the potential client includes the amount of the Firstar check in their CD purchase, their return is actually slightly higher than the advertised rate because the additional initial funds earn interest at the rate of the underlying bank CD. Using the example above, a $10,051.33 three month CD at 2% would return $10,101.21 compared to the advertised rate return of $10,100.96.

word of mouth marketing – though as stated, there are no requirements to listen to any sales presentation or purchase any product in order to participate in the CD Program. The Defendants estimate that half or less of those who purchase a CD approach a Representative at a later point in time to inquire about insurance products. *See*, Exhibit 1; CD Program, ¶¶ 20-23.

2. CD Program Legal Standard

The ATRO argues that the CD Program is a security as defined by 71 O.S. § 1-102. An FDIC insured certificate of deposit (CD) is a security exempt from registration pursuant to 71 O.S. § 1-201(3)(b) and typically, a CD issued by an FDIC-insured bank is not a security due to the fact that comprehensive laws and regulations govern the banking industry and provide ample protection to the consumer. *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982). As shown herein and as alleged in the ATRO, the CD Program involves the purchase of an FDIC insured CD. However, what ODOS argues in the ATRO is that the overall package – the CD purchase *plus* the Promotional Incentive collectively form an "investment contract" pursuant to 71 O.S. § 102(32).

In determining whether offers and sales of CDs packaged with promotional incentives constitute securities transactions, courts must consider not just the CDs that customers purchased and received, but the promotional incentives and all other relevant aspects of the transactions. *Safeway Portland Employees' Fed. Credit Union v. C.H. Wagner & Co., Inc.*, 501 F.2d 1120, 1123 (9th Cir. 1974); see also *Ronald Edward Reiswig, et al, v. The Department of Corporations for the State of California, et al,* 144 Cal. App. 4th 327 (2006). Depending on its structure and nature, a CD program may or may not be a security, or may be a security exempt from registration requirements. See e.g. *Safeway Portland Employees' Fed. Credit Union*, 501 F.2d 1120, 1123 (9th Cir. 1974); *Ronald Edward Reiswig, et al. v. The Department of Corporations for the State of California, et al,* 144 Cal. App. 4th 327, 50 Cal.Rptr.3d 386 (2006); *In the Matter of Timothy Alonza Lilly, David Larry Puckett, Joe A. Richards, and First Fidelity Financial Group of Maumelle, LLC*, Case No. S-08-043 (below); and 71 O.S. § 1-201(3)(b).

This factual scenario appears to be one of first impression in Oklahoma. However, there is a California appellate case that is almost exactly on point, an Arkansas regulatory action that is close on point but factually distinguishable, and a recent report showing that the Texas State Securities Board Commissioner and North American Securities Administrators President Denise Voigt Crawford considers transactions identical to the Firstar CD Program as "not violating any laws." In this regard, the Defendants respectfully offer the following discussion and analysis of each as guidance for the Court.

a. The Texas State Securities Board, NASAA

A news report from Houston, Texas addressed the legality of, and perhaps best summarizes, the CD advertisements and transactions offering higher rates than bank rates such as Firstar's CD Program. The news report interviewed Ms. Denise Voigt Crawford, Securities Commissioner with the Texas State Securities Board and current President of the North American Securities Administrators Association (the "NASAA").

The report investigated companies with programs factually identical to Firstar's CD Program (except that several of the companies are noted as running "bait-and-switch" programs for the purpose of selling annuities). Ms. Crawford is quoted as saying that the advertisements containing higher rates than bank rates are placed by "insurance agencies who are using CDs that pay a high rate of interest as marketing tools;" "[t]hat's why we're seeing all these ads, so that these folks can get investors in the door to then sell them other products." *See*, Exhibit 1; CD Program, ¶ 26.

The article notes that even in the event of this bait-and-switch, "[t]here is nothing illegal about the ads..., [t]hey were printed by insurance companies and their motive is to sell insurance products. ***But, the securities commissioner said they <u>are not violating any laws</u> by luring investors this way***." <u>*Id*</u>.

Transactions identical to Firstar's CD Program (though Firstar does not operate a bait-and-switch) have been stated by the Texas Securities Commissioner and President of the NASAA to ***not be in violation of any laws***. Aside from the *Reiswig* case (below), The Defendants submit that there could be no more powerful evidence that the Firstar CD Program is not in violation of any laws, is not an investment contract, and does not cause irreparable harm upon the public.

b. California (Reiswig) Discussion

In *Ronald Edward Reiswig, et a. v. The Department of Corporations for the State of California, et al,* 144 Cal. App. 4th 327, 50 Cal.Rptr.3d 386 (2006), a California Court of Appeals addressed a very similar factual situation and legal issue as is presented in this case.[3] In *Reiswig*, the Plaintiffs advertised CD rates higher than prevailing bank rates, and offered a promotional bonus check to CD purchasers in order to provide them with the advertised rate of return. The Appellate Court summarized the facts of the case as follows:

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[3] *Reiswig* is attached hereto.

Fidelity offered prospective investors yields on certificates of deposit (CD's) greater than was available at any bank. Prospective customers were required to make an appointment and personally meet with a Fidelity sales agent. The sales agent would inform the prospective customer the higher yield was available only upon the first $5,000 invested; if the customer wished to invest more, the sales agent would offer a fixed annuity as an alternative to a CD, if the customer wanted the CD, the sales agent would provide the customer a list of banking institutions offering the highest rates on Federal Deposit Insurance Corporation (FDIC) - insured CD's. Upon proof the customer opened a CD from an institution on the list, Fidelity would cut and send the customer a bonus check equal to the difference between the yield paid by the banking institution and the yield advertised by Fidelity. The check would be issued within seven days of the date on which the customer submitted proof to Fidelity of opening the CD." *Reiswig,* 50 Cal.Rptr.3d at 388.

As stated by the Appellate Court, the only issue in the case was "whether the investment offered by Fidelity Insured Deposits, Inc, ("Fidelity"), constitutes a security under California law, subject to the regulatory jurisdiction of the California Department of Corporations (DOC)."[4] Id.

Procedurally, the California Corporations Commissioner (the "Commissioner") had issued a "Desist and Refrain Order" against Fidelity, and Fidelity had sought relief from such Order in the California Superior Court. The Superior Court *concluded that the investment offered by Fidelity was not a security,* and the Commissioner appealed such ruling to the California Court of Appeals.

In affirming the Superior Court's decision that *the investment was not a security*, the Appeals Court held as follows:

> We agree with the Superior Court and hold the CD-plus-bonus package offered by Fidelity is not a security within the meaning of the California securities laws. In so holding, we are not addressing the propriety of Fidelity's promotional scheme. It appears to us Fidelity is possibly engaged in a classic bait and switch, using high-rate CD's as bait to lure customers in to hear a sales pitch for annuities, which are subject to regulation by the California Department of Insurance. However, the only issue before us is whether the investment offered by Fidelity is a security and, hence, subject to the DOC's regulatory powers. *Reiswig,* 50 Cal.Rptr.3d at 389.

Unlike the Oklahoma Securities Act which specifically exempts an FDIC-insured debt of a banking entity from regulation by ODOS [71 O.S. § 1-201(3)(b)], there was apparently no such similar exemption in California. Thus the Appellate Court was required to go through the steps of determining whether the CD-plus-bonus package was an "investment contract," and thus, a security. In its analysis, the Appellate Court stated that California Courts have applied either separately or together two distinct tests: the risk capital test and the federal test. The Court *found that the CD-plus-bonus package was not a security* under either the risk capital test or the federal test. In discussing the federal test, the Court made the observation that, "[s]ubjecting issuers of

[4] Fidelity Insured Deposits, Inc. is not associated with Firstar or Mr. John J. Hamilton.

bank CD's to the anti-fraud provisions of the federal securities laws was unnecessary to protect investors because CD holders "are abundantly protected under the federal banking laws."' *Reiswig,* 50 Cal.Rptr.3d at 392. The Court also made the following observation in its analysis of the federal test;

> Fidelity's advertising offered FDIC-insured CD's paying a higher rate of interest than that offered by banks. An investor purchased a CD from a bank that was unrelated to Fidelity. Since the CD was FDIC insured, the investor did not risk losing the money invested. Fidelity paid the difference between the advertised interest rate and the rate of return paid by the bank with a bonus check earned upon presentation of proof the investor had opened a CD. Neither Fidelity nor FEP used the investors' funds generated from purchasing the CD's. Interest on the CD's was paid by the banking institutions issuing them. The bonus checks were not paid from earnings resulting from the use of the investors' funds because those who invested in the CD plus-bonus package paid no money to Fidelity or FEP. *Reiswig,* 50 Cal.Rptr.3d at 392-93.

The Appellate Court went on to note a prior case whereby an investment package containing, in part, a CD was found to be a security where a securities broker/dealer engaged in brokerage of CDs in concert with one of its subsidiaries. See, *Safeway Portland Employees' Federal Credit Union v. C.H. Wagner & Co., Inc.* (9th Cir. 1974) 501 F.2d 1120. The subsidiary in *Safeway*, through independent money brokers, obtained borrowers willing to pay a premium to induce third parties to purchase CDs issued by specified banks. The borrowers then would seek loans from those banks issuing the CDs. The securities broker located investors to purchase the CDs by offering a bonus in the form of an additional rate of interest, to be paid from the premiums paid by the borrower. *Reiswig,* 50 Cal.Rptr.3d at 393-94. The "key" to *Safeway*, noted by the Appellate Court, and its difference with *Reiswig*, was that the *Safeway* CDs were uninsured, and their viability was dependent upon the entrepreneurial and investment skills of the brokers in inducing third parties to purchase the CDs, their skills in securing loans from banks, and the ability of the borrowers to repay the loans. *Reiswig,* 50 Cal.Rptr.3d at 394-95.

The Appellate Court noted that the third party and business acumen reliance in *Safeway* is different than a mere reliance upon the continued solvency of an enterprise – represented in *Reiswig* by the seven (7) day gap in time when a CD purchaser would purchase a CD and receive a check from Fidelity to cover the difference in advertised rate and bank rate. This later type of "continued solvency" reliance "does not alone satisfy the federal test and create an investment contract." Id.

The Appellate Court went on to state,

> What is the DOC's real concern here? We perceive the DOC's concern is not with the CD-plus-bonus package per se, but with Fidelity using the package as a come on to allegedly mislead investors into purchasing undesirable annuities. The trial Court

> characterized the CD-plus-bonus package as a classic bait and switch used to bring potential customers before Fidelity sales agents, who could then try to sell *annuities*. Both sides agree the sale of annuities is subject to regulation by the Department of Insurance. *Reiswig,* 50 Cal.Rptr.3d at 397-98.

Ultimately the Appellate Court agreed with the Superior Court and found that the CD package funds were not subject to any risk that was not protected by banking regulations and the FDIC. As such, the package simply did not qualify as an investment contract and was not a security

c. California (Reiswig) Analysis

Firstar's position in this matter is even stronger than the situation described in *Reiswig* for several reasons.

First, the "Promotional Incentive" paid by Firstar is delivered to the CD purchaser or directly to the bank ***at the same time that the CD is purchased***. Whereas in *Reiswig*, a client may have had to wait for seven (7) days to receive a check after purchasing a CD, here, any CD purchaser leaves the transaction with a check in hand, or Firstar writes a check is to the bank at the time of the transaction. Thus, even though a general reliance on the solvency of an enterprise does not convert a transaction such as this into being a security pursuant to *Reiswig*, here such a wait and any potential reliance is nonexistent. Here, CD purchasers leave the transaction with a check in hand for the difference of the advertised rate and the bank rate (or Firstar writes a check directly to the bank to include in the CD purchase), and their remaining funds – invested in an FDIC insured CD through a bank, are fully protected by the FDIC and not subject to the provisions of the Act.

Second, the Firstar CD Program, like the program in *Reiswig*, is structured such that CD purchaser funds are subject to no risk that is not protected by banking regulations and the FDIC. The only risk in either program is that of the continued solvency of the entity. As stated by the *Reiswig* Court, the risk of insolvency "was the same risk any creditor takes when earning a fee in advance of payment," which does not transform a transaction in to an investment contract. *Reiswig,* 50 Cal.Rptr.3d at 394-96.

Third, unlike California, in Oklahoma bank CDs are statutorily exempt from the registration requirements of the Act pursuant to 71 O.S. § 1-201(3)(b). Whereas in *Reiswig*, the Appellate Court needed to analyze the entire CD package using the blue sky and federal test for an investment contract, the core of the transaction in Oklahoma is exempt. Here, the only alleged non-exempt part of the CD Program is Firstar's acts of writing checks to the CD purchasers.

Fourth, the CD Program is absolutely not a "bait and switch" operation like the operation referenced by the Appellate Court in the *Reiswig* case. At no time is any individual required to listen to any marketing or sales presentation, lecture, seminar, or other sales presentation in order to inquire about, or purchase, a CD. At no time is any individual required to purchase any security, insurance product, or any other product whatsoever in order to inquire about or purchase a CD. There is simply no condition precedent to the purchase of a CD and ***no condition precedent to the receiving of a bonus check*** provided by Firstar in the CD Program. *See*, Exhibit 1; CD Program, ¶¶ 5-6. Further, in several instances, individuals inquiring about a CD purchase have decided not to purchase a CD after opening a CD account and initiating CD purchase. Such individuals have taken the Promotional Incentive checks written to them by Firstar and used the funds for some other purpose. Firstar does not, and has never, asked for a return of the Promotional Incentive. *See*, Exhibit 1; CD Program, ¶¶ 18-19.

d. Arkansas (Lilly) Discussion

In the Matter of Timothy Alonza Lilly, David Larry Puckett, Joe A. Richards, and First Fidelity Financial Group of Maumelle, LLC ("*Lilly*") before the Arkansas Securities Commissioner (the "Commissioner"), Case No. S-08-043, the Arkansas Securities Department (the "ASD") sought, and was granted, an order enjoining the Respondents from selling securities based upon a factual situation that is somewhat similar to, but quite distinguishable from, the one before this Court.[5]

In *Lilly*, the Commissioner described a package whereby First Fidelity Financial Group of Maumelle ("FFFGM") would advertise CD rates at rates higher than bank rates and offer a promotional incentive in order to make up the difference between the advertised rate and the bank rate. "Respondents would then collect payment from the customer and submit all necessary information and payment to the issuing bank. At some point, Respondents were to send the issuing bank the necessary payment for the promotional incentive. All the customer had to do was complete necessary paperwork and submit payment for the CD to the Respondents." ¶¶ 9, 12, and 23.

FFFGM held itself out to be a "full service financial services company" and would perform a "needs analysis" on each client that sought to purchase a CD packaged with the promotional incentive. ¶ 10. FFFGM "would only add the promotional incentive to the CD if the

[5] *Lilly* is attached hereto.

needs analysis was completed, the customer had at least $50,000 in assets, and the customer had been offered other products or scheduled a second appointment." Id. "Customers were also required to sign a form indicating that they had been offered a fixed annuity with a stated rate and term and declined to purchase such annuity." Id.

According to the Commissioner "the promotional incentive added by Respondents was not always accurate. At times, Respondents added more money than was necessary to reach the advertised annual percentage yield. In some cases Respondents did not add sufficient funds to reach the annual percentage yield." ¶ 11. Furthermore, the Respondents told customers that they "would add the money necessary so that customers would receive the advertised annual percentage yield," however, "[w]hen these additional amounts were in fact added, the funds came from Covenant Senior Advisors," a separate, third-party entity owned by Mr. Lilly. ¶ 12.

The Commissioner found several instances where the promotional incentive payments were insufficient, were not made, or were subject to other problems, stating

> Ten customer files reflected insufficient payments of funds necessary to reach a 4.75% annual yield on CDs issued by Discover Bank...Two customer files reflected insufficient payments of funds necessary to reach a 4.75% annual yield on CDs issued by IndyMac Federal Bank, FSB, ... ¶ 15.
>
> In addition, the examiners discovered that First Fidelity had paid the additional interest directly to one investor and cancelled the purchase CDs by two investors.

The Commissioner found that these problems were directly caused by the Respondents, because it was the Respondents who would "collect payment from the customer and submit all necessary information and payment to the issuing bank. ***At some point, Respondents were to send the issuing bank the necessary payment for the promotional incentive***. All the customer had to do was complete necessary paperwork and ***submit payment for the CD to the Respondents***." ¶ 23 (emphasis added). In this regard, the Commissioner ultimately found that "[t]he money invested by the customers was always subject to the risk that Respondents would not fulfill their promises and the customers would not receive the annual percentage yield advertised by Respondents." ¶ 26.

Ultimately, the CD purchasers in *Lilly* placed their funds in the trust and charge of the Respondents who were then responsible for preparing documents, adding the promotional incentive funds to the client funds, and submitting the necessary funds and paperwork to the bank for the CD purchase. Because the CD purchasers relied upon the Respondents in this manner, their funds were subject to the risks of placing such funds in trust with the Respondents to complete the transactions as advertised and stated. The Commissioner ultimately found that this risk was not protected by banking regulations or the FDIC, and thus the transaction was an investment contract.

e. Arkansas (Lilly) Analysis

The *Lilly* matter is factually and materially distinguishable from the instant case for numerous reasons.

First, and of most importance, the structure of the *Lilly* CD package was such that the Respondents "would collect payment from the customers and submit all necessary information and payment to the issuing bank," and at "some point" later, "were to send the issuing bank the necessary payment for the promotional incentive." ¶ 23. This is a materially distinguishing program structure from the Firstar CD Program because Firstar does not collect payments from its clients, and all promotional incentive payments ***are made to the clients*** or are sent to the banks ***at the time of the transaction***. Because the Respondents in *Lilly* retained control over the clients funds and did not make the promotional incentive payments at the time of the transaction, the Commissioner found that the "money invested by the customers was always subject to the risk that Respondents would not fulfill their promises and the customers would not receive the annual percentage yield advertised by Respondents." ¶ 26. This ***risk***, is the key difference between the *Lilly* package and Firstar's CD program. No purchasers of the Firstar CD program have any funds subject to this type of risk – or subject to any risk whatsoever that is not FDIC insured. The only "risk" that a Firstar client may have is that Firstar is not solvent enough to cover the check written to him, i.e. that the check will "bounce." However, this type of continued solvency risk "does not alone satisfy the federal test and create an investment contract" *Reiswig,* 50 Cal.Rptr.3d at 396.

Second, In *Lilly* there were four unadvertised conditions for a customer to purchase a CD: 1) if a "needs analysis was completed," 2) "the customer had at least $50,000 in assets," 3) "the customer had been offered other products or scheduled a second appointment," and 4) customers had signed "a form indicating that they had been offered a fixed annuity with a stated rate and term and declined to purchase such annuity." ¶ 10. Whereas the *Lilly* matter is a clear case of a "bait-and-switch," there are no conditions precedent to the inquiry or purchase of a CD, or the receipt of a promotional bonus check, in the instant case. See, Exhibit 1; CD Program, ¶¶ 4-6.

Third, In *Lilly* the promotional incentive was paid not from FFFGM, who advertised the CD rate, offered the CD package, and met with customers, but rather was paid from Covenant Senior Advisors, a separate, third-party entity. This situation is similar to that of the *Safeway* program described in *Reiswig*, where CD purchasers have to rely on third parties who are not involved in the CD purchase transaction. *Reiswig,* 50 Cal.Rptr.3d at 394-95. Here, there is no separate, third-party entity involved in the CD Program; Firstar makes all promotional incentive payments.

Fourth, in *Lilly* there were several instances where the promotional incentive was not added to the CD package resulting in several customers not receiving the advertised rate of return. In ten instances "customer files reflected insufficient payments of funds necessary to reach a 4.75% annual yield on CDs issued by Discover Bank," and in two instances "customer files reflected insufficient payments of funds necessary to reach a 4.75% annual yield on CDs issued by IndyMac Federal Bank, FSB." ¶ 15. Further, in two instances, FFFGM "cancelled the purchase CDs by two investors." In the instant matter, there is no instance of a CD purchaser not receiving the advertised rate, there is no instance where Firstar failed to pay the Promotional Incentive, and there is no instance where Firstar cancelled (or could cancel if it wanted to) CDs already purchased by clients.

The *Lilly* program has several material program differences from the Firstar CD Program. These differences created a particular risk on the *Lilly* clients which caused that program to be an investment contract. Contrarily, the Firstar CD Program creates no such risk and is not an investment contract.

3. There is no Irreparable Harm Relating to the CD Program

There is no irreparable harm being caused upon the public or ODOS relating to the CD Program. Simply stated, all promotional incentive rates and the promotional incentive structure is fully disclosed both in advertisements and in person (and acknowledged by individuals who purchase a CD), individuals are not required to hear a seminar, presentation, or other sales pitch in order to purchase a CD, individuals do not pay any funds whatsoever to either of the Defendants, individuals only pay funds to an FDIC insured bank and purchase FDIC insured CDs, CDs are not purchased by or through either Defendant, and neither Defendant receives any commission, fee, or other compensation in any form from potential clients who purchase CDs. Further, to the Defendants knowledge ***every single individual who purchased a CD received a***

rate of return equaling or exceeding the advertised rate. The promotional incentive is ***paid by Defendant Firstar to individuals by check prior to the client's purchase of any CD or paid directly to the bank at the time of the CD purchase.***

Ultimately, the alleged program is not a security pursuant to 71 O.S. § 1-101 et *seq.* subject to ODOS oversight, or is, *at most*, a security exempt from registration pursuant to 71 O.S. § 1-201(3)(b) as an FDIC insured CD. CD purchasers' funds are never at any risk that is not protected by banking regulations and the FDIC. In this regard, ODOS has not met its burden in showing that the public has, or will, suffer irreparable harm if the CD Program is not restrained from operation.

B. The A&O Bonds

The ATRO incorrectly describes the A&O Bonds and makes several statements that are materially incorrect. More importantly however, ODOS is aware that the last alleged sale of an A&O Bond by Defendant Hamilton occurred *over two and a half years ago*. ODOS is also aware of all of Defendant Hamilton's activities relating to the A&O Bonds, as it investigated A&O and Defendant Hamilton in January 2008 and in September 2008. ODOS is also aware, as stated in the TRO, that "A&O Life Fund 5.1 LLC filed for bankruptcy protection under Chapter 11 in the Northern District of Illinois." TRO pg. 6. In this regard, any alleged emergency, urgency, or necessity for the TRO as it relates to the A&O Bonds is completely unfounded. Defendant Hamilton could not sell any A&O Bonds if he wanted to, as they do not exist anymore. ODOS is aware of this fact, and was aware at the time of the filing of the TRO that there had been no alleged sales by defendant Hamilton since the fall of 2007. In this regard, the TRO was not properly founded and the Defendants respectfully request that the Court vacate the Order granting the TRO.

1. Facts Regarding the A&O Bonds

The last alleged A&O Bond sale by or through Defendant Hamilton occurred in the fall of 2007. No sales or alleged sales of A&O Bonds have been made by Defendant Hamilton since the fall of 2007. ODOS is aware that the last alleged sale of an A&O Bond by Defendant Hamilton was made over two and a half years ago. At no time did Defendant Hamilton host any "seminars" relating to the A&O Bonds as alleged in the TRO. *See*, Exhibit 1; A&O Bonds, ¶¶ 1-4.

Approximately two and a half years ago, in January 2008, ODOS investigated the A&O Bond sales and or A&O Life Funds, L.P. In January 2008, ODOS asked Defendant Hamilton to appear for a deposition. Defendant Hamilton willingly appeared, without counsel, for a deposition with ODOS. At that time, Defendant Hamilton provided hundreds of pages of original documents to ODOS relating to his involvement with the A&O Bonds and with A&O. After such appearance, Defendant Hamilton heard nothing more from ODOS relating to the A&O Bonds or A&O until September 2008, approximately two months after Defendant Hamilton opened the Firstar office, when ODOS conducted another inquiry. After that inquiry, Defendant Hamilton heard nothing more from ODOS with regard to the A&O Bonds or A&O until the filing of this action. *See*, Exhibit 1; A&O Bonds, ¶¶ 5-7.

Defendant Hamilton's association with A&O began in June 2007, when he became a Managing Member of A&O. Prior to his association with A&O, he thoroughly investigated A&O and the bonds, including traveling to Houston, Texas and meeting with the principals of A&O and meeting with several staff members the two A&O offices. Hamilton was advised by A&O that the bonds were, *inter alia*, collateralized by bonded life insurance policies and were completely secure through the maturity date of the bond. Defendant Hamilton further investigated A&O in November 2007, after learning of a pending ODOS investigation, and spoke with the new president of A&O, David White, who was a Certified Public Accountant, and who assured Defendant Hamilton that he thoroughly inspected all of the books and records of A&O. Defendant Hamilton resigned his position and affiliation with A&O in December 2007. *See*, Exhibit 1; A&O Bonds, ¶¶ 8-13.

In December of 2008, Defendant Hamilton received a copy of a letter written by GLO CPAs LLLP, a CPA firm that was engaged to review the financial records of the various A&O Funds and presumably forwarded to the respective A&O Bond holders. The letter stated, in essence, that all premiums due on the policies had been paid in full or had been escrowed for payment; that all policies were current and in good standing; that the reinsurance premiums payable to PCI had been paid in full and that all A&O funds held assets equal to or greater than their respective liabilities. *See*, Exhibit 1; A&O Bonds, ¶ 16.

In May 2009, Defendant Hamilton received a copy of a letter which had been received by one of the A&O Bond clients from Mr. Russell E. Mackert, on behalf of Shepard Capital Management. The letter indicated that the escrow company accounts which held A&O fund premiums, had been the subject of litigation and as a result, some of the required life insurance policy premiums were not being paid timely. Currently the various A&O funds which hold the collateralized insurance policies for the A&O Bonds are subject to a Chapter 11 filing in the U.S. Bankruptcy Court in the Northern District of Illinois and the company that issued the Bonded Surety Agreement on the insurance policies (Provident Capital Indemnity) has agreed to the payment of two (2) bonded policies thus far, in the respective amounts of Ten Million Dollars ($10,000,000.00) and One Million Dollars ($1,000,000.00) and has made its first installment payment. *See*, Exhibit 1; A&O Bonds, ¶¶ 17-18.

Defendant Hamilton has personally contacted or attempted to contact each A&O Bond purchaser relating to his alleged sales to advise them of the status of A & O. To his knowledge and belief, all A&O Bond purchasers have been notified of the filings in the U.S. bankruptcy Court and have been provided with the forms to file a creditor claim. *See*, Exhibit 1; A&O Bonds, ¶ 19.

2. Legal Standard regarding the A&O Bonds

As stated above, in this action, the Court granted a temporary restraining order without notice to the Defendants. Courts have the power to grant a temporary restraining order "without written or oral notice to the adverse party or the attorney for the adverse party only if: (1) it clearly appears from specific facts shown by affidavit or by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the attorney for the adverse party can be heard in opposition; … ." 12 O.S. § 1384.1(B)(1). "Injury or detriment is irreparable when it is incapable of being fully compensated for in damages or where the measure of damages is so speculative that it would be difficult if not impossible to correctly arrive at the amount of the damages." *Inergy Propane, LLC V. Lundy*, 2009 OK CIV APP 8, ¶42, 219 P.3d 547. The ATRO argued that the TRO was necessary to "halt further violations of the Act, to protect the rights of the Department in its obligation to safeguard the public interest, to prevent any dissipation or loss of investor funds and property, and to remedy acts that Defendants have already committed" ATRO, pg. 1. The TRO granted the ATRO stating that "[t]he irreparable injury to be suffered by Plaintiff is the continued violations of the Act by Defendants if not temporarily restrained."

3. There is no Irreparable Harm relating to the A&O Bonds

There can be no irreparable harm upon either ODOS or the public with regard to the A&O Bonds because there can be no current sales or continuing violations of the Act. The last alleged A&O Bond sale by or through Defendant Hamilton occurred in the fall of 2007. No sales or alleged sales of A&O Bonds have been made by Defendant Hamilton since the fall of 2007. ODOS is aware of this fact and was aware of this at time of filing. ODOS is also aware of the current bankruptcy proceeding involving A&O, and that there can no longer be any bonds for sale.

The basis for the inclusion of the A&O Bonds in the ATRO appears to be an attempt to show some sort of pattern by the Defendants, considering that ODOS investigated Defendant Hamilton in January and September 2008 relating to the A&O Bonds and took no further action until this matter. However, the A&O Bonds are simply insufficient to support the TRO because there can be no irreparable injury caused upon the public or ODOS, based upon continued violations of the Act, when there have been no alleged sales since late 2007 and when there can be no sales because the A&O Bands no longer exist.

C. ODOS has not Met its Burden of Showing Irreparable Harm

Ultimately, ODOS, through the ATRO, simply has not met its burden of showing that irreparable harm will occur unless the TRO remains in place. The Firstar CD Program has provided every CD purchaser with their advertised rate of return. Firstar is unaware of a single complaint by any CD purchaser, and is unaware of any instance in which a CD purchaser did not receive the advertised rate of return. At no time have any CD purchaser funds been subject to any risk that is not insured by the FDIC. The CD Program terms and the promotional incentive structure is fully disclosed to every CD purchaser prior to their purchase. Simply stated, the Firstar CD Program has brought no harm upon the public.

Further, the CD Program is not an "investment contract" or other security as defined in the Oklahoma Securities Act. Thus the CD Program is outside of ODOS' scope of authority. Contrarily, the CD Program is necessary for the continuation of Firstar's business and its being enjoined has placed a severe financial burden upon Firstar. On balance, the ATRO fails to meet its required burden because there is no public harm due to the CD Program, and because the CD Program is likely outside of the scope of ODOS regulation, or exempt from the allegations made by ODOS in this action. In this regard, the Defendants respectfully request that the TRO be vacated.

Likewise, there simply can be no irreparable harm to the public or to ODOS with regard to the A&O Bonds. The last alleged sale of an A&O Bond by Defendant Hamilton occurred in late 2007. A&O is currently subject to a bankruptcy proceeding initiated in September 2009. Defendant Hamilton could not offer or sell an A&O Bond today if he wanted to as they simply do not currently exist to offer or sell.

D. Bifurcation

If the Court decides that the TRO should remain in place due to, or because of, the A&O Bonds, the Defendants would respectfully request that the Court bifurcate the two issues and vacate the TRO as to the CD Program as it is necessary for Firstar to continue as an ongoing enterprise.

E. Other Considerations

Defendant Firstar is a member of the Better Business Bureau ("BBB") of Central Oklahoma and is a BBB Accredited Business. Defendant Firstar has an "A" rating from the BBB and has had zero BBB complaints in the previous three (3) years. *See*, Exhibit 1; CD Program, ¶ 25.

Further, Defendant Firstar was a "Top 5 Finalist" for *The Oklahoman* Reader's Choice Awards in 2009 for "Best Local: People, Place & Things" in the Financial Advisor category. *See*, Exhibit 1; CD Program, ¶ 25.

Finally, after the initiation of this action, Defendant Firstar collected numerous statements and affidavits from its clients and CD purchasers in support of Firstar stating essentially that the CD Program details were fully disclosed and that such clients received the advertised rate of return on their CD purchase. *See*, Exhibit 1; CD Program, ¶ 24.

CONCLUSION

For the reasons stated herein, the Defendants respectfully request that the Court vacate the TRO and grant the Defendants costs and fees associated with this filing, and any and all other relief that the Court may deem just and proper.

Dated: July 26, 2010

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was served on the following parties or their counsel of record, as indicated below, on the 26th day of July, 2010:

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