BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Ameriprise Financial, Inc.,
Third-Party Defendant Below, Petitioner

v.) No. 24-ICA-340

Charles E. Vallandingham,
Third-Party Plaintiff, Below, Respondent

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR[1]

1. The Circuit Court correctly found in favor of plaintiff on claims of fraud and fraudulent concealment. The defendant engaged in fraudulent concealment and affirmative fraud when its vice president in charge of supervising the compliance managers misrepresented to the plaintiff material untruths about the book of business that plaintiff was considering purchasing from another Ameriprise agent. The affirmative statement of the defendant that the real and only reason for the termination of the seller of the book was a failure of the seller to sell sufficient financial plans and affirmative assurance of the defendant that there was nothing more the plaintiff needed to know about the transaction were not only false, the misrepresentations created a duty to disclose the truth to prevent misleading of the plaintiff. Instead, defendant told the plaintiff false information, half-truths and concealed material information, making its affirmative representations false. This amounted to fraud and created a duty to disclose, a duty under the law that existed regardless of the existence of a franchisor-franchisee relationship.

In addition, the defendant had a duty to disclose the extensive compliance problems with the book of business because of the special relationship between the plaintiff and his supervising vice president, a position of reliance and trust, who instead induced the plaintiff into buying a toxic book of business to the benefit of Ameriprise, riddled with problems from overcharging the clients, improper transfer of client funds, forging documents, and keeping clients paying for worthless Ameriprise annuities for years.

2. The Circuit Court was correct to admit and consider the evidence that it considered. The evidence defendant claims was "post-transaction" was actually evidence of compliance issues that occurred prior to, existed prior to, a*nd that defendant knew of and was actively investigating* prior to the sale of the book of business to plaintiff, and should have disclosed to the plaintiff instead of leading him to the opposite conclusion. The information only came to the attention of the plaintiff after the sale because defendants failed to make timely mandatory reports of compliance issues to regulatory body FINRA, despite regulatory requirements, which if properly reported would have been accessible by the

[1] Plaintiff has attempted in good faith to respond to all assignments of error. For the record, plaintiff does not agree with any assignment of error in this matter.

plaintiff prior to the sale. Defendant did not make any of those mandatory reports until after the sale, for conduct it knew about long before the sale. Therefore, all of the evidence considered was relevant to defendant's knowledge of problems and its failure to disclose and concealment of that information, which was directly relevant to plaintiff's fraud and fraudulent concealment claims. The supposed "post transaction matters," prior class action, FINRA violations, litigation and regulatory issues, and testimony from plaintiff's expert regarding the same, were all relevant to and related to pre-sale problems with the book of business of which defendant was aware, but failed to disclose, report, or tell the plaintiff.

In addition, the fall out, consisting of complaints of customers, regulatory fines and substantiated FINRA violations, and false excuses that client damages were covered by an old class action, are also relevant to what plaintiff had to deal with after he purchased the bad book of business, including relevant to him trying to mitigate damages for his customers and himself, which took time away from his ability to generate income, and relevant to the damage to his business reputation from being lumped in with the sins of the defendant and Beck.

3. The damages awarded by the Court were supported by the weight of the evidence. Plaintiff's expert valued the damages based upon lost profits, using pre- and post-sale tax returns and comparison to peer data. Defendant argues that damages based upon peer data is not appropriate, when Ameriprise uses and relies upon the same peer data to monitor and evaluate its sales force, and when the law allows use of market data in determining lost profits. The defendant's economic expert, who reviewed almost nothing with respect to this particular case, provided a *legal* opinion that you could only award damages based upon the difference between the sale price and what the book of business was worth at the time of purchase. This is not accurate under the long-standing law of damages, and the Court was well within its discretion to award damages for lost profits based upon the reliable evidence of lost profits. Also, the law provides for emotional distress, annoyance and inconvenience damages in a fraud case, and the evidence of all the plaintiff went through trying to deal with the cheated Ameriprise clients, and the suffering he endured, overwhelmingly supported what was a comparatively modest emotional distress damage award.

Importantly, the Court's decision was supported by the weight of the evidence of record. The

findings made by the Court were not clearly wrong, and its decision was not arbitrary, capricious, an abuse of discretion or based upon any error of law. The defendant incorrectly narrows the scope of plaintiff's claims, and simply argues its favored interpretation of select evidence, ignores other evidence, and argues that this Court should reweigh the evidence of the finder of fact essentially *de novo* and make different findings. This is not the Court's role on appellate review. As such, the defendant has failed to meet its heavy burden on appeal. The overwhelming weight of the evidence shows that the plaintiff proved his claims and the award was more than justified.

II. STATEMENT OF THE CASE

The facts and evidence in this case consisting of a nine-day trial are difficult to summarize. As such, the plaintiff refers the Court to plaintiff's proposed findings of fact and conclusions of law and encourages a read of it for a more detailed resuscitation of the egregious facts that led to this action. (A2976-3029) Plaintiff addresses here facts that are more pertinent to the arguments made by the defendant, but by no means are those all of the bases upon which the Court made its correct decision.

Charles Vallandingham is a resident of Cross Lanes, West Virginia. While in college he began working for Ameriprise and after accepted a position as an independent financial planner in 1996 under a contract with them. He held Series 7 and 63 designations. He had the designation as a "Certified Financial Planner," which is one of the premier designations of his profession. (A1452-5) When he began working for Ameriprise, he had no clients and he built his practice from scratch by calling people referred to him or by "cold calling" prospects. He learned how to market himself on the job and spent a lot of time familiarizing himself with FINRA rules which regulate the industry. He loved his work. (A1461-3)

Plaintiff served in the United States Marines and comes from a family of retired Marines. Both his father and grandfather were career officers retired from the Marines. From his education, training and experiences, Mr. Vallandingham was knowledgeable of the moral, ethical and legal rules and duties of his profession and industry, including FINRA regulatory rules of the industry as well as Ameriprise's own Code of Conduct and the franchise agreement between him and Ameriprise. (A1455-7)

As part of his responsibility under the franchise agreement to work for Ameriprise, he was required to pay a franchise fee, which included a fee of approximately $5,000-$6,000 per year specifically for Amerprise to provide compliance services and oversight. (A1465-7)

The defendant, Ameriprise, is a Delaware corporation which operates nationally. Ameriprise offers to the public investments in insurance, annuities and other financial products. (A967,978) William Cupach (hereinafter "Cupach") was hired by Ameriprise as a Franchise Field Vice President (FFVP), and his responsibilities included overseeing the independent field financial advisors from a growth capacity. (A957-9) Cupach held Series 7, 24 and 66 licenses, which made him qualified to supervise Field Agents, Field Registered Principles and Field Registered Managers. (A961)

In the early part of 2008, Cupach became responsible for operations in Ohio, Western Pennsylvania and most of West Virginia, which included oversight of the Ameriprise field advisors, including plaintiff, and intermediate managers in West Virginia. (A967,976-8) Cupach explained his responsibilities as a field VP. If individual franchisees were looking for ways to grow their business or market their business, his team is responsible for partnering with them to create a business plan *to help them grow* or to "leverage people and the resources we have at Ameriprise." (A959) Thus, his job was to help the plaintiff to grow his business. This created a relationship of trust between plaintiff and Cupach.

Contrary to representations of defendant in its brief that Cupach only supervised sales, he also supervised the compliance managers. Field Registered Principals (FRPs) supervise other advisors, including the FFA's like the plaintiff and Kenneth Beck, who was the seller of the book of business at issue in this case. (A959-961) They are responsible to keep and maintain a *compliance* file on the FFAs they supervise. (A1184) As the Franchise Field Vice President (FFVP), Cupach, supervised Field Risk Managers (FRMs), and the Field Registered Principals (FRPs). (A960-1) Ameriprise provided day to day oversight of its advisors through the services of its Field Registered Principals (FRPs). (A963-4) Then, it would supervise the FRPs by monthly teleconference meetings conducted by FFVPs, like Cupach. (1A963-4) Cupach stated that the FRPs in this case had the duty to let Mr. Cupach know if they became aware of anything going on with Beck. (A980-1) In turn, in 2008, Cupach would then have monthly

telephone meetings with his supervisor in the home office, Mr. Gassman, the Group Vice President. (A1082-3) Mr. Gassman then reported to Bill Williams, V.P. of the Independent Group. (A1083)

Cupach testified that all FRPs know that "at any time if anything is happening within their span of control, to pick up the phone and call me." (A1179) For example, if an advisor forged a document, "I immediately get a phone call." (A1179) The same would be true if there was an unauthorized transfer of funds or unauthorized investment of funds. (A1179-80,1200-3)[2] As such, Cupach, in his job of supervising the compliance managers, was kept appraised of compliance problems with his financial advisors.

Cupach stated that Ameriprise has a "duty and a responsibility to supervise our advisors to the best of our ability using all means possible." (A1184) Ameriprise admitted it's various duties to its field advisors like plaintiff. Importantly, they have the duty to provide "compliance" and "oversight," and Cupach had the responsibility to supervise all of the advisors working in his area, including Kenneth Beck, the person selling the bad book of business, and plaintiff. (A977) Ameriprise also provided them with resources and support for their businesses, further fostering the trust relationship. (A977)

Ameriprise was paid well for it. It charged its agents money in exchange for and in consideration of Ameriprise performing its duties and responsibilities and deducted these fees from the advisor's commission checks. (Pl.Ex.4-A754) One of the most important duties Ameriprise agreed to provide was compliance oversight to all its advisors. Specifically, Ameriprise agreed to conduct as it deems advisable and consistent with the regulatory and supervisory obligations, inspections of (a) the operations of the independent financial advisor business for the purpose of establishing independent advisor's compliance with the franchise agreement, as well as (b) compliance with all federal, state, local and NASD[3] and other regulatory organizations, laws, rules, and regulatory requirements, (c) including licensing requirements in all of AEEA's (Ameriprise's) policies and practice in the client relations manual, all of the above (hereinafter referred to as "Compliance rules"). (A1063-4, Pl.Ex.4-A754) Ameriprise admitted that it had the explicit duty and responsibility to see to it that its advisors are in compliance with Ameriprise's

[2] Forgery and unauthorized transfer of funds were two of the problems with the Beck book of business.
[3] NASD and FINRA rules overlap, because NASD was taken over by FINRA, as explained by expert McGinnis.

policies and procedures as well as industry codes of conduct and FINRA rules and regulations. (A960-1)

Cupach also described some of Ameriprise's duties to its clients to include (1) full and fair disclosure to the clients; (2) the continuing duty to serve and disclose pertinent information to the clients about the products they were purchasing or had purchased; (3) a continuing duty to treat clients fairly; (4) a duty to recommend only suitable products to their clients; (5) in determining whether the product is suitable you look at (a) the client, including (b) age of client, (c) financial situation of the client, that is, can they afford to lose money or not, and "what is their current and on-going financial situation"; and (6) what are the goals of the client. (A972-3) After Ameriprise has satisfied the above, then it has the duty to make a determination of how it can meet the goals of the client. (A973) The duty to the client includes making full and fair disclosure of all material facts, particularly where the advisor's or company's interests may conflict with those of the client. (A973) Also, Ameriprise has the duty and responsibility to provide the client with the best possible product based upon that point in the client's life; that is, what is the best possible situation based upon their suitability for purchasing a particular product, their work flow, their age, as well as other considerations and then, at the point of sale, explain how Ameriprise gets paid for selling the product. (A974)[4]

In addition to the above duties, Ameriprise and its advisor must comply with all laws and regulations governing required disclosures of communication with the client. (A975) They have the duty to help the client and client prospects to understand the products and services and to be fair, accurate and balanced. Also, there is a duty not to omit material facts, qualifications, or caveats if the result would be misleading to the client. (A975) As Cupach stated, "[e]very advisor has a fiduciary responsibility to their client." (A974-5) If the advisor or Ameriprise finds themselves where their interests may be in conflict with the interests of the client, such as selling the client an unsuitable product in exchange for a big commission, they must put the interests of the client first. (A974-5)

Ameriprise admits that the NASD and FINRA rules and regulations are, in fact, industry

[4] Beck's book of business contained many products unsuitable for the Ameriprise clients and, in fact, contained products worthless to Ameriprise clients, as discussed further, *infra*.

standards that apply to its dealings with its clients and provide for its duties and responsibilities toward its clients. (A963) In addition, Ameriprise adopted its own Code of Conduct which outlines its own duty as a broker-dealer and the duties of its advisors in marketing, selling and dealing with its clients. (A975-6;Pl.Ex.3-A753) Surprisingly, however, Cupach, the VP with responsibility to assure compliance for over 200 FAs, testified that he had not read the Ameriprise Code of Conduct. (A969) The Code of Conduct states, however, "Do the right thing for the client." (A976, 753) The financial industry, which Ameriprise participated in, "requires compliance" and it is "mandatory," not merely a code of conduct stated to be goals which advisors seek to attain. (A979-80)[5]

A. The Defendant knew of problems with Beck prior to the sale of Beck's book to plaintiff.

The duties and requirements of Ameriprise are relevant because the financial advisor who was selling the book of business, Beck, was not in compliance with and had been violating these duties and, by virtue of its own duties, Ameriprise knew it prior to the sale of the book to plaintiff, but did not tell him. Cupach admitted that he had a right to look at the compliance files of Mr. Beck when he wanted to. (Cupach, A1171) He was "aware of his [Mr. Beck's] history that was on record in his file, his franchise file or his compliance file." (A1171) Mr. Beck's FRP, Sean Bradford, would do an annual audit of each of his FAs as required. The FRP would write up deficiencies found and send them to the home office. (A1186-7) Cupach admitted that, if one of his FAs were being investigated then he would "know about it." If it were an "enhanced investigation," he testified that he would "absolutely" know about it. (A1213) This is relevant because prior to and during the sale, Beck was under enhanced investigation.

Sean Bradford was the FRP for Beck and Dan Johnson was the FRM. (A878) At least by March 2008, Cupach as the FFVP was supervising Beck, Johnson and Bradford. As a result of Bradford's review of Beck's files, the following communications took place between Bradford and Beck ***prior to the sale***:

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[5] Ameriprise prepared its Code of Conduct and touted it in advertising and on-line for prospective clients and for clients to read. (9-52-53; Exhibits 42 & 43.) The Code of Conduct was represented to be the outline of Ameriprise's "basic business ethics and legal requirements applicable to Ameriprise Financial employees and advisors." (Id., Exhibit 42, p. 3.) The CEO stated, "[o]ur Code of Conduct is non-negotiable." The Code of Conduct is to help its advisors and all employees "meet their legal and regulatory obligations and make ethical business decisions." (Id.)

(a) On Feb. 28, 2008, Bradford wrote Beck and stated that "My staff and I have emailed you several requests in the past few weeks." Included was a list of requirements, including mail check logs, CIR follow-up checklist, 443's for two clients with outstanding matters of $19,212 and $30,000….443 Forms are required when an advisor changes a client from one product to another. It requires the client's signature so it is clear that the client knows and understands the switch to another product, and also the rationale for it. Beck was given one day to produce some information and seven days to produce the 443s and other matters requiring signature. (A1096-8; Pl.Ex.10-A1014)

(b) Missing Check Logs, etc. On this document, there were missing check logs for Jan., Feb., Mar. and Apr. 2008, and seven missing 443s for Jan. through Mar. 2008, including some of the same ones requested by the letters of Feb. 28, 2008. (A1099-1100; Pl.Ex.11-A1015)

(c) Letter dated Mar. 4, 2008 from Bradford to Beck. (Pl.Ex.12-A1016). Bradford advised Beck that he is being sent a third "similar" deficiency letter stating Beck had not responded to the RP requests forwarded to him on Feb. 28, 2008. (A1100-2)

(d) A document indicating that Beck was fined $500 for failing to submit requested documents in violation of Ameriprise policies. (A1102; Pl.Ex.13-A1017)

(e) "Letter of Caution," from Bradford to Beck dated Apr. 14, 2008, again advising him that he was in violation of company policies to "*protect* the company, our clients and *our advisors*," which became a part of his Compliance History and warned Beck that any future violations may be subject to more severe disciplinary action. Beck was given until Apr.16, 2008 to comply. (A1109-10)

(f) On Dec. 10, 2008, Bradford sent to Beck a Letter of Reprimand and a Notice of Fine. The letter confirmed that Bradford, ***Cupach*****,** Dan Johnson, the Field Risk Manager, and Beck, had a conversation concerning the "continued" unresponsiveness of Beck with compliance issues after they had made multiple attempts by email and phone to get him to respond. According to the letter, there were several items still outstanding. The reprimand letter was placed in Beck's permanent compliance file. He was directed to submit all of the FR's requests by Dec. 31, 2008, *including his "2008 Compliance Interior Follow-up with Gaps," all missing check and securities logs, mail logs, client specific suitability explanations, including some that appeared outstanding since February 2008 and before*. In summary, Bradford told Beck that failing to follow the directive could render him in "default of the Franchise Agreement pursuant to Section 17 of the Agreement." (A1106-15; Pl.Ex.15-A1019) Section 17 provided for *firing for cause* as well as other bases for termination.

(g) On Dec. 11, 2008, Beck signed the receipt for another letter from Mr. Bradford placing him on *advanced escalation* of the consequence management process for monthly meetings with his FRP, and requiring him to submit all requested information within the time requested, respond to all RP phone calls within 24 hours. (A1019-20)

(h) Beck had broken numerous rules prior to the end of 2008, in addition to the failure to respond to his supervisor's requests to provide the information they needed to even assess his performance and compliance with their Code of Conduct and FINRA Rules.

Thus, defendant knew of problems prior to the sale of the Beck book of business to plaintiff, but the defendant did not tell him about it. ***Cupach admitted that there were numerous issues identified in Mr. Beck's practice and they were monitoring him for various failures to respond and other components***

that had been brought forth. This investigation continued from the middle of 2008 until the sale and continued after the sale. (A1067) Cupach was aware of the investigation as early as April 2008 and he got involved at some point in the process of Beck's history. (A1212-3,1216)

Kia Thomas is a compliance officer manager for Ameriprise and she was designated to testify on behalf of Ameriprise with regard to compliance issues, as was Cupach. (A1066-8) The Compliance Department annually visits financial advisor's client files to assure compliance. (A1086-7) Her testimony supported the proposition that financial advisors should be able to rely on Ameriprise's compliance system to protect them and its clients. (A1090-3) Thomas was familiar with Beck and his book of business because she reviewed customer complaints against him and performed an internal investigation of them. (A1234,1088-9) She confirmed that Beck owed his clients a fiduciary duty.[6] (A1235-6,1088-9)

She determined that Beck borrowed money from a client and *Ameriprise* paid it back because it was a violation of Ameriprise's policy. (A1241) In auditing files, they look for signature discrepancies where a financial advisor is signing clients' names to documents. (A1242-3) *She testified that there were a number of signature irregularities in Beck's client files.* (A2186) Thomas prepared a chart showing client complaints and action taken with regard to Beck. (A1244; Pl.Ex.5-A983-91) ***These go back to 2004***. *Id*. When asked whether she found Beck had misrepresented premium payments to his client, she stated they didn't look into that because it was covered by a class action and no relief was available to clients who were covered by the litigation regardless of Beck's misconduct. (A1256-7)[7]

Mr. Helms was also an Ameriprise compliance analyst in its Surveillance Department from 2004 to 2009. As early as June 2008, prior to the sale of the Beck book of business to plaintiff, he began a *surveillance investigation* of Beck's practices, (A1412-4) which revealed:

> (a) After Beck showed up on a report in the home office in June of 2008, which was used to determine whether an advisor was selling a high concentration of a product just to get paid a high commission when it may be unsuitable for the client. (A1410-4) The investigation was found to be "with merit" and the investigation was then continued by looking at other clients. (A1414-5) One,

[6] Thus, plaintiff had that same duty to the Ameriprise clients, after he purchased the bad book of business.
[7] These wrongdoings were not covered by the prior class action, as will be discussed *infra*, and, therefore, the problems should have been reported to regulatory authorities, which then would have been available to the plaintiff when he searched for the information, and should have been disclosed to plaintiff.

Mr. Gribble, had instructed that he only wanted to be placed in cash. Nevertheless, Beck had invested his money in an annuity; obviously to receive a commission. (A1415) Helms then began *an accelerated review of Beck's book in 2008,* prior to the sale. (A1413)

(b) Helms found Beck collected $3000 premium from a client when he only owed $1800. (A1433)

(c) Helms prepared a chart like Ms. Thomas of his findings. (A1448-9;Pl.Ex.29-A1273-8) On the second copy of the Exhibit, page 3, there was a reference to "**definite forgeries**" which was circled and a handwritten note stated "Remove." (A1448-9;Pl.Ex.29-A1273-8) Forgeries are a reportable offense to FINRA. Helms admitted that even if he believed an event was reportable to FINRA, management could overrule him. (A1435)

(d) Helms found in his investigation that a client loaned Beck money and he had asked another client for money but was denied, both of which are FINRA violations. (A1428-30)

(e) He further found that most of Beck's files had been cleaned out, another big red flag. (A1428-32)

Importantly, Helms described his file to include "proactive oversight" of Beck's practices from *2004 to 2009*, which covers the period before and after the sale of the Beck book to the plaintiff in March of 2009.

Helms and defendant also had the ability to run re-projections of life insurance policies in their computer system since at least 2008. Therefore, Ameriprise had the ability to determine whether an annuity was "suitable" or not. Helms was asked, "Don't you agree that FINRA and Ameriprise rules and regulations require the suitability is (sic) an on-going duty to the client of the firm?" He replied, "That's why advisors meet with their clients. They should be running re-projection if they [the clients] own an insurance policy." (A1431-3) He also agreed that a broker-dealer "cannot disclaim any responsibility under the suitability rule." (A1443) This means they owe an absolute duty to the clients to investigate the suitability of clients' investments if they are going to sell them.

Ameriprise was aware of Helms's investigation and findings prior to the Beck book of business being sold to plaintiff. (A1441) This was verified by Kia Thomas. ***Thomas testified that Beck's supervisors at Ameriprise would have known about the investigation prior to the sale***. (A1164,1187) As explained above, Cupach was a supervisor of Beck.

B. Plaintiff buys the toxic book of business because of misrepresentations by defendant.

Plaintiff had worked into a position with a market group where his peers were making up to $3-5 million per year, with an average of almost $500,000 per year. He aspired to do better than average if he

could. (A1468-9) Prior to the sale at issue here, he successfully acquired the business of another Ameriprise advisor who was leaving his practice. After this, he had approximately 200 clients. (3-116.) He wanted to further grow his practice. (A1469-70) He received a call from another advisor and from Beck. Beck said that he had been *fired because he was required to have sold five financial plans* and he wanted to sell his book of business. (A1471-2) Plaintiff agreed to meet with Beck to discuss it and he requested that Beck bring records which plaintiff would need to determine the number of clients, how the products were dispersed and any other documents that would assist him in making a decision. (A1473)

Mr. Vallandingham called his group Vice President, Cupach, and told him what Beck had stated and he asked Cupach why he had been terminated. ***Cupach replied that he was terminated for not selling at least five financial plans.*** Plaintiff asked, *"**is he really being let go for that**"* and Cupach said "***yes**."* (A1473)[8] Plaintiff then asked Cupach if Beck had been sent a letter to which Cupach stated "there is a letter. If Beck wants to show it to you, you can see it." Mr. Vallandingham then inquired further, "***Is there anything else I need to know regarding this transaction**?*" Cupach replied, "***no.***" (A1473-4) ***Importantly, Cupach testified that he does not deny that conversation took place but he has no memory of it.*** (A1162, 1218)

The plaintiff asked and Beck showed him the termination letter dated January 7, 2009, which stated the reason plaintiff was told by Cupach--failure to sell five plans. (Pl.Ex.21-A1050-3) The termination letter granted Beck 90 days until a buyer can be found and approved and, if Beck could not find a buyer within 90 days, all of Beck's rights would terminate and he would lose his equity in his

[8]The phrase: Plaintiff asked, "is he really being let go for that" and Cupach said "yes," isn't even mentioned in defendant's brief. Defendant improperly narrows the basis for plaintiff's claims, saying that, "Valladingham testified that he asked Cupach if there was anything else he needed to know about the transaction and that Cupach responded negatively. This alleged "failure to disclose" forms the *sole* basis for Valladingham's fraud claim…" (Def. Br. 3) While this is enough, defendant entirely ignores this affirmative misrepresentation of Cupach that the real and only reason Beck was being fired was for failing to sell. This is telling.

business.[9] Also, the letter stated that, in the interim, Ameriprise would assume continuous service to all clients. (Pl.Ex.21-A1051) The letter also required Beck to deliver all records, financial plans, original client records, and computer databases. (Pl.Ex.21-A1050-3) Thus, if Ameriprise did not unload the book of business, it would be solely in charge of dealing with the extensive problems in Beck's book.

After plaintiff reviewed the documentation, talked with Beck and inquired of his Vice President Cupach whether Beck was fired only for not selling plans, he went to FINRA's Broker Check to "make sure." He saw no disclosable events, no complaints, and no forgeries. It was clean. (A1475)[10]

Defendant argues that plaintiff never asked Beck for his compliance history, as recommended in the Acquisition Manual "available" to the plaintiff. While he was aware that Beck had a compliance file, he also knew he was not allowed to review it. He knew this because he had requested his own compliance file and defendant refused. He was told by his RP, "you are not going to see your personal compliance record." (A1475-6) Thus, he was told by defendant that advisors, which would include Beck, couldn't obtain their own compliance files, which justifies why he never asked Beck for his. Cupach also admitted that defendant would not have been able to give him Beck's compliance file even if he had asked for it. (A2477) So instead, in addition to reviewing FINRA's broker check, plaintiff also looked at Beck's compensation statement to see what he was charged for compliance, which is a gauge of whether an advisor has compliance issues, and it was the same as plaintiff indicating to plaintiff that Beck was okay. (A1477) Thus, the defendant's argument that plaintiff did not do his due diligence is not correct.[11] ***Likewise, it is reasonable that plaintiff did not ask for Beck's compliance history, because Cupach had assured him that Beck was being terminated for failing to sell, and that was the real reason, and that is all he needed to know.*** He may rely on that under the law without further inquiry, as discussed *infra*.

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[9] The defense argues the plaintiff was buying a Lamborghini for $15,000, so he should have somehow known of the compliance issues, despite Cupach's leading him otherwise. Beck had to sell his book in 90 days or lose it all, which is a good reason to support why the book was priced at what defense claims is the discounted rate. Defense also makes much of the fact that he was getting 205 customers with 13 million in customer assets for .006% of the 13 million. This is misleading because the commissions advisors receive are much smaller than the assets value.This is shown by the commissions plaintiff earned on his customers prior to the purchase as reflected in tax returns.

[10] It was clean because Amerprise failed to report known violations to FINRA as required.

[11] Even if it were correct, it is not a defense to their affirmative fraud.

This also eviscerates defense argument about the questions to ask in the Acquisition Manual that was supposedly "available" to the plaintiff. The plaintiff did inquire to the best he knew was available to him. Also, the question he asked Cupach, "is that [failing to sell enough] the real reason" for Beck's termination, and Cupach's response yes, answers that question.[12]

Defendant argues the "undisputed evidence" establishes that Cupach "***would***" have advised plaintiff that he could have a copy of Becks' compliance history report had Beck authorized it. This is not undisputed evidence, it is a hypothetical that never took place. The undisputed evidence is that Cupach did not advise plaintiff that he could have a copy of Becks' compliance history report if Beck authorized it. Instead, he assured the plaintiff there is nothing more he needed to know. The same goes for its argument that, "if Valladingham had requested his compliance history and Beck had consented, he *would* have learned that (1) Ameriprise sent Beck a preventative caution letter in 2004; (2) Beck received a reprimand letter and a $2,000 fine in February 2007; (3) Beck received a reprimand letter in October 2007; (4) Beck received a compliance letter in February 2008; (5) Beck received a deficiency letter in March 2008; (6) Beck received a letter of caution in April 2008; (7) Beck received notice of an internal investigation finding in August 2008 that he was experiencing financial problems; (8) Beck received a September 2008 letter requesting mail and check logs; (9) Beck received a December 2008 reprimand letter with a $500 fine for failing to follow corporate policies; and (10) Beck received an enhanced supervision action plan in December 2008. (A983-991) This hypothetical is really a list of all of the problems Ameriprise knew about, but did not tell the plaintiff, instead making assurances otherwise. Calling a hypothetical that did not occur "undisputed evidence," is just an attempt to get around facts that are bad for defendant.

Plaintiff stated that he trusted Ameriprise and, if there was something wrong with Beck's book of business that they knew about, defendant would advise him of it. (A1477) He had no doubt that Ameriprise would tell him if there was a problem with it and he expected them to. (A1211) His reliance

[12] Plaintiff is entitled to rely upon the representations of the defendant and does not have to do further investigation under the law, as discussed *infra*, so the argument about due diligence isn't a defense to its fraud anyway.

on Ameriprise and Cupach was justified, as they were there to help plaintiff grow his business, by their own admissions. (Cupach A957-9)

Plaintiff testified that he was aware of his duties to the clients if he agreed to buy the business. He had a duty to look at their investments to make sure that they were suitable at that time and going forward. "[W]e have a tremendous amount of responsibility and duty to do our best to know as much about this client as possible so we can put them in the best possible position to accomplish their goals." (A1478) For that reason, plaintiff was concerned about the condition of Becks' book prior to purchasing it, that is, whether there might be problems with it because he already had 200 clients and Beck had about 250. He was not in a position, financially or otherwise, to take care of 250 clients with serious problems in their investments. He only had one assistant at the time. (A1480) Plaintiff had debt with back taxes and he had reported it. Since he is a regulated financial advisor, it was properly reported on his Broker Check and defendant was well aware of it. (A1480) Thus, he could not afford to buy a bad book of business.[13]

When he signed the papers he was very happy that he was able to buy the business with the help of his best friend, Mark Arnold, who was another Amerprise agent working out of the same office as the plaintiff. He believed it was a good opportunity for himself and his family. He wanted to grow his business and be a successful advisor. He picked up the files and undertook to service the clients.

Defendant claims plaintiff did not buy the book of business because he borrowed money from Mr. Arnold to buy it and, therefore, he had no standing to complain about the book. First, this argument is not a defense to defendant's fraud. Second, the evidence showed that Ameriprise knew that plaintiff was a purchaser. The sale and transfer documents showed Vallandingham and Arnold as the transferees of the Beck book of business and both Arnold and Vallandingham signed the documents. (Pl.Ex.20-A1027) On Exhibit 20, the Consent to Transition Agreement, the "Acquiring Advisor" is plaintiff with a note to the home offices from him stating, "Please make me as servicing advisor on 100% of the clients for the Beck

[13] Defendant makes much of the plaintiff having a prior bankruptcy and a tax debt, in hopes to divert the focus from its bad conduct that is directly relevant to the claims. Note that plaintiff's prior bankruptcy and tax debt does not serve as a defense to any of the fraud or fraudulent concealment of the defendant. Defendant primarily argues its version of facts and makes disparaging comments about plaintiff that are not a defense to its fraud.

transfer." (Pl.Ex.20-A1027-49) Exhibit 20 and defendant's own records show plaintiff as servicing advisor for Beck's clients. (A1142) The only reason Arnold was made a party was because he was loaning plaintiff money to make the purchase. Ameriprise was advised of the arrangement between plaintiff and Arnold and "absolutely approved it." (A1210-1) He was on Ameriprise's books as advisor and on his clients' statements as advisor. Arnold's name is not on them and never was. (A1210-1)

Despite defendant's attempts in its brief to disparage the plaintiff over tax debt and prior bankruptcy, Cupach admitted that Ameriprise had no concerns over whether plaintiff was a proper person to acquire any interest in the clients and, in fact, 100% of Beck's clients were treated in all respects as plaintiff's clients after the transfer. (A1215) The loan arrangement and transfer to plaintiff was approved by Mr. Gassman, home office Vice President for the Department. (A1083-4, 1134-5)

Once the papers were delivered to Ameriprise, the sale was approved within *1-2 days* when the average is generally 30 days. (A1163) It shows Amerprise's confidence in the plaintiff. It also demonstrates Ameriprise's eagerness to have him take over the business. In fact, the evidence leads to the very reasonable conclusion that Ameriprise wanted to unload onto the plaintiff what was very soon to become solely Amerprise's toxic book of business, in hopes to stick plaintiff with the extensive problems they knew were imbedded within it, without telling him about it.

So management told someone they supervise, someone they were supposed to be helping, that an advisor was terminated for not selling enough, assured him that's the real reason, and told him that's all you need to know, when management knew he was under accelerated compliance review, he also forged documents, converted client funds without permission, sold people products that maximized his commission, but were not in the client's best interests, lied to clients about the liquidity of their investments, had not produced records to show the legitimacy of his transactions when specifically asked, and had clients spend their pensions on worthless annuities and life insurance for years.

C. The plaintiff discovered Ameriprise's fraud after the sale and had to deal with the fallout.

After plaintiff obtained Beck's client files, he started the review and discovered things that concerned him so he requested a file audit and Jennifer Tucci came down to do it. Then he received a call

from a lady who asked where Beck was and wanted to know if plaintiff had her $500 she had loaned Beck. She had a cancelled check and an I.O.U. Borrowing money from a client, being a clear FINRA violation, plaintiff immediately notified his RP. (A1483-7) Plaintiff discovered other problems. Client Kackowski's variable annuity life insurance policy didn't appear that it could support the 125,000 cash benefit. So, plaintiff had to give Mr. Kackowski the bad news that his policy would not generate enough money for him to have the life insurance benefit he had paid for even if he paid the premium because it would lapse. ***Beck had continued to tell Mr. Kackowski that it was a viable product and collected those premiums and received his commission when it was not viable***. (A1491) Plaintiff testified that financial advisors have the duty as human beings and as mandated by FINRA to make sure their clients' money is going into "suitable" products and that it is an "on-going" duty. The particular product qualified as a FINRA security. Beck was having this gentlemen throw good money after bad. (A1491) When Ameriprise was advised, they falsely told Mr. Kackowski that it was covered by a class action which took place in 2000-2001, leaving the plaintiff to deal with the upset client with no recourse. (A1488-91)

Plaintiff discovered there were many other clients with similar matters and he attempted to help them and mitigate by giving them the proper places to send complaint letters and assisting them in writing them. Now having 250 Beck clients, he had to clear his schedule and attempt to resolve their problems. There were many clients in the same position, the Fishers, Pearl Watts, the Halls, Lonnie Gribble, and more. There were 34 clients who defendant claimed were estopped by the class action settlement from getting any relief even though the settlement was in 2000-2001 and Beck had continued *for seven to eight years* giving them false advice which kept them paying him premiums. (A1494-7, 1504-5)

Two of Beck's clients, Pearl Watts and Judy Keller, testified at trial confirming the problems and what plaintiff did to try to help mitigate:

> (a) Ms. Watts was 83 years old. She had worked all her life and retired in 1993 from Carbide. (A899) She trusted Ameriprise to take care of her financial interests. (A890) She purchased a life insurance policy through Ameriprise and Beck in 1997 in order to help her family. Beck told her that if she paid the premiums she would have life insurance to leave to her family. (A890-1) Beck used money from her IRA and other investments with Ameriprise to pay for the premiums. (A891) She met Mr. Beck regularly and he reassured her that there was nothing to worry about and

to continue to make the payments. (A891) No one, neither Beck nor Ameriprise, told her there was anything to worry about or that her life insurance was failing. (A892)

Plaintiff discovered that by 2009, Ms. Watts had paid well over $50,000 for the insurance and ***she had been making payments from her IRA to a worthless life insurance policy for years.*** (A894-5, 915) In 2009, plaintiff contacted Ms. Watts to go over her investments and told her the bad news that her life insurance was lapsing. (A892-3) This was very upsetting to her and she became angry at Beck and Ameriprise for not supervising Beck and for failing to advise her of the situation. (A893) Mr. Vallandingham assisted her in writing a complaint letter to Ameriprise. (A894;Pl.Ex.1-A742-3) In response to her complaint letter, Ms. Watts was told that there was nothing they could do to help her and she recovered no money from the over $50,000 she paid. (A895) She was told she was covered by the class action back in 2001, but she received nothing from the class action. (A896-7)

(b) Judy Keller and her husband are residents of Dunbar, West Virginia. Mrs. Keller retired from the federal government after 32 years of service in 2002. (A918) She purchased a variable annuity life insurance policy from Ameriprise and Beck. Mrs. Keller took out the life insurance policy for her husband's benefit should she predecease him. (A919) Her retirement was such that her pension would decrease substantially upon her death and the insurance policy would serve to offset the reduction of income to her husband upon her death. (A919;Pl.Ex.2-A746-52) She testified that, when they were encouraged to purchase the variable annuity life insurance policy, they were not advised that there was any risk that the life insurance policy would fail or lapse. She testified that she would not have purchased the policy if informed of this risk. It was their retirement. (A921-2) This policy was risky because it was a variable annuity and the life insurance is supported, in part, by other securities. This product was proprietary and owned by Ameriprise. It had big commissions up front and was a risky investment which was not explained to Ms. Watts or the Kellers or the other 32 clients of Beck. (A922-3) The Kellers met with Beck twice a year to review their investments. During these meetings, they would review their investments with Beck and he would make investment recommendations and have the Kellers sign Ameriprise documents of the type *that would be sent to the home office, so they would know*. Beck never advised the Kellers they would have to pay additional premium or that their policy was in danger of lapsing at any time. (A941-3)

In plaintiff's review of her file, he discovered that the Kellers had the same problems as Ms. Watts and many others. He set up a meeting with the Kellers and ***explained that their policy was worthless*** and recommended that they cease making payments. They were devastated. Mrs. Keller's retirement for her husband was lost. Plaintiff assisted her to write a complaint letter, but she was told they would do nothing for her because of the class action in 2001. (A836-9, 842-4; Pl.Ex.5-A983 & Ex.18-A1024) Ameriprise took the position that Beck's malfeasance years after the class settlement was also released, no matter what. (A1111-6, 1124-30)

The clients were very upset. Some cried and some became very angry. Most of them left and went elsewhere. (A1504) Plaintiff continued to try to help the clients to write letters because he knew, if he didn't, the home office wouldn't help them and because he thought it was right thing to do. (A1497) Ameriprise advised him that their policy precluded him from helping them. (A1492-3) Plaintiff asked them, "do you mean to tell me that no matter what he did or told these people, no matter what representation he gave, that they can get no relief?" He was told that he could not help them. Thus, his

new clients were suffering and he was suffering with them. Kia Thomas, a compliance analyst, sent an e-mail to plaintiff on May 20, 2009, wherein she directed him as follows:

> Lastly, as I mentioned in my voicemail, *please continue to service the clients* and assist them with available options for their accounts. However, *please do not advise clients to write complaint letters* (if clients wish to write a letter, of course they can do so) or "specific" avenues to pursue if they don't agree with our resolution. You may tell clients they are free to pursue any avenues they feel appropriate, *but do not give them specific names or avenues*. *Keep it general to protect* yourself *and the firm*. (A1108; Pl.Ex.18-A1024, emphases added)

So he was directed by defendant to service his cheated clients, but not tell them what to do about being cheated. (A1108;Pl.Ex.18-A1024) This is fraud and fraudulent concealment, similar to what they perpetrated on the plaintiff and plaintiff was forced to deal with it but not help them.

Thomas also directed plaintiff *not* to direct his clients to FINRA or to the W.Va. Insurance Commissioner and not to put the "***firm***" at risk and that was Ameriprise's policy. (A1124-31;Pl.Ex.18-A1024)[14] The evidence and testimony showed the defendant fraudulently protecting the firm in violations of its duties and, *relevantly, putting the plaintiff in a no-win situation dealing with the book of business and complying with his fiduciary duty to his clients.* While defendant claims there weren't violations and, therefore, plaintiff did not reasonably suffer the damage dealing with it, plaintiff's expert explained there were violations, discussed *infra*.

D. The problems were substantiated by defendant and FINRA.

The defendant's denials of problems and violations are not credible because, first, it requested plaintiff assist in the Beck investigation. *He was told to ask the clients if Beck had borrowed money from them*. Some of them became angry at plaintiff because, not knowing the circumstances they were

[14]Thomas explained the (improper) reason for this policy is that a written complaint is required to be filed with FINRA. If a customer makes a written complaint by letter or otherwise and does not give a specific dollar amount for damages, then Ameriprise is supposed to make a good faith calculation of the amount of the damages. If it is over $5000, then they must report it to FINRA and, of course, it is posted as a U-4 on the Broker Check. So if the client does not know to state an amount, Ameriprise can estimate it at less than 5000, so it does not have to report its violations to FINRA. According to Thomas, verbal complaints do not have to be reported regardless of the amount of damages. (A1105-8) Therefore, if the clients do not know where to send the letter and call it in or do not write letters, then defendant has no complaints on the FINRA website. Thomas explained that Ameriprise's policy in "discouraging" clients from sending written complaints is to "protect the brand." (A1108)

offended that he would be trying to undermine Beck. (A1108) After plaintiff complained, Ameriprise, agreed not to require him to ask, but then they had him *looking through his files for forgeries*. (A1204-5)

There's more. As a result of Ms. Thomas' investigation, it was determined that:

(a) Beck client Fisher had a justified complaint because Beck violated the suitability rule, but Ameriprise calculated the damages below $5000 (A1134);
(b) Beck had made unauthorized transactions with regard to client McCalvin which was not reported to FINRA until *after* plaintiff bought the book (A1128-38; Pl.Ex.5-A986);
(c) The complaint of client Clendenin was justified due to signature irregularities (forgery) regarding a 2000 variable annuity and, since all forgeries are required to be reported, defendant reported this to FINRA *after* the sale (A1138-9);
(d) Client Grant's forgery claim was also reported to FINRA but only *after* the sale (A1143);
(e) Client Clark's complaint was deemed justified due to an unauthorized transaction (A144-5);
(f) Client O'Dell's complaint was justified because the product she was placed in was an unsuitable product and defendant settled with O'Dell for $104,481. (A1154-5)

All of this peaked FINRA's interest and they made an inquiry and asked for more specific information with regard to the U-5 filings by Ameriprise in 2009. (A1149) There were no reports of Beck's misconduct *before* the sale to plaintiff was completed and even his stated termination was for reasons not in violation of his duties to his clients but only for failing to sell enough.

Importantly, Cupach testified that he was aware of Mr. Beck's consequence management history leading up to the termination. (A1225-6) If, however, Ameriprise had terminated Beck for violating compliance rules that would have to be reported to FINRA, prior to his termination. (A1253) *All the evidence leads to the reasonable conclusion that defendant did not want to make FINRA reports and so they came up with a pretextual and fraudulent reason for Beck's termination, which allowed them to avoid it, and then falsely claimed to plaintiff that their pretext was the only reason they terminated Beck*. A FINRA rule requires Ameriprise to be accurate and truthful in providing the reason for terminating an advisor. (A2534) So, if there was bad conduct, it is posted and the public, including the plaintiff, can see it.

Months after he purchased the book of business, *plaintiff discovered that there had been an on-going investigation of Beck's practices for some time* ***before*** *he purchased it.* (A1205-6) Plaintiff testified that the purchase hurt his reputation in the community. He became attached to Beck in the eyes of the community. One client told plaintiff since Beck picked him as a successor there must be a reason. "You guys must be alike." (A1207-8) It has affected his ability to get clients and keep them. (A1208)

E. Plaintiff's well-qualified expert confirmed that there were pre-sale problems with the Beck book of business that Ameriprise should have disclosed, but did not.

Plaintiff called expert William McGinnis to confirm that there were pre-sale problems with the Beck book of business of which defendant had knowledge, that those pre-sale problems were violations of FINRA and industry rules, and to confirm that they should have been reported to FINRA. The supposed "post transaction matters," prior class action, FINRA violations, litigation and regulatory issues, and testimony from McGinnis regarding the same, were all relevant to and related to pre-sale problems with the book of business of which defendant was aware, but failed to disclose or tell the plaintiff or regulators.

Mr. McGinnis is well qualified to provide his opinions. He has been an investment and securities financial consultant for over 10 years. He worked in brokerage finance as an investment analyst and a portfolio analyst. (A1537-40) He was licensed as a financial advisor and has supervised other financial advisors. (A1562) He previously worked for five different brokerage firms and possesses a broad perspective as to the duties and responsibilities of a broker-dealer. (A1566) He explained that he is a chartered financial analyst, which requires a three-year examination process that is one of the most comprehensive examinations in the investment industry which he passed in 1989 and which he has maintained current. (A1571) He is a charter financial analyst, charter holder, which is generally considered the highest designation in the investment industry. McGinnis twice passed the Series 7 and 63 tests and was licensed when he was working. He also had passed the Series 65, the investment advisor exam which qualifies one as a money manager. McGinnis testified that Series 65 covers the same subject matter required to be licensed as a registered investment advisor representative. (A1543-4) He is president of Milwaukee CFA Society and on the President's Council of the CFA Instructors, a 150,000 member worldwide body, and he is on the North American Securities Administrators Association Writing Team that prepared the 65-66 exams which are required tests to be taken for investment managers which includes FINRA and NASD rules as well as NASA rules, and New York Stock Exchange rules.

Defendant attacks his qualifications because he was not a "licensed" investment manager at the time of trial, but McGinnis explained that to be licensed requires working for a broker-dealer at the time.

He explained that broker-dealers typically prohibit their employees from testifying in securities cases. Therefore, it essentially would preclude him and others who offer testimony to also be a licensed advisor. *Defendant's expert, Mr. West, confirmed this and admitted that* ***he was not licensed either***. (A1551-5)

McGinnis has been recognized as an expert in the subject field by judges and FINRA arbitration panels and in the regulatory field. (A1551) As a chartered financial analyst, he is responsible to understand and know all of the applicable securities laws and is familiar with FINRA rules. (A15570-8) He has been an expert in about 25 cases in the past 9-10 years in the U.S. and internationally in England, Canada and Singapore. (A1559-60) He has published many articles as an investment analyst and been quoted as an authority in Forbes, Fortune, and Newsweek, and Business. (A1545) The Court correctly found that he was qualified to testify in the area of broker-dealer and financial advisors, including the duties and responsibilities to clients and to each other as required by the regulatory entity.

McGinnis explained that FINRA Rules are built around protection of the industry and of the public. The industry is self-regulated previously by NSAD, which became FINRA and broker-dealers are required to self-comply with the industry's rules. (A1577-8) Since NASD became FINRA, some of the rules are still from NSAD. (A1577-8) He testified that there is a rule as to supervision, NASD 3010 and suitability, FINRA 2111. NASD 3010 requires a broker-dealer to supervise registered representatives. (A1577) The suitability rule provides that the broker-dealer and its registered representative are assisting clients in making and recommending suitable investments appropriate for their age, financial position, risk tolerance and related criteria. (A1578) He confirmed that there is a records and reports requirement, NASD 3110, which requires the broker-dealer and its financial advisor to maintain records so that actions of the advisors can be cross-checked by supervisors and outside regulators. (A1579)

McGinnis confirmed an advisor is not permitted to borrow money from a client per FINRA 3240. (A1579) There is also a rule which prohibits an advisor from making any transaction not authorized by the client, incorporated into FINRA 2111 along with the requirement as to "suitability." (A1579)

Broker-dealers have a duty to report certain violations by themselves or their advisors. Importantly, McGinnis testified that, if an advisor violates certain rules like forgery or violation of some

other type, the broker-dealer is *required* to file forms U4 or U5 depending on whether the advisor is still employed or terminated. (A1579) McGinnis testified that to a reasonable degree of certainty Beck violated all of those Rules. (A1580,1576) He explained that he looked at violations by Beck in 2004 up through 2009, since the period of the sale of Beck's business took place in 2009. (A1580-1) From his review of the documents, he found that they established *knowledge* and a pattern that *should have been reported*. Those pre-sale violations included:

(a) Client Kackowski (*2004*): McGinnis opined this was a predatory transaction. He testified the investment industry watches annuities closely because there are high commissions paid to the broker and the financial advisor up front. (A1582) Beck moved Kackowski from one annuity to another which caused the customer to lose the death benefit guarantee and provided another layer of surrender charges on the client and a lower minimum interest guarantee. This created negatives for the client but a commission for Beck. (A1582-3) *Ameriprise deemed this an inappropriate transaction*, reversed the annuity, put Kackowski back in the original investment, charged Beck $847 and cautioned him. *McGinnis opined that Beck's violations should have been reported by Ameriprise as a U-4, which goes on a public document for review by clients and others, but were not*.

(b) Mr. Kackowski (2010): had a different annuity purchased in *1998* that had a problem and Ameriprise's compliance department was notified. Kackowski's complaint was that a different annuity would run out of money when Beck had told him it would be paid for in four years. Beck had misrepresented the policy. The client's out of pocket was already $124,000 for a policy that had $125,000 in death benefits and, if he had paid the entire premium to age 100, he would have invested $324,000 for a $125,000 life policy. Kackowski was 70 years old when he purchased the product. To make matters worse, Beck was taking Kackowski's money from an IRA to pay the premium which boosted Kackowski's out of pocket to approximately $200,000. Plaintiff, when he discovered this in 2010 in Beck's files, discussed it with Kackowski and told him that he should get out of the annuity and a complaint was made to Ameriprise. Ameriprise told Kackowski that the issue had been taken care of in a class action in 2000-2001 and there was nothing they could do to help him. (A1583-6) McGinnis testified that, when defendant found the *2004* transaction was improper, the Compliance Department should have looked to see what other product Kackowski purchased from Beck and whether there were other problems, *and reported those*, but did not.

(c) Client Holt (*2004*): Holt was sold Class B shares in a mutual fund in violation of rules. Commissions on Class B shares are usually high. *Beck was fined $1500 and reprimanded in 2004.*

(d) Client Clark (*2007*): On Feb. 19, 2007, Beck's Registered Principal, Sean Bradford, sent Beck a certified letter of reprimand for an unauthorized transaction. (A1591;Pl.Ex.8-A994-5) ***Clark complained there was a withdrawal from her account of $40,000.*** She demanded that the $40,000, plus interest, be returned to her account. Upon investigation by Compliance and the RP, there was no switch Form 443 in Beck's file. This is a required form that not only identifies the transaction but also explains the rationale for the advisor's decision to execute the transaction. The 443 is one of the "tools" that compliance uses to monitor annuities to determine whether they are "suitable" for the client. Neither was there a Form 345 which documents an advisor-assisted telephone transaction. (A1592-3) *Beck was issued a reprimand and fine* in the amount of $2000 which was placed in his permanent compliance file which plaintiff never had access to. ***McGinnis stated that he agreed with Ameriprise's senior compliance analyst Mr. Helms that this violation should have been reported to***

FINRA as a U-4, a FINRA form which notified them of the violation, which FINRA puts on the public "Broker Check" for the particular advisor. The Broker Check is available to the public to review the compliance history of any financial advisor. (A1594, 1416) McGinnis also noted that the letter was dated Feb. 17, 2007 and Beck had not signed that he received it until Oct. 2007, some seven to eight months later, *both prior to the sale to plaintiff*. (A1595-6)

(e) Client Gribble (*2008* & 2009): Beck's violation related to Gribble was discovered in about June of 2008; however, when Ameriprise discovered it they did not notify Mr. Gribble. (A1599) Mr. Gribble did not discover it until 2009, after plaintiff had purchased Beck's book. He complained that there would be no penalty for him to access the new annuity and to take funds out of it but he learned that was not possible. McGinnis testified that Ameriprise believed Gribble's accusation and, consequently, gave him a "free-look" at the annuity for close to a year *which kept the damage below the $5000 reportable damage* for a U-4 report to FINRA. (A1596-8)

Thus, defendant's argument in its brief, that the problems were all post sale discoveries of which it was not aware, is impeached by the testimony of plaintiff's expert. The defendant had actual knowledge of compliance problems in Beck's book prior to the sale.

F. Defendant knew prior to the sale that Beck was failing to respond to compliance.

Plaintiff's expert also explained the red flags related to defendant's knowledge of other problems with the Beck book of business prior to the sale to plaintiff, including Beck's failure to respond to compliance, discussed *supra*, showing that Amerprise had emailed Beck several times with requests for important information related to compliance issues, including forms like those missing from previous files for which he was cautioned or reprimanded, with a series of letters and documents containing threats of more serious reprimands or other action and a fine. (A1604,Pl.Ex.10-16-A1014-1021) So, in addition to failing to maintain compliance standards, McGinnis stated that Beck "has gone quiet, which is truly concerning." The foundation of the consumer protection within the investment industry is compliance and that compliance system is built on the fact that information is provided to supervise on a regular and timely basis. But Ameriprise knew that Beck had "failed to meet deadlines, failed to meet repeated requests and now is ignoring his registered representative," which is a "a material problem." (A1603) This is relevant because Cupach did not disclose these problems to plaintiff when asked if there was anything else he needed to know.

McGiness explained other facts showing defendant's knowledge of problems with Beck in 2007, related to 443 annuity reporting. He had already shown himself to be a compliance issue and, in March

2008, he was not updating the firm on new annuities he was selling, "a big risk." (A1605) In about April 2008, Ameriprise provided Beck with a form because he had not submitted a check log for over three months. Check logs are required to demonstrate money received or sent by an advisor and are provided to Ameriprise for oversight. (A1604-5;Pl.Ex.11-A1015) After many threats, the last letter was a notice that he was placed under "*enhanced supervision*." (A1608-9) McGinnis testified that Beck was "totally ignoring his FRP at this point." (Id.) Also, Helms began an enhanced or *accelerated review* in Oct. or early Nov. 2008. (A1619-20) Again, Cupach did not disclose these problems to plaintiff when asked.[15]

G. Defendant wrongfully denied clients relief leaving plaintiff to deal with them.

The defendant took the position that a 2000-2001 class action settlement barred Ameriprise clients from ever bringing any claim for bad conduct by Ameriprise or its financial advisors for violations of FINRA and industry rules after the class action was settled, leaving the plaintiff to deal with unhappy clients. This confounded the plaintiff because he understood the ongoing duty to review the client's products to assure "suitability" of the client's products. Nevertheless, defendant's Rule 30(b)(7) witness, its officers and compliance personnel all testified that that was defendant's position. (A1618, 1622-3, 1174-6, 1111) Despite defendant's claim about the class action, plaintiff still had a duty to his newly obtained clients to help them mitigate their damages, which in turn mitigates his own damage to his reputation and helps him to attempt to retain them as clients.

Moreover, defendant's claim was wrong. Plaintiff submitted Ex.32 (A1281), Stipulation of Settlement of the class action, Ex.38 (A2048); Findings of Fact and Conclusions of Law Concerning Class Action Settlement; and Ex.39 (A2137), the Final Order and Judgment Approving Class Action

[15] Ultimately as explained by McGinnis, Amerprise agreed to an Acceptance and Waiver and Consent dated Feb. 11, 2011, where Ameriprise was censured for failing to have a system in place which was adequate for compliance issues like these occurring prior to plaintiff's purchase of the Beck book of business. The consent included 10 forgeries on 34 different documents by one advisor which was brought to Ameriprise's knowledge in 2005 and Ameriprise's investigation was not completed by 2008. Ameriprise was censured by FINRA and fined $50,000. (A1616-7) Ameriprise later entered into another Acceptance Waiver and Consent which included a finding that its supervisory systems were not reasonably designed to adequately monitor the transmittal of funds during the time period 2006 to October 2010. They were fined $750,000. (A2903;Pl.Ex.44-A2830-8) McGinnis stated to a reasonable degree of certainty that Ameriprise's compliance system was grossly inadequate to supervise and to determine compliance of Beck. (A1617) While the Court did not base its decision on the 2011 censure, it evidenced a broad scheme of failure to report FINRA violations prior to the sale.

Settlement. The Court took judicial notice of these pleadings filed in the U.S. District Court in Minnesota. A review of these documents makes it clear that, as would be expected, the only matter released in the class action were acts taking place prior to the settlement *not damages caused by the defendant and its advisors as to industry and regulatory violations after the settlement.* The order provides: "Nothing in this Release shall be deemed to alter…a Class Member's right to assert any claim that independently arises from acts or circumstances that occur for the first time after the last day of the Class Period." (Pl.Ex.39-A2146-7) The Class Period is Jan. 1, 1985, ending on Feb. 29, 2010. (Pl.Ex.32-A1290)

Thus, the defendant is not permitted to continue to intentionally harm its clients by failing to provide proper advice with respect to ongoing policies seven plus years after the class settlement *and plaintiff had a duty to those clients to do what he could for them, which took time away from income generation and his business.* Defense expert West agreed that future acts and misconduct are not indemnified, "Q. As I understand what you are saying is that the class action did not resolve future acts after the class action settled. A. That is my understanding." (A2736-7) His opined the clients could get relief after settlement, "they had all remedies available," and, if the broker-dealer used the class action as a shield knowingly to avoid having to pay a claim, that would be a violation. (A2737)

H. Plaintiff's expert opinions were more credible than defendant's expert.

Plaintiff's expert McGinnis concluded, based upon his knowledge, training and experience:

a. Mr. Vallandingham reasonably and prudently relied upon Ameriprise and the Broker Check, to which Ameriprise had the responsibility to post filings. (A1626-7)

b. Ameriprise had superior information and had access to the compliance file. They knew they were conducting investigations, including an enhanced investigation of Mr. Beck. (A1627)

c. Ameriprise did not provide full and fair disclosure to Mr. Vallandingham. (A1627)

d. The sale transaction was fraught with misrepresentations and a failure to disclose. (A1628)

e. There was nothing available to Mr. Vallandingham except those things he did review, the Broker Check, and requesting information from Ameriprise supervisors like Cupach. (A1631)

f. The U-4 or Broker Check had nothing on it when Mr. Vallandingham checked it. (A1632)

Defendant called its expert, Mr. West to testify. His investigation was limited. He did no review of the "suitability" of investments in Beck's book. (A2678-9) He did not review defendant's own FINRA compliance record. (A2751) He did not review defendant's Code of Conduct. (A2751) He had no way to determine if clients were in trouble or whether the clients' insurance policies were good or bad. (A2178-23) He did not review the clients' files. (A2818) Throughout his testimony, he could not address questions on specific client issues. Yet he testified, essentially, that there were no FINRA violations. However, when he was asked if he had known Beck's record before 2009, when Beck was terminated, would he trust him to be his own financial advisor, he promptly stated "no." (A2751) He conceded that the condition in Beck's book existed prior to the transfer. (A2753)

West opined that there was no duty of a broker-dealer to audit an advisor's book of business when they were attempting to sell the business or to give plaintiff an opinion as to viability of the business or to disclose its surveillance investigation which was on-going, so he found no violations of defendant's duties toward Mr. Vallandingham. (A2674-8) *Even if it were correct that defendant had no duty to disclose the investigation, which it is not, they can't affirmatively lead the plaintiff to believe there are no other issues and tell him there is nothing more he needs to know about it, because it's not true.* This is essentially what the Court correctly found. Cupach could have said, there may be other reasons for his termination, but I can't tell you, and I cannot tell you if there are other things you need to know or say nothing. Instead, Cupach chose to speak and gave the plaintiff assurances that amounted to fraud and fraudulent concealment. ***West conceded that if the manager, like Cupach, was asked about someone's book and if the manager did respond then the manager should tell the truth about it.*** (A2718)

West testified that broker-dealers and financial advisors are required to comply with a State's common law (A2720) and there is no rule which permits a broker-dealer to commit fraud. (A2721) West stated that FINRA Rule 2110 precludes broker-dealers from entering into conspiracies and concealing significant information about their advisors. (A2754-5) *This includes the duty to not defraud your advisors.* (A2755) Further, he confirmed, contrary to Ameriprise's claim, ***there is no rule which prohibits the broker-dealer from telling the transferee advisor of another's book of business about problems in***

the transferor's book of business. (A2758) Further, he agreed that plaintiff had an interest in knowing what went on in this book of business. (A2774)

With regard to the problems imbedded in Beck's book of business and plaintiff's attempts to deal with the problems after he purchased it, the defense expert gave conflicting testimony that supported plaintiff's position. He agreed that there were practices requiring advisors to have ongoing dialogue with clients and make appropriate recommendations to the client as he came upon new information (something Beck did not do, but plaintiff did). (A2669) He agreed that since defendant included the "ongoing suitability" requirement in the Code of Conduct, *that Ameriprise was required to make a suitability analysis at each recommendation.* (A2689-95, 2669-71) While West claimed that it was acceptable for defendant to prohibit their advisors from assisting clients with their complaints, he admitted that the financial industry relies on complaints by their clients to provide compliance and agrees that a broker should not put a roadblock in front of its clients to avoid complaints. (A2680-2, 2704-7) Importantly, West conceded that defendant had the duty to make sure Beck was conducting his practice in accordance with the Code of Conduct and FINRA rules. (A2711, 2723) This would include FINRA reporting rules.

With regard to defendant's implication that they did not disclose or report because the investigation of Beck was ongoing, and complaints were not made until after the sale, West agreed that a broker-dealer does not have forever to review an advisor's records to determine whether there have been Rule violations or problems with an advisor and they must perform their duties timely. (A2721-3) *West agreed that the plaintiff had a right to rely on the defendant enforcing compliance with Mr. Beck.* (A2725-7) If they had, defendant should have reported violations to FINRA, which plaintiff would have discovered when he looked.

I. Plaintiff suffered significant damages as shown by competent testimony and evidence.

When you take a large number of problem clients and put that burden onto the plaintiff, it is going to be a major distortion and detriment to his existing client base. One bad client consumes as much time as three, four, five good clients. (A2727-8) Beck had 250 clients. He had 200. *His customer satisfaction was 98* going into the transaction. After, *it dropped to 69.5*. Clients were upset and it reflected in their view of

him. (A1210) Plaintiff explained that all the problems with Beck's book of business had been hidden from his clients, other advisors and the public. Therefore, when he had to meet with the clients and deal with it, they were naturally upset and it was "detrimental to the beginning of this relationship." (A1205-6)

He testified that he spent most of the time trying to clear up the situation with the 250 clients instead of doing his normal business. He had to work additional hours and, even then, was only able to keep about 25% of them. (A1206) Also, the manner in which the class action excuse was handled adversely affected his reputation in the community. It affected his ability to get clients and keep them. (A1208) It also affected his ability to work with his existing clients because he was too tired from dealing with the Beck clients.

He had a legal duty to care for his clients. If he didn't, he believed he could be legally and morally liable for the client's damages stating, "I could lose my ability to keep my license." (A1212) If he had not purchased the business, he would have spent the last four years marketing his business and worked more with his existing clients to make himself more "referable" to gain more clients. (A1209-10)

He testified that he was affected emotionally. He stated that it was overwhelming; he had been a huge company man who had been there since college; it was all he ever knew; he believed in the Code of Conduct. He thought he was going to get an *award* for turning this in because it was the right thing to do so, when he was met with potentially being written up or reprimanded for doing what he thought was right, it was devastating and it caused him a lot of sleepless nights thinking he had given up his whole life, his whole energy and years of paying expenses to this company. He had to go to the doctor because of blood pressure issues; he had to talk to some of his colleagues who counseled him because he wanted to quit; he thought about resigning three times during this time frame because he couldn't help his clients; he worried about whether they would try to find cause to get rid of him for advocating for clients on a fiduciary basis doing what was in their best interest. It put him in a rough position because he was affiliated with a franchise taking a stance contrary to his own beliefs and the fiduciary standard under which he believed they operated; it was bothersome and humiliating to be in this position; and being associated with the Beck book of business hurt his business and will hurt his business going forward in the future. (A1212-4)

J. Plaintiff's economic expert Ross Dionne properly calculated damages based on lost profits.

The plaintiff presented forensic accountant expert Ross Dionne, a certified public accountant since 1980 and certified valuation analyst since 1999. (A1848-50) He testified as to compensatory damages of the plaintiff. While defendant claims he did not review tax returns, Dionne reviewed plaintiff's historical tax returns for the years prior to the acquisition of the Beck book, and reviewed Ameriprise advisor performance statements. He then analyzed this material, plaintiff's actual history prior to March 2009, to determine what his revenue should have been going forward but for the acquisition of the Beck book of business. Dionne then looked to the historical costs of the plaintiff, applied those costs going forward to calculate what plaintiff's damages were from the date of the purchase to the current date as of the end of 2012, the most complete year he had. (A1853-58)[16]

Mr. Dionne testified that the most compelling evidence of plaintiff's lost profits were the advisor performance statements.[17] Prior to the acquisition, Mr. Vallandingham was slightly ahead, but after the acquisition was always behind his peer advisors at Ameriprise in revenue generated. (A1855-7) As the Court noted, this observation is succinctly detailed by in Mr. Dionne's expert report, which states:

> (1) Mr. Vallandingham's earnings prior to the March 11, 2009 acquisition were just 4.87% below his peers. As of the end of 2012, his earnings are now 129.35% lower than his peer Ameriprise Agents.
>
> (2) Mr. Vallandingham' s total assets prior to the March 11, 2009 acquisition were 6.12% more than his peers. As of the end of 2012, Mr. Vallandingham's assets are now 52.97% lower than his peer Ameriprise Agents.
>
> (3) Mr. Vallandingham's returns on total assets prior to the March 11, 2009 acquisition were just 0.64% on $21,293,156 of assets. As of December 31, 2012, Mr. Vallandingham's return on total assets is just 0.48% on $32,136,107 of assets.
>
> (4) Mr. Vallandingham's book of business value prior to the March 11, 2009 acquisition was just 1.54% less than his peers. As of the end of the year 2012, Mr. Vallandingham's book of business is now 63.93% lower than his peer Ameriprise Agents.

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[16] Defense raised the issue of why 2013 was not included in this calculation. Dionne stated he only uses complete years to calculate his damage projections and while circumstances could exist in 2013 which might change his opinions, he stated that due to the continuing disparity between revenues generated by plaintiff and his peers through 2013, his opinions would not be affected. (A1910-4)

[17] Defense complains that plaintiff was allowed to testify about his performance compared to is peers as if he were an expert. A plaintiff is entitled to testify about his loss of income and basis for it, and he had the experience to do it. Even if not so, plaintiff's expert Dionne reviewed the same documents and formulated his opinions based upon that review, which is what the Court relied upon in its order as within its discretion in weighing the evidence.

(5) Mr. Vallandingham's returns on book of business value prior to the March 11, 2009 acquisition were 0.59% on a book value of $24,412,196. As of December 31, 2012, these returns are just 0.46% on a book value of $33,717,467.

(6) Mr. Vallandingham's historical operating ratio before the March 11, 2009 acquisition of the book of business on March 11, 2009 ranged from 44.45% to 52.16% of total revenue. His current operating ratio is 66.11 % of his total revenue. This is more than 15% higher than the operating expense ratio we reported prior to the acquisition.

(Pl.Ex.34-A1658, internal citations to report appendixes omitted).

To calculate lost profits plaintiff incurred through December 31, 2012, Dionne used a regression analysis of plaintiff's historical gross revenue for 2006 through 2008 as a basis for projecting gross revenues for 2009 through 2012, and then calculated net lost profits through December 31, 2012. (Pl.Ex.34-A1655-60) Mr. Dionne determined that the past compensatory damages in this case were $246,518 to a reasonable degree of certainty. (A1871-3) He then forecasted the present value of future lost profits based on two different assumptions:

(1) Lost Profits will continue at an annual amount equal to Mr. Vallandingham's average calculated lost profits from 2009 to 2012 (Schedule 1-8-A1659); and,

(2) Lost profits will continue at an annual amount equal to the difference in annual earnings for Mr. Vallandingham compared to Ameriprise Agents in his peer group (Schedule 1-8a-A1659).

After offsetting Schedules for percentage of worklife expectancy based on plaintiff's age, race and demographic calculations, and further reducing to a present value at the real rate of 0.37%, Dionne opined to a reasonable degree of professional certainty that the present value of plaintiff's future lost profits based on assumptions (1) and (2) are $613,452 and $974,276. As explained by the Court, Dionne presented a 'damage floor' and 'damage ceiling' for plaintiff using the previously described calculations of past and future lost profits. The damage floor was calculated using past lost profits from 2009 to 2012 added to the present value of future lost profits using the base year lost profits equal to Vallandingham's average lost profits from 2009 to 2012. The damage ceiling was calculated using past lost profits from 2009 to 2012 added to the present value of future lost profits using an annual base amount equal to the difference in annual earnings for plaintiff compared to his peer Ameriprise agents. Accordingly, in Dionne's opinion to

a reasonable degree of professional certainty, the damage floor and damage ceiling for the plaintiff are $860,010 and $1,220,794 respectively. (A1871-73; Pl.Ex.34-A1660)

Defense expert Taylor did not take issue with Dionne's calculations in any way other than to make a legal argument against lost profits being used in the case. He didn't do a convincing job of it. The Court was permitted to make an award based on lost profits. Taylor opined that the numbers showed he made more money in 2010, shortly after buying the book, but he did not sufficiently review the book to determine whether that increase was due to the Beck book or profits coming in from prior work plaintiff did on his own book. Taylor further rendered opinions on damages without reviewing any deposition or trial testimony on the issue. (A2888) He failed to ascertain how many persons were part of the Beck book despite opining that the transition of the book from Beck to plaintiff was "successful." (A2880-1, 2888) So while defendant argues in its brief that certain "performance data points" demonstrate a successful transition and claim his practice was profitable after seven quarters, its expert's testimony held less weight because it was not based upon sufficient review of the relevant documents.

Taylor testified that lost profits was not a proper measure of damages for this case. He testified that the value of the Beck book, given its problems, was the difference in the value before and after the sale. (A2876-7) He was critical of plaintiff's expert for valuing damages to Mr. Vallandingham by the method of determining lost profits. He failed to take issue with Mr. Dionne's findings or calculations in any way other than to make a *legal* argument against lost profits being found in this case. He was simply not as convincing as Dionne's testimony. The Court was within its discretion to follow plaintiff's expert's opinion as more convincing than that of defense and not to follow Taylor's legal opinion.

Taylor also opined that it is not reasonable to sell a book with that potential for earnings for $75,000, implying that plaintiff should have known there were problems, despite Cupach's assurances and the testimony of defendant's other expert West that plaintiff was entitled to rely on what Cupach represented. Even so, Taylor conceded that when he arrived at his opinion, he was not aware of time constraints on the book's sale or that the book could only be sold to Ameriprise advisors. He noted on cross-examination that all of these factors would effectively reduce the sale price. (A2884-5)

Defendant objects to plaintiff's expert using peer data, in part, to determine plaintiff's damages. However, evidence showed that defendant uses peer data to determine the performance of its agents. Plaintiff's financial data is kept by Ameriprise which then is summarized to indicate not only what plaintiff's business is doing, but also compares him to his peers, those financial advisors who are in this "peer group." "That's the way we look at our growth." (Pl.Ex.30-31-A1279-80; Tr.Day2-157-8)

III. SUMMARY OF ARGUMENT

The Circuit Court correctly found in favor of plaintiff on claims of fraud and fraudulent concealment. The defendant engaged in fraudulent concealment and affirmative fraud when its vice president in charge of supervising the compliance managers and the plaintiff misrepresented to the plaintiff material untruths about the book of business that plaintiff was considering purchasing from another Ameriprise representative. The affirmative statement of the defendant that the real and only reason for the termination of the seller of the book was a failure of the seller to sell sufficient financial plans and affirmative assurance of the defendant that there was nothing more the plaintiff needed to know about the transaction were not only false, the misrepresentations created a duty to disclose the truth to prevent the misleading of the plaintiff. Instead, the defendant told the plaintiff false information, half-truths and withheld material information, making its affirmative representations false. This amounted to fraud and created a duty to disclose, a duty under the law that existed regardless of the existence of a franchisor-franchisee relationship. Instead, he induced the plaintiff into buying a toxic book of business to the benefit of Ameriprise, riddled with problems from overcharging the clients, improper transfer of client funds, forging documents, and keeping clients paying for worthless Ameriprise annuities for years.

The Circuit Court was within its discretion to admit and consider the evidence that it considered. The evidence defendant claims was "post-transaction," a prior class action, FINRA violations, litigation and regulatory issues, and testimony from plaintiff's expert regarding the same, actually was evidence of compliance issues that occurred prior to, existed prior to, a*nd that defendant knew of and was actively investigating* prior to the sale of the book of business to plaintiff, and should have disclosed to the plaintiff instead of leading him to the opposite conclusion. The information only came to the attention of

the plaintiff after the sale because defendant failed to make timely mandatory reports of compliance issues to regulatory body FINRA, despite regulatory requirements, which if properly reported would have been accessible by the plaintiff prior to the sale. Defendant did not make any of those mandatory reports until after the sale, for conduct it knew about long before the sale. Therefore, all of the evidence considered was relevant to and related to pre-sale problems with the book of business of which defendant was aware, but failed to disclose, report, or tell the plaintiff, which was directly relevant to plaintiff's fraud and fraudulent concealment claims.

In addition, the fall out, including complaints of customers, regulatory fines and substantiated FINRA violations, and false excuses that client damages were covered by an old class action, are relevant to what plaintiff had to deal with after he purchased the bad book, including relevant to him trying to mitigate damages for his customers and himself, which took time away from his ability to generate income, and relevant to the damage to his business reputation from being lumped in with the sins of the defendant and Beck.

The damages awarded by the Court were supported by the evidence and law. Plaintiff's expert valued the damages based upon lost profits, using pre- and post-sale tax returns and comparison to peer data. Defendant argues that damages based upon peer data is not appropriate, when Ameriprise uses and relies upon the same peer data to monitor and evaluate its sales force, and when the law allows use of market data in determining lost profits. The defendant's economic expert, who reviewed almost nothing with respect to this particular case, provided a *legal* opinion that you could only award damages based upon the difference between the sale price and what the book of business was worth at the time of purchase. This is not accurate under the long-standing law of damages. The Court was well within its discretion to award damages for lost profits based upon the reliable evidence of lost profits. Also, the law provides for emotional distress damages, annoyance and inconvenience in a fraud case, and the evidence of all the plaintiff went through trying to deal with the cheated Ameriprise clients, and the suffering he endured, overwhelmingly supported what was a comparatively modest emotional distress damage award.

III. STATEMENT REGARDING ORAL ARGUMENT

This case involves well-settled law and a discussion of discretionary fact finding. Therefore, the plaintiff believes that a Rule 19 oral argument is appropriate for this case.

IV. ARGUMENT

A. The Court correctly found defendant committed fraud and fraudulent concealment.

"Generally speaking, `[f]raud has been defined as including all acts, omissions, and concealments which involve a breach of a legal duty, trust or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another.' *Stanley v. Sewell Coal Co.,* 169 W.Va. 72, 76, 285 S.E.2d 679, 682 (1981) (citations omitted). *Accord Dickel v. Smith*, 38 W.Va. 635, 641, 18 S.E. 721, 723 (1893)." *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998). Fraud must be proven by clear and convincing evidence. *Bowers v. Allied Warehousing Services, Inc.*, 729 S.E.2d 845, Syl. Pt. 3 (W. Va. 2012) and *Quicken Loans v. Brown*, 737 S.E.2d 640, 652-653 (W. Va. 2012.)[18] The essential elements in an action for fraud are that: (1) the act claimed to be fraudulent was the act of the defendant or induced by him; (2) it was material and false; (3) the plaintiff relied upon it and was justified under the circumstances in relying upon it and (4) he was damaged because he relied upon it. Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); Syl. Pt. 2, *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988); Syl. Pt. 2, *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 425 S.E.2d 144 (1992); Syl. Pt. 3, *Cordial v. Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996); *Teter v. Old Colony Co.*, 190 W.Va. 711, 717, 441 S.E.2d 728, 734 (1994); *Powell v. Time Ins. Co.*, 181 W.Va. 289, 296, 382 S.E.2d 342, 349 (1989); *Kessel v. Leavitt*, 511 S.E.2d at 752. "Where one person induces another to enter into a contract by false representations, which he is in a situation to know, and which it is his duty to know, are untrue, he, in contemplation of law, does know the statements to be untrue, and, consequently, they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. ***It is not indispensable to a recovery that the***

[18] It is telling that nearly all of the cases cited by defendant are unreported, out of state cases.

defendant actually knew them to be false." Syl. Pt. 4, *Cordial v. Ernst & Young*, 199 W. Va. 119, 121, 483 S.E.2d 248, 250 (1996), citing *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927).

"'[A]n action for fraud can arise by the concealment of truth.'" *Teter v. Old Colony Co.*, 190 W.Va. 711, 717, 441 S.E.2d 728, 734 (1994)] (quoting *Thacker v. Tyree*, 171 W.Va. 110, 113, 297 S.E.2d 885, 888 (1982)). "Such a basis for a claim of fraud is possible because '[f]raud is the concealment of the truth, just as much as it is the utterance of a falsehood.' *Frazier v. Brewer*, 52 W.Va. 306, 310, 43 S.E. 110, 111 (1902)…." *Kessel v. Leavitt*, 204 W.Va. at 127, 511 S.E.2d at 752.

First, defendant argues that plaintiff abandoned claims leaving only a claim for fraudulent concealment. This is not correct. While plaintiff proved her claim for fraudulent concealment, plaintiff also claimed and proved affirmative fraud. This is evidenced by the proposed findings of fact and conclusions of law proposed by plaintiff, which included findings and law on affirmative fraud. (A2976-3030) Defense makes this argument in hopes to avoid the law which states that, when a person choses to make a representation knowing someone is relying upon it, they have a duty to tell the truth, regardless of whether there is a fiduciary relationship.

Defendant further argues that plaintiff only pleaded fraud against Beck, not against Amerprise, and later argued that plaintiff only pleaded fraudulent concealment against Ameriprise. The amended complaint shows plaintiff pleaded both against Ameriprise:

> 14. *Ameriprise* had express knowledge of defendant Beck's practices as described above…15. Defendants, including *Ameriprise*,…set about to cover up and conceal from the clients the defendants' tortious and fraudulent acts and omissions from the clients, the public, FINRA, a regulatory authority, and also *to conceal* same from Mr. Vallandingham, by acts and omissions,… 17. As a sole or proximate result of the aforesaid misrepresentation by the *acts* and omissions of both Beck and Ameriprise, Vallandingham entered into an agreement to purchase…23. *Ameriprise* concealed *by act* and omission…28. Vallandingham also relied upon *Ameriprise's* and Beck's *representation*…29. The acts and conduct of *defendants* acting as aforesaid were *fraudulent*." (A89-93)

B. "As is" and disclaimers are not a defense to fraud and fraudulent concealment.

Defendant argues that the "as is" clause and disclaimers in the purchase contract absolves it from responsibility for its misrepresentations and concealment. Not correct:

> In the same way that fraud is recognized as an exception to the parole evidence rule, fraud is similarly recognized to be an exception to the contractual language typically found in an integration or merger clause which seeks to limit one party's liability to the other. *See Hitachi Credit America Corp. v. Signet Bank,* 166 F.3d 614, 630 (4th Cir.1999) (recognizing that "buyer can show that a contract of sale was induced by the seller's fraud, even though the written contract contains covenants waiving warranties or disclaiming or limiting liabilities"); *see also Rubberlite, Inc. v. Baychar Holdings, LLC,* 737 F.Supp.2d 575, 582–83 (S.D. W.Va.2010) (predicting that under W.Va. law neither parol evidence rule nor integration clause in license agreement barred claim alleging negligent misrepresentations and omissions); *In re Marine Energy Sys. Corp.,* 299 Fed.Appx. 222, 229 n. 1, 2008 WL 4820128 (4th Cir. 2008) (recognizing that neither the parol evidence rule nor the merger or integration clause in the parties' contract prevents party from proceeding on tort theories of negligent misrepresentation and fraud).

Traders Bank v. Dils, 226 W. Va. 691, 696-97, 704 S.E.2d 691, 696-97 (2010)(footnote omitted).

As our Court explains, when a party is fraudulently induced to enter into a contract which he alleges caused him damages, the fulcrum of the particular fraudulent claim is the false promise made by the party inducing him to enter into the contract *not the contract he was fraudulently induced to enter into* in the first place. *Traders Bank v. Dils*, 226 W. Va. 691, 697, 704 S.E.2d 691, 697 (2010). Therefore, the "as is" and disclaimers contained in the purchase agreement the plaintiff was fraudulently induced to enter into do not insulate the defendant.[19]

Defendant argues that plaintiff did not buy a prior book of business "as is," but did buy Beck's book as is. This actually *supports* plaintiff's claim, i.e., he accepted Beck's book, "as is" because of the false assurances of Cupach. Even if not so, this is not a defense to its fraud.

C. Plaintiff is entitled to rely upon the representations of the defendant under the law.

Defendant argues that plaintiff did his own investigation and, therefore, cannot claim reliance. However, "It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of

[19] While not necessary, a careful reading of the purchase agreement also fails to insulate defendant. The clause says that the advisor releases claims from Ameriprise "related to or arising from the *negotiation* of, execution of, implementation of or performance *by any Transferring Advisor* or any obligation of the Transition Agreement." This only purports to release Ameriprise for the actions of Beck, who is the Transferring Advisor, not for the fraudulent actions of Ameriprise itself. Ameriprise did not negotiate the purchase agreement, so plaintiff is not seeking to hold Amerprise responsible for negotiation of the agreement. The statement that says the acquiring advisor has not relied upon any representation or action by Ameriprise in deciding to enter into the Succession Agreement, even if it were a defense, which it is not, only arguably applies to affirmative representations, not concealment. Finally, the agreement expressly says that Ameriprise is not a party to the agreement, yet Ameriprise seeks protection from it.

the conclusion in the plaintiff's mind, that is enough…" Syl.Pt. 6, *Cordial v. Ernst & Young*, 199 W. Va. 119, 122, 483 S.E.2d 248, 251 (1996), Syl.Pt. 3, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927). "One to whom a representation has been made as an inducement to enter into a contract has a right to rely upon it as true quoad the maker, without making inquiry or investigation to determine the truth thereof." Syl. Pt. 2, *Staker v. Reese*, 82 W.Va. 764, 97 S.E. 641 (1918). As further explained:

> The mere fact, however, that some investigation is made by the representee is usually held, particularly in the late cases, not to amount in and of itself to a bar to the right to rely upon representations. The representee who attempts investigation may have a right to rely upon the representations where expert knowledge is necessary to an effectual investigation, which knowledge is possessed by the party making the representations, and not by the other. Moreover, if the representee, instead of investigating as fully as he may, makes only a partial investigation and relies in part upon such investigation and in part upon the representations of the adverse party, and is deceived by such representations to his injury, it is held that he has a right to rely on, and may maintain an action for, such deceit. ***This rule is particularly applicable where the representations were designed to deter further investigation.*** Furthermore, the fact that one makes an examination or inquiries does not necessarily show that he did not rely on the false representations of the other party."

37 Am.Jur.2d, *Fraud and Deceit*, §237 (1968) (footnotes omitted). *Accord Lengyel v. Lint*, 167 W.Va. 272, 277, 280 S.E.2d 66, 69 (1981).

In support of its reliance argument, defendant again says it's like the plaintiff was buying a Lamborghini and defendant was the innocent bank who only lent him money to buy it and signed the title for the lien. Think about all the flaws in that statement for a minute. Here, the bank was Mr. Arnold who loaned money to plaintiff to buy the book. Ameriprise is manufacturer of the car, who knows there are serious defects in it, but doesn't tell the customer. Cupach is its car salesman, who tells the customer that the reason for the discount is low sales resulting in too much inventory, and leads the customer to purchase the car he knows is riddled with defects. Defendant's glib analogy does not hold up.

Defendant argues that it is "critical" that Cupach said to plaintiff that he did not think Beck's book of business was worth the 75,000 they were paying for it, claiming he was discouraging the plaintiff not inducing him to buy it. If so, he should have been far more explicit. At best, it says, maybe try to get it for a lower price, but obviously, given Cupach's assurances that the only reason for Beck's terminations was failing to sell enough, and assurances that is all plaintiff needed to know, reasonably led the plaintiff into thinking the reason was that Beck didn't hustle enough to maximize his book and plaintiff could.

(A2205) At best, the defendant is asking this Court on appeal to reweigh the evidence and interpret the facts and make inferences in its favor, which is not this Court's role on appeal. The finder of fact had more than enough evidence to justify the finding that plaintiff reasonably relied on Cupach's assurances in deciding to buy Beck's book. The inquiry stops there.

Defendant argues that plaintiff's questions and Cupach's misrepresentations in response were too general. Again, this is simply an argument to interpret the facts in defendant's favor. The Court was within its discretion to determine that the questions asked and the responses made were enough to mislead. The Court, as the finder of fact, understood what Cupach meant when he said what he said. Given what he knew about the ongoing and accelerated investigation of Beck, the Court knew what he said was misleading. We all know it. The defendant did its best to argue its own interpretation, as it does here, the Court just didn't buy it.

D. The duty to disclose exists under the facts, regardless of the franchisor/franchisee relationship.

Defendant claims that the Court ruled that the defendant, as a franchisor, had no duty to disclose to the plaintiff, as a franchisee. The problem with this argument is that it is not really what the court ruled, and this statement does not appear anywhere in the decision. It is, at best, misconstrued. What the court held was, "Though Cupach and Ameriprise were under no duty to disclose confidential information contained in Beck's internal compliance file, Cupach was nonetheless asked a simple question which he could have refrained from responding to, *yet he chose to answer*, and in doing so, misrepresented the status of the Beck business. The Court finds that Vallandingham relied on this misrepresentation, and *he was justified in doing so given Cupach's position at Ameriprise and his position of knowledge*. (A3060)

So the Court ruled, first, that defendant had a duty to disclose because he chose to speak and misrepresented when he did. Second, the Court ruled that Cupach, in his position as Vice President, in charge of compliance managers and in charge of plaintiff, and who had superior knowledge made it reasonable for plaintiff to rely on what he said, i.e., a position of trust. This creates a duty to speak under the law, or keep your mouth closed. At the very least, don't lie about it and lead the plaintiff to believe

that's all he needs to know. It's classic fraud and fraudulent concealment, independent of any duty of a franchisor to a franchisee, even assuming the Court had ruled as defense claims.

So while defense argues that there is no fiduciary relationship between a franchisor and franchisee, the existence of a fiduciary relationship is not the only circumstance creating a duty to disclose. Courts and jurisprudence have acknowledged that the duty to disclose material facts may arise as a result of a fiduciary *or* confidential relationship between parties, *or* from the particular circumstances of a case, and may be legal or equitable in nature. 26 Willston on Contracts §69:17 (4th ed.) (citations omitted). *See also*, 37 Am.Jur.2d, *Fraud And Deceit* § 200; 37 Am.Jur.2d, *Fraud And Deceit* §207; *Chiarella v. U.S.*, 445 U.S. 222, 100 S.Ct. 1108 (1980); *TransPetrol, Ltd. v. Radulovic*, 764 So.2d 878 (Fla. 2000); *Sowards v. Rathburn*, 8 P.3d 1245 (Id. 2000); *Vela v. Marywood*, 17 S.W.3d 750 (Tex. 2000); *Rood v. Newberg*, 718 N.E.2d 886 (Mass. 1999). "A duty to speak arises from a fiduciary *or* confidential relationship *or* where a person is, `by force of circumstances,' under a duty to speak." 26 Willston on Contracts §69:17 (4th ed.), (citing *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. 2002). ***When one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression and, regardless of the existence of a duty to disclose, a direct inquiry regarding a material fact requires a truthful answer.*** *Id.*[20]

Thus, transactional circumstances other than a confidential or fiduciary relationship give rise to a duty to disclose, and one such circumstance is the disclosure of certain facts, which, absent other disclosures, will mislead. *Id.* In discussing such half-truths, the U.S. Supreme Court stated as follows:

> A statement in a business transaction which, while stating the truth, so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation. Such a statement of a half truth is as much a misrepresentation as if the facts stated were untrue.

[20] Defendant argues that plaintiff's expert testified that there is not a fiduciary duty created strictly by the franchisor/franchisee agreement, but that is not all plaintiff's expert said. McGinnis explained that Ameriprise had a fiduciary duty to its clients, and if it had met that duty and followed FINRA reporting rules, the compliance issues would have been reported to FINRA. If defendant had, plaintiff would have seen them when he did his Broker Check. McGinnis also said that Ameriprise had a fiduciary duty to disclose to plaintiff because the compliance issues involved the clients that plaintiff was assuming in Beck's book. (A1769-70)

26 Willston on Contracts §69:17 (4th ed.) citing *Equitable Life Ins. Co. of Iowa v. Hasley, Stuart & Co.*, 312 U.S. 410, 425, 61 S.Ct. 623 (1941)). *See also* 37 Am.Jur.2d, *Fraud And Deceit* § 209; *Sparks v. Guaranty State Bank*, 318 P.2d 1062 (Cal. 1957); *American Petroleum Products, Inc. v. Mom and Pop Stores, Inc.*, 497 S.E.2d 616 (Ga. 1998); *Eisenschmidt v. Conway*, 155 P.2d 241 (Okla. 1944). It is a universally recognized exception that if one undertakes to speak, he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. *Id.* "If he speaks at all, he must make a complete and fair disclosure." *Id.*

Additionally, numerous courts have described the duty to speak arising from circumstances where a defendant possesses superior information that a plaintiff is entitled to have. 26 Willston on Contracts §69:17 (4th ed.) The possession of superior information coupled with a relationship involving a degree of trust and confidence, or the fact that the information was not reasonably available to the other party are circumstances that create the duty to speak. *Id. See also* Restatement Second, Contracts §160 (action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist). As noted in *Okland Oil Company v. Conoco*, 144 F.3d 1308, 1324 (10th Cir. 1998):

> '[i]n determining whether there is a duty to speak, consideration must be given to the situation of the parties and matters with which they are dealing.'" *Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp.,* 24 F.3d 1190, 1195 (10th Cir.1994) (quoting *Silk v. Phillips Petroleum Co.,* 760 P.2d 174, 179 (Okla.1988)). Those considerations may require either (1) an absolute positive duty to speak based on a fiduciary or similar duty, **or** (2) a duty to speak arising from a partial disclosure. *See Thrifty Rent-A-Car Sys.,* 24 F.3d at 1195. The second duty is imposed because the speaker is " 'under a duty to say nothing or to tell the whole truth. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that what is disclosed is the whole truth.'" *Id.* (quoting *Deardorf v. Rosenbusch,* 201 Okla. 420, 206 P.2d 996, 998 (1949)); *see also Varn v. Maloney,* 516 P.2d 1328, 1332 (Okla.1973); *Ragland v. Shattuck Nat'l Bank,* 36 F.3d 983, 991-92 (10th Cir.1994); Okla. Stat. tit. 76, § 3 (Deceit may be found, inter alia, by the "suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."). So even in the absence of a fiduciary or similar relationship, the duty to speak often arises. *See Ragland,* 36 F.3d at 991-92; *Uptegraft v. Dome Petroleum Corp.,* 764 P.2d 1350, 1353-54 (Okla.1988).

E. The Court's factual findings were not clearly wrong.

As found by the Court, "Clearly, there were numerous serious issues identified by Ameriprise in Beck's practice. Ameriprise was monitoring Beck for various failures to respond or provide compliance

documents as well as specific issues brought about by customer complaints. This investigation continued from the middle of 2008 until the sale of the Beck practice to Vallandingham in March 2009, and continued even thereafter." (A3050) This finding was supported by evidence and was not clearly wrong.

The Court further reasoned, "As discussed previously in this Order, prior to Cupach's misrepresentation that there was nothing more Vallandingham needed to know about the Beck business, there were numerous and various issues with Beck's business that Cupach and Ameriprise were keenly aware of. Accordingly, the Court concludes that Cupach and Ameriprise had actual knowledge of the issues within the Beck business as evidenced by the investigations of Beck's business prior to, and even contemporaneously, with the sale of the Beck business to Vallandingham." (A3059) This finding of fact was supported by the evidence and was not clearly wrong.

With further regard to the knowledge of defendant of problems with book of business, its failure to report them, and the plaintiff's due diligence, the Court reasoned:

> In fact, Ameriprise continued to investigate and/or audit the Beck business after he was terminated on January 9, 2009. The violations of the Ameriprise rules and the applicable regulatory rules all took place while Beck was still employed in 2008, but they were not reported to FINRA or reflected on Beck's Broker Check until after the business had been transferred to Vallandingham. There were eight filed complaints, four of which were filed with FINRA as U-5s, which means they were reported after Mr. Beck no longer worked for Ameriprise. These complaints were for forgeries, loans from clients, unsuitable products and unauthorized transactions. Therefore, unless Vallandingham accessed Ameriprise's confidential internal compliance file for Beck, there would have been no other way for him to independently verify Beck's compliance history. (A3059)

The Court correctly found:

> 95. Moreover, the Court concludes that, by clear and convincing evidence, Vallandingham has proven that the statement of "No" by Cupach in response to Vallandingham's inquiry as to whether there was anything else he needed to know regarding the Beck business was false and that Cupach knew it was false when he made that statement. Further, the statement was material as it induced Vallandingham into purchasing the business. (A3060)

This finding was supported by the evidence and was not clearly wrong.

With regard to the duty to disclose and reliance, the Court determined:

> 96. Though Cupach and Ameriprise were under no duty to disclose confidential information contained in Beck's internal compliance file, Cupach was nonetheless asked a simple question which he could have refrained from responding to, yet he chose to answer, and in doing so, misrepresented the status of the Beck business. The Court finds that Vallandingham relied on this misrepresentation,

> and he was justified in doing so given Cupach's position at Ameriprise and his position of knowledge. The misrepresentation was material, and Vallandingham was damaged thereby.(A3060)

The Court concluded that, because Cupach chose to speak, he had a duty to tell the truth. This conclusion is supported by long standing West Virginia law of fraud and this duty exists independent from any franchisee/franchisor relationship. The Court found that in answering, Cupach affirmatively misrepresented the state of the Beck book of business. This finding of fact is supported by the evidence and is not clearly wrong.

The Court further justified its finding of fraud:

> 97. This conclusion is further supported by the evidence surrounding the circumstances and timing of the sale from Beck to Vallandingham, including: (A) the only stated reason to Vallandingham for Beck's termination as 'failing to sell five financial plans a year,' given the multiple adverse actions taken by Ameriprise against Beck leading up to his termination, all of which were serious in their regulatory compliance implications for Beck and Ameriprise and which could have each been grounds for his termination; (B) Ameriprise declining to buy the business and expeditiously approving the sale within just two (2) days, as opposed to the typical thirty (30) days it would normally take for such an approval upon a business with this level of compliance issues and that Ameriprise was still actively investigating; and, (C) after the sale, the rather unfair reprimanding of Vallandingham when he brought to Ameriprise's attention certain compliance issues with the Beck book of business he inherited that Ameriprise was either already well aware of (unbeknownst to Vallandingham, of course), or should have been aware of, and instead of supporting Vallandingham and his new clients (whom, it should be reiterated, were Ameriprise customers all along, whether with Beck or with Vallandingham), Ameriprise essentially told Vallandingham to stop trying to help these people and instead concentrate on finding ways to sell them more financial products. (A3060)

Defendants never admit to fraud. Instead, fraud can be inferred from all the circumstances surrounding the transaction, including the defendant's knowledge and conduct before and after the sale. The Court's findings were not an abuse of discretion or clearly wrong.

F. The evidence the Court considered was relevant to the issues in the case.

Defendant argues that the Court incorrectly admitted evidence and allowed the plaintiff to prosecute a negligence claim as fraudulent concealment, claiming almost all of the evidence had nothing to do with fraudulent concealment and should not have been admitted. Not so. The Court was correct to admit and consider the evidence it considered. The evidence defendant claims was "post-transaction" actually was evidence of compliance issues that occurred prior to, existed prior to, a*nd that defendant knew of and was actively investigating* prior to the sale of the book of business to plaintiff, and should

have disclosed to the plaintiff instead of leading him to the opposite conclusion. The information only came to the attention of the plaintiff after the sale because defendants failed to make timely mandatory reports of compliance issues to regulatory body FINRA, despite regulatory requirements, which if properly reported would have been accessible by the plaintiff prior to the sale. Defendant did not make any of those mandatory reports until after the sale, for conduct it knew about long before the sale.

Therefore, all of the evidence considered was relevant to defendant's knowledge of problems, and its failure to disclose and concealment of that information, which was directly relevant to plaintiff's fraud and fraudulent concealment claims. The supposed "post transaction matters," prior class action, FINRA violations, litigation and regulatory issues, and testimony from plaintiff's expert regarding the same, were all relevant to and related to pre-sale problems with the book of business of which defendant was aware, but failed to disclose or tell the plaintiff. In addition, the fall out, consisting of complaints of customers, regulatory fines and substantiated FINRA violations, are also relevant to what plaintiff had to deal with after he purchased the bad book of business, including relevant to him trying to mitigate damages for his customers and himself, which took time away from his ability to generate income, and relevant to the damage to his business reputation from being lumped in with the sins of the defendant. The Court did not abuse its discretion in admitting it.

G. The Court made a determination of damages that was supported by the evidence and not clearly wrong, based upon error of law, or an abuse of discretion.

In discussing damages for lost profits, the W.Va. Supreme Court explained: "[D]amages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." *Cell, Inc. v. Ranson Invs.*, 189 W. Va. 13, 16, 427 S.E.2d 447, 450 (1992) citing and adopting Restatement (Second) of Contracts § 352 cmt. b (1981). The Court weighed the factual evidence of damages and determined, within it is discretion:

> 98. Vallandingham was clearly damaged by Ameriprise's misrepresentations and concealments by purchasing the Beck book of business and being responsible for dealing with those clients, when, had he known the extent to which he would have to be dealing with those clients and cleaning up Beck's violations, Vallandingham would have never gone through with the purchase. (A3061)

> 99. The Court further finds and concludes that, to a reasonable degree of certainty, Vallandingham has incurred financial damages as a proximate result of being fraudulently induced to enter into the contract to purchase the Beck business. (A3061)

In weighing the evidence of the amount of damages, the Court explained:

> 100. Ameriprise called Paul Taylor as an expert to rebut Vallandingham's damage expert, Ross Dionne. Mr. Taylor testified that the damages in the tort claim could not properly be calculated by calculating lost profits, but rather, that the appropriate measure of damage is the difference in price between what Vallandingham paid and what he would have paid - at a lower price - had he known about the "unfavorable activity" that was going on in the Beck book of business. Tr. Day 9, at 28. The Court finds Mr. Taylor's opinions not helpful because calculating lost profits by the method Mr. Dionne used is appropriate, and those damages are recoverable in tort. Essentially, Mr. Taylor is offering the Court only his opinion of the law. Syl. Pt. 5, *Jackson v. State Farm,* 215 W.Va. 634 (2004); *Hardman Trucking, Inc. v. Poling Trucking Co*., Inc., 176 W.Va. 575 (1986); *Cell, Inc. v. Ranson Investors*, 189 W.Va. 13 (1992);[21] *Given v. Field*, 199 W.Va. 394 (1997). (A3061)

The Court did an exceptionally detailed analysis of the damages assessment of Ross Dionne, nearly three pages of the order. (A3053-55) This is something a jury never does, so it is not required, but nevertheless, the order provides clear support for the finding of facts the Court made on damages. Remember that defense economic expert did not take issue with Mr. Dionne's calculations. The Court was within its discretion as the finder of fact to determine that the lost profits assessment of Dionne better reflected the damages sustained by the plaintiff.

Defendant makes a one sentence statement that emotional distress damages are not available in a fraud claim as a matter of law, citing an out of state case, or are only available if the tortfeasor acts willfully or maliciously, citing another out of state case. However, *West Virginia* awards emotional distress damages in fraud cases, same as any other case and does not require any particular showing of willful or malicious conduct. *See Miller v. Miller,* 613 S.E.2d 87, 91 (W. Va. 2005) (stating "that damages recoverable in fraud actions may include pain and suffering, punitive damages, and annoyance and inconvenience"). To the extent that intentional conduct were required, the Court found fraud and concealment, which are intentional torts, so an emotional distress award can be awarded under those circumstances.

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[21] Defense cites *Cell* for the proposition that factual findings on damage awards are reviewed de novo. *Cell* does not say this. Thus, damage findings are reviewed under a clearly wrong standard, like any other fact findings.

V. CONCLUSION

One of the most senior judges in West Virginia made findings of fact in a full bench trial, and supported those findings in detail in a 31-page order, even though, when sitting in for a jury, this detail would not have been necessary. The Court properly weighed the evidence and made findings of fact that are supported by evidence in the record that were not clearly wrong. On appeal, the defendant is required to show that the Court's factual findings were clearly wrong. Instead, the defendant picks its favored interpretation of select evidence, ignores other evidence, and argues that this Court should reweigh the evidence essentially *de novo* and make different findings of fact in its favor. This is not the Court's role on appellate review. As such, defendant has failed to meet its heavy burden on appeal.

WHEREFORE, the plaintiff/respondent, Charles Vallandingham, respectfully requests that the Court's order be affirmed.

CHARLES VALLANDINGHAM,
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CERTIFICATE OF SERVICE

I, Kelly Elswick-Hall, do certify that on November 22, 2024, I served the foregoing "Brief of Respondent" using the E-Filing system upon:

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