

IN THE SECOND JUDICIAL DISTRICT COURT-FARMINGTON
OF DAVIS COUNTY, STATE OF UTAH

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STATE OF UTAH,)
)
Plaintiff,)
)
vs.) Case No. 111701135 FS
)
ANDRUS ESQUIVEL,)
)
Defendant.)
-----)

Remanded Preliminary Hearing
Electronically Recorded on
March 21, 2012

BEFORE: THE HONORABLE MICHAEL G. ALLPHIN
Second District Court Judge

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P R O C E E D I N G S

(Electronically recorded on March 21, 2012)

COURT CLERK: No. 24, State of Utah vs. Andres Esquivel
case No. 111701135, set for remanded preliminary hearing.

THE COURT: Counsel, are you ready?

MR. LYON: Yes, your Honor.

MR. HOLJE: Yes, your Honor.

THE COURT: Call your witness.

MR. HOLJE: Your Honor, before we get started, the
State would like to invoke the exclusionary rule.

THE COURT: Counsel on either side, if you have
witnesses other than the officer that is going to assist
Counsel, any potential witnesses, we'd ask them to step aside,
please not talk about the case amongst themselves either before
or after their testimony.

MR. LYON: Your Honor, I do -- I have --

THE COURT: You all know who you've got. So if you
would just direct them, I'd appreciate it.

MR. LYON: Just for the record, I've got three victims
that will be present, my lead investigator and then our expert,
that I think are entitled to stay under the rule.

MR. HOLJE: Your Honor, with -- I don't have any
witnesses to call today. For the Court's information --
Justin, if you want to stand up -- your Honor, if I could
introduce Justin Pratt. He's a new member of the bar. He's

1 my mentee under the Bar's new lawyer mentoring program --

2 THE COURT: Uh-huh.

3 MR. HOLJE: -- and he's required to observe, so --

4 THE COURT: You can have him come up and sit behind
5 you there if you'd like.

6 MR. HOLJE: That would be great. Thank you, your
7 Honor. Other than that, Steve Burton is a member of the Bar.
8 He works with Justin Pratt. I don't have any --

9 THE COURT: Okay.

10 MR. HOLJE: -- issue with him being here either.

11 THE COURT: Let's go ahead, then, Mr. Lyon.

12 MR. LYON: Okay. Your Honor, just as a very brief
13 opening statement, just to lay a little foundation for your
14 Honor --

15 THE COURT: Go ahead.

16 MR. LYON: -- this is a securities fraud case, and
17 we're going to be hearing from three of the individuals who
18 invested in the company which the defendant (inaudible), which
19 was called "X-Tag." We also have the Investigator Sweet, who
20 performed some of the investigation.

21 We also have Tom Brady, who is our expert, who I think
22 will be able to shed a little bit of light for the Court, I'm
23 hoping, as to the securities, and why this falls within the
24 parameters of the security, given that this is not what we
25 generally see in our normal practice; but I think we'll proceed

1 with that, your Honor.

2 THE COURT: Okay.

3 MR. LYON: State calls Kyle Cluff.

4 THE COURT: Sir, if you'd just --

5 MR. LYON: Stop right there. Stop right there.

6 COURT CLERK: You do solemnly swear that the testimony
7 you are about to give in the case now before the Court will be
8 the truth, the whole truth and nothing but the truth, so help
9 you God?

10 THE WITNESS: Yes.

11 THE COURT: Thank you. Now you can please have a seat
12 at the witness stand. Go ahead.

13 KYLE CLUFF,

14 having been first duly sworn,

15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LYON:

18 Q. Mr. Cluff, could you please state your name, spelling
19 your last name for the record.

20 A. Kyle Cluff, C-l-u-f-f.

21 Q. Mr. Cluff, do you reside in the Davis County area?

22 A. I do not.

23 Q. Is it Weber County?

24 A. Yes.

25 Q. Okay, and are you employed right now?

1 A. I am.

2 Q. Okay, where do you work?

3 A. I work at McKay Dee Hospital.

4 Q. You're also going to school?

5 A. Yeah, I'm a full-time student at Weber State.

6 Q. What are you studying?

7 A. I am a senior. I'm Athletic Therapy, and getting
8 ready to apply for my graduate school in Health Administration.

9 Q. Okay, now Mr. Cluff, have you been previously employed
10 at Anytime Fitness?

11 A. I have.

12 Q. Were you so employed at the Bountiful location back in
13 February of 2008?

14 A. I was.

15 Q. What were your responsibilities there?

16 A. I was a personal trainer/manager of the gym.

17 Q. While you were so employed, did you have an occasion
18 to come in contact with an individual by the name of Andres
19 Esquivel?

20 A. I did.

21 Q. Okay, that's the defendant sitting next to Mr. Holje?

22 A. Yes, sir.

23 Q. Could you tell us when that occurred?

24 A. That was in February of 2008.

25 Q. What were the circumstances in which you came in

1 contact with him?

2 A. I came personally in contact with him under the
3 impression of him buying a personal training package from the
4 gym.

5 Q. Was someone -- did someone instruct you to speak with
6 Mr. Esquivel?

7 A. Yes.

8 Q. Who was that?

9 A. The gym manager.

10 Q. Tell us about the conversation you had with the
11 defendant.

12 A. That I did, or that the gym manager did?

13 A. That you did.

14 Q. Well, the defendant was in the owner's office, as
15 I walked in, explaining about his Internet company. He was
16 talking about the government giving him money for startup
17 costs, about his soon-to-be appearance on the Oprah Winfrey
18 show, how MySpace tried to buy it for 5 million but he
19 declined.

20 Q. Did he explain what his company is?

21 A. He did.

22 Q. Can you tell us what he explained to you as?

23 A. He said his company was an Internet company that
24 would keep pedophiles and rapists off of the Internet, and
25 keep them from coming in contact face-to-face with children

1 or adolescents.

2 Q. Did he tell you what the name of his company was?

3 A. He did.

4 Q. What was that?

5 A. X-Tagged.

6 Q. Did he explain what the purpose of X-Tagged was?

7 A. To keep the Internet safe.

8 Q. Now, I recognize you said that he was going to help
9 keep people safe. Did he explain how that was going to work?

10 A. He did. He stated that X-Tagged used license plates
11 to verify individuals; and so, for example, if somebody was on
12 MySpace and they were talking to an individual, X-Tagged would
13 be a company that a person would take a picture touching their
14 license plate, and he said to me that if they touch someone
15 else's license plate, that would be a felony same as if you
16 opened somebody's mailbox and took their mail.

17 So I touch on their license plate. It identified them
18 as who they are. So if someone's on MySpace talking to a -- to
19 a young girl, and they want to meet face-to-face, and she said,
20 "Are you X-Tagged?" she could then go see if he's on X-Tagged
21 and if he's verified, see what he looks like, see what his
22 license plate is, so when they meet face-to-face she can know
23 what to expect, know what car to see him driving up in, and
24 have him be verified.

25 Q. Now, was this supposed to be some sort of social

1 networking site?

2 A. Yes.

3 Q. At the time was he looking for investors in the
4 company?

5 A. He didn't specify.

6 Q. Had he indicated whether he had already received money
7 from any sources?

8 A. He did. He said the government gave him \$2,000,000
9 for startup costs.

10 Q. For the company?

11 A. For the company.

12 Q. Did he indicate whether he was going to be going in
13 television promoting this?

14 A. He did. He said he had already appeared on the Maury
15 show. That he was signing autographs and his lawyer made him
16 stop because their paperwork wasn't fully done, and that in six
17 month's time he would be on the Oprah Winfrey show.

18 Q. Now, on that first occasion that you came into contact
19 with him, was there any offering as to investment in the
20 company?

21 A. He told me what the stock price was.

22 Q. Which was what?

23 A. One dollar per share.

24 Q. Was there any minimum investment?

25 A. Yes, he did say you had to invest over \$500. That was

1 the cost of the paperwork for his lawyer to process.

2 Q. Did he make any indication whether the company had
3 plans to go public?

4 A. He did. He did say once it went public, immediately
5 it would be upwards in the 30 to \$40 per share, and that within
6 a relatively quick time it would surpass Google with their
7 stock, which was currently at 500 plus per share.

8 Q. Did he explain how the stock was going to be I guess
9 realizing those sorts of gains?

10 A. He did not.

11 Q. Did he indicate whether X-Tag was patented?

12 A. He did tell me it was patented.

13 Q. Did he tell you how much time was on the patent?

14 A. He did say it was a 20 year patent, and they had 18
15 years remaining.

16 Q. Had he received -- did he tell you whether he had
17 received any cooperation from the Utah Government Division of
18 Motor Vehicles?

19 A. He had stated that they are in process to link X-Tagged
20 with the DMV, to once again verify that they are the owner of
21 that -- of that car that they're taking a picture with.

22 Q. Did he indicate to you whether he had received any
23 offers to buy the company?

24 A. He did. He said that MySpace offered him \$5,000,000
25 for the company.

1 Q. Did he tell you whether he had accepted or declined
2 that offer?

3 A. He said he declined it.

4 Q. Did he give a reason why?

5 A. He did. He said that MySpace declined it for the
6 purpose that they would not use it. MySpace, for example, has
7 multiple individuals on there that have fake profiles. So if
8 X-Tagged were to be invented and be used, it would take away
9 from their amount of people, which would take away from the
10 price of advertising that they would receive. So he said that
11 they would take it and sweep it under the rug. So he was not
12 going to allow that to happen.

13 Q. Now, tell -- give us the context in which this whole
14 conversation took place while you're speaking with him.

15 A. I was trying to sell him personal training at the gym.

16 Q. Okay, and did you in fact, I guess, sign him up? Is
17 that how you would characterize it? Did you sell him any
18 personal training plans?

19 A. He agreed to buy a fairly big plan. He stated, though,
20 that his days are very busy. He's with lawyers and in and
21 out of meetings. That he needed somebody to train him about
22 2 o'clock in the morning; and he said he would train three
23 times what I'm asking if that -- if we could get somebody
24 there. I said we could not, you know, appease that request.

25 Q. So this conversation with him talking about your

1 company is taking place at the same time that you were trying
2 to sell him on personal training and fitness plans?

3 A. Correct.

4 Q. After this initial conversation did you make any
5 decisions as to whether to invest in X-Tag?

6 A. No.

7 Q. At some point did you make a decision to invest?

8 A. I did.

9 Q. Tell us when that happened.

10 A. It was -- I believe it was Monday after that weekend I
11 gave him a call and asked if the stock was closed or open.

12 Q. Okay, and what was his response?

13 A. He told me to hold on for a second and he asked whom-
14 ever he was driving with, he said, "Is the stock closed or
15 open?" They said, "It's still open," and he said, "Yes, it's
16 still open." Then so I told him I would like to purchase some
17 shares.

18 Q. How many shares did you want to purchase?

19 A. I told him I had \$4,000, so that would be the
20 equivalent of 4,000 shares.

21 Q. Did you in fact write out a check for \$4,000 to X-Tag?

22 A. I did.

23 Q. When did that happen?

24 A. That was I believe in March.

25 Q. To whom did you give the check?

1 A. I gave it to his associate, John.

2 Q. Did you receive anything in exchange for that?

3 A. I received a convertible promissory note.

4 Q. I'm sorry, tell me when -- when all of this oc --
5 roughly when all of this occurred.

6 A. This was in March.

7 Q. Now, at some time after March did you decide you
8 wanted to invest further in X-Tag?

9 A. I did. Even in March I wanted to invest more, but
10 that's all the money I had.

11 Q. Okay, and so at some point later did you in fact
12 invest further?

13 A. I did. Mr. Esquivel called me I believe in May, told
14 me that there was a percent that had opened up and wanted to
15 know if I was interested in purchasing it.

16 Q. What did you tell him?

17 A. I asked him how much, and he told me it was \$50,000
18 for 1 percent.

19 Q. Did you in fact give him \$50,000?

20 A. No, I told him I'm not wealthy enough for that.

21 Q. Okay, did you invest any further money, then?

22 A. I did. He texted me a few days later and said that
23 they discussed it, and I could have it for \$20,000. So I
24 called him, and I said, "I don't have that money either."
25 Then he came up with a solution, saying if I could come up

1 with \$10,000, he would then credit -- the other \$10,000, he
2 would then finance it himself.

3 Q. Okay, and tell us, how would you come up with \$10,000?

4 A. So he took my \$4,000 of the shares that I bought,
5 and he said he would convert that to the \$10,000. He paid me
6 \$2,000 for the diet plans and the personal training that I was
7 emailing him over several months. Then he also -- I gave him
8 another check for \$2,000, and he took my Chevy Cavalier, which
9 had a broken engine, and said if I gave him the title he would
10 credit that for \$2,000, which totals a monetary amount of
11 \$10,000.

12 Q. At that time did you execute a second document to
13 memorialize the purchase of additional shares and the agreement
14 that you've just explained?

15 A. I did. He took my promissory note for the shares
16 back, and in return gave me a document for 1 percent of the
17 company.

18 Q. You didn't -- did you keep a copy at all of that first
19 -- that first promissory note?

20 A. No, I did not.

21 Q. Okay, now -- now, Mr. Cluff, I'm showing you what's
22 previously marked as State's Exhibits looks like 1 and 3.
23 Could you tell us what these are?

24 A. Yeah, these are the two checks that I made out to
25 X-Tagged Incorporated.

1 Q. That's Exhibit 1.

2 A. Exhibit 1 is the \$2,000 I gave for the 1 percent
3 ownership.

4 Q. Okay.

5 A. And Exhibit -- is this two?

6 Q. No, this is just one exhibit.

7 A. Okay, yeah, the first one is the 4,000 shares. The
8 second check is the extra 2,000 I gave in the end of May, June.

9 Q. I'm showing you what's been marked as Exhibit 3. Do
10 you recognize that?

11 A. I do.

12 Q. What is it.

13 A. It is a copy of my contract that Mr. Esquivel gave me
14 after I gave him the monetary money that I had just described.

15 Q. Is it the second promissory note you're talking about?

16 A. Yes.

17 Q. Pointing your attention to the very last page, there
18 is -- most of this is a typed contract, and on the last page
19 there's some handwriting. Could you explain to us what that is
20 about?

21 A. Yes, Mr. Esquivel wanted me to meet him at Bogie's,
22 which is a nightclub, I believe it's Clearfield. I don't go to
23 nightclubs, so I told him I would meet him in the parking lot.
24 In the parking lot he wrote the terms of our agreement. He
25 said that -- he gave me \$2,000 for the gym and diet. I gave

1 him \$6,000 in cash. Then for the title of my Cavalier he gave
2 me another \$2,000. Then on the bottom he says that he financed
3 the rest by him, and X-Tagged for the other \$10,000.

4 Q. Okay, so if I'm adding this up correctly, the 2,000
5 were the diet gym plans, the 6,000 representing the first
6 4,000, plus the second 2,000, and then \$2,000 for the title
7 to your Chevy Cavalier?

8 A. That's correct.

9 Q. Okay, \$10,000.

10 MR. LYON: State moves to admit Exhibits 1 and 3.

11 MR. HOLJE: No objection.

12 THE COURT: Thank you. I'll receive them.

13 (Exhibit Nos. 1 and 3 received into evidence)

14 Q. BY MR. LYON: Now, at any point in time was there a
15 conversation about -- we understand that you invested in X-Tag.
16 Was there any conversation between you and the defendant about
17 being able to get your money back?

18 A. Yes. Even on the promissory note that I initially
19 bought with the shares, he said that if the company did not
20 take off as he expected it to, we could receive our money back,
21 plus 3 percent interest in my case, by December of 2009. So
22 he, in other words, said, "You're putting it in a bank, and
23 with a good interest plan. You'll get it back if it doesn't
24 work."

25 Q. Did you subsequently try to get that money back?

1 A. I did multiple times.

2 Q. Were you successful in doing so?

3 A. No.

4 Q. In that contract it references being able to call due
5 the note at -- or after December 31st, 2009. Did you try to
6 call due the note after that date?

7 A. I did multiple times.

8 Q. In your dealings and discussions with Mr. Esquivel did
9 he ever tell you about a judgment of \$3,075.62 that he received
10 against him in 2003?

11 A. He did not.

12 Q. Did he tell you about a judgment of \$5,597.60 in 1999?

13 A. He did not.

14 Q. Did he tell you about a judgment against him for
15 \$1,537.69?

16 A. He did not.

17 Q. Did he ever tell you whether this was a -- X-Tag was a
18 Utah business?

19 A. He did not.

20 MR. LYON: Nothing further, your Honor.

21 THE COURT: Thank you. Counsel.

22 MR. HOLJE: Thank you.

23 CROSS EXAMINATION

24 BY MR. HOLJE:

25 Q. Okay, Mr. Cluff, just before I forget to ask this,

1 because it's relevant to the charges in the Information, did
2 any of the money that you provided to Mr. Esquivel come from a
3 retirement account?

4 A. No.

5 Q. Your own retirement account?

6 A. No.

7 Q. Did any of this money come from equity in your home?

8 A. No.

9 Q. Okay, just personal savings?

10 A. Yes.

11 Q. Okay. All right, so is it your testimony Mr. Esquivel
12 told you to your face he's the owner of X-Tag?

13 A. Yes.

14 Q. At any point did he use the word "stock"? We've
15 talked about shares here. You've mentioned shares. He never
16 mentioned the word "stock," though, right?

17 A. It was quite a long time ago. I don't recall.

18 Q. Okay. Your own assumption is that you were buying
19 stock?

20 A. That's what I was assuming, yes.

21 Q. Okay. All right. You told us you gave your money to
22 an individual named John?

23 A. Uh-huh, that's correct.

24 Q. You didn't give it to Mr. Esquivel, right?

25 A. No. Mr. Esquivel told me to give it to John. He

1 would be coming to the gym to pick it up.

2 Q. Okay, did John have a last name, that you're aware of?

3 A. I believe it was John Steere, I believe.

4 Q. Okay, had you ever met John Steere before?

5 A. I haven't.

6 MR. LYON: Your Honor, if I could just interject. I
7 believe, Counsel, you're talking about the first instance, not
8 the second?

9 MR. HOLJE: I'm talking --

10 MR. LYON: Just so we're clear on the record.

11 MR. HOLJE: Thank you. That's a useful clarification.

12 Q. BY MR. HOLJE: The first time you gave any money to X-
13 Tagged, was that to an individual named John??

14 A. Yes.

15 Q. Okay, and in return for this -- which was \$4,000 at
16 the time, right?

17 A. That's correct.

18 Q. In return for the \$4,000 he gave you what?

19 A. A convertible promissory note.

20 Q. Okay, so the initial time was a convertible promissory
21 note, and subsequent when extra money was added, you were given
22 a second convertible promissory note; is that right?

23 A. A 1 percent document, yeah, of ownership in the
24 company.

25 Q. Okay. All right, so that we're clear, I'm not trying

1 to trick you --

2 A. Yeah.

3 Q. -- are both documents that we're talking about
4 convertible promissory notes?

5 A. To my knowledge. I'm not a legal expert.

6 Q. Okay, did it say that on the top of it?

7 A. On the top of it, it says 1 percent owner of X-Tagged.

8 Q. Okay, but you -- do you have a copy of that anywhere?

9 A. It's with the Judge, I believe.

10 Q. Okay. All right, thank you.

11 MR. HOLJE: Okay, if I may approach, Judge.

12 THE COURT: Yes.

13 Q. BY MR. HOLJE: Does this document that we're looking
14 at, marked as Exhibit 3, does it have a title to it?

15 A. Yes.

16 Q. What does it say?

17 A. "Convertible promissory note."

18 Q. Is this what you were given?

19 A. Yes.

20 THE COURT: You can just leave it right there, in case
21 either one of you want to use it.

22 MR. HOLJE: Okay, thank you. Thank you, your Honor.

23 Q. BY MR. HOLJE: Your decision to give any money was
24 influenced by the representation of an attorney about the value
25 of X-Tagged shares; is that right?

1 A. That was for the 1 percent, yes.

2 Q. Okay. Tell us about that.

3 A. I received an email. I believe it was from-- forwarded
4 to me by Jason web, who worked at Advantia; and they said on
5 their last current valuation 1 percent of X-Tag was worth
6 \$50,000.

7 Q. Okay, is Mr. Webb the attorney that you're talking --

8 A. Yeah, that's who I talked to initially when I got my
9 shares.

10 Q. Okay, and then it was based on that representation
11 that you decided to invest, right?

12 A. Of course.

13 Q. Not based on what Mr. Esquivel told you at the gym,
14 right?

15 A. No, it was based on both.

16 Q. Okay, but you hadn't given any money prior to --
17 excuse me, let's clarify that. That representation was given
18 to you when by Mr. --

19 A. That was when we were in the discussions of buying the
20 1 percent.

21 Q. Okay.

22 A. Before I had given any money.

23 Q. Okay, thank you. Then based on some very special
24 arrangements that Mr. Esquivel and you made, you decided to
25 give him money for 1 percent, right?

1 A. That's correct.

2 Q. It's your understanding that this was for ownership in
3 the company, right?

4 A. Yes.

5 Q. Okay, do you consider yourself an owner of X-Tagged?

6 A. Not at all.

7 Q. Did you at any point consider yourself an owner of
8 X-Tagged?

9 A. I did. I tried to execute that, with no -- no
10 success.

11 Q. Okay, what do you mean you tried to execute?

12 A. I would try to give ideas, ask questions. Anytime
13 I asked a question that was -- that the defender could -- the
14 defense couldn't answer, he would use explicit language with
15 me, get angry with me, tell me to get a lawyer, "You're not
16 going to see your money."

17 Q. You worked pretty closely with Mr. Esquivel for two
18 years on X-Tagged business; is that right?

19 A. That's correct.

20 Q. Okay, in an effort to make it profitable, right?

21 A. Yeah, to see some sort of return.

22 Q. Okay, tell us what your role was specifically.

23 A. I had no role, I had no title. I was just a 1 percent
24 owner.

25 Q. Okay, a 1 percent owner?

1 A. Uh-huh.

2 Q. Did you go to meetings with him, or --

3 A. I tried to set up a few meetings, but I never attended
4 any.

5 Q. Okay, so these ideas that you're presenting for X-Tag,
6 those were presented how and when?

7 A. I would -- for one example I met -- I got in contact
8 with Isafe.org, which is an Internet safety company out of
9 California, and I tried to set up a meeting for Mr. Esquivel
10 multiple times, and finally he attended. I just tried to push
11 the company forward. He seemed hesitant. He wanted to stay
12 in the same level, as if it was comfortable, and none of his
13 promises came to fruition. So I was trying to enable it to
14 happen.

15 Q. Okay. Okay, back to -- well, sorry, did you ever at
16 any point attempt to convert your convertible promissory note
17 into shares of stock?

18 A. No, I did not. The company never went public.

19 Q. Okay. You never at any point received a stock
20 certificate, right?

21 A. No.

22 Q. Your evidence of ownership in the company is solely
23 based on a convertible promissory note?

24 A. That's correct, and his recognition, well, I was on
25 good terms with him.

1 Q. Okay. All right, in that convertible promissory
2 note that you signed, was there language about risks involved
3 with --

4 A. None. It was all positive.

5 Q. There was no language about risk?

6 A. There was no risk.

7 MR. HOLJE: Okay. Your Honor, if I could approach?

8 THE COURT: Go ahead.

9 MR. HOLJE: Do you still have that up there?

10 Q. BY MR. HOLJE: I'm referring to State's Exhibit 3. Is
11 this your signature on page 8 of that document?

12 A. It is.

13 Q. Okay, did you read the document before signing it?

14 A. I did not.

15 Q. You didn't read it?

16 A. Uh-uh.

17 Q. Okay. Page 6 mentions representations and warranties
18 of the holder; is that correct?

19 A. Yes.

20 Q. Okay. I'll give you a second to review paragraph 18
21 of that document.

22 A. (Witness reading document).

23 Q. Have you had an opportunity to review that?

24 A. I did.

25 Q. Okay, is there anything in that paragraph that talks

1 about risks associated with this -- what we're calling an
2 investment for purposes of today?

3 A. It does say "the holder is capable of evaluating the
4 risks and merits of this investment."

5 Q. Okay, talk about based on your financial and business
6 experience?

7 A. Uh-huh.

8 Q. Okay. Does it say that you could suffer a complete
9 loss of your investment?

10 A. Not that I can see. I could be missing it, though.

11 Q. You may need to continue onto the next page.

12 A. It's the next page? Okay. Yeah, it does mention it.

13 Q. Okay, Mr. Cluff, the document that you signed, doesn't
14 it say that it's a highly speculative investment and involves a
15 high degree of risk?

16 A. It does.

17 Q. Okay, and you signed that, right?

18 A. I did.

19 Q. Okay, and again, if you already answered this, I
20 apologize. You did nothing to convert the promissory note
21 into anything other than a promissory note?

22 A. I never had an opportunity nor any -- any question to
23 do so.

24 Q. Okay, no inclination or anything?

25 A. None.

1 Q. Okay. You talked about some value for personal
2 training and dieting, right?

3 A. Yes.

4 Q. Mr. Esquivel never actually did any personal training,
5 did he, at Anytime Fitness?

6 A. No.

7 Q. Okay. Is it your testimony, then, that \$2,000 of your
8 10,000 total was based on diet plans that you prepared for him?

9 A. It was diet plans and specific exercises that I would
10 email him --

11 Q. Okay, so --

12 A. -- in his preparation to be on Oprah.

13 Q. Okay, so based on a number of emails, you believe you
14 earned \$2,000 from him, right?

15 A. I didn't charge. He came up to me and said, "I will
16 give you \$2,000 to go towards this 1 percent," and I agreed. I
17 said, "Okay."

18 Q. Okay, in essence a credit, right?

19 A. Yeah, he would credit it to the \$10,000 --

20 Q. Credit the 2,000.

21 A. -- for the 1 percent.

22 Q. Okay, you never, say, invoiced him for \$2,000 worth of
23 work? You never gave him a bill for --

24 A. No, I never, and I was doing it just to help out a
25 fellow employee. He came to me and said, "Since you've done

1 this, I will give you this much money."

2 Q. Okay. Out of the kindness of his heart, essentially?

3 A. Well, I guess so.

4 Q. All right. With respect to the title to your Chevy

5 Cavalier --

6 A. Uh-huh.

7 Q. -- 1998 Chevy Cavalier, right?

8 A. Yes.

9 Q. And this was in 2009, right, that this was going on?

10 A. In 2008.

11 Q. Excuse me, 2008. So the car would have been ten years
12 old then, right?

13 A. Yes.

14 Q. Okay. A ten-year-old Chevy Cavalier, and you told us
15 the engine didn't work; is that right?

16 A. Yeah, as I told Mr. Esquivel, yes.

17 Q. Did the engine even exist? Was there an engine --

18 A. It was in there, yeah, just --

19 Q. It didn't work?

20 A. -- didn't feel too good, yeah.

21 Q. Car was inoperable, right?

22 A. Yes, sir.

23 Q. Okay. All right, as far as the value of that car, did
24 you guys sit down and look it up or --

25 A. No, he stated that his lawyers just need collateral,

1 and he would give \$2,000 for that title.

2 Q. Okay, again, a number that Mr. Esquivel just chose on
3 his own, right?

4 A. He stated it to me, and I said, "Of course."

5 Q. Okay. All right, and with respect to efforts to get
6 your -- again, what we'll call an "investment" for purposes of
7 today. With respect to getting your investment back, you told
8 us you tried several times?

9 A. Yes.

10 Q. Would you elaborate on that, please.

11 A. In what regards?

12 Q. How did you try to get it back?

13 A. Phone calls, multiple emails. I spoke with a lawyer.
14 Told me to write an email stating the provision that it says
15 that I can receive it back by December 31st of 2009. I wrote an
16 email asking just for the amount back.

17 Q. These are emails to who?

18 A. Mr. Esquivel.

19 Q. Okay, do you have those emails still?

20 A. On my account I do.

21 Q. Did you provide them to Mr. Sweet, the investigator in
22 this case?

23 A. I don't believe so.

24 Q. Okay. Take -- I'm not -- take a guess, how many times
25 did you -- did you try?

1 A. Between five and ten.

2 Q. Okay, and they were all by email?

3 A. Yes.

4 Q. Did you receive responses to any of these emails?

5 A. I received a few saying -- you know, attacking my
6 religion and using explicit language towards me saying I won't
7 -- I won't see it back. Get a lawyer.

8 Q. Okay, and those were emails that you didn't see fit to
9 present to the investigator in this case?

10 A. I may have presented. It was quite a long time ago.
11 I don't think I was asked for them either.

12 Q. Haven't you been approached by individuals requesting
13 to pay you back this money?

14 A. To me personally? Not to me personally.

15 Q. You've never been approached about repayment of your--

16 A. I have heard rumors of them speaking to the other two
17 gentlemen that they wanted to buy us out; and we had given them
18 time frames and the amounts, and nothing ever materialized.

19 Q. Okay, no personal contact from a Steve Klemark?

20 A. No, not to me.

21 Q. Or an Alan Brady?

22 A. Not to me.

23 Q. Or a Shar Jenkins or --

24 A. No, not to me. They were, according to the other two--

25 THE COURT: Just tell me what you know personally.

1 THE WITNESS: What I know personally is that they told
2 Ryion --

3 THE COURT: No, no, no.

4 THE WITNESS: Oh, sorry.

5 Q. BY MR. HOLJE: What you know.

6 A. Oh, no, I didn't. They never contacted me.

7 Q. Okay. Didn't you approach Mr. Esquivel in an email
8 one time asking for \$90,000 in return?

9 A. I did.

10 Q. Okay, and that was based on your investment of \$6,000
11 cash, right?

12 A. Yeah, that was based on multiple things. It was based
13 on the amount that he said he sold the company for three or
14 four months prior, that I had not received any payment for. So
15 he was asking for my buyout.

16 Q. Okay, and nothing in writing that you're aware of
17 entitling you to \$90,000 or anything?

18 A. With my calculation, it was my buyout. He did say
19 to me on the phone -- I said, "I need the money. I need to
20 be bought out," and he said, "Well, I could probably get you
21 \$90,000, you know, by tomorrow or the next day; but if you hang
22 onto this, it would be worth a lot more." So that email was
23 referring to the conversation we had, "I'll take the \$90,000,
24 and you know, you can buy me out."

25 Q. You mentioned that Mr. Esquivel never told you affirm-

1 atively that X-Tag was a Utah business, right?

2 A. Not that I recall.

3 Q. Did he mention that it was a Wyoming business?

4 A. No, he did not.

5 Q. That it was a business incorporated in any state at
6 all?

7 A. No.

8 Q. Have you subsequently learned -- or I mean, in the two
9 years that you worked closely with him did you learn whether or
10 not it was incorporated in any state?

11 A. It was -- I didn't -- not from his voice. No, not
12 from his mouth. I had assumed it was, because it's X-Tag
13 Incorporated he said he invented in Utah. So that's my
14 assumption.

15 Q. Okay, but working as a certain percent owner of X-Tag,
16 you never looked to see whether it was in fact a real company
17 or not?

18 A. I didn't, nor did I have the opportunity. He never
19 gave me any -- any ability to look over the records or the
20 finances or any part of that dealings.

21 Q. Just finally, with respect to -- let's go back to
22 the very beginning when you had a conversation in the gym, in
23 Anytime Fitness. You've told us about certain representations
24 that were made about the Oprah Winfrey show and Google buyouts
25 and things of that nature. You didn't invest right after you

1 heard those things, right?

2 A. No, it was -- that was on a Saturday. I invested on
3 a Monday.

4 Q. Did you in the meantime speak to an attorney?

5 A. No.

6 Q. You told us before that you invested after an attorney
7 told you this was worth 50,000.

8 A. That was in regard to the 1 percent.

9 Q. Okay, so timewise about what, two months later; is
10 that accurate?

11 A. I invested in February. I think there's a copy of my
12 check that I gave for the 1 percent was in the end of May.

13 Q. Okay.

14 A. Or the beginning of June.

15 Q. Okay, and in the meantime, between those three months
16 did you do any investigating on your own about X-Tagged or did
17 you talk to Mr. Esquivel about Oprah or any of those --

18 A. He would make remarks saying, for numerous reasons I
19 can't remember, "It's been postponed." "It's been postponed."
20 There was always a reason it never -- never came to fruition.
21 So he continued to dangle the carrot in front of our -- in
22 front of my face, and I believed because I'm a -- I'm a trust-
23 worthy person and I believed him.

24 Q. Okay, just relied on him, didn't do any investigating
25 on your own; is that --

1 A. I played on the website, and it was built, and I
2 looked at it. I talked to his lawyer, which in fact gave me
3 a closure that this was a legitimate company.

4 Q. Okay, and you told us that you were a percent owner of
5 X-Tagged. At what point did you decide that you were not? You
6 also told us you don't believe you're a --

7 A. Oh, I don't -- well, I don't -- I don't believe the
8 company is a legitimate company or a profitable company. I
9 don't know if it's even registered anywhere; but at the point
10 that I -- even if it was, the point that I thought that I was
11 not is when I questioned some of the things that he had been
12 saying about certain people buying the company, it being sold,
13 being jerked around side-to-side. As soon as I questioned
14 him, he blew up, started swearing, got angry, told me to get
15 a lawyer.

16 Q. Okay, and just finally, Mr. Cluff, you've told us that
17 you didn't read that convertible promissory note, so if you
18 don't know the answer to this, just say so. It directs you in
19 very specific terms on how to request that you be -- that you
20 get your money back. Did you follow through with any of those
21 specifics?

22 A. Like I said, my father got me in touch with his
23 lawyer, and he looked over the contract, and he told me it
24 was more than appropriate to use an email to request the
25 provision of the money to be returned, plus interest, within

1 a 30 day time frame, and I sent that.

2 Q. Okay, and could I direct your attention to paragraph
3 13 of that. Does your paragraph 13 on the State's Exhibit 3 in
4 front of you say notices?

5 A. Yes.

6 Q. Okay, and does it give some addresses there?

7 A. It does.

8 Q. Okay, addresses on where letters are to be sent to
9 make certain things happen?

10 A. It was.

11 Q. Okay, but you didn't write any letters to those
12 addresses, right?

13 A. He was no longer at that address.

14 Q. Okay, how do you know?

15 A. Because he told me he was in -- I was still on good
16 terms with him while he left to Colorado --

17 Q. Okay.

18 A. -- and I could not find -- he would not give a new
19 address to contact him. So the lawyer said an email would
20 suffice.

21 MR. HOLJE: All right, that's all the questions I have
22 for your Honor.

23 THE COURT: Thank you. Mr. Lyon.

24 MR. LYON: Just a few followup, your Honor.

25 ///

REDIRECT EXAMINATION

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BY MR. LYON:

Q. Did the defendant ever tell you whether he was licensed to sell securities in the State of Utah?

A. He never said.

Q. When discussing your investment with the defendant orally, were there any discussions about risks and the risk that you might be taking by investing in X-Tag?

A. He stated none.

Q. Okay, just so we're clear, did he -- tell us, did he specifically tell you there was no risk associated with X-Tag, or tell us exactly --

A. All that he told me was that it was on the verge of turning public and becoming, as I said, 30 to \$40 immediately, and it will go above Google, which was 500 and something, and it was on that verge. Everything was ready. He was getting ready to prepare for the Oprah Winfrey show. The site was up. I looked at it. With all those things in hand, I believed it was a legitimate -- legitimate company.

Q. Okay, and Mr. Woolsey has directed your attention to the convertible promissory note, the paragraph and the language that discussed the risk associated with investment.

A. Yes.

Q. Did you have any discussions with him, with the defendant with regard to any of the risks associated with the

1 investment?

2 A. He never mentioned any risk. It was all positive.

3 Q. Did the defendant ever tell you how your 4,000 -- your
4 initial 4,000 buy in and then your other -- your second buy in,
5 how that -- how that was related to the -- let me start over.

6 With regards to your first investment of \$4,000, that was equal
7 to how much -- what percentage in the company?

8 A. He never stated. It was just 4,000 shares.

9 Q. Okay, he never said whether that's a percent, half
10 percent, 10 percent?

11 A. No.

12 Q. Did the defendant ever contact you with regards to --
13 and inform you that the company had been sold?

14 A. He had.

15 Q. Tell us when the first time that happened.

16 A. He had contacted me multiple times. Not necessary
17 that the company was sold, on those terms, but that he had
18 given part of it to different combinations of companies, and
19 he had stated that "You're a millionaire. We're all done. We
20 don't have to do anymore work, you know. They're going to take
21 it from here." He did, however, on December I believe it was
22 2009, close to Christmas, he contacted me and said that they
23 sold the company in its entirety.

24 Q. Did they say to whom?

25 A. He told me it was Donald Trump that bought it.

1 Q. When you were first looking at investing the -- I
2 guess it would be the February, the springtime of 2008, did he
3 give you an initial date of when the company would go public?

4 A. When he -- when we were speaking, even when I called
5 him to buy the shares, he didn't even know if -- he thought it
6 was public at the time, so he said it was on the verge.

7 Q. Now, would -- with regards to the judgments against
8 the defendant, would that -- had you known the defendant had
9 those problems with credit in the past, would that have
10 influenced your decision in investing in X-Tagged?

11 A. Absolutely.

12 MR. LYON: Nothing further.

13 THE COURT: Anything else?

14 MR. HOLJE: No, your Honor.

15 THE COURT: Thank you, Mr. Cluff, you may step down.

16 This witness be excused?

17 MR. HOLJE: As far as we're concerned.

18 MR. LYON: Yeah.

19 THE COURT: Hearing nothing --

20 MR. LYON: Oh, I'm sorry, what did you say?

21 MR. HOLJE: I said as far as we're concerned, that's
22 okay.

23 MR. LYON: Oh, okay.

24 THE COURT: You may be excused, Mr. Cluff.

25 Your next witness.

1 MR. LYON: Okay, your Honor, the State calls Christopher
2 Engelbrecht.

3 COURT CLERK: You do solemnly swear that the testimony
4 you are about to give in this case before the Court will now --
5 in this case now before the Court will be the truth, the whole
6 truth and nothing but the truth, so help you God?

7 THE WITNESS: (Inaudible).

8 THE COURT: Go ahead.

9 CHRISTOPHER PAUL ENGELBRECHT,
10 having been first duly sworn,
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. LYON:

14 Q. Please state your name for the record, spelling your
15 last name.

16 A. Yes, Christopher Paul Engelbrecht, E-n-g-e-l-b-r-e-c-
17 h-t.

18 Q. Mr. Engelbrecht, correct?

19 A. Correct.

20 Q. Back in the fall of 2008 were you the owner of Anytime
21 Fitness in Bountiful?

22 A. I was.

23 Q. In the time frame of about -- during the year of 2008
24 did you meet the defendant?

25 A. I did.

1 Q. Tell us when you first met him.

2 A. Andy came into the facility on -- in February to look
3 at a membership.

4 Q. Did you have contact with him that first time he came
5 in?

6 A. I did not.

7 Q. When did you meet with him?

8 A. I would guess it would be the second time.

9 Q. Tell us how the two of you met.

10 A. Andy came into my office to, what I assumed, talk
11 about a gym membership.

12 Q. When he comes into your office, do you initially start
13 talking about a gym membership?

14 A. The conversation was more short talk, you know,
15 personal, "How are you doing?" Then Andy, at that point,
16 had a lanyard of some sort around his neck, which then had
17 some digits on it, and the conversation took a turn for that.

18 Q. Okay, and was that lanyard dealing with X-Tagged?

19 A. It was.

20 Q. Tell us about your conversation that you had about the
21 company.

22 A. Excuse me. Andy proceeded to explain to me that it
23 was a company that he had invented that is designed to give
24 security to the Internet, keeping pedophiles, rapists, things
25 of that nature off of the social sites, such as Facebook and

1 MySpace.

2 Q. Did he tell you what phase the company was as far as
3 development? Was it --

4 A. He at that point explained to me that they were on the
5 verge of going public, and that they were going to put their --
6 at that point have stock in the company.

7 Q. Did he-- at any point in time during your conversation
8 did he -- did the conversation turn towards an investment in
9 the company?

10 A. Yes, the conversation did take that direction, and --
11 excuse me, but it was a conversation that dealt with, "Hurry
12 up, we're about to go public; and if you're going to invest,
13 you need to make a decision."

14 Q. How was that communicated to you, this hurry up and
15 decide?

16 A. Each time I spoke with Andy, he would basically say,
17 "We're on the verge. We're about a week away from going public.
18 So right now is the best time to get in, because once it con-
19 verts over, you'll be a millionaire."

20 Q. Okay, so are you talking about subsequent conversations
21 you've had with him, too, other than this first conversation?

22 A. They would be, you know, as he -- he came into the gym
23 one other time, and yes, that's where the conversation went as
24 well.

25 Q. Okay, and just for right now, let's focus on that

1 first conversation that you had with the defendant. When he's
2 explaining the company, does he make any indication whether
3 individuals are interested in purchasing the company?

4 A. Yes, he told -- he told me that Michael Jordan was
5 looking at purchasing the company. He was going to be on the
6 Oprah Winfrey show because of it, and that he also mentioned
7 that it was going to be bigger than Google.

8 Q. Did he indicate -- did he tell you whether he was
9 planning on meeting with any other major -- I guess you could
10 say -- computer based companies?

11 A. What I can recollect right now is Google. Oh, wait, I
12 apologize, in regards to MySpace.

13 Q. Did he tell you whether -- what the price of X-Tag's
14 stock was going to be after it went public?

15 A. Not a direct quote. He just continued to say it was
16 going to be worth millions. It's going to be bigger than
17 Google.

18 Q. Now, on this first occasion that you meet with him, do
19 you make any decisions as to whether you want to invest or not?

20 A. No, I do not.

21 Q. Did you have a second -- or subsequent conversations
22 with the defendant?

23 A. Only through phone, telephone.

24 Q. Tell us about those conversations.

25 A. The last time I spoke with him before investing, he

1 said that they are within the next couple of days going public.
2 He's not sure if I can still invest, but he will check it out,
3 and that at this point that I should probably just move forward
4 and invest, so that way -- and he'll work something out.

5 Q. Did you make a decision as to whether you wanted to
6 invest or not?

7 A. Yes, at that point I -- what I had done is I called
8 Kyle to verify a few things, as he had spoke with his lawyer to
9 get some clarification; and it was at that point that I made
10 the decision to invest.

11 Q. How much did you initially invest?

12 A. 2,000.

13 Q. Now, when you spoke with the defendant about your
14 investment, did he talk to you about the risks associated?

15 A. No, it was all positive when he spoke to me.

16 Q. Did he -- as per your agreement and your oral agree-
17 ment, did you -- was there -- was there any decision as to
18 whether you could get your money back?

19 A. When he spoke to us, he basically made it look as
20 though there was nothing to be worried about. It was a win/win
21 situation, because verbally he had said to me that I would get
22 a 12 percent return on that after the given date. So it would
23 be no less than having money in a bank with interest.

24 Q. When you say "it," under what circumstances would you
25 get your money back?

1 A. At the end of a specific period, which was the 2009
2 December.

3 Q. Just so we're clear, you would get that money -- your
4 investment back plus 12 percent. Were there -- is that even if
5 the company had gone public?

6 A. That was -- yes, that would have been -- that was the
7 understanding that I had, yes.

8 Q. Did you have any conversations with him about X-Tagged
9 and its affiliation with the Utah Division of Motor Vehicles?

10 A. Yes, I did. He had said to me that they were working
11 to partner with the DMV for their license plate database, and
12 it would be unbelievably huge. He also mentioned that he was
13 looking at giving them 51 percent of the company.

14 Q. All right, Mr. Engelbrecht, I'm showing you State's
15 Exhibit 2. Do you recognize that?

16 A. Yes, I do.

17 Q. What is it?

18 A. This is the convertible promissory note that we had
19 done for this -- the investment of \$2,000.

20 Q. Who signed that?

21 A. That was signed by my wife, Melissa.

22 Q. Were you present at that time?

23 A. I was not.

24 Q. Do you recognize the signature on the back there?

25 A. Of my wife, yes.

1 Q. That's her signature?

2 A. Yes, it is.

3 Q. Did you have subsequent conversations with the defend-
4 ant regarding this note?

5 A. Excuse me?

6 Q. Did you have subse -- after you executed this -- I
7 think it's called a convertible promissory note --

8 A. Convertible promissory note.

9 Q. -- did you have subsequent conversations with the
10 defendant regarding the investment of \$2,000?

11 A. At that point, no, I did not.

12 Q. Did the defendant make any indication to you whether
13 X-Tagged was patented?

14 A. Yes, he had said it was.

15 Q. Had the defendant disclosed to you about a judgment
16 in 2003 for \$3,075.62?

17 A. No, he did not.

18 Q. Did he discuss -- disclose to you prior to your
19 investment about a judgment against him in 1999 for \$5,597.60?

20 A. No, he did not.

21 Q. Similarly did he disclose to you about a judgment he
22 received against him for \$1,537.69 in 1999?

23 A. He did not.

24 Q. Did he disclose to you he was not licensed to sell
25 securities in Utah?

1 A. No, he did not.

2 Q. During your conversations with him about X-Tagged, did
3 he make any indication as to X-Tagged being a Utah company?

4 A. No, he did not.

5 Q. Had you known about the prior judgments and he was
6 not licensed to sell securities, would that have changed your
7 decision in investing in X-Tagged?

8 A. 100 percent.

9 Q. Prior to receiving that promissory note, had you
10 received any disclosures as to risks associated with investment
11 in X-Tagged?

12 A. No, I did not.

13 Q. Now, in the fall of 2008 do you have a conversation
14 with the defendant about signing any documents to convert
15 stock?

16 A. Yes, I did.

17 Q. Tell us about that.

18 A. He called me concerning doing this conversion, and he
19 wanted me at that point to come over to his sushi restaurant.
20 I told him when I got off from the gym I would. I didn't get
21 off until around 10 o'clock. At that point I called him, and
22 he said that he had already taken care of it, signed the
23 documents, and everything is taken care of.

24 Q. Did you in fact ever receive any stock in X-Tagged?

25 A. I did not.

1 Q. Have you tried to receive your money back?

2 A. Yes, I did.

3 Q. Have you been successful in that?

4 A. No, I have not.

5 MR. LYON: The State moves to admit Exhibit 2.

6 MR. HOLJE: No objection.

7 THE COURT: Thank you. I'll receive it.

8 (Exhibit No. 2 received into evidence)

9 MR. LYON: Nothing further, your Honor.

10 CROSS EXAMINATION

11 BY MR. HOLJE:

12 Q. Okay, Mr. Engelbrecht, you're a business owner, right?

13 A. I was, yes.

14 Q. You were, okay. When did you sell?

15 A. November of last year.

16 Q. Okay. All right, so at all times that we're talking
17 about here, you were a business owner, right?

18 A. Correct.

19 Q. All right, I'm sure as a business owner you understand
20 the concept of risk, right?

21 A. I do.

22 Q. Isn't it -- in your opinion isn't it kind of an oxy-
23 moron to have an investment without risk?

24 A. Yes.

25 Q. Your testimony was that Mr. Esquivel said there is no

1 risk; is that accurate, or --

2 A. Yes.

3 Q. Okay, he affirmatively said that, or just you guys
4 never talked about it?

5 A. No, he said that in my office.

6 Q. That there is no risk in this?

7 A. Correct, he believed in karma.

8 Q. Okay, as a business owner did any red flags go off or
9 any bells and whistles in your head?

10 A. At that point, no, when it had to deal with a return.

11 Q. I'm sorry?

12 A. When it had to deal with a return that I would receive
13 at the end.

14 Q. Okay, so I'm not even sure I understand that, but
15 you -- your decision to invest was based on conversations
16 that talked about Oprah Winfrey and Google and things of that
17 nature; is that --

18 A. Yes, and he also mentioned the return that we would
19 receive at the end of the investment.

20 Q. How about -- you're friends with Kyle Cluff, right?

21 A. That is correct.

22 Q. Okay, how about the conversations you had with Kyle
23 Cluff and representations from his attorney?

24 A. What question are we asking?

25 Q. You relied on those before investing; is that accurate?

1 A. Correct.

2 Q. Okay. This promissory note, convertible promissory
3 note, did you read it before signing it?

4 A. I did not.

5 Q. As a business owner, was that kind of the normal way
6 you do business or --

7 A. No.

8 Q. What made this one different?

9 A. I was not there.

10 Q. Okay. Is your name on it?

11 A. My name is written in as "Chris."

12 Q. Okay, that's your name, right, Chris?

13 A. That is.

14 Q. Okay. All right. You said it was signed by your
15 wife, right?

16 A. Correct.

17 Q. Okay. Has your wife made any efforts to get her money
18 back or get -- make contact with X-Tagged?

19 A. No.

20 Q. Okay. Did your wife read it before signing?

21 A. I cannot answer that.

22 Q. Okay. Did you have any independent verification
23 from an attorney, specifically Jason Webb, about the value of
24 X-Tagged?

25 A. I did not.

1 Q. Did you rely on any representations from an attorney
2 given to your friends about the value of X-Tagged?

3 A. I did.

4 Q. Okay. You've been -- you were here when I questioned
5 Mr. Cluff, right?

6 A. Yes.

7 Q. The -- I think the testimony was that this Jason Webb
8 said it would be worth \$50,000; a 1 percent share was worth
9 50,000, right?

10 A. Correct.

11 Q. Was that information that was in your head at the time
12 you invested?

13 A. That's what Kyle had told me.

14 Q. Okay, and that attorney, to your knowledge -- I under-
15 stand you didn't speak to him, but to your knowledge, was he
16 sort of saying this was a legitimate company?

17 A. Yes.

18 Q. Subsequent to making an investment did you do any
19 independent investigation about whether or not X-Tagged was
20 incorporated in Utah or where it was incorporated or anything
21 like that?

22 A. No.

23 Q. Okay, did you ever hear anything through the grapevine
24 about that?

25 A. Not until a month ago.

1 Q. Okay. You told us that you asked for your money back,
2 right?

3 A. I did.

4 Q. Again, can -- can you elaborate on the efforts you
5 went through to get a money back?

6 A. In December 2009 I, one, sent an email to Andy directly
7 asking for it back. I received no reply; and two, I sent a
8 certified letter to the address on the contract, and that was
9 sent back as a return.

10 Q. Undeliverable?

11 A. Correct.

12 Q. Any reason why? I mean, no forwarding address, things
13 like that?

14 A. No forwarding address; and if I remember correctly,
15 address is no longer there, or something of that nature.

16 Q. Okay, so just those two things, right; an email with
17 no response and a letter that was unsuccessful?

18 A. Correct.

19 Q. Okay, and what efforts did you go through after that,
20 or how did you get here after that point?

21 A. How do I -- to this point here?

22 Q. Right.

23 A. Well, at that point, that's when I went and visited
24 Mr. Sweet.

25 Q. Okay, on your initiation or were you contacted? In

1 other words --

2 A. No, it was on my initiation.

3 Q. Okay. Didn't you also make a police report on this
4 matter?

5 A. No, I don't -- I don't recollect.

6 Q. You don't recollect if you met with the Bountiful
7 police?

8 A. At this point I can't remember.

9 Q. Okay. After sending an email or sending a letter,
10 haven't you been contacted by numerous individuals about
11 repayment?

12 A. No, I have not.

13 Q. Ever in your life?

14 A. Not directly from them, no.

15 Q. Indirectly?

16 A. Explain.

17 Q. Well, did anybody talk to your wife, or did anybody
18 talk to your friend and say, "Pass the word onto Chris," or --

19 A. Yes, through friends, not through my wife.

20 Q. Okay, if you'd explain that, please.

21 A. From what I understood, they would give a payment to
22 us, but there was no -- that I understood, there was no leading
23 time. There was nothing that took place in order for that to
24 happen.

25 Q. Okay, so you personally have never been contacted by a

1 Steve Klemark?

2 A. I was recently contacted, I think it was by Steve, as
3 of about two weeks ago.

4 Q. Okay.

5 A. But it wasn't concerning payment. It was to sit down
6 and go over information that he said I needed to know.

7 Q. Okay, was that the first contact you'd ever had with
8 him?

9 A. Yes.

10 Q. Okay, what about an Alan Brady?

11 A. No.

12 Q. No contact from him; or a Shar Jenkins?

13 A. Actually there were emails -- I apologize, there were
14 emails just recently sent as of -- just as recent. I apologize,
15 my mind was thinking in the past, but there were emails sent
16 speaking with apparently his lawyer for me to try and gain
17 payment back. They said that I would be paid back.

18 There was a picture of a check with my name on it
19 for \$2,000. There were text messages at that point that were
20 -- or I apologize, emails that were sent, and me requesting
21 that it would be the amount plus interest, and they informed
22 me, whomever I was speaking with via email, that I would be
23 paid back. I needed to work through his lawyer, Mr. Martinez,
24 and all communication at that point fell off. I had never
25 received nothing more.

1 Q. Okay, and can you put a time frame on this for us?

2 A. To my remembering would have been the December time
3 frame.

4 Q. Of 2011?

5 A. That's correct.

6 Q. So that we're clear here, your testimony is that
7 those efforts we've just talked about, those communications
8 we've just talked about via email and directing you to contact
9 lawyers and that, that's the first contact you've ever had
10 about getting repayment, is just --

11 A. Other than from Kyle and speaking with him, I have
12 never had any type of direct contact, other than that, that I
13 can remember.

14 Q. Okay. Okay, if you'll bear with me, we can probably
15 -- I think a lot of this has been covered. The only other
16 thing, just by way of clarification, I think you mentioned,
17 like Mr. Cluff did, that there was a representation made to
18 you about the DMV participating in this idea of X-Tagged,
19 right? Do you remember that?

20 A. Yes.

21 Q. That representation was specifically -- I think the
22 way you worded it was he was in the process of working with
23 them; is that -- did I get that right?

24 A. That's correct.

25 Q. Okay, not that there was any sort of affirmative deal

1 in place, but that that was an effort that was being made; is
2 that right?

3 A. That's correct.

4 Q. Did you ever follow up with Mr. Esquivel about some
5 of the things you've testified to with respect to interested
6 parties and X-Tagged, people like Michael Jordan or Google or
7 any of them?

8 A. No, I did not.

9 Q. Okay. Did you have any sort of -- did you think that
10 you were an owner of X-Tagged?

11 A. No.

12 Q. Did you make any efforts to direct its affairs or, you
13 know, give ideas and input on it?

14 A. No.

15 Q. Essentially is it -- is it fair to say that your buddy
16 Kyle made an investment and thought it was good, and you jumped
17 onboard?

18 A. Yes.

19 MR. HOLJE: That's all the questions I have.

20 THE COURT: Thank you, Counsel. Mr. Lyon?

21 MR. LYON: I've got nothing further from this witness.

22 THE COURT: Okay, thank you, Mr. Engelbrecht, you may
23 step down.

24 Your next witness?

25 MR. LYON: Similarly, your Honor, may he be excused?

1 THE COURT: Yes.

2 MR. LYON: You're free to stay or go.

3 The State calls Ryion Butcher.

4 COURT CLERK: You do solemnly swear that the testimony
5 you are about to give in the case now before the Court will be
6 the truth, the whole truth and nothing but the truth, so help
7 you God?

8 THE WITNESS: Yes.

9 RYION BUTCHER,

10 having been first duly sworn,

11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. LYON:

14 Q. Okay, Mr. Butcher, could you please state your name
15 for the record --

16 A. Yes.

17 Q. -- spelling your first and last name.

18 A. It's Ryion Butcher, R-y-I-o-n B-u-t-c-h-e-r.

19 Q. Mr. Butcher, were you employed at Performax Gyms in
20 Clearfield in 2009?

21 A. Yes, I was.

22 Q. During that time did you work with Mr. Cluff?

23 A. Yes.

24 Q. Who testified here today?

25 A. Uh-huh.

1 Q. At the time, Mr. Cluff was also working at Anytime
2 Fitness?

3 A. That's correct.

4 Q. In your discussions and interactions with Mr. Cluff,
5 did you ever have any discussions about X-Tagged?

6 A. Yes.

7 Q. At any point in time did the defendant come into
8 Performax Gyms and have any discussions with you about X-
9 Tagged?

10 A. Yes, he did. He came in.

11 Q. Could you tell us when that happened.

12 A. That happened April 2009.

13 Q. Tell us about this first encounter you've had with
14 the defendant.

15 A. Yes, he was coming in to talk about the company and
16 meet with Logan Laws and Kyle.

17 Q. Okay, and Logan Laws is another individual that
18 happened to invest?

19 A. Yes, he was an 18-year-old kid that invested.

20 Q. Was this meeting set up by Mr. Cluff?

21 A. I believe it was set up by Mr. Esquivel.

22 Q. Okay, and so Mr. Esquivel was coming to meet with
23 Mr. Laws; you just happened to kind of sit in on the meeting?

24 A. Yes, they --

25 Q. Okay, during that meeting the defendant talked about

1 X-Tagged?

2 A. Yes.

3 Q. Could you tell us what he told you in describing the
4 company.

5 A. Yes, he told us about this new social networking
6 company. That it was going to be bigger than all the current
7 social networking companies out there.

8 Q. Specifically?

9 A. Google and -- well, I mean, Facebook and MySpace.

10 Q. Did he explain the company to you?

11 A. Yes, he was -- he talked about how they used the
12 license plates to verify individuals that it was really them
13 that were on the social networking site. That you would have
14 to get your picture taken with your license plate, and there-
15 fore it would verify you that you're that person.

16 Q. Now, did he tell you whether there were individuals
17 wanting to purchase X-Tagged?

18 A. Yes. He said that Google was interested in purchasing
19 X-Tagged. He was talking about a meeting with them within the
20 next two weeks.

21 Q. Did he give a price that investors were willing to pay
22 for X-Tagged?

23 A. Yeah, he was throwing all sorts of numbers around. He
24 said upwards for \$500,000,000 to \$1,000,000,000.

25 Q. Did he make reference to one Hugh Hefner being

1 interested?

2 A. Yes, he says he turned Hugh Hefner down. He also
3 stated that he was going on the Oprah show.

4 Q. Now, in this contacts did he indicate to you whether
5 there was an opportunity to buy into the company?

6 A. Yes, the said there was a half of a percent left in
7 the company, and it was the last half percent, and that if I
8 wanted in, I better act quickly, because there were so many
9 investors in line looking at buying this last half percent up.

10 Q. Did you in fact -- let's see, did he tell you what
11 that percent would be worth?

12 A. Yes, he said it was currently worth \$50,000.

13 Q. Did he explain to you how that's worth --

14 A. No.

15 Q. -- \$50,000? Did he explain what it would be worth
16 in the near future?

17 A. Yes, after -- well, after that, that meeting, and
18 after I invested it seemed like every single week the amount,
19 the price of it kept going up every single week.

20 Q. Okay, let's just talk --

21 A. Okay.

22 Q. -- Mr. Butcher, just as to this first meeting --

23 A. Okay.

24 Q. -- did you in fact invest in the company then?

25 A. Yes.

1 Q. How much did you put in?

2 A. I put in 25,000 -- I mean, \$2,500 at first.

3 Q. He was wanting to sell half a percent for \$5,000; is
4 that correct?

5 A. Yes.

6 Q. Okay, and so tell us how you put in \$2,500 as opposed
7 to 5.

8 A. Yes. Well, he said that if I would just pay the 25
9 for the half percent, and that I would kind of help out, then
10 that would make up for the rest.

11 Q. Okay, now at this time did the defendant tell you
12 whether X-Tag was patented?

13 A. Yes.

14 Q. Did he tell you whether it was an LLC in Utah?

15 A. No.

16 Q. Did he tell you whether it was a business in Utah?

17 A. Yes.

18 Q. Did he explain to you whether there was any sort of
19 affiliation between the Department of Motor Vehicles and X-Tag?

20 A. Yes.

21 Q. What did he tell you?

22 A. He said that they were onboard with X-Tagged.

23 Q. When you say "onboard," what does that mean?

24 A. That they were going to -- they were going to be a
25 part of X-Tagged and authorize the use of people's license

1 plate, getting their help with X-Tag and making it safe.

2 Q. Okay, when -- and did he explain how that -- the
3 interaction between X-Tagged and the DMV was going to take
4 place?

5 A. No.

6 Q. Now, when you make your initial \$2,500 investment, do
7 you remember what day?

8 A. Yeah, I believe -- I can't remember the specific day.

9 Q. All right, well, let me just see if I can help refresh
10 your recollection. I'm showing you what's been marked as
11 State's Exhibit No. 4. Do you recognize that?

12 A. Yes.

13 Q. Tell us what you're looking at.

14 A. April 7th, 2009, a check for \$2,500 made out to X-Tag.

15 Q. That's your check?

16 A. Yes.

17 Q. Okay, and that's the first investment you make?

18 A. That's correct.

19 Q. Okay, and did you receive -- in exchange for the
20 \$2,500 did you receive anything?

21 A. Yes, I got a -- I have a document saying that --

22 Q. Okay.

23 A. -- I would receive 50 -- 50,000 shares.

24 Q. Okay, and I'm showing you -- this is all part of one
25 exhibit; but can you tell us what you're looking at there?

1 A. Basically my investment paper --

2 Q. Okay.

3 A. -- of 100,000. That was 100,000.

4 Q. Okay, and so -- okay, and from whom did you receive
5 that investment papers?

6 A. Mr. Esquivel.

7 Q. Okay, now after giving the first \$2,500 were you
8 again approached by the defendant as to another investment
9 opportunity?

10 A. Yes, he said --

11 Q. When did that happen?

12 A. Just shortly after. About probably two weeks.

13 Q. Okay, tell us what happened.

14 A. He contacted me again and said that another half
15 percent became available.

16 Q. Were you interested in purchasing another half
17 percent?

18 A. Yes.

19 Q. Did you in fact make another investment?

20 A. Yes.

21 Q. How much was the second one for?

22 A. For \$2,500.

23 Q. Again, referring to what's been marked as Exhibit 4,
24 do you recognize these?

25 A. Yes.

1 Q. Can you tell us what they are?

2 A. It's my second investment of \$2,500, and another
3 certificate saying that I own 50,000 shares.

4 MR. LYON: Okay, State moves to admit Exhibit 4.

5 MR. HOLJE: No objection.

6 THE COURT: Thank you. Just 4? They're all the same
7 exhibit?

8 MR. HOLJE: They've all -- for the record, there are --
9 Exhibit 4 has four documents within it.

10 THE COURT: Thank you. I'll receive 4 with the four
11 documents.

12 (Exhibit No. 4 received into evidence)

13 Q. BY MR. LYON: Now, Mr. Butcher, in your conversations
14 with Mr. Esquivel, at any point in time did he let you know
15 that he had a judgment against him in 2003 for \$3,075.62?

16 A. No.

17 Q. Did he let you know he had a judgment against him in
18 1999 for \$5,597.60?

19 A. No.

20 Q. Did he let you know that he had a judgment against him
21 in 1999 for \$1,537.69?

22 A. No.

23 Q. Did he ever have a conversation with you about the
24 risks associated with investment?

25 A. No.

1 Q. Did he ever let you know -- have a conversation with
2 you that you could get your money back if things didn't work
3 out, things didn't go public?

4 A. Yes.

5 Q. Tell us about that.

6 A. Yes, he told us that rest assured that anytime we
7 wanted out, he would give us our money back with 12 percent
8 interest.

9 Q. Did he give you a date as when you could get that
10 back?

11 A. He said anytime, because he -- he mentioned that he
12 had investors lined up, and any one of them would gladly jump
13 on that, that percent and buy it up for more than what I had
14 paid for it.

15 Q. Did you at anytime in fact try to exercise that right
16 and get your investment back?

17 A. Yes.

18 Q. Tell us when that happened.

19 A. That happened within probably a month later. I
20 approached Mr. Esquivel and I said, "You know what, things
21 aren't going too well. I'm getting ready to purchase a house.
22 I could really use my money back. Could I get that back?" and
23 he said, "Absolutely." He goes, "I have an investor that's
24 willing to pay \$50,000 right now for it, so it will only be
25 helping X-Tag, but yeah, I'll give you your money." Then he

1 stated he would give me that money Monday.

2 Q. Did you in fact receive your money back?

3 A. No, and then he told me I'd receive it on Wednesday.

4 Then he just kept dragging it out and out and out further and
5 further and further.

6 Q. At any time did the defendant let you know that he was
7 not licensed to sell securities in Utah?

8 A. No time did he ever.

9 Q. Other than those -- as part as what's been received as
10 4, we've got those two documents memorializing the investment
11 you made, did you receive any other written explanation as to
12 the risks associated with investing in X-Tagged?

13 A. No.

14 MR. LYON: Nothing further.

15 THE COURT: Thank you.

16 CROSS EXAMINATION

17 BY MR. HOLJE:

18 Q. So, Mr. Butcher, is it true that the only documents
19 you were given throughout this entire ordeal were those that
20 have been presented as State's Exhibit 4?

21 A. Yes.

22 Q. Okay, you didn't -- unlike your friends, you didn't
23 receive a convertible promissory note?

24 A. No.

25 Q. Okay, and I just -- for the record we need to clarify

1 a couple things. If I could direct your attention to the
2 consent of all members of the Board of Directors dated
3 April 7th, I think you have that one in front of you?

4 A. It's right here.

5 Q. Oh, excuse me. That one mentions, does it not,
6 Mr. Butcher, that you were being granted 150,000 shares, and
7 then parentheses 100,000; is that right?

8 A. Yes.

9 Q. Okay, do you -- do you know which is accurate?

10 A. The -- well, let's see.

11 Q. In other words, the wording says 150 --

12 A. Yes, the wording -- he mixed up the wording.

13 Q. Do you know which is accurate?

14 A. For the 1 percent, it's 100,000 for half it's 50.

15 Q. Okay, and with respect to what's being given in
16 exchange for that, this document dated April 7th says \$5,000;
17 is that right?

18 A. Yes.

19 Q. Is that what your copy says?

20 A. My total investment is 5,000, uh-huh.

21 Q. Okay, but on 4/7 of '09, on April 7th, you didn't give
22 him \$,000, right?

23 A. No, no.

24 Q. Okay. At no point did you, in a single episode, give
25 him \$5,000?

1 A. No, it was --

2 Q. Okay.

3 A. -- two separate instances.

4 Q. Okay, with respect to the other one dated 4/7 -- 4/16,
5 actually, of 2009, if I could direct your attention as well
6 to the amount given, the wording there says \$5,000 was given,
7 right? I'm looking at the one dated April 16th of '09.

8 A. Yes.

9 Q. Okay, does that say that you gave him \$5,000?

10 A. Yes, total I've given him \$5,000.

11 Q. Okay, but not on that occasion, right?

12 A. No.

13 Q. In fact, in parentheses it says 2,500, right?

14 A. Uh-huh.

15 Q. Okay. All right, I just wanted to put that on the
16 record --

17 A. Okay.

18 Q. -- to make sure that was -- that that was clear. Did
19 you believe you were an owner of X-Tagged?

20 A. No.

21 Q. Were you ever told you were an owner or --

22 A. He would say -- he would say that we are, but we
23 really had no say in anything to do with X-Tag.

24 Q. You were -- this document that you signed here, the
25 ones that -- the two documents we've been talking about, they

1 call you the business associate, right?

2 A. Uh-huh.

3 Q. Okay, and they say that you will be taking an active
4 roll in the business of the corporation, right?

5 A. Yes.

6 Q. Okay. You have promoted yourself as the X-Tagged
7 representative of Utah, right?

8 A. That's the title he gave me.

9 Q. Okay.

10 A. Which I have no idea what it even means.

11 Q. Okay, did you -- didn't you do a You Tube video sort
12 of promoting X-Tagged?

13 A. Yes, we did a funny -- promoting the stickers --

14 Q. Okay.

15 A. -- that he goes around and puts on cars.

16 Q. Okay, and you -- you represented yourself to the world
17 through the Internet that you were the Utah representative of
18 X-Tagged, right?

19 A. Yes.

20 Q. Okay, as that Utah representative of X-Tagged, what
21 was your role?

22 A. Basically just wanted me to help with things. For
23 instance, we wanted to change his website, make it better,
24 and so we were -- I was actively engaged in helping him fight,
25 somebody to do that and also do a promotional -- like a video

1 on how to use the X-Tag website.

2 Q. Is it fair to say marketing, you were --

3 A. Yes.

4 Q. -- involved in marketing X-Tagged in Utah?

5 A. Uh-huh.

6 Q. Didn't you represent to Mr. Esquivel or others
7 involved in X-Tagged that you had a marketing degree?

8 A. No.

9 Q. At any time?

10 A. Not at any time.

11 Q. Are you aware of anybody suggesting that you did have
12 a marketing degree?

13 A. Some people might assume that, just because that's
14 what I did at Performax. I would go marketing the gym.

15 Q. Okay.

16 A. So some people may interpret that as I must have a
17 marketing degree, but I do not.

18 Q. Your sworn testimony is you've never told anyone that
19 you did?

20 A. Yes.

21 Q. Okay.

22 A. I never told anyone.

23 Q. Okay. How long did you act as the -- or are you still
24 acting as the Utah representative of X-Tagged?

25 A. No, I recent -- I found out quite quickly, started to

1 do my homework on Mr. Esquivel, and started to find out a lot
2 of the things that he had been telling us were in fact lies.

3 Q. How long would you say you acted in that roll?

4 A. Two weeks.

5 Q. Okay, so all in -- I think you told us you provided
6 money in April, early April of 2009?

7 A. Yeah.

8 Q. Right.

9 A. Because I started getting suspicious pretty quick.

10 Q. Okay, are you aware of the date of the video that you
11 sent out or --

12 A. No, sir.

13 Q. Okay. All right, so you met in-- you met Mr. Esquivel
14 at a -- at a different gym than the one we've previously been
15 discussing, right? It wasn't Anytime Fitness?

16 A. That's correct.

17 Q. Okay, and when you met him, were either Kyle Cluff or
18 Chris Engelbrecht there?

19 A. Kyle was.

20 Q. Kyle was there as well?

21 A. Uh-huh.

22 Q. Okay, and his experience, did that inform your -- your
23 desire to meet with Mr. Esquivel?

24 A. No, it was after sitting down with Mr. Esquivel that I
25 was -- I became interested.

1 Q. Okay. Just purely out of curiosity when he walked in
2 the door you wanted to meet, or did Kyle say, "Hey, do you want
3 to sit down and meet?"

4 A. Yeah, just I wasn't doing anything at the time, and
5 they were all going to meet, and so --

6 Q. Okay.

7 A. -- I went and sat in.

8 Q. Okay, now so that we're clear, I mean, your buddies
9 had given him money almost a year earlier, right?

10 A. Yes.

11 Q. Okay, were you aware of that at the time?

12 A. At that time, yes.

13 Q. Okay. What we've heard here today in testimony is
14 that Mr. Esquivel talked about going on Oprah Winfrey as early
15 as March or February of 2008, and you met him in April of 2009,
16 right?

17 A. Uh-huh.

18 Q. Is it your testimony that you heard him from his mouth
19 say he was going on Oprah Winfrey at that time?

20 A. Yes.

21 Q. Okay, and did any red flags go off? Did your buddy
22 say, "Hey, he told us that a year ago and it still hasn't
23 happened"?

24 A. Well, they were on -- I think they still believe that
25 it was going to happen, because he would keep pushing things

1 further and further, just like the meeting for Google. It
2 would come time to meet with Google, and all of a sudden the
3 meeting's changed to this month or this week or this week. It
4 just always kept changing. The dates always kept changing.

5 Q. Okay. Okay, I think you told us -- and I apologize
6 if I get the amounts -- you correct me if I'm wrong -- did
7 you tell us that he said it was worth -- X-Tagged was worth
8 500,000,000 to 1,000,000,000?

9 A. Yes, he has told me that before.

10 Q. Upwards of that, right?

11 A. Yes.

12 Q. Okay, and that he was willing to give you 1 percent
13 ownership of that for \$5,000 or for -- yeah, I mean, ultimately
14 2 increments of a half percent for \$5,000?

15 A. Yes.

16 Q. Did you do any math there to --

17 A. I know, I feel really stupid. Yes.

18 Q. Okay, so when he comes back and offers you a half a
19 percent more, the difference in time there was just these 10
20 days, right? Is that -- is that accurate --

21 A. Yes. Yeah, there --

22 Q. -- or was it --

23 A. -- there wasn't a whole lot of time that had passed.

24 Q. Okay, in those 10 days did any of these -- let me
25 rephrase that. What kind of -- what kind of interaction did

1 you have with him during those 10 days?

2 A. I was trained to help promote the website, get stickers
3 out and schedule things. A lot of which Andy would fail to
4 show up or appear or get the things that I needed to me.

5 Q. Did you use the gym -- were you a manager at the gym,
6 right?

7 A. I was -- I did -- I was the sales manager and did
8 marketing, and also personal training.

9 Q. Okay, and did you use the gym as sort of a vehicle to
10 get X-Tagged paraphernalia out there?

11 A. Did I use the gym?

12 Q. What I mean is, you know, did you promote X-Tagged
13 through the gym?

14 A. Not that I can recall.

15 Q. Didn't have stickers available at the desk or --

16 A. No, no.

17 Q. -- anything like that?

18 A. No, we were -- we were going to shoot a commercial
19 there.

20 Q. All right, you testified earlier that -- or when
21 Mr. Lyon asked you about X-Tagged being a Utah business, was
22 there conversations about it being incorporated in any other
23 state?

24 A. No.

25 Q. Anybody ever bother to ask, that you're aware of?

1 A. No.

2 Q. You certainly didn't ask, right?

3 A. No.

4 Q. Okay. Have you subsequently learned that it's a
5 business in Wyoming?

6 A. Yes.

7 Q. Okay, when did that happen?

8 A. Probably a month ago.

9 Q. A month ago is when you found out, not when it was
10 made a business in Wyoming; is that --

11 A. Yes, that's correct.

12 Q. Again, with respect to -- I'll ask you what I asked
13 Mr. Engelbrecht -- with respect to the DMV, your testimony
14 before was that DMV was onboard. Is it possible that that
15 conversation said it's in the works or something a little
16 softer than onboard?

17 A. I understood it to be that they were full on going -

18 Q. Okay.

19 A. -- and that it was active.

20 Q. Okay, so those weren't his words that they were --
21 the deal was signed and stamped and ready to go. That's your
22 interpretation of it, right?

23 A. Yes.

24 Q. Okay. You mentioned Logan Laws was there, right?

25 A. That's correct.

1 Q. Logan Laws, are you aware, has asked for money and
2 received money back in this instance?

3 A. Yes, but not without a fight.

4 Q. Okay, are you friends with Logan Laws?

5 A. Yes, I am.

6 Q. Okay, have you made any efforts like Logan to get your
7 money back?

8 A. Yes.

9 Q. Explain those, please.

10 A. Yes, when I first initially asked for my investment
11 back, I did it in a very nice way, after I found out that
12 through my research some of the things that Andy had told us
13 were lies. I just asked for my money back, didn't want any
14 confrontation or anything.

15 When he just kept pushing the dates out, I called him
16 and I said that he wasn't an honest man, and he blew up and got
17 mad at me, and then started telling all the other X-Tag people
18 that he kicked me off of X-Tagged because I was gay and I was
19 posting gay pictures of myself on X-Tag.

20 I do have an email stating that -- saying that he sent
21 a mass message out to everyone saying I was gay and I posted
22 gay pics, and that I would never see a penny of my investment.

23 Q. Subsequent to that have you sort of gone on your own
24 campaign on the Internet to --

25 A. Yes.

1 Q. -- to say bad things about him?

2 A. Of warning people about Mr. Esquivel.

3 Q. Okay.

4 A. And the investment scam.

5 Q. Okay, and that includes, you know, blogging and
6 posting descriptions on Internet sites and those types of
7 things?

8 A. Yes, telling my story basically.

9 Q. Okay, how long has that been going on?

10 A. For a while.

11 Q. Put in terms of months?

12 A. Probably two years.

13 Q. Okay, have you been approached by -- you've heard me
14 ask this question to your friends. Have you been approached by
15 Alan Brady, Steve Klemark, Shar Jenkins in regards to getting
16 money back?

17 A. Just Alan Brady.

18 Q. Okay, when did that happen?

19 A. Alan Brady, I've met with him once. I can't recall
20 the day he came to Performax, though, and met with me, and
21 told me he's working on getting our money back, and he has all
22 sorts of stuff on Andy Esquivel. I don't know if he was just
23 pretending that he wasn't with Andy anymore, but he told me
24 that Andy was indeed a fact -- a scam, and that there was a lot
25 more investors than I knew that were scammed, and he had a list

1 of them. Then he told me --

2 Q. Did you --

3 A. -- that he would try to get our money back, but
4 nothing ever happened.

5 Q. -- have you ever refused an offer to --

6 A. No.

7 Q. -- give you money back?

8 A. Nope.

9 Q. Never at any time?

10 A. Never at any time. They always said they were -- they
11 would say, "All right, we're going to get you your money back,"
12 and then nothing would ever happen. Collin -- or Leonard
13 Martinez, his attorney, I called -- I've called him at least
14 20, 30 times and have not received an answer, or anything
15 about payback. Matter of fact, they were trying to negotiate
16 a payback the last time we were in Court with Andy, and said
17 that they were going to try and get us some --

18 THE COURT: Well, wait just a minute. Wait until
19 you're asked.

20 THE WITNESS: Oh, okay.

21 Q. BY MR. HOLJE: As long as you bring it up, have you
22 been approached by anyone at the -- and I'm not talking about
23 today, okay? Specifically Kathy Morris, have you ever been
24 approached about anybody about, you know, your desire to go
25 forward with this case versus getting some money and drifting

1 off into the sunset?

2 A. Yes.

3 Q. Okay. Did you refuse to take money at that point?

4 A. No, I never refused to take the money. I even said
5 he didn't have to pay me back the 12 percent interest. I just
6 said, 'Just give me the 5,000 and we're done.' I mean, that's
7 it.

8 Q. From that time you've never heard any offer about
9 getting 5,000 back; is that accurate or --

10 A. That's accurate.

11 MR. HOLJE: I think that's all the questions I have for
12 you, Mr. Butcher.

13 THE COURT: Thank you. Mr. Lyon?

14 MR. LYON: I've got nothing further from this witness.
15 May he please be excused?

16 THE COURT: Thank you. Mr. Butcher, you may step down
17 and be excused. Thank you for coming today.

18 MR. LYON: You're free to stay or to go.

19 THE WITNESS: Okay.

20 THE COURT: Your next witness.

21 MR. LYON: The State calls Adam Sweet.

22 COURT CLERK: You do solemnly swear that the testimony
23 you are about to give in the case now before the Court will be
24 the truth, the whole truth and nothing but the truth, so help
25 you God?

1 THE WITNESS: Yes.

2 ADAM SWEET,

3 having been first duly sworn,

4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SWEET:

7 Q. Would you please state your name for the record,
8 spelling your last name.

9 A. Adam Sweet. Last name S-w-e-e-t.

10 Q. What's your occupation?

11 A. I am a securities compliance investigator for the Utah
12 Division of Securities in the Utah Department of Commerce.

13 Q. How long have you been so employed?

14 A. For approximately 19 months.

15 Q. Were you assigned to perform the investigation
16 regarding the defendant?

17 A. Yes, I was.

18 Q. Okay, you've sat through the testimony of Mr. Cluff,
19 Engelbrecht and Butcher, correct?

20 A. Yes.

21 Q. Okay, now in your investigation of the defendant, did
22 you locate any past judgments that have been -- I'm not sure
23 what the proper (inaudible) terminology is -- levied against
24 him?

25 A. Rendered.

1 Q. Rendered, thank you.

2 A. Yes.

3 Q. Okay, could you tell us about those?

4 A. Yes, I can. Can I refer to my notes?

5 Q. Sure.

6 MR. HOLJE: Your Honor, we'll stipulate that what
7 exists on, you know, on Court records is -- it is what it is.
8 I think the records can speak for themselves, rather than go
9 through half a dozen judgments.

10 MR. LYON: That's fine, and I think I've gone through
11 each one of the witnesses what those judgments are. If they're
12 willing to stipulate to that, that's great.

13 THE COURT: Were there four of them?

14 MR. LYON: Three.

15 THE COURT: Three of them.

16 MR. LYON: Two in 1999. One for about 5,500, the other
17 for just over 15, and one in 2003 for just over 3,000.

18 THE COURT: You'll stipulate to those?

19 MR. HOLJE: Not to the --

20 THE COURT: That they exist?

21 MR. HOLJE: That they exist, right.

22 THE COURT: All right, thank you.

23 Q. BY MR. LYON: Okay, did you also perform an investi-
24 gation as to whether X-Tagged is a registered business?

25 A. Yes, I looked into whether or not it was a registered

1 business.

2 Q. Okay, and how did you do that?

3 A. By accessing the Utah Division of Corporations.

4 Q. According to the Utah records is X-Tagged a registered
5 business at all?

6 A. No.

7 Q. Has it ever been?

8 A. In Utah, no, not by the name of X -- X-Tagged had no
9 listing.

10 Q. Did you investigate whether Mr. Esquivel is licensed
11 to sell securities in the State of Utah?

12 A. Yes, I did.

13 Q. Has he ever been so licensed?

14 A. No.

15 Q. Do you -- you're familiar with the assertion that the
16 defendant made representations that he had communicated with
17 the Division of Motor Vehicles, and they were going to grant
18 authorization to communicate with the State database?

19 A. I'm sorry, I didn't hear the -- didn't get the first
20 part of the question.

21 Q. Let me give you a better question.

22 A. Okay.

23 Q. At all during your investigation, did you investigate
24 whether the Division of Motor Vehicles had granted defendant
25 consent or access authorization to communicate and access the

1 database containing all of the -- the DMV records?

2 A. Yes, I did. I did contact the Utah DMV and spoke
3 with someone and received a letter in return verifying that
4 -- without looking at it -- that X-Tagged would -- or Andy
5 Esquivel, that they had never had any dealings or operations
6 with them, and that -- it said in the letter, generally
7 speaking, they would never condone such activity, by allowing
8 a private company to gain access to drivers license and
9 people's personal information.

10 Q. That's because -- is it -- do you know whether that
11 information is protected by State and Federal statute?

12 A. I don't know that.

13 Q. Okay.

14 A. I do know that now, after glancing down at the letter.
15 I don't know if you want me to read that brief part.

16 Q. That's sufficient.

17 A. Okay.

18 Q. Do you -- did you investigate whether X-Tagged had
19 ever become a publicly traded company?

20 A. No. I mean, as far as I understand as a personal
21 investigator, that it was not a Utah registered as a business.
22 I kind of stopped there.

23 Q. Okay, so you would -- there's no need to even go
24 further?

25 A. Yeah, as far -- yeah.

1 Q. Did you check to verify whether X-Tag has ever been
2 patented?

3 A. I did. I did an online search of the U. S. Patent
4 Office, and there were no results for X-Tagged.

5 Q. Which would indicate?

6 A. As far as I understand, it would indicate a patent
7 that X-Tagged was -- had claimed or was in the process of
8 claiming.

9 Q. Meaning there is no patent?

10 A. Not -- no, no.

11 MR. LYON: Okay, I've got nothing further.

12 THE COURT: Thank you.

13 CROSS EXAMINATION

14 BY MR. HOLJE:

15 Q. So, Mr. Sweet, you -- you investigated X-Tagged in
16 other states, correct?

17 A. I -- as -- I investigate -- no, I just investigated
18 the Utah --

19 Q. Did you -- did you look into whether or not there was
20 a -- the name X-Tagged was being reserved in Colorado?

21 A. It was either Colorado or Wyoming. I think I'd come
22 across that X-Tagged is a registered corporation there, in one
23 of those two. I can't remember.

24 Q. Okay, and that that name -- well, does your report
25 refer to anything about the name X-Tagged being held in the

1 State of Colorado?

2 A. Reserved?

3 Q. Yes.

4 A. Let me -- let me check. It would right here if it
5 did. I do have in my report that X-Tagged is not registered
6 in Utah. X-Tagged held a name reservation in Colorado from
7 April 1st, 2010 to July 30th, 2010, with Darrel Acumen listed as
8 reservation holder.

9 Q. Okay, not Andy Esquivel?

10 A. No, if it had said his name I would have put that in
11 there.

12 Q. Okay, are you aware that X-Tagged is incorporated in
13 the State of Wyoming?

14 A. No. If I -- well, no, I'm not.

15 Q. Okay, your investigation --

16 A. If I -- no, I mean, if I had reason to, I mean, to
17 search a particular state I would. I just don't rand -- you
18 know, randomly. I think Colorado I learned that he was -- had
19 visited Colorado or was doing business in Colorado. So I went
20 to that State's corporation's website. So I had reason to look
21 there, and that's why I came across Colorado's information --

22 Q. Okay.

23 A. -- but I don't recall. Wyoming's new to me. I don't
24 recall any of the investors testifying --

25 Q. Okay.

1 A. -- anything about it.

2 Q. You were being told that X-Tagged was a bogus business
3 essentially, right?

4 A. By who?

5 Q. Well, by any of the individuals that you've -- that
6 you met with as part of this investigation?

7 A. Um --

8 Q. Any of these alleged victims who've testified today?

9 A. -- they were complaining -- they submitted -- they
10 complained that they invested money with X-Tagged and Andy,
11 and hadn't got their money paid back; and they proceeded to
12 tell me the representations that were made to them.

13 Q. Okay, but not necessarily that X-Tagged was not an
14 actual business or anything?

15 A. Um --

16 Q. In other words, an alter ego for --

17 A. -- I don't remember an investor saying X-Tagged is not
18 a business.

19 Q. Okay, as far as you were concerned, it was, right? It
20 just didn't --

21 A. Until I researched it and found out that it wasn't
22 registered in Utah, but had a name reservation in Colorado.

23 Q. Okay. All right. Did you -- did you come across --
24 well, let me try that again. You did come across some other
25 businesses that Mr. Esquivel was involved in, right?

1 A. I did. So yes.

2 Q. Is single and dating one of those?

3 A. Yes.

4 Q. Okay, any -- and that was registered in the State of
5 Utah, correct?

6 A. Yeah, I have that registered for the State of Utah. I
7 have the registration date, the expiration date, and then what
8 position Mr. Esquivel held.

9 Q. Okay, any sort of overlap that you were aware of, or
10 connection between single and dating and X-Tagged?

11 A. No. I mean, when we do a search of the corporation's
12 website we can search of we know the names of the company.
13 Specifically we can do it that way; or if we don't, we can put
14 in the principal's name, the individual's name, and that will
15 pull up businesses registered to that person. So --

16 Q. Okay.

17 A. -- it doesn't explain any connections.

18 Q. But your investigation didn't focus on whether or not
19 the two were somehow related?

20 A. No, because the complaints were not about single and
21 dating.

22 MR. HOLJE: Okay, Judge, if I could have just one quick
23 moment.

24 THE COURT: Go ahead. Are you all right?

25 COURT CLERK: Yeah.

1 MR. HOLJE: All right, I think that's all the questions
2 I have for you. Thank you.

3 THE COURT: Thank you. Any followup, Mr. Lyon?

4 MR. LYON: Not from this witness.

5 THE COURT: Thank you, Mr. Sweet. You may step down.

6 Other witnesses?

7 MR. LYON: Just one, Judge. State calls Tom Brady.

8 COURT CLERK: You do solemnly swear that the testimony
9 you are about to give in the case now before the Court will be
10 the truth, the whole truth and nothing but the truth, so help
11 you God?

12 THE WITNESS: Yes, I do.

13 THOMAS BRADY,

14 having been first duly sworn,

15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LYON:

18 Q. Would you please state your name for the record,
19 spelling your last name.

20 A. Thomas Brady, B-r-a-d-y.

21 Q. What's your occupation?

22 A. I'm the acting director of enforcement for the Utah
23 Division of Securities.

24 Q. How long have you been so employed?

25 A. Well, I'm currently in two roles. I'm also the

1 securities analyst. I've been the acting director for a month.

2 Q. How long have you been with the Utah Division of
3 Securities?

4 A. Just under three years.

5 Q. Prior to taking a job with the Division of Securities,
6 did you receive any education?

7 A. I'm a lawyer; I'm an attorney.

8 Q. Okay, let's talk about your education. You received
9 an undergraduate degree?

10 A. Yes, my undergraduate degree is in political science
11 from Brigham Young University.

12 Q. You say you're a lawyer; you've gone on to law school?

13 A. Yes, I attended Michigan State University.

14 Q. Okay, and when did you finish up there?

15 A. In 2009.

16 Q. Tell us about your responsibilities as a securities
17 analyst and then Director of Enforcement.

18 A. Okay. As the analyst I'm more or less a staff
19 attorney. I'm a staff attorney or in-house Counsel for the
20 Division of Securities in the enforcement section. My respons-
21 ibilities are mainly to take the investigative reports that the
22 investigators conclude, review them, ensure that the elements
23 are met for whatever the allegations or causes of actions are,
24 and then prepare the pleadings for that case. Also for ongoing
25 cases I negotiate settlement agreements with opposing Counsel.

1 Q. Do you write any technical reports or articles based
2 upon -- as an analyst?

3 A. Yes, yes. When legal issues arise, it's my task to
4 research those out. I prepare memos explaining the nuances
5 that come up in our cases.

6 Q. Provide legal Counsel to that division, then?

7 A. Correct.

8 Q. Okay, now tell us about -- as an acting director, tell
9 us what your responsibilities are.

10 A. My responsibilities are to screen incoming complaints,
11 supervise attorneys and investigators with their respective
12 case files. Also to -- I am involved in negotiations on
13 certain administrative proceedings.

14 Q. Now, are you affiliated with any groups related to
15 your employment?

16 A. Related to securities law, yes. I'm a member of the
17 North American State Securities Association.

18 Q. Okay.

19 A. NASSA.

20 Q. Have you held any positions of responsibility within
21 that group?

22 A. Yes, I'm a member of the Mountain Region Enforcement
23 section.

24 Q. Okay, and so what does that mean?

25 A. In that region or zone, there are representatives from

1 each state. I think there are eight or nine states in our
2 region that are represented, and we meet semi-annually to
3 discuss certain trends that are occurring, certain fraudulent
4 trends that are occurring within our respective states. We
5 also do what's called "de-conflicting," where we discuss
6 potential targets that we're investigating one state that may
7 have carryover into a different state. Mainly it's working
8 together.

9 Q. As a result of your training and experience, do you --
10 can you tell us what a security is?

11 A. Yes, I can.

12 Q. What is --

13 A. Would you like me to?

14 Q. Yeah.

15 A. Well, a security, by name, under the statute, under
16 61-1-13 could be a stock, a note or a bond, an interest in
17 an LLC. There are certain categories that it falls under.
18 There are -- or specifically named categories. Then there
19 are broader categories, such as an investment contract that we
20 look at.

21 Q. Okay. Are all securities regulated by the State of
22 Utah?

23 A. Yes. In addition to that, securities are regulated by
24 the Federal Government.

25 Q. Okay. Due monitoring. Can you tell us why they're

1 regulated?

2 A. To protect investors, more or less. To protect the
3 investors. Not to inhibit business, but protect the investors.

4 Q. As part of protecting investors has the State imposed
5 certain regulations and disclosures associated with the sale of
6 security?

7 A. Yes, they have.

8 Q. Okay, and is that primarily located in 61-1-1?

9 A. Yes and no. There are three areas where securities
10 are regulated under -- under the Utah Uniform Securities Act.
11 The first one is registration. So if securities -- any offer
12 of a security needs to be registered with Federal Government or
13 with the State.

14 MR. HOLJE: Judge, I'm going to object on relevance at
15 this point. I mean, he's charged with securities fraud. I
16 think for purposes of today we don't need the academic lecture
17 here on this.

18 THE COURT: You're satisfied that at least the charging
19 document, the Information charging securities fraud, that that
20 definition -- or the alleged actions here would fall within
21 that definition?

22 MR. HOLJE: The alleged acts, your Honor.

23 THE COURT: All right, thank you.

24 MR. LYON: Okay, and I don't want to -- I know it's
25 already a quarter after 5, I'm sure everyone's having a good

1 time, but I will try to move us along.

2 MR. HOLJE: So that I'm -- and so that we're clear, I'm
3 not admitting the definition of the security here. I'm just,
4 you know. What I'm saying is we can look at the statute
5 ourselves and see how security is defined.

6 MR. LYON: Okay.

7 THE COURT: But for purposes of today's hearing, you
8 don't object to the Court relying on the testimony of this
9 witness, when he indicates that the alleged actions would
10 fall within the securities fraud statute subject to your --
11 assuming it goes onto the time of trial, fleshing that out
12 and trying to have the Court or the trier of fact, a jury,
13 make a determination as to whether it actually falls within
14 that?

15 MR. HOLJE: Right, and I think he's told us that a
16 security is a stock, a bond, a note, I mean, an investment
17 contract. Those are all statutory. We can look at those and
18 see. So it's --

19 THE COURT: Okay. I think for purposes of this hearing
20 today then we've probably gone far enough, Mr. Lyon, unless you
21 think there's a couple more questions you need to ask.

22 MR. LYON: No. I mean, ultimately that's -- well, let
23 me be quick here, real fast, your Honor. I do have just a few
24 questions.

25 THE COURT: Go ahead.

1 Q. BY MR. LYON: You understand that for purposes of
2 today's hearing only, we're acknowledging that these three
3 transactions that took place fall within the parameters of a
4 security. So we don't need to whether -- concern ourselves
5 whether they are or not --

6 MR. HOLJE: Judge, I may have confused everybody here.
7 I apologize. I'm not saying that we admit that what took place
8 here, even for today's purposes, falls within security. I'm
9 just saying this witness is sort of testifying about where we
10 can find securities and how they're regulated and --

11 THE COURT: Well, Counsel, I think it's the burden of
12 the State, if he's going to in fact prove up his Information,
13 that we've got to have some definition of securities for the
14 Court to make a determination that the alleged actions fell
15 within the securities fraud statute. So I mean --

16 MR. HOLJE: I agree with that, and all I'm saying is I
17 just don't want to read through Title 61 here, you know. We
18 know that's in there, but --

19 THE COURT: Okay, you just ask him a few clarifying
20 questions, will you --

21 MR. LYON: I will.

22 THE COURT: -- that will get us where we need to be as
23 far as the limited scope that we're trying to fit within here.

24 MR. LYON: Okay, and I do want to move things along. I
25 just want to make sure I'm laying adequate foundation for the

1 Court.

2 THE COURT: Sure.

3 Q. BY MR. LYON: Okay, my train of thought is derailed. We
4 have talked about what a security is and why they're regulated.
5 Could you tell us where primarily it is -- the focus of the
6 regulation is within the code? I mean, we're -- it's located
7 within 61-1; is that correct? At least part, in part.

8 A. That's the anti-fraud provision of the code, yes.

9 Q. Okay, now under that section of the code are there
10 any responsibilities and obligations placed upon an individual
11 who is selling a security as far as disclosures go?

12 A. Yes.

13 Q. Okay, could you tell us about those.

14 A. Well, specifically you can look at subsection (2)
15 of 61-1-1 where it states that during an offer an individual
16 makes any untrue statement of material fact, or omits to state
17 a material fact, in order to make the statements made in the
18 light of the circumstances under which they're made not mis-
19 leading.

20 Under that provision, if an individual is offering a
21 security, yes, they need to state material facts. In other
22 words, good disclosures. If they fail to give or omit those
23 disclosures, then they violate that subsection.

24 Q. Okay, and you've heard the testimony today of these
25 three individuals?

1 A. Yes.

2 Q. Okay, are there any disclosures that should have been
3 given -- well, before we get there, let me just ask you, you
4 have heard -- you've had a chance to review the file regarding
5 Mr. Esquivel?

6 A. Yes, I have.

7 Q. Heard the testimony today by these three witnesses?

8 A. Yes, I have.

9 Q. Do you have an opinion as to whether -- let's start
10 with Mr. Cluff -- whether the investment made by Mr. Cluff,
11 whether that was a security?

12 A. In my opinion, yes, that was a security transaction.

13 Q. Could you tell us why?

14 A. Well, in the initial offer it looks as if Mr. Esquivel
15 was offering a stock or a share of a company in that initial
16 offer. By definition, as we mentioned earlier, under statute,
17 a stock is a security, and share of a company is a security, so
18 long as it has the characteristics of a stock.

19 With the official transaction I guess you could say
20 while he was offered a stock it looks like what he actually
21 received was a promissory note. "He" being Mr. Cluff. Looks
22 like he received a promissory note under the code. A note is
23 presumed -- and under case law a note is presumed to be a
24 security.

25 Q. Okay, and understanding the presumptions that applied,

1 do you still believe that this -- that the note that was given
2 to Mr. Cluff is a security?

3 A. In my opinion, yes, it's likely a security.

4 Q. Okay, can you tell us why?

5 A. Well, under-- when analyzing a note, as I said before,
6 under the Reeves' test a note is presumed to be a security.
7 There are seven categories of non-securities. If a security --
8 or excuse me, a promissory note does not fall on its face in
9 one of those categories, you then apply what's called a "family
10 resemblance" test.

11 In my opinion the promissory note did not fall in
12 any of those seven categories. So the next step would be to
13 look at the four factors of the family resemblance test, which
14 would indicate does it look like it falls into one of those
15 categories.

16 Q. Okay.

17 A. Those factors --

18 Q. You're talking about -- when you say "the four
19 factors," this is essentially the Reeves' test that was
20 commonly referred to?

21 A. The Reeves' test or family resemblance test.

22 Q. Okay.

23 A. Yes.

24 Q. Okay, can you just go through those four factors?

25 A. Sure. The first one is the expectation of the seller

1 and the buyer. In looking in this transaction, it looks like
2 the expectation of the seller and the buyer was that it was an
3 investment.

4 The second factor is the plan of distribution. In
5 this case it's a little different, a little difficult to pin-
6 point that. In my opinion it does not look like there was a
7 plan of distribution. You could argue that it could be open to
8 anybody, or it was specific to these individuals. So I don't
9 know that that's applicable in this case, in my opinion.

10 Q. Okay.

11 A. The third factor would be the expectation of the
12 public as to whether or not the transaction was an investment.
13 In my opinion the public would deem this as an investment.

14 Q. Why?

15 A. Because it had the characteristics of an investment.
16 There was an expectation of profit, there was furnishing value
17 with the expectation of profit. There was no consumer nature
18 to this. It looks like an investment.

19 Q. Okay, tell us about the fourth factor.

20 A. The fourth factor involves any risk reducing factors,
21 which would include a regulatory scheme or collateral -- or
22 collateral for the investment.

23 Q. Is there any sort of regulatory scheme?

24 A. It doesn't look like it. In reviewing the promissory
25 note, there is no regulatory scheme attached.

1 Q. What would be a regulatory scheme?

2 A. Oh, for example, if it were -- a CD is regulated by
3 the FDIC. There's another entity regulating that to ensure
4 the investor -- in other words, to protect the investor. There
5 is no protection here for the investor by another regulatory
6 agency, nor was the note collateralized. So those are three
7 out of -- given three out of the four factors. Missing one is
8 not dispositive; so in my opinion it's likely to be a security.

9 Q. Now, you heard the testimony of Mr. Cluff as to the
10 events that led up to the first investment of \$4,000, and then
11 a subsequent investment of 2,000 and a title to his vehicle and
12 whatnot. During all of this interaction with the defendant and
13 Mr. Cluff, were there any -- was there any information that
14 should have been revealed to Mr. Cluff by the defendant but
15 was not?

16 A. Well, material information, yes.

17 Q. Such as?

18 A. Financial statement of X-Tagged in its business oper-
19 ations, its track record to other investors if it had other
20 investors, certainly the judgments against Mr. Esquivel should
21 have been disclosed, in my opinion.

22 Q. What about the patent information?

23 A. That would have been a misstatement, in light of the
24 evidence that I've seen. By stating that there was a patent
25 pending or in the works, and then as the investigation showed

1 that that was not true, that would be considered a misstatement
2 rather than a disclosure.

3 Q. Okay, so we're breaking into two different categories
4 as far as omissions.

5 A. Yes.

6 Q. You're talking omissions he should have disclosed
7 financial records and specifically the fact that he has three
8 judgments?

9 A. Yes.

10 Q. Okay, and as far as misstatements, what would you put
11 in that category?

12 A. Well, the patent.

13 Q. Uh-huh.

14 A. Stating that there was a patent, and if I could review
15 my notes?

16 Q. Sure.

17 A. Is that okay? Okay. I think as far as provable
18 misstatements, I think the patent would be the large one in
19 this -- in that transaction.

20 Q. Okay, let's talk about now Mr. Engelbrecht. You've --
21 you've heard the testimony of Mr. Engelbrecht, and also had a
22 chance to read the file regarding this. Do you have an opinion
23 as to whether the investment made by Mr. Engelbrecht was a
24 security?

25 A. Yes, I do.

1 Q. And the opinion is?

2 A. I think it's very similar to Mr. Cluff's. Sounds like
3 the same transaction. The offer seemed to be a stock, and the
4 sale seemed to be a promissory note, which both are securities.

5 Q. Just so we're clear, you're breaking this down into
6 two separate analysis, essentially, because the -- if I'm
7 understanding you correctly, there's discussion about stock,
8 but when it's memorialized in writing it's a promissory note.
9 Are you -- is it your testimony that both of these would fall
10 within the parameters of a security?

11 A. Yes, under 61-1-1 it talks about in connection with
12 the offer or sale of a security. Because there are different
13 securities, there are different products -- I should say
14 different products here. That's why I've broken them up into
15 two. Seems to have a different product with the offer than
16 with the sale.

17 Q. Okay, given the events leading up to the investment
18 by Mr. Engelbrecht, were there any disclosures that should have
19 been made known unto Mr. Engelbrecht that were not?

20 A. Yes, financial statements, the civil judgments that
21 were pending. Also there were statements made as to the value
22 of the stock, which under Hanley, Hanley vs. SEC it states that
23 in order for an offerer to recommend a security, there needs
24 to be a reasonable basis for recommending the security.

25 In my opinion some of the -- some of the statements

1 made about a stock being worth \$1 one day and then soon growing
2 to \$500 per share, in order to make that a reasonable statement
3 there needs to be some disclosure as to how that's going to
4 happen. So in my opinion that would be a disclosure issue as
5 well, explaining how it jumps from \$1 to \$500.

6 Q. Were there any misstatements that occurred?

7 A. May I review my notes?

8 Q. Un-huh.

9 A. Yes, the statement about the DMV having a working
10 relationship with X-Tagged and then the subsequent verification
11 that that was false, that would be a misstatement. Also, again
12 the patent. Also the statement that there's no risk in the
13 investment.

14 Again, going back to (Inaudible), there needs to be
15 a reasonable basis for making a statement, and the statement
16 that there's no risk in an investment, especially a high yield
17 investment like this one, there needs to be a reasonable basis
18 for making that statement. I did not see one in the evidence,
19 and it does not appear that Mr. Esquivel gave Mr. Engelbrecht
20 a reasonable justification for making that statement. So I
21 would -- in my opinion that would be a misstatement as well.

22 Q. When we're looking at the required parameters for
23 disclosure, is it necessary for the defendant to have explained
24 what was being done, what had been done, or how X-Tagged was
25 going to become a public company?

1 A. Yes. In light of the statements made about X-Tagged,
2 and the success it was going to have, the interest from Google,
3 Facebook, MySpace, in order to make those reasonable statements
4 there needed to be some sort of explanation to make the state-
5 ments reasonable.

6 Q. Now, let's move onto Mr. Butcher. You've had a chance
7 to review the file regarding Mr. Butcher?

8 A. I have.

9 Q. You've heard his testimony here today?

10 A. Yes.

11 Q. Do you have an opinion whether the investment made by
12 Mr. Butcher is a security?

13 A. Yes, it looks like Mr. Butcher received a stock.

14 Q. Were there any disclosures that should have been made
15 to Mr. Butcher that were not?

16 A. Yes, the financial statements, the civil judgments,
17 also there are risk disclosures, although I did just get
18 through saying that saying there's no risk is a misstatement.
19 Also the failure to disclose risks is an omission of material
20 fact.

21 Q. So if there was no conversation between Mr. Butcher
22 and Mr. Esquivel as to the risk, that would be an omission?

23 A. Correct.

24 Q. Okay.

25 A. Also, again, the statements -- well, as far as the

1 disclosures, yes, there needed to be disclosures as to how the
2 investment was going to succeed.

3 Q. The -- are there any misstatements that were made?

4 A. If I can review my notes, please. That the DMV was
5 onboard, as Mr. -- as Mr. Butcher characterized. Also the
6 worth of this stock. I think again going back to making the
7 statement reasonable, the fact that Mr. Esquivel made a state-
8 ment that a half percent of a company was worth \$50,000, but he
9 was willing to sell that to Mr. Butcher for \$5,000, I believe
10 it was -- or excuse me, 2,500. No, it was 5,000 -- 5,000 for
11 a share that was worth \$50,000, I think in order to make that
12 statement reasonable, there needed to be some sort of expla-
13 nation.

14 Q. What about the statement regarding the patent of
15 X-Tagged, where would that fall?

16 A. That would be a misstatement, in light of the investi-
17 gation showing that there was no patent.

18 MR. LYON: Okay, I've got nothing further.

19 THE COURT: Thank you. Counsel.

20 MR. HOLJE: Just a few questions, your Honor.

21 CROSS EXAMINATION

22 BY MR. HOLJE:

23 Q. So Mr. Brady, just so that we're clear, there are
24 statutory -- securities are statutorily enumerated to an
25 extent; is that correct?

1 A. Yes.

2 Q. In other words, a stock is a security, a bond is a
3 security, a note is a security?

4 A. Yes.

5 Q. What we're talking about in this case, at least with
6 respect to two of the alleged victims is -- are -- just totally
7 lost my train of thought -- the promissory notes, the convert-
8 ible promissory notes; is that right?

9 A. Yes.

10 Q. A convertible promissory note is different from a
11 traditional note, correct?

12 A. I guess you could say that, yes.

13 Q. In other words, a convertible promissory note gives
14 somebody an opportunity to convert what is otherwise a note
15 into stock; is that accurate?

16 A. Yes.

17 Q. Okay, so to your knowledge is convertible -- specific-
18 ally a convertible promissory note listed anywhere in the regu-
19 latory scheme of Utah?

20 A. No, it's broadly defined as simply "note."

21 Q. Okay, and is it your testimony that the term "note"
22 encompasses a convertible promissory note?

23 A. If it passed the family resemblance test of the
24 Reeves' test, yes, that would be my testimony.

25 Q. Okay, so it's not an automatic thing. There's this

1 analysis that needs to take place, right?

2 A. Yes, it needs to be a substance over form issue.

3 Q. Okay. Right. Okay, and in this particular case, at
4 least with respect to those that Counsel that are talking about
5 convertible promissory notes, there was no stock issued at any
6 point, right, or no stock given to them?

7 A. Officially -- with the first two?

8 Q. Yes.

9 A. No.

10 Q. In other words -- so we need to make the record clear.
11 With respect to Mr. Cluff, then Mr. Engelbrecht, they never
12 received any stock, right?

13 A. It looks like in reviewing the file they received a
14 receipt indicating that they own shares. I don't know that
15 they received any stock certificates officially.

16 Q. Right, okay.

17 A. If that's what you're asking.

18 Q. That is what I'm asking; and essentially, I mean, is
19 it fair to say they have a piece of paper saying that if they
20 want shares of stock they can get them, but that's about it,
21 right? Is that --

22 A. Yes, and no. With -- as far as the promissory note is
23 concerned, yes, that's correct, but a securities transaction
24 does not need to be in writing. It can be an oral agreement.

25 Q. Okay, and so are you relying on what -- we broke this

1 down into a dichotomy of sale versus -- or offer versus sale.

2 Are you relying on the offer when you give your opinion that
3 they were offered stocks?

4 A. Yes.

5 Q. Okay, that's not based on the fact that they received
6 a convertible promissory note; it's based on the fact that the
7 word "share" was used or something like that, or --

8 A. To clarify, you're still talking about the first two--

9 Q. Yes, I am. Yeah.

10 A. Yes, based on the statements, the oral statements
11 made during the offer of a security, by the description or
12 Mr. Esquivel, my opinion of what he sold them was a stock.

13 Q. Okay, and your opinion is essentially aside from --
14 your opinion is not reliant on the convertible promissory note,
15 it sounds like, at least not exclusively?

16 A. Not with the offer. With the actual sale, yes.

17 Q. Right, okay. All right. I'm just -- I'm not trying
18 to confuse you. I'm trying to wrap my brain around this. You
19 said your opinion was that yes, it's a security. With respect
20 to Engelbrecht and Cluff, your opinion was that it was a stock.
21 I'm just trying to figure out why you had that opinion. It's
22 not based solely on the convertible promissory note. It takes
23 into account other factors.

24 A. Yes, and if you'd like I can explain why I think it's
25 a stock.

1 Q. That actually might be helpful, yeah.

2 A. Okay.

3 Q. Yeah.

4 A. Okay, again, there needs to be a substance over form.

5 Although with a category like stocks and notes, it's more cut
6 and dry; but with a stock, so long as the product that's sold
7 has the characteristics of a stock it is considered a security.

8 Q. Okay, the family resemblance test, right?

9 A. No, no, that would be -- family resemblance relates to
10 the promissory note or to any note.

11 Q. Uh-huh.

12 A. A stock, if -- in order to look at the characteristics
13 of a stock, they're typical -- there are usually five or six,
14 I believe. There's whether or not there are voting rights;
15 dividends; whether it's negotiable, meaning you can transfer
16 it, it's transferrable; and whether or not there's an apprec-
17 iation in value. If it carries those characteristics then it's
18 likely a stock.

19 In looking in this case, judging by what Mr. Esquivel
20 was offering, in my opinion the stock offered was a security,
21 based on those characteristics.

22 Q. Okay, but the convertible promissory note that they
23 were actually given didn't specify any of those things, right?

24 In fact, it said the opposite; no voting rights were given,
25 and that, you know, transferability and all those issues were

1 addressed in that; isn't that accurate?

2 A. Yes, and therefore with the promissory notes you would
3 take a different analysis and view them as a note.

4 Q. Okay, so you're -- you're not looking at the two
5 together. You're saying, "Hey, we have a stock here," just
6 because at that point it meets the definition regardless of
7 what happened afterwards with the promissory note?

8 A. Well, I would say in my opinion Mr. Esquivel offered
9 one type of security, offered one security --

10 Q. Deliberately?

11 A. -- and sold a different security.

12 Q. Okay, and the fact that it was offered, that's where
13 you're saying fraud comes in, right?

14 A. Well, I'd say fraud comes in on both the offer and the
15 sale.

16 Q. Okay. You went through -- I don't want to get too
17 bogged down in this family resemblance test here, but --

18 A. Sure.

19 Q. -- isn't one of the considerations the managerial
20 efforts that are made by individuals involved in the company
21 and investors?

22 A. What you're talking about is a passive investor.

23 Q. What I'm asking is, does it matter that Ryan Butcher
24 was the Utah representative, and that he put in efforts to
25 direct his company?

1 A. Okay, I think I know what you're asking.

2 Q. Oh, and frankly, Kyle Cluff, as well, admitted to
3 being an owner of it, suggesting ideas on the direction of the
4 company. Those are relevant considerations, aren't they?

5 A. They are if you're using an investment contract
6 analysis. Under the investment -- to determine whether or
7 not a transaction or a product is a security as an investment
8 contract, you use what's called a "Risk Capital Test," which
9 looks at four factors.

10 One of them is what you're talking about. One is
11 furnishing value; two, with the expectation of profit; three,
12 subject to the risk of the enterprise; and four, does the
13 investor receive actual or practical control of the enterprise?

14 Q. Okay, so you're saying that is specific to investment
15 contracts?

16 A. The way you're describing it, yes.

17 Q. Okay, and it doesn't factor into notes or stocks?

18 A. That particular prong is for the investment contract
19 analysis. It wouldn't provide the note analysis.

20 MR. HOLJE: Okay. Okay, I think that's all the
21 questions I have, your Honor, your Honor.

22 THE COURT: Thank you. Anything else?

23 MR. LYON: (Inaudible).

24 THE COURT: Thank you, Mr. Brady. Appreciate it very
25 much.

1 Anything else?

2 MR. LYON: The State rests, your Honor.

3 THE COURT: Counsel, do you anticipate calling any
4 witnesses?

5 MR. HOLJE: No, I don't, your Honor.

6 THE COURT: Do you feel a need to argue anything?

7 MR. HOLJE: I can do it very briefly.

8 THE COURT: Okay.

9 MR. HOLJE: Judge, with respect to Count No. I, that
10 alleges an amount of \$10,000 or more. That is specific to
11 Mr. Cluff, Kyle Cluff. The State is alleging that it's over
12 the \$10,000 threshold based on an initial \$4,000 check, a
13 subsequent \$2,000 check, and then a credit that was given by
14 Mr. Esquivel just to be a nice guy, apparently, or whatever,
15 for a diet plan that was made. He was, you know, he was an
16 employee of the gym and was apparently helping him learn how
17 to eat right.

18 So Mr. Esquivel on his own says, "Okay, we'll give you
19 a \$2,000 credit for the diet plan. In addition, another \$2,000
20 is credited based on a title to a ten-year-old car. In 2008 --
21 in 2008 it's a 1998 Chevy Cavalier. So a ten-year-old car that
22 by his own admission is inoperable, and again \$2,000 seems to
23 be just kind of pulled out of thin air. You know, there's no
24 evidence presented about the actual value of this 1998 Chevy
25 Cavalier.

1 I would suggest that a ten-year-old car that's inoper-
2 able in a Chevy particularly is not worth \$2,000. That's just
3 a number that was arrived at by Mr. Esquivel. Same with the
4 diet plan. Mr. Cluff told us there were no receipts given,
5 there were no -- it wasn't invoiced. It was just a number that
6 they pulled out.

7 So in actuality what you have here is \$6,000 being
8 given. The rest I would say are just credits that should not
9 be deemed sufficient for purposes of the \$10,000 threshold.
10 That would make it a third -- that would make Count I a third-
11 degree felony, not a second degree felony.

12 THE COURT: Okay.

13 MR. HOLJE: I'll submit on that basis, Judge.

14 THE COURT: Thank you. Let me first indicate for
15 Mr. Esquivel's purpose and for anyone in the courtroom, I
16 think that both lawyers in this case understand that in
17 preliminary hearings it's not the -- the Court doesn't have
18 the opportunity to weigh the evidence, and has to take the
19 evidence in the light most favorable to the State.

20 So specifically, Mr. Esquivel, as it pertains to
21 your lawyer's arguments regarding the value of the vehicle
22 and the value of the diet plan, the fact is there was evidence
23 presented that those were the values; 2,000, 2,000, \$6,000
24 cash. So the Court takes that as -- as to be true in this
25 particular case, because I can't weigh the evidence. It's been

1 presented, and I take the evidence in the light most favorable
2 to the State.

3 So given that premise, let me back up, then, and
4 say based on the testimony of the witnesses, the documentary
5 evidence that I've received, that the Court finds probable
6 cause to believe that there were crimes committed in this
7 particular case by Mr. Esquivel; and they were as follows:

8 Count I, the Court finds that there was the crime
9 of securities fraud, a second-degree felony, committed in this
10 case. Probable cause to believe that it was been committed
11 by Mr. Esquivel, and specifically the \$10,000 or more value
12 would apply to Mr. Cluff. So even though he's not named in
13 this information, the Court believes that count would follow
14 Mr. Cluff.

15 The Court also finds probable cause to believe that
16 the crime in Count II, securities fraud, a third-degree felony,
17 was committed; and Count III, securities fraud, a third-degree
18 fraud, was committed as well. I'm not going to attach a victim
19 to either one of those, but we have two victims that basically
20 it appears to the Court after having heard the evidence that
21 each of those victims would be identified with one of these
22 particular counts.

23 So I'll find that it's appropriate to bind this over
24 to the trial Court, which in this case is Judge --

25 MR. LYON: Connors, your Honor.

1 THE COURT: -- Connors. How far out do you want to go?

2 MR. HOLJE: A couple of months, maybe?

3 MR. LYON: Let's go -- this is just for arraignment.

4 MR. HOLJE: Oh, yeah, let's just -- sorry, I thought
5 you were setting the trial date as well, Judge.

6 THE COURT: No, no, no, no. So --

7 MR. HOLJE: We can --

8 THE COURT: -- arraignment.

9 MR. HOLJE: -- go just a couple --

10 THE COURT: Judge Connors holds his on Wednesday
11 mornings at 8:30.

12 MR. LYON: Tuesday.

13 COURT CLERK: Tuesday mornings.

14 THE COURT: At what?

15 MR. LYON: Tuesday mornings.

16 THE COURT: Tuesdays, excuse me. Thank you for keeping
17 me straight. Probably one other thing I ought to indicate for
18 the record that as Mr. Lyon indicated, securities is not one of
19 the areas that we normally get involved with. I was, however,
20 satisfied after having reviewed the statute and heard the
21 testimony of the expert witnesses, that at least there was
22 sufficient evidence presented that the Court could find
23 probable cause that these alleged incidents were in fact
24 a security transaction on each one of the three counts, and
25 therefore the violation occurred.

1 So have you got a date?

2 MR. HOLJE: Just a few weeks out is fine.

3 COURT CLERK: On the 3rd or the 10th of April?

4 MR. HOLJE: I'm in Duchesne on the 3rd. If we could go
5 to the 10th, please.

6 THE COURT: Mr. Lyon, do you want your exhibits?

7 MR. LYON: Yeah, do you mind if I withdraw them, or do
8 you want to leave them in?

9 MR. HOLJE: No, I don't care.

10 THE COURT: I'll allow you to withdraw your exhibits.

11 MR. HOLJE: Your Honor, this is kind of a weird request.

12 I've done it in the past, but he's a -- he's a resident of
13 Colorado. At least that's where he's at right now. He's
14 making quite a bit of travel plans to get here each time for
15 Court. Is there any way to waive his personal appearance at
16 that arraignment, and you know, we'll know --

17 THE COURT: Well, if that's all we're going to do is an
18 arraignment, we can do one of two things. We either waive his
19 appearance and you appear on his behalf, or I could actually
20 arraign him today, and then we set it for pretrial down the
21 road once you've had an opportunity to prepare. Let's don't --

22 MR. LYON: We can do that right now.

23 MR. HOLJE: Why don't we do that, yeah. He'll enter
24 pleas of not guilty right now, your Honor, and that might be
25 a

1 cleaner way. I apologize for not suggesting that sooner.

2 THE COURT: Well, let's do this, then. Setting on
3 behalf of Judge Connors, and this case having been bound over
4 by the Magistrate, we're here on an arraignment, Mr. Esquivel.

5 Counsel, Mr. Esquivel has a copy of the Information?

6 MR. HOLJE: Yes, he does.

7 THE COURT: He understands each of the counts?

8 MR. HOLJE: Yes.

9 THE COURT: Would you waive the reading of the Inform-
10 ation, then?

11 MR. HOLJE: We'll waive a formal reading of that, your
12 Honor.

13 THE COURT: All right, and you anticipate that he's
14 going to enter --

15 MR. HOLJE: Not guilty pleas today.

16 THE COURT: -- not guilty pleas.

17 MR. HOLJE: Yes, your Honor.

18 THE COURT: All right. Given that, I will arraign
19 Mr. Esquivel on these three counts, and enter a not guilty
20 plea on each of the three counts, and we'll send it then to
21 Judge Connors for a pretrial conference. Now, you tell me
22 how far out that you want to go, that you think you can
23 reasonably -

24 (Counsel confer off the record)

25 MR. HOLJE: Something approximately a month down the

1 road, your Honor.

2 THE COURT: Okay, do you have a calendar? Do you want
3 to --

4 MR. HOLJE: Yeah, if we could -

5 THE COURT: -- do you want to tell me when you want to
6 come?

7 MR. HOLJE: Is there --

8 THE COURT: Tuesdays at 8:30.

9 MR. HOLJE: Okay. Okay, let's go the 24th, if that's
10 acceptable.

11 THE COURT: That's fine, isn't it?

12 MR. LYON: That's agreeable to the State, your Honor.

13 COURT CLERK: Is that April 24th?

14 MR. HOLJE: Yeah.

15 THE COURT: Tuesday, April 24th at 8:30 a.m. Judge
16 Connors is in courtroom No. 5. Thank you all very much.

17 MR. HOLJE: Thank you.

18 THE COURT: Court will be in recess. Thanks, Diane.

19 MR. LYON: Thank you for staying late.

20 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21st day of July 2012.

My commission expires:
January 12, 2016

Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County

Signed: _____
Beverly Lowe, CCR/CCT