

below, WSS and Turner are entitled to a dismissal of the Petition. In the alternative, Respondents respectfully request leave to file a motion to stay this proceeding.

PRELIMINARY STATEMENT

The Petition of the Utah Division of Securities (the “Division”) should be dismissed for a simple reason: the Division’s claim has previously been litigated and resolved in state court. On February 9, 2005, the Division filed a complaint (the “State Court Action”) in the Fifth District Court, Washington County, Utah (the “Court”) based on a claim of Respondents’ alleged failure to supervise (copy attached as Exhibit A). An Order dismissing the Division’s complaint against Respondents was subsequently entered by the Court on July 14, 2006 (the “July 14, 2006 ORDER”) (copy attached as Exhibit B). A final judgment was entered on September 14, 2006 (copy attached as Exhibit C) As a result, the Division lacks subject matter jurisdiction to consider the Petition.

THE MOTION TO DISMISS (Rule 12(b)(1) and (6))

Utah Code Annotated 63-46b-1(4)(b) provides as follows:

This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from: * * * (b) granting a timely motion to dismiss . . . if the requirements of Rule 12(b) . . . are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.”

Rule 12(b)(1) and (6) of the Utah Rules of Civil Procedure provide:

“Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto, if one is required, except that *the following defenses may at the option of the pleader be made by motion*: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted. (emphasis added)

For purposes of a 12(b) motion, the Hearing Officer takes the well plead allegations of the Petition as true. If those allegations fail to state a claim under applicable law, the Petition

should be dismissed. In this case the question of subject matter jurisdiction is a fundamental threshold question that must be resolved before proceeding. Further, the statute of limitations has expired for this action.

I. THE DIVISION LACKS SUBJECT MATTER JURISDICTION AND THE STATUTE OF LIMITATIONS FOR THIS ACTION HAS EXPIRED

A. The Same Claim Was Previously Litigated and Resolved.

In the State Court Action the Division brought a District court case against Respondents Walnut Street Securities (“WSS”), Carole Turner (“Turner”) and others. The Division’s claim in the State Court Action was based on the Respondents’ alleged failure to supervise and detect the fraudulent selling away activity of Roy Hafen, then a registered representative of WSS. The identical set of facts has been alleged in the Petition in this action, taken word for word from the allegations of the Complaint in the District Court Case. The claim in both cases is failure to supervise. In addition to attempting to re-litigate the same claim (which is sufficient to preclude jurisdiction of this matter) the Division has also had opportunity to seek remedies against the Respondents based on their licensure. Further the Division specifically requested in the State Court Action that the Respondents be fined. However the Division’s opportunity and request for those remedies was resolved negatively against the Division when the Court dismissed the Division’s State Court Action with prejudice and on the merits on June 6, 2006 for failure to state a claim upon which relief can be granted. The Division also failed to amend its Complaint as allowed by the July 14, 2006 ORDER. The judgment in the State Court Action is now res judicata as to all matters in this action.

Additional evidence that the Division seeks to relitigate the same claim in this administrative action is the severity of the sanctions it seeks in this proceeding – revocation of license and a \$300,000 fine. Those draconian sanctions for alleged “failure to supervise” are

far in excess of the sanctions recommended by the NASD in its sanction guidelines (See NASD Sanction Guidelines at NASDR.com). The NASD does not speak in terms of “revocation” for a failure to supervise and the recommended fines are only a fraction of \$300,000 in the most egregious cases of failure to supervise. The Division is attempting to relitigate the Washington County case in this administrative proceeding. The Division is trying to take into account its claim that WSS was responsible for the investor losses that occurred as a result of the fraud of Hafen, Brady and of Christopher and Carol Ann Munson (the latter two being the persons who received the Video Venue investment money). The sanction demands are far beyond the NASD recommended guidelines. We respectfully submit that such an approach is an abuse of discretion and unauthorized by law. The District Court in Washington County has already ruled that WSS and Turner are not responsible for investor losses – there was no causation. The alleged “failure to supervise” of WSS and Turner did not cause the losses.

The allegations made by the Division are, economically, extremely damaging allegations to the Respondents, and the excessive remedies requested in the Division’s administrative action are completely inappropriate and have previously been adversely determined against the Division in the District Court. The Division is without subject matter jurisdiction in this proceeding and it should be dismissed.

B. The Statute Of Limitations On This Action Has Expired And Further Action As To This Matter Cannot Be Justified As Being In The Public Interest.

Petitioner's claims are barred by the statute of limitations. Utah Code Ann. § 61-1-21.1 provides that no civil complaint or cause of action may be filed under the Utah Uniform Securities Act more than five years after the alleged violation. Petitioner attempts to hold WSS responsible for Hafen's non-WSS activity. Petitioner relies on the filing of an outside business activity report by Hafen on July 10, 2001 (the “OBA”). See Ex.D, July 10, 2001 OBA.

Petitioner asserts that Respondents' monitoring of Hafen's outside business activity, including the receipt of the OBA, gives rise to its claim. See Pet., P. 36. However, the Petition in this proceeding was served August 4, 2006, more than five years and 24 days after the Division alleges WSS and Turner should have taken action on this so called "red flag." (See State of Utah, v. Michael R. Moore, 802 P.2d 732 Court of Appeals of Utah 1990, where the Court upheld the application of the five year statute of limitations imposed by the Utah Securities Act rather than the general statute of limitations found elsewhere in the Utah Code). This same five year statute applies in this case and should bar this cause of action under the Utah Securities Act Accordingly, petitioner's claims should be dismissed

Finally, inasmuch as five years have expired since the OBA referenced by the Division and even more time since the selling away activity of Hafen occurred and given the other facts and circumstances of this case, Respondents respectfully notes that this action is not in the public interest at this late date, particularly in view of the July 14, 2006 ORDER (See UCA 61-1-6(2)).

II. STATEMENT OF FACTS

A. The Present Action

This action concerns the activities of Roy N. Hafen. Petition, ¶ 2. Petitioner alleges that Hafen, along with Brady¹, solicited investments for and made misrepresentations concerning Video Venue, a project "represented by Hafen as the production, sale and implementation of a patented screen system whereby advertising would be delivered to gas station customers while pumping fuel." Pet., ¶ 8. Petitioner claims that Hafen and Brady thereby: (1) offered and sold unregistered securities in violation of Utah Code Ann. § 61-1-7; (2) made false statements and omissions of material fact in violation of Utah Code Ann. § 61-1-1(2); and (3) "engaged in acts,

practices and courses of business which operated as a fraud or deceit” in violation of Utah Code Ann. § 61-1-1(3). Pet., ¶¶ 25-35.

Petitioner asserts claims under Utah Code Ann. § 61-1-6(2) and Division Rule 164-6-1(g) against WSS, Turner, and Mack. Pet., ¶¶ 38, 39. Petitioner alleges that WSS and Turner (or Mack) “failed to detect a number of ‘red flags’” arising from Hafen’s failure to properly report outside business activities, his engaging in securities activities not recorded on the books and records of WSS and his use of unapproved advertising. Pet., ¶¶ 35, 36. Petitioner claims that this alleged failure to properly supervise Hafen and investigate his activities constitutes a violation of Utah Code Ann. § 61-1-6(2)(j) and constitutes a dishonest and unethical business practice under Division Rule § 164-6-1(g)(C)(28). Pet., ¶ 38, 39. There is no allegation that WSS and Turner (or Mack) were involved in the sale of the Video Venue securities, that they obtained any financial benefit from the transactions, that they knew about the transactions, that the investors relied upon WSS, Mack or Turner, nor that the investors were customers of WSS.

B. Petitioner’s Filing Of Notice Of Agency Action Is Forum-Shopping Under Well Established Rules Of Law.

“The policy in the law is . . . to simplify and expedite procedure and . . . avoid a multiplicity of lawsuits.” See Hunter v. Sunrise Title Co., 84 P.3d 1163, 1166 (Utah 2004) (citing Bartholomew v. Bartholomew, 548 P.2d 238, 241 (Utah 1976)) (emphasis added). Forum shopping is not condoned by Utah courts. The Utah Court of Appeals recently affirmed a denial of a motion to compel arbitration that was made after the parties had proceeded through the discovery stage. See Smile, Inc. v. Britesmile Mgmt., Inc., 122 P.3d 654 (Utah App. Ct. 2005). There, the defendant already had been unsuccessful on a motion to dismiss, had engaged in significant discovery, and had been assessed attorneys’ fees and been ordered to produce

¹ Plaintiff does not allege that Brady was employed by, or affiliated with, WSS. Pet., ¶ 7.

electronic discovery. The court refused to consider the defendant's attempt to escape the forum after adverse rulings, determining that "granting the motion to compel arbitration at this late stage, after BriteSmile has tested the judicial waters, would be no different than allowing BriteSmile to forum-shop." Id. at 661.

Petitioner should not be permitted to proceed with this action. Litigation involving exactly the same claim has been resolved adversely to the Division in the Fifth Judicial District Court of Washington County. Petitioner's claims in the State Court Action have been dismissed with prejudice and on the merits. The Division should not be permitted to blatantly forum-shop for a more favorable determination. Further, to permit this matter to go forward flies in the face of judicial economy in light of the final judgment entered in this matter. The Petition should be dismissed.

III. IN THE ALTERNATIVE, THE HEARING OFFICER SHOULD PERMIT THE RESPONDENTS TO FILE A MOTION FOR STAY.

Pursuant to Utah Code Ann. § 63-46B-6(3) and 63-46b-18, the presiding officer may permit additional pleadings including a motion for stay of the Division's action. Such a stay is in the interest of judicial economy and would preclude conflicting results in two separate forums. Proper use of judicial time is not served by having two forums decide the same issue at the same time. This would be the case if the administrative proceeding involving the same claim made in the State Court Case is allowed to go forward. By requesting leave to file a motion to stay and a memo of authorities in support thereof, the Respondents seek the right to fully brief and argue the legal rationale for staying this proceeding. A District Court Judge has already ruled on the merits of this matter and it is essential that the Division give proper consideration to the conflict between the two disparate proceedings brought by the Division. This is not a simple matter but

involves questions of comity, restraint, judicial economy, federal and state due process, justice and deference to the Courts of the State of Utah.

**HEARING REQUESTED AND REQUEST FOR
CORRECTION OF WEB SITE INFORMATION**

Pursuant to the Division's Rule R164-18-6, the Respondents request a hearing on this Motion to Dismiss/ Request for Leave to file a Motion to Stay.

Respondents further request the following additional relief: (1) that the Division's web site be updated to reflect the correct inception date of this action (Docket Number 06-0040), being August 4, 2006, the date of the Notice of Agency Action, as provided in 63-46b-3(1)(a) and (2) that the Division's web site (Docket Number CV-00051) be updated to include a copy of the July 14, 2006 ORDER of the Court dismissing the Division's claims in the State Court Action with prejudice and on the merits so that the public has full and complete information about that proceeding. Finally, the Respondents also respectfully request that the Forms U-6 filed by the Division with respect to this proceeding be amended as follows: (1) to clarify that Turner was not the agent involved in the selling of the notes; (2) to refer to and provide information as to the July 14, 2006 ORDER; and (3) to clarify that the allegations of failure to supervise against WSS relate only to the Video Venue matter.

V. CONCLUSION

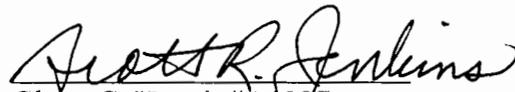
WSS and Turner did not financially benefit from the Hafen/Video Venue selling away activity and were not aware of it. Participants in that investment were unaware of Hafen's affiliation with WSS. At all times, WSS complied with its own and NASD supervisory procedures then in effect. Investors in the Hafen/Video Venue venture were not customers of Walnut. Investor losses in the matter were incurred prior to the appearance of the July 10, 2001 "red flag." Any "negligent supervision" was not a cause of investor losses, as a matter of law. For these and for the reasons set forth above, Respondents Walnut Street Securities, Inc. and

Carole A. Turner are entitled to dismissal of the Petition, or in the alternative, for leave to brief and argue the question of the stay of this proceeding.

DATED this 28th day of September 2006.

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Carole A. Turner

By:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendants Walnut Street Securities, Inc.'s And Carole Turner's Motion To Dismiss Petition For Order Revoking Licenses, Barring Licensees, And Imposing A Fine Or In The Alternative For A Stay Of This Proceeding Including Memorandum of Authorities in Support of Motion to Dismiss and Request for Hearing has been furnished by first class mail, postage prepaid to the following on the 28th day of September 2006.

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