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BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:

FIRST WESTERN ADVISORS, INC.,
CRD #13623;
GARY W. TERAN, CRD # 1076442;
DAVID A. RUSSON, CRD # 1194052;
BRIAN G. KASTELER, CRD # 2182796; and
CARL A. PAGE, CRD # 710908

Respondents.

MOTION TO DISMISS

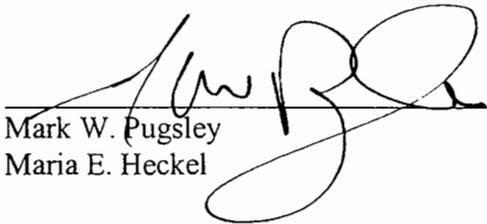
Docket No. SD-07-0015
Docket No. SD-07-0016
Docket No. SD-07-0017
Docket No. SD-07-0018
Docket No. SD-07-0019

Oral Argument Requested

Respondent First Western Advisors, Inc., ("FWA"), by and through its attorneys of record, Ray Quinney & Nebeker P.C., pursuant to R151-46b-7(6) of the Utah Administrative Code moves to dismiss the adjudicative proceeding commenced by the Division's Notice of Agency Action dated February 16, 2007, as untimely on the grounds and for the reasons more particularly set forth in the supporting memorandum filed with this motion.

DATED this 15th day of June, 2007.

RAY QUINNEY & NEBEKER P.C.



Mark W. Pugsley
Maria E. Heckel

*Attorneys for Respondent First Western Advisors,
Inc.*

918838

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of June, 2007, a true and correct copy of the foregoing **MOTION TO DISMISS** was served by hand-delivered to the following:

Administrative Court Clerk
c/o Pam Radzinski
Utah Division of Securities
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, Utah 84114-6760

Laurie L. Noda
Assistant Attorney General
160 E. 300 South, Fifth Floor
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A handwritten signature in black ink, appearing to read "Laurie L. Noda", is written over a horizontal line. The signature is highly stylized and cursive.

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Respondents.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Docket No. SD-07-0015
Docket No. SD-07-0016
Docket No. SD-07-0017
Docket No. SD-07-0018
Docket No. SD-07-0019

Respondent First Western Advisors, Inc., (“FWA”), by and through its attorneys of record, Ray Quinney & Nebeker P.C., submits this memorandum of law in support of its Motion to Dismiss this adjudicative proceeding as untimely pursuant to R151-46B-7(6) of the Utah Administrative Code and rule 12b(6) of the Utah Rules of Civil Procedure. Under Utah Code section 61-1-6(5) the Utah Division of Securities (“the Division”) may not institute a proceeding to revoke a license “on the basis of a fact or transaction” known to it when a new or renewed license becomes effective, unless it is brought within 120 days of the effective date of that license. The facts alleged in the Petition and in public records subject to judicial notice show

that the Division's Petition is based on a prior Securities and Exchange Commission ("SEC") investigation of the same sales of class B mutual funds alleged to be wrongful in the Petition.¹ The Division had knowledge of this investigation through the CRD disclosures of FWA's brokers at least as early as August of 2004. After learning of the SEC's investigation, the Division nevertheless renewed FWA's license at the end of 2004, 2005, and 2006. This action was initiated far more than 120 days after it learned of the relevant facts, and was therefore brought in contravention of section 61-1-6(5) and should be dismissed as untimely. Alternatively, the Division should dismiss this proceeding in whole or in part as untimely based on the five year statute of limitations contained in Utah Code section 61-1-21.1.

STATEMENT OF FACTS

The following facts are apparent on the face of the Petition:

1. First Western Advisors, Inc. is a Utah corporation with a principal place of business in Salt Lake City, Utah. FWA has been licensed in Utah as a broker-dealer since November 10, 1983. (Petition ¶ 1.)
2. On February 16-17, 2007, the Division filed a Petition to Revoke Licenses Bar Licenses and Impose Fines and a Notice of Agency Action instituting these proceedings against FWA and the present and former broker-dealer agents of FWA listed in the Petition, including Gary Teran, David Russon, Brian Kasteler, and Carl Page (together "FWA's agents"). The Petition alleges that FWA failed to supervise its agents and that FWA and its agents committed various

¹ In fact, the Division relied heavily upon investigative testimony and other information gathered by the SEC in the prior investigation in the Petition.

violations of state securities laws and ethical practices related to FWA's agents' sales of B and C class mutual funds.

3. Gary Teran has been licensed in Utah as a broker-dealer agent of FWA since January 24, 1986, and Carl Page has been licensed in Utah as a broker-dealer agent of FWA since July 9, 1992. David Russon was licensed as a broker-dealer agent of FWA from July 11, 1994 until September 30, 2006, and Brian Kasteler was licensed as a broker-dealer agent of FWA from October 2, 1992 until September 30, 2003. (Id. ¶¶ 2-5.)

4. The Petition's allegations of wrongdoing are based primarily upon allegedly inappropriate mutual fund sales that occurred between 1998 and June of 2003. (Id. ¶¶ 35, 39, 48, 56-57, 64-69, 77, 79, 85, 90, 93-94, 98-100).

5. The Petition also alleges that in 2003 and early 2004, agents David Russon and Brian Kasteler, who were subject to supervision by FWA, wrongfully encouraged clients to sign statements contradicting testimony that the clients had given to the Securities and Exchange Commission ("SEC") regarding these transactions. (Id. ¶¶ 46-47, 54-55, 62-63, 75-76, 84, 89, 97.)

6. The allegations in the Petition are based on an investigation conducted by the SEC, including testimony taken by the SEC prior to the fall and winter of 2003. (See, e.g., id. ¶¶ 36-37, 43-47, 49-55, 58-63, 70-71, 74-76, 81-84, 86-89, 95-97, 101.)

In addition to the above facts, we request that the presiding officer take judicial notice of the following law and facts, which are a matter of public record subject to judicial notice. See Tal v. Hogan, 453 F.3d 1244, 1265 (10th Cir. 2006) (stating that when ruling on a 12(b)(6) motion a

court may “take judicial notice of its own files and records, as well as facts which are a matter of public record.” (internal quotation marks and citation omitted)).

7. The Division has by rule designated the web-based “Central Registration Depository” (“CRD”) as a repository for disclosures made to the state in connection with licensing of broker-dealers and their agents. Utah Admin. Code R164-4-3(D)(1) (2007).

8. Licenses awarded to broker-dealers and their agents expire on December 31 every year. Utah Code Ann. § 61-1-4(1)(d) (2006). To maintain licensure, a broker dealer or agent is required to file a new application annually. Id. § 61-1-4(1)(a). The broker-dealer or agent is also required to amend any document filed with the division at any time if the information if that document “becomes inaccurate or incomplete in any material respect.” Id. § 61-1-5(4).

9. In August 2004, FWA agents filed amendments to their license applications (form U-4) with the CRD notifying the Division that an SEC investigation was pending regarding alleged “improper sale of class B Mutual Funds.” (Attached hereto as Exhibit A.)

10. Nevertheless, because, as stated in the Petition, FWA and its present agents have maintained their licenses since the 1980’s (Teran and FWA) and early-to-mid 1990s (Page), (Petition ¶¶ 1-5), it is clear that the Division renewed FWA’s license and the licenses of the individual respondents three times, at the end of 2004, 2005, and 2006, before filing the petition.

11. In March 2005, FWA agents again filed amendments to their license applications with the CRD disclosing that the SEC had dropped its investigation. (Attached hereto as Exhibit B.) And in April 2005, former FWA agent Kasteler filed a termination notice (form U-5) with the CRD

that disclosed the SEC investigation into “mutual fund share class purchases” and the investigation’s resolution in March 2005. (Attached hereto as Exhibit C).

ARGUMENT

I. THIS LICENSE REVOCATION PROCEEDING AGAINST FWA IS UNTIMELY UNDER SECTION 61-1-6(5) AND SHOULD BE DISMISSED

The Division should dismiss the proceeding against FWA pursuant to the limitation on license revocation proceedings contained in Utah Code section 61-1-6(5) because the facts and transactions upon which the proceeding is based were known to the Division prior to the Division’s renewal of FWA’s license in 2004, 2005, and 2006. Utah Code section 61-1-6 authorizes the Division to impose sanctions, including suspension or revocation of a license, on a person licensed as a broker-dealer or broker-dealer’s agent; and it describes acts that warrant such sanctions. But section 61-1-6 also protects the licensee by limiting the time that the Division may delay in commencing a proceeding to revoke or suspend a license after the Division learns of the conduct that allegedly warrants such sanctions. Specifically, there are two provisions within section 61-1-6 that limit the Division’s delay in revoking or suspending a license.

First, subsection 61-1-6(5) provides as to all of the grounds for sanctions listed in section 61-1-6, that “[t]he division may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to it when the license became effective unless the proceeding is instituted within the next 120 days.” Utah Code Ann. § 61-1-6(5) (2006). Subsection 61-1-6(5) applies when a broker-dealer’s or agent’s license becomes effective after both the initial grant of a license and after the yearly license renewal. See Utah Code Ann. §§ 61-1-4(1)(a),(d),(e)

(providing that broker-dealer and agent licenses expire on December 31 of each year and are renewed pursuant to an application process, becoming effective on the 30th day after an application is filed); See also Blinder Robinson & Co., Inc. v. Goettsch, 431 N.W.2d 336, 338-40 (Iowa 1988) (interpreting language very similar to Utah Code section 61-1-6(5) contained in Iowa’s Uniform Securities Act² to apply to license renewals and characterizing that section as “a statute of limitations for revocation proceedings”); 69A Am. Jur. 2d Securities Regulation—State § 72 (interpreting this provision of the Uniform Securities Act to mean that “where the facts underlying the administrative complaint have been known to the agency, but the Administrator has granted the license or a renewal of the license, the agency and Administrator are precluded from later bringing an administrative proceeding based on that same information”).

Second, subsection 61-1-6(2)(f), which initially provides that the Division may take disciplinary action on a license if it learns that the broker-dealer or agent was “within the past five years” found by another regulatory body to have “willfully violated” securities laws, states that “the division may not commence agency action to revoke or suspend any license under [the same subsection] more than one year from the date of the order relied on.” Utah Code Ann. § 61-1-6(2)(f)(i)-(iii) (2006).

The Petition’s frequent references to testimony connected with the SEC proceeding shows that the Division has relied heavily on the SEC’s prior investigation of the same

² According to Blinder, the Iowa Securities Act stated as follows: “The administrator may not institute a suspension or revocation proceeding under subsection 1 on the basis of a fact known to the administrator when registration became effective unless the proceeding is instituted within thirty days after the effective date.” Blinder, 431 N.W.2d at 338-39 (quoting Iowa Code § 502.304(2) (1985)).

allegations of impropriety related to FWA's agents' sales of B and C class shares of mutual funds raised by the Division's Petition. According to the CRD disclosures, FWA's agents notified the Division of the SEC investigation in August 2004. The Division was also notified when the investigation was dropped two years ago, in March 2005. Nevertheless, the Division has only now commenced a proceeding to revoke the broker-dealer licenses of FWA and its agents, impose fines, and thereafter bar FWA and its agents from working in the securities industry. In the meantime, between August 2004 and February 2007, the Division renewed the licenses of FWA and its agents three times: at the end of the year in 2004, 2005, and 2006.

It follows that the Division's actions must now be limited by subsection 61-1-6(5), which section deprives the Division of authority to institute a proceeding to revoke Respondents' licenses "on the basis of a fact or transaction known to it when the license became effective unless the proceeding is instituted within the next 120 days." Utah Code Ann. § 61-1-6(5) (2006). The Division cannot bring a licensing action based on facts learned from an SEC investigation two-and-one-half years after learning of the investigation and two full years after that investigation was dropped by the SEC. The 120 day statutory grace period for filing a revocation action after the 2004 and 2005 licensures has long since expired. Accordingly, the Division should grant FWA's motion to dismiss.

FWA additionally notes that if in 2005 the SEC had, instead of dropping its investigation, concluded that there was evidence that FWA's agents engaged in willful wrongdoing, FWA would also argue that the present proceeding should be barred by the one-year limitation in subsection 61-1-6(2)(f). But, because the SEC dropped its investigation, this case does not fit

into the express language of 61-1-6(2)(f)—although the rationale for imposing a one-year time limit on bringing a licensing proceeding premised on a prior action by the SEC would seem to be stronger where the events that are the basis for this proceeding against Respondents occurred years ago, where the SEC found them to be without sufficient merit to support an action, and where the Division was informed of the SEC’s investigation. The inapplicability of this section in cases where wrongdoing is not established by the SEC’s investigation does add extra weight, however, to Respondents’ argument that section 61-1-6(5) is intended to serve as a bar to a delayed action based on an old SEC investigation that the Division had knowledge of.

II. ALTERNATIVELY, THE ALLEGATIONS PREMISED ON SECURITIES ACT VIOLATIONS THAT ALLEGEDLY OCCURRED PRIOR TO 2002 SHOULD BE DISMISSED AS UNTIMELY BASED ON THE 5 YEAR STATUTE OF LIMITATIONS CONTAINED IN SECTION 61-1-21.1(1).

Alternatively, the agency should dismiss the majority of the allegations against FWA in this proceeding based on the five year statute of limitations applicable to violations of Utah’s Uniform Securities Act.³ See Utah Code Ann. § 61-1-21.1(1) (2006). Under this five-year bar, allegations of securities law violations occurring prior to 2002 should be dismissed.

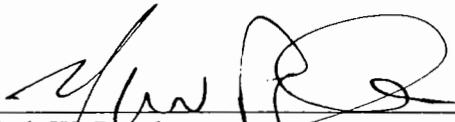
³ Based on the Utah Court of Appeals decision in Rogers v. Div. of Real Estate, 790 P.2d 102, 105-06 (Utah Ct. App. 1990), there is a question as to whether a licensing action is a “civil action” to which this statute of limitations will apply. But that case was decided in the context of real estate licensure, and the issue has not yet been decided by the Utah Supreme Court. As a matter of due process, licensing actions by the Division of Securities should be subject to a statute of limitations. Further, the legislature likely did not intend to provide a statute of limitations that protects wrongdoers from criminal liability and liability to investors while providing no limitation on even minor licensure actions brought by the Division.

CONCLUSION

For the foregoing reasons, the proceeding to revoke FWA's broker-dealer license, impose fines, and bar FWA from the securities industry is untimely under provisions of Utah's Uniform Securities Act. Respondents therefore request that the Division grant their motion to dismiss.

DATED this 15th day of June 2007.

RAY QUINNEY & NEBEKER P.C.



Mark W. Pugsley
Maria B. Heckel

Attorneys for Respondent First Western Advisors

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of June 2007, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served by hand-delivery to the following:

Administrative Court Clerk
c/o Pam Radzinski
Utah Division of Securities
160 East 300 South, 2nd Floor
Post Office Box 146760
Salt Lake City, Utah 84114-6760

Laurie L. Noda
Assistant Attorney General
160 E. 300 South, Fifth Floor
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Salt Lake City, Utah 84114-0872

A large, stylized handwritten signature in black ink, likely belonging to Laurie L. Noda, is written over a horizontal line. The signature is highly cursive and loops around the line.

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