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

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IN THE MATTER OF:

FIRST WESTERN ADVISORS, INC.,  
CRD #118440;  
GARY W. TERAN, CRD #1076642;  
DAVID A. RUSSON, CRD #1194052;  
BRIAN G. KASTELER, CRD #2182796;  
CARL A. PAGE, CRD #710908

Respondents.

**MEMORANDUM IN OPPOSITION  
TO MOTION TO DISMISS**

Docket Numbers: SD-07-0015  
SD-07-0016  
SD-07-0017  
SD-07-0018  
SD-07-0019

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Pursuant to the Department of Commerce Administrative Procedures Act Rule 151-46b-7(6)(c), the State of Utah, Division of Securities (“the Division”), opposes the Respondent’s, First Western Advisor’s, Inc. (“FWA”), Motion to Dismiss.

**RESPONSE TO STATEMENT OF FACTS**

1. The Division admits the Respondent’s Statement of Facts 1 through 10.
2. The Division disputes the characterization in ¶ 11, that the SEC “dropped” its investigation in 2005. The Division asserts that the SEC referred its investigation to the Division for completion and possible action based on violation of state securities laws.

## ARGUMENT

### A. APPLICATION OF UTAH CODE 61-6-6(5) IS MOOT.

Utah Code Ann. 61-6-6(5) provides

The 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.

By its express terms, the limitation only applies to proceedings that seek to suspend or revoke a person's or an entity's license issued by the Division. It does not apply to any other action the Division may seek to take.

The Division hereby certifies that it will not seek suspension or revocation of FWA's license. It will limit its action to seeking judicial findings that the alleged conduct violated the law, and imposition of a fine.

By certifying that it will not seek suspension or revocation of FWA's license, the Division does not concede FWA's argument that, if it were seeking suspension or revocation, the Division's petition is untimely under 61-6-6(5). *Blinder Robinson & Co. v. Goettsch*, 431 N.W.2d 336 (Iowa 1988), cited and relied upon by FWA, provides that "[t]he limitations of section 502.304(2) [Iowa's statute similar to 61-6-6(5)] do not take effect so long as the superintendent [Division in Utah] exercises reasonable diligence." *Id.*, at 341.

This standard has not been adopted by Utah courts and is contrary to the standard used in a Massachusetts state case, *In the matter of Shearson Loeb Rhoades, Inc. and James V. Burlison, Jr.*, Blue Sky Reports ¶71,666, Commerce Clearing House, 1981, which held that a fact or transaction only becomes known when there has been "an adjudication by the Division or some other judicial or administrative body." In addition, the standard in *Blinder Robinson & Co. v. Goettsch* is at odds

with the draftsmen's commentary on the Uniform Securities Act, and the most recognized treatise on Blue Sky law. Nevertheless, even if the *Blinder* standard were adopted, the Division contends it has met the test.

The Division received the referral of this matter from the SEC approximately late-spring or early-summer of 2005. It was assigned to an investigator in August of 2005, who had to obtain and review thousands of pages of documents and transcripts, and then conduct her own investigation. Further information was requested and received from the SEC and other entities, and reviewed. While drafting the petition, the Division realized that other information would need to be received and reviewed to support the petition. That information was obtained and the Division's investigation was completed with the filing of the petition in February 2007.

This matter is distinguishable from the holding in *Blinder Robinson & Co. v. Goettsch*. There, the agency failed to review documents in its possession for two years before finally reviewing them and filing an amended notice of hearing. *Id.*, at 337-338. The court found that "the two-year delay in undertaking a detailed review of th[e] documents [produced by Blinder] does not demonstrate the exercise of reasonable diligence." *Id.*, at 340-341. Here, the Division began a timely review of reams of documents, conducted its own investigation, and requested and reviewed additional information, from the time that it received the referral from the SEC in 2005, to the filing of the petition in February 2007.

There is no suggestion or evidence in FWA's motion that the Division failed to act with reasonable diligence. Because the Division acted with reasonable diligence, the time limitation asserted by FWA does not apply. *Blinder Robinson & Co. v. Goettsch*, at 341. That would be true even if the Division were seeking suspension or revocation in this matter.

**B. UTAH CODE ANN. 61-6-21.1 IS INAPPLICABLE.**

FWA contends that the Division's allegations of securities violations occurring prior to 2002 should be dismissed under 61-6-21.1. This statute is inapplicable because it applies only to criminal prosecutions of securities violations. This matter is an administrative, not a criminal, proceeding.

While Respondent appears to suggest in a footnote that there is a question as to whether a securities licensing administrative action is a "civil action", there is no support in the statute or Utah case law for any such question. Section 61-1-21.1 specifically identifies two of the three types of actions permitted by the Division under the Utah Uniform Securities Act, civil and criminal actions, to which the limitations period of five years applies. If the legislature intended to include administrative actions it would have done so. Moreover, if the limitation period was intended to include all three types of action, there would be no need to specifically refer to criminal and civil actions because the statute would be all-inclusive.

Further, civil, criminal, and administrative actions all apply different procedures, and each affords the Division distinct remedies. Thus, by definition administrative licensing actions taken under Section 61-1-6 are not the same as civil actions taken by the Division as authorized by Section 61-1-20 of the Act. For example, a civil action permits the Division to obtain in district court a civil injunction, a restraining order, appointment of a receiver, disgorgement, rescission, and any relief the court considers just. Licensing actions taken under Section 61-1-6 do not include such remedies, but do permit sanctions relating to a person's securities license, such as censure, revocation, other limitations, or a bar from the securities industry.

Finally, in a case cited by Respondent, *Rogers v. Div. of Real Estate*, 790 P.2d 102 (Ut. App. 1990), the Utah Court of Appeals rejected the same argument in the context of an administrative real

estate licensing action:

Contrary to Rogers's assertion, **an administrative disciplinary hearing is not a civil proceeding**. . . . It is a special, somewhat unique, statutory proceeding, in which the disciplinary board investigates the conduct of a member of the profession to determine if disciplinary action is appropriate to maintain sound professional standards of conduct and to protect the public.

Id. at 105-06 (emphasis added, citations omitted). The reasoning of the Court of Appeals is equally applicable to the instant matter. Actions taken by Utah's Real Estate Division and Securities Division are both governed by the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-1 et seq., as well as the same rules promulgated under UAPA, Department of Commerce Administrative Procedures Act Rules, Utah Admin. Code. R151-46b-1.

**C. THERE IS NO STATUTE OF LIMITATION FOR ADMINISTRATIVE DISCIPLINARY PROCEEDINGS NOT SEEKING SUSPENSION OR REVOCATION.**

Utah Code Ann. 61-6-6(5) is applicable only to suspension and revocation proceedings. No other limitation period is prescribed in 61-6-6 for other administrative actions or sanctions sought by the Division. Because the Division is not seeking suspension or revocation in this matter, there is no statute of limitation applicable to its petition.

Moreover, the petition in this matter is a disciplinary proceeding based on violation of Utah's securities law. The Utah Court of Appeals established in the *Rogers* case cited above, that "[i]n the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings." *Rogers*, 790 P.2d at 105. Here, there is no specific legislative authority limiting the Division's action since it is not seeking suspension or revocation of FWA's license.

## CONCLUSION

Based on the foregoing, the Division respectfully requests that FWA's motion to dismiss be denied because Utah Code Ann. 61-6-6(5) is moot because the Division is not seeking suspension or revocation of FWA's license; even if the Division were seeking suspension or revocation, the Division exercised reasonable diligence which renders the statute inapplicable; 61-1-21.1 by its terms only applies to criminal prosecutions; and where no other specific legislative authority exists, there is no statute of limitation that applies to administrative disciplinary proceedings.

Respectfully submitted this 12<sup>th</sup> day of October, 2007.

THE DIVISION OF SECURITIES

By:   
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D. Scott Davis  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing on this

12<sup>th</sup> day of October, 2007, to the following:

Mark W. Pugsley RAY QUINNEY & NEBEKER, P.C. 36 South Main Street, Suite 1400 P.O. Box 45385 Salt Lake City, Utah 84145-0385	Sent via:
	Hand-Delivery
	Facsimile:
	<input checked="" type="checkbox"/> Mailed (U.S. Mail, postage prepaid)
	Other _____

PAULIA RADZINSKI