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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.

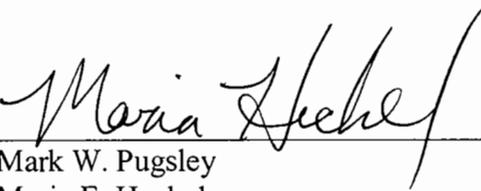
**NOTICE TO SUBMIT
FOR DECISION**

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

Defendant First Western Advisors, hereby notifies the presiding officer that its "Motion to Dismiss" is fully briefed, at issue and ready for oral argument. This Motion was filed and served on counsel for the Division of Securities (the "Division") on June 1, 2007, together with a memorandum of law. The Division filed and served an Opposition Brief on October 12, 2007. Defendants Reply is served and filed concurrently herewith.

DATED this 25th day of October 2007.

RAY QUINNEY & NEBEKER P.C.



Mark W. Pugsley
Maria E. Heckel

Attorneys for Respondent First Western Advisors

952006

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of October 2007, a true and correct copy of the foregoing **NOTICE TO SUBMIT** was served by hand-delivery to the following:

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**REPLY 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., respectfully submits this Reply Memorandum in support of its Motion to dismiss this proceeding initiated by the Utah Division of Securities (the “Division”) as untimely pursuant to Utah Code section 61-1-6(5) or, alternatively, to dismiss claims barred by the five-year statute of limitations provided in Utah Code section 61-1-21.1.

REBUTTAL STATEMENT OF UNDISPUTED FACTS

1. In the Division’s Opposition, the Division admits the facts are undisputed and quibbles only with FWA’s “characterization” of the SEC’s termination of its investigation.

2. However, despite Paragraph 2 of the Division's "Response to Statement of Facts," it is an undisputed fact that the SEC is no longer pursuing its own investigation against FWA, and thus it is undisputed that the SEC closed (or "dropped") its investigation. As a matter of law, the SEC does not have authority to refer its investigations to the Division for "completion" and the Division cannot simply act for the SEC. The SEC and Utah's Division of Securities are different agencies having different sources of authority, preventing the Division from acting as an arm of the SEC. Indeed, in the Division's Memorandum in Opposition, the Division itself argues that it could not act for two years after the SEC closed its investigation because the Division needed, among other things, to "conduct[] its own investigation." (Division's Opp. at 3.)

ARGUMENT

The parties agree that the Division was notified of the SEC investigation upon which this action is based in August 2004, (FWA's Statement of Facts ¶ 9), and that it received the actual investigative files from the SEC in "late-spring or early-summer of 2005" (Division's Opposition at p. 3) and assigned an investigator to the case in August 2005 (*id.*), but it did not bring this revocation proceeding against FWA until February 16-17, 2007 (FWA's Statement of Facts, ¶ 2). In the meantime, the Division renewed FWA's broker-dealer license multiple times at the end of 2004, 2005, and 2006. Because this revocation proceeding was brought more than 120 days after the Division first renewed FWA's license having knowledge of the SEC investigation upon which this action is based, this proceeding was instituted in contravention of section 61-1-6(5) and should be dismissed as untimely.

The Division's arguments to the contrary are unavailing. Because the sanctions sought by the Division do not dictate the nature of this licensing proceeding, the Division cannot moot the application of section 61-1-6(5) by modifying its request for sanctions to withdraw its request

for revocation of FWA's license and seek only a fine. Additionally, the Division's arguments that it did not have the necessary "knowledge" of the SEC investigation because the facts known to it were not findings made in a judicial proceeding is not supported by the plain language of the statute or the weight of the case law. Similarly, there is no statutory provision or case law supporting the Division's assertion that the statutory time limit on bringing a revocation proceeding is inapplicable if it can show that it was "reasonably diligent."

Alternatively, this action should be dismissed in whole or in part based on statutes of limitations in Utah Code sections 61-1-21.1 or 78-12-25(2).

I. UTAH CODE SECTION 61-1-6(5) APPLIES TO BAR THIS PROCEEDING AND IS NOT MOOT BECAUSE THIS PROCEEDING IS AN UNTIMELY LICENSE SUSPENSION OR REVOCATION PROCEEDING.

The Division's Petition against FWA is expressly based on the authority of Utah Code section 61-1-6, entitled "Denial, suspension, revocation, cancellation, or withdrawal of license—Sanctions," rather than upon the general enforcement authority of Utah Code section 61-1-20. (See Petition at p. 1.) Section 61-1-6 gives the Division authority "by means of adjudicative proceedings" to "issue an order" imposing various "sanctions" "if the director finds that it is in the public interest and finds, with respect to the applicant or licensee . . . that the person: [has committed various improper acts]." Utah Code Ann. § 61-1-6(1)-(2). This authority is limited, however, by the provision that 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." *Id.* § 61-1-6(5). As explained in FWA's Memorandum in Support of its Motion to Dismiss, the Division's petition is untimely and thus barred under subsection 61-1-6(5) because it is based on facts that were indisputably

known to the Division more than two years ago and the Petition on its face brought a “suspension or revocation proceeding.”

A. This Proceeding is Not a “Fine Proceeding”—It is a “Revocation or Suspension Proceeding” Brought Pursuant to Section 61-1-6.

The Division argues that the term “revocation or suspension proceeding” in section 61-1-6(5) should be read narrowly to apply only to proceedings where the sanctions of revocation or suspension are sought; therefore the Division has withdrawn its request for the sanction of revocation and now seeks only a fine. There are two errors in the Division’s logic. First, the Division erroneously equates the specific sanctions sought (i.e., revocation, suspension, censure, or fine) with the type of section 61-1-6 licensure proceeding involved (i.e., denial, suspension, revocation, cancellation, or withdrawal). Second, the Division erroneously assumes that, although it unquestionably initiated a revocation or suspension proceeding in this case (in which the Division asked for the sanctions of revocation of FWA’s license and fines) and did so in violation of section 61-1-6(5), it can nevertheless proceed with its action by simply withdrawing its request for revocation of FWA’s license.

To determine the meaning of the term “revocation or suspension proceeding” intended in section 61-1-6, the agency must “read the plain language the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” Li v. Enterprise Rent-A-Car Co., 2006 UT 80, ¶ 9, 150 P.3d 471 (internal quotation marks omitted). Additionally, Utah Code section 61-1-27 provides that it is the Legislature’s express purpose “to make uniform the law of those states which enact [the Uniform Securities Act],” and the provisions should “be so construed as to effectuate its general purpose.” Utah Code Ann. § 61-1-27 (Lexis 2007).

Applying these interpretive principles, it is apparent from the plain language of section 61-1-6 that the type of “proceeding” brought by the Division does not equate to the “sanctions” that the Director may impose after making findings in the “adjudicative proceeding,” which sanctions are identified as such in section 61-1-6(2) and listed in section 61-1-6(1). Indeed, subsection 61-1-6(1) permits the Director to order any or all of the sanctions listed therein in any type of “adjudicative proceeding” brought against an applicant or licensee pursuant to this section so long as the necessary findings of wrongdoing are made. See id. § 61-1-6(1)(e). In other words, any of the sanctions listed in section 61-1-6(1) may be imposed during a “revocation or suspension proceeding” or any other proceeding, including the sanctions of revocation, suspension, censure, restriction of the license, a fine, or “any combination” of these sanctions. See id. § 61-1-6(1)(a)-(e).

The Division, in arguing that this license proceeding is no longer a “revocation or suspension proceeding,” does not explicitly identify the new type of proceeding it believes this to be. However, following the Division’s logic in classifying the proceeding by the desired sanction, it appears that the Division is actually arguing that, now that it has withdrawn its request for revocation, this is a “fine proceeding.” One problem with this logic (other than the fact that the section allows the Director to impose multiple sanctions in one overarching administrative proceeding) is that neither the Utah’s statutes nor the Uniform Securities Act on which Utah’s Act is based authorize a “fine proceeding” and our research on the issue has uncovered no cases where a “fine proceeding” has been brought based on section 61-1-6 or its equivalent in other states.

The only proceedings explicitly identified within the text of section 61-1-6 are a “revocation or suspension proceeding” (mentioned in subsections 61-1-6(5), (8)(a), and (8)(c)),

and a proceeding “to impose conditions upon [] withdrawal” (mentioned in 61-1-6(8)(a)(ii)). The later proceeding “to impose conditions upon withdrawal” does not correspond with any of the “sanctions” listed in subsection 61-1-6(1). Instead, it corresponds with the types of licensure proceedings listed in the title of section 61-1-6, which include “[d]enial, suspension, revocation, cancellation, or withdrawal of [a] license.” See id. § 61-1-6. This same list of proceedings is similarly recognized in the applicable version of the Uniform Securities Act. See Uniform Securities Act 1956 § 204; see also 69A Am. Jur. 2d Securities Regulation—State §§ 65-73 (discussing details of proceedings for denial, revocation, suspension, cancellation, or withdrawal of a license).

Because there is no such thing as a “fine proceeding,” the Division’s action falls within one of the categories of licensure proceedings allowed by the statute (denial, suspension, revocation, cancellation, or withdrawal of a license). Of these potential proceedings, the Division’s action in this case can only be described as a suspension or revocation proceeding because the FWA is currently licensed with the division and is in business. This is consistent with the general interpretation of section 204 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 renewal of the license, the agency and Administrator are precluded from later bringing an administrative proceeding based on that same information.” 69A Am. Jur. 2d Securities Regulation—State § 72. Furthermore, this action was initially brought by the Division as a license revocation proceeding. The nature of the proceeding has not changed simply because the Division has committed to seek a lesser sanction.

This interpretation of section 61-1-6 as providing for a “suspension or revocation proceeding” but not a “fine proceeding” makes sense considering the use of the term “suspension

or revocation proceeding” in multiple contexts within section of 61-1-6. As mentioned previously, subsection 61-1-6(5) bars the Division from instituting 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.” There is no reason why this provision would bar the Division from pursuing only some sanctions (revocation) but not others (censure or a fine) when the stated purpose of the provision is to “prevent[] the [Director] from holding past violations over the head of the [licensee].” Joseph Long, 12A Blue Sky Law §11:8 (citing Draftsmen’s Commentary to §204 of the Uniform Securities Act, last sentence, Louis Loss, Commentary at 33)). However, it does make sense to distinguish a “suspension or revocation proceeding” from license denial, cancellation, or withdrawal proceedings involving changes in the status of the license that are initiated by the licensee.

In another context, subsection 61-1-6(8)(a)(i) allows a license to be withdrawn automatically after a licensee files a withdrawal application unless “a revocation or suspension proceeding is pending when the application is filed.” Utah Code Ann. § 61-1-6(8)(a)(i). Again, it would not make sense to distinguish a pending proceeding where a Division seeks to sanction a licensee by barring the licensee from employment with a licensed broker dealer, in which case the withdrawal would be automatically effective, from a proceeding involving the sanctions of revocation or suspension, in which case the withdrawal could not become automatically effective. Similarly, Utah Code section 61-1-6(8)(c)(i) allows a director to “initiate a revocation or suspension proceeding within one year after withdrawal became effective.” It would likewise not make sense for the drafters of section 61-1-6 to permit the Division to impose the sanctions of license revocation or suspension on a licensee that has already been withdrawn, but not to

allow the Division to bar that licensee from future employment with a licensed broker dealer or to impose a fine.

B. The Division's Action is Untimely and Barred by Section 61-1-6(5).

The Division argues in the alternative that section 61-1-6(5) does not apply to bar this proceeding because the facts known to the Division through its receipt of the investigatory materials from the SEC were not "known" because they had not been the subject of findings in a judicial proceeding. The Division also argues that Blinder, Robinson & Co. v. Goettsch, 431 N.W. 2d 336 (Iowa 1988), created an exception to the rule that applies if the Division was reasonably "diligent" and that it was indeed reasonably diligent in this case. Neither of these arguments is persuasive or supported by the weight of the case law.

The Division's argument that it did not "know" the facts because they had not been judicially determined is based solely upon one decision of an administrative agency, the Massachusetts Securities Division, in In re Shearson Loeb Rhoades, Blue Sky L. Rep. (CCH) ¶ 71,666 (Mass. Sec. Div. 1981). That administrative decision was considered and is reasoning rejected by the Iowa Supreme Court in Blinder as inconsistent with the accepted legal definition of "knowledge" for purposes of that state's Uniform Securities Act, which that court found incorporated facts actually known or facts that "upon exercise of reasonable diligence" the administrator should have known.¹ 431 N.W. 2d at 340.

¹Additionally, although other courts apparently have not explicitly decided this issue, the Missouri Court of Appeals indicated in Fehrman v. Blunt, 825 S.W.2d 658 (Mo. Ct. App. 1992), that "facts known" would be interpreted to mean something more akin to actual knowledge. In Fehrman, that court found that the Missouri Commissioner's order finding violations of securities laws and denying licensure to an applicant was untimely; therefore the Commissioner was required to license the applicant in Missouri. Id. at 660, 664. The court was concerned, however, with the effect of Missouri code section 409.204(a)(2)(K), a provision similar to that at issue here, which prevented the Commissioner from instituting a suspension or revocation proceeding "on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 30 days." Fehrman, 825 S.W.2d at 664. The court therefore ruled that for the purposes of that specific section,

The Iowa Supreme Court was right. If the drafters of the Uniform Securities Act or Utah's Securities Act had intended "facts known" by the Division to be limited to things judicially known, they would have so provided in the statute. The drafters did not do so. See id. The drafter's comment mentioned but not quoted by the Division simply suggests that an old criminal conviction is an "example" of a fact that may be known to the Administrator.² It does not define the facts known by the administrator as facts that were judicially determined. Accordingly, the definition of facts known from Blinder applies. Regardless of whether facts known are interpreted to be facts actually known to the Division or facts that the Division would know in the exercise of reasonable diligence, the important facts upon which this proceeding is based were at the very least actually known to the Division when it received the SEC's investigative file in 2005, before it renewed FWA's license at the end of 2005 and long before it filed its Petition in 2007. Therefore, Utah Code section 61-1-6(5) applies.

Second, Blinder did not create a "reasonable diligence" exception to the application of the statute, and such an exception would be at odds with the statutorily mandated time limit in section 61-1-6(5) on filing a proceeding based on facts known to the Division. In Blinder, the court held that two types of facts qualified as "facts known" to the administrator; facts actually known, and those that would be known in the exercise of reasonable diligence. 431 N.W.2d at

the applicant's registration would be deemed effective "as of the date of the court's mandate," thus giving the Administrator another 30 days to bring a suspension or revocation proceeding. Id. In Fehrman, the facts allegedly known to the Administrator had not been the subject of judicial findings. Id.

² That comment discusses section 204 of the Uniform Securities Act, the equivalent of Utah Code section 61-1-6(5) as follows:

"Its inclusion is dictated by elemental considerations of fairness. All it means is that when an Administrator, for example, knowingly waives an old criminal conviction and permits an application to become registered, neither he nor his successor may hold that conviction over the registrant's head for as long as he is registered."

Draftsmen's Commentary to § 204(a), Last sentence, L. Loss, Commentary on the Uniform Securities Act 33 (1976).

340. In this context, the issue of whether the Division exercised reasonable diligence only matters in determining whether the SEC investigation was “known” to the Division, not in determining whether the time-limit for filing an action should be extended. See id. In Blinder, the administrator had failed to review documents available to it for two years and thus had not exercised reasonable diligence. Id. at 340-41. Therefore, the court found that the proceeding was untimely and it stated

Our holding requires the administrator to exercise reasonable diligence in reviewing information provided for investigation. The limitations of section 502.304(2) do not take effect so long as the superintendent exercises reasonable diligence.”

Id. at 341. This perhaps overly-broad statement was evidently intended to mean that where an administrator does not have actual knowledge of the facts, it will only be held to have knowledge when it fails to exercise reasonable diligence in considering the facts available to it. The plain language of the statute is clear that where, as in this case, the Division had actual knowledge of the existence of the SEC investigation upon which this proceeding is based and the nature of that investigation, the Division cannot avoid the statutory bar in section 61-1-6(5) by making excuses for the delay in prosecuting his action. Though, for the record, FWA does not believe that the Division was diligent in bringing this case because all of the allegations contained in the Division’s petition came from an investigation that was closed by the SEC two years before this proceeding was filed.

II. ALTERNATIVELY, ALL PRE-2002 ALLEGATIONS ARE BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS IN SECTION 61-1-21.1(1).

Utah Code section 61-1-21.1(1) states, “No indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation.” As the Division correctly points out, one case from the Utah Court of Appeals, Rogers v. Div. of Real

Estate, 790 P.2d 102 (Utah Ct. App. 1990), has held that administrative actions are not civil actions subject to civil statutes of limitations. Rogers is, however, a Court of Appeals case, not a case from the Utah Supreme Court, and there are problems with Rogers that suggest that Rogers may not be the last word on this topic.

Specifically, although Rogers indicated that administrative actions are not “actions” and thus not subject to the catch-all four year statute of limitations in Utah Code section 78-12-25(2) for “an action for relief not otherwise provided for by law,” Rogers did not consider Utah Code section 78-12-46. That section defines “action” to “includ[e] a special proceeding of a civil nature.” Utah Code Ann. § 78-12-46 (Lexis 2007). According to the Utah Supreme Court, the reference to a special proceeding of a civil nature in this section “applies to proceedings in courts of justice or quasi-judicial bodies in which the rights of the parties thereto are determined, but which proceedings were not known as common law actions or proceedings in equity.” Crystal Car Line v. State Tax Comm’n, 174 P.2d 984, 990 (Utah 1946).

Accordingly, section 78-12-46 defines actions to include administrative actions such as the proceeding at issue in this case. Combined with Utah Code section 78-12-33, which makes the statutes of limitations applicable “to actions brought in the name of or for the benefit of the state in the same manner as to actions by private parties,” section 78-12-46 directly contradicts the Court of Appeals’ holding in Rogers that administrative actions are not “actions” and arguably make the catch-all four-year statute of limitations in Utah Code section 78-12-25(2) applicable to administrative proceedings. Similarly, the court’s holding that statute of limitations applicable to civil actions may also be unresolved due to the inclusion of an administrative proceeding as an “action.” It is FWA’s position that administrative proceedings are intended by the Legislature to be subject to some statute of limitations. Accordingly an administrative action

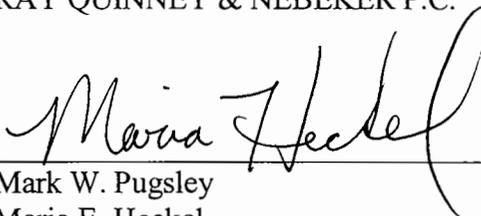
should either be considered a “civil action” for purposes of Utah Code section 61-1-21.1 and subject to a five year statute of limitations like other securities actions. Or, alternatively, the administrative action should be subject to the four year statute of limitations provided in Utah code section 78-12-25(2).

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 29th day of October 2007.

RAY QUINNEY & NEBEKER P.C.



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Attorneys for Respondent First Western Advisors

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of October 2007, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served by hand-delivery to the following:

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