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Utah Department of Commerce  
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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:

**ROGER BRYCE ROWLEY, CRD#2367495**

Respondent.

MEMORANDUM IN RESPONSE TO  
REQUEST FOR AGENCY REVIEW,  
AND REQUEST FOR DISMISSAL

Docket No. SD-09-0013

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Pursuant to the Utah Department of Commerce Administrative Procedures Act Rules, R151-46b-12(5)(c), the Utah Securities Division (hereafter "Division") submits this Memorandum in Response to Request for Agency Review, and Request for Dismissal.

**RELEVANT FACTS**

1. On June 22, 2005, the Respondent, Roger Bryce Rowley, entered a no contest plea, in the Fourth District Court, to one count of willfully selling an unregistered security, a

third degree felony. See, Exhibit A (Information and Plea In Abeyance Agreement).<sup>1</sup>

2. Five weeks later, on July 29, 2005, Mr. Rowley signed a Stipulation and Consent Order (hereafter “Consent Order). Exhibit B. In the Consent Order, Mr. Rowley admitted the Division’s investigative conclusions that he violated Utah’s Uniform Securities Act by selling unregistered, non-exempt securities in Utah. Exhibit B, ¶9.

3. Mr. Rowley was not licensed as a securities agent in the State of Utah at the time he sold the unregistered securities. Exhibit C, ¶¶ 27-28.

4. Mr. Rowley’s no contest plea was withdrawn and the criminal case was dismissed on August 19, 2008, based on his successful compliance with the abeyance agreement. Exhibit D.

5. On December 15, 2008, Brookstone Securities, Inc., CRD #13366 (hereafter “Brookstone”), submitted an application to license Mr. Rowley as a broker-dealer agent in Utah. Exhibit C, ¶3. Prior to beginning any business as a broker-dealer agent, a person must be licensed in any state where he/she acts as an agent. Utah Code Ann. 61-1-3(1). Mr. Rowley is not currently licensed as a broker-dealer agent in any state.<sup>2</sup>

6. The Division appropriately deemed the application to license Mr. Rowley as a

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<sup>1</sup>All exhibits appended to this memorandum are copies of documents contained in the Division’s record in this matter.

<sup>2</sup>Individuals can be employed by a broker-dealer in either licensed or unlicensed capacities. Mere employment by a broker-dealer does not signify a person is licensed.

request for agency action, pursuant to R164-18-6(D)(2), and the director of the Division issued an Order Denying Application for License on February 18, 2009. The Order was mailed to Mr. Rowley and Brookstone on February 23, 2009. The Order informed Mr. Rowley of his right to appeal, and referred him to the appropriate statutory and administrative provisions for filing an appeal. Exhibit C at 9.

7. On March 18, 2009, Mr. Rowley faxed a one paragraph letter, dated March 17, 2009, to the Division stating in part that his letter was “a formal request for an appeal to the State of Utah Division of Securities” regarding the denial of the application for him to be licensed as a registered securities representative. The letter stated as grounds for the appeal “[m]any statements in the denial letter are inaccurate and need to be addressed.” Exhibit E.

8. The Division forwarded the letter to the Utah Department of Commerce (hereafter “Department”) and, by letter dated March 19, 2009, the Department, although not required to do so, advised Mr. Rowley that his March 17, 2009 letter was insufficient to meet the requirements of a request for agency review, advised him of the proper procedures to follow, and gave him until March 30, 2009, to correct the deficiencies. Exhibit F.

9. On March 30, 2009, Mr. Rowley faxed a letter to the Executive Director of the Department, stating he wanted to appeal the Division’s denial of the license application for him. Exhibit G.

## ARGUMENT

Mr. Rowley requests review of the Division's February 18, 2009 Order Denying Application for License. His request must be denied for the following reasons:

A. Mr. Rowley failed to correct the deficiencies as directed.

The Division first notes that the Department was under no obligation to advise Mr. Rowley that his apparent request for agency review was insufficient. The Division could have requested, or the Department could have ruled *sua sponte* that his submission was insufficient and dismissed his appeal without giving Mr. Rowley any opportunity to correct the deficiencies in his request for agency review. R151-46b-12(3)(f).

1. Mr. Rowley failed to serve the Division or its counsel with his March 30, 2009 request for agency review.

The Department's March 19, 2009 letter to Mr. Rowley advised him to provide copies of any filings to the Division or its counsel as required by R151-46b-12(3)(e). Exhibit F. He did not do so.

2. Mr. Rowley failed to comply with Utah Code §63G-4-301 and Rules R151-46b-12(3) and 12(7).

The Department advised Mr. Rowley that he bore the burden of establishing that the Division committed legal and/or factual error, and provided him with the statutory and rule citations that instructed him how to meet that burden. Exhibit F. Nevertheless, Mr. Rowley failed to follow the requirements of the statute and rules.

As noted above, he did not properly serve his request for agency review as required by statute and rule. Nor has he cited any applicable law establishing that the Division committed error in denying his license application. The Division's Order demonstrates that it correctly applied the law in its denial of the application for a securities license.

3. Mr. Rowley failed to marshal the evidence as required by rule.

In his March 30, 2009 letter, Mr. Rowley states that he is "address[ing] material representations made by the state against [him]." Such "material misrepresentations," as he further describes in his letter, are simply challenges to the factual findings made by the Division, most, if not all, of which were admitted by Rowley in the previous administrative action.

R151-46b-12(3)(c) provides that a party challenging a finding of fact bears the burden of marshaling or gathering all of the evidence in the record in support of the finding and demonstrating that, despite the evidence, the finding is not support by substantial evidence. "Failure to marshal the evidence permits the executive director to accept a division's findings of fact as conclusive." *Id.* The factual findings challenged by Mr. Rowley are: that he sold unregistered securities in Utah; that he was paid \$161,932 in commissions; that he violated Utah law; that he answered affirmatively regarding a criminal action; that his conduct was egregious; and that he was required to have a securities license from the State of Utah at the time he allegedly violated Utah securities laws.

Mr. Rowley's March 30, 2009 letter marshals no evidence in the record to support his challenges to the Division's factual findings. In fact, it ignores completely his 2005 plea in

abeyance agreement, which he provided to the Division, where he entered a no contest plea to selling unregistered securities, and it almost completely ignores the Consent Order he signed in 2005 where he accepted the Division's findings/conclusions that he sold unregistered securities in Utah. He only acknowledges the Consent Order to point out that he did not understand its "implications," although the order is very clear in its findings/conclusions. Mr. Rowley argues he only signed it because he thought he would be allowed to be relicensed after successful completion of the plea in abeyance, despite there being nothing to that effect in the Consent Order or the Division's record in this matter.

a. Sale of unregistered security

Mr. Rowley challenges the findings that he sold unregistered securities, Exhibit C ¶¶ 6-7. Mr. Rowley marshals no evidence in the record regarding this finding, but asserts for the first time that the product he sold was not a security and was exempt from registration. If true, this would have been a defense for Mr. Rowley in 2005, and he should not have signed either the plea in abeyance agreement in the criminal case, or the Consent Order, where he admitted that he sold an unregistered security. Nevertheless, he signed each document, which are in the Division's record, and each clearly supports the Division's findings that he sold unregistered securities. Notably, Mr. Rowley's March 30, 2009 letter admits that the investments he sold "inadvertently became unregistered securities."

b. Payment of commissions

Mr. Rowley challenges that he was paid \$161,932 in commissions relating to the unregistered securities he sold in 2003. He again ignores the Consent Order wherein he admits/accepts the Division's findings and conclusions that he received \$161,932 in

commissions. He asserts that he was only paid \$103,000, but points to no evidence in the record to support his claim or to show that the Division's finding is incorrect.

c. Violation of Utah law

Mr. Rowley challenges that Division's Grounds for Denial, Exhibit C, ¶16, that he willfully violated or willfully failed to comply with the Utah Securities Act. As noted in the Division's Order, Exhibit C at 5, n.4, willful means to act deliberately and purposefully, and implies a willingness to commit the act (in this case, the sale of a security) and does not require an intent to violate the law. State v. Larsen, 865 P.2d 1355, 1358 n.5 (Utah 1993). Again, Mr. Rowley references information not contained in the Division's record, and marshals no evidence to demonstrate that the finding is not supported by substantial evidence. Again, Mr. Rowley admitted in both the criminal and administrative actions in 2005 that his conduct constituted a willful violation of Utah law.

d. Charge or conviction of a felony

It appears, but is not clear, that Mr. Rowley is challenging ¶23 of the Division's Grounds for Denial, regarding whether he is required to report the criminal action taken against him in 2005. He claims the Division states that "dismissal is the antithesis of a conviction," but the Division is merely citing what Mr. Rowley stated in his November 13, 2008, Amended U4 form. Once again, Mr. Rowley marshals no evidence in support of his challenge and ignores completely the evidence of the criminal action taken against him in 2005, which he is required to continue to report, as concluded by the Division in paragraphs 21-23 of its Order. R164-4-1(D)(1)(a)(I) requires agents seeking licensure to submit to the CRD a U4 form.<sup>3</sup> As found by

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<sup>3</sup>R164-4-3(D)(1) designates and authorizes the web-based CRD to receive and store filing on behalf of the Division. Therefore, a filing with the CRD is considered filed with the Division. R164-4-3(D)(3)(b).

the Division, the U4 form requires that Mr. Rowley disclose and explain any felony charges (not just convictions) and no contest pleas to any felony, which he did. Exhibit C, ¶¶20-21.

e. Egregious conduct

Mr. Rowley challenges the Division's Grounds for Denial ¶26 that his conduct was "sufficiently egregious." He fails to cite the rest of the sentence in the Division's Grounds for Denial that his "conduct was sufficiently egregious to justify the filing of criminal charges . . . as well as . . . administrative action" by the Division.

He claims his conduct was "in compliance with all state laws and statutes." Mr. Rowley again completely ignores the felony criminal action filed against him and the administrative action wherein he admitted his violations of the law. He again fails to marshal any evidence in the record to demonstrate that this finding is not supported by substantial evidence, or that his conduct did not violate the law.

f. Unlicensed activity

It is not clear whether Mr. Rowley is challenging the Division's findings/conclusions in paragraphs 27-29 of the Order that he was unlicensed in 2003 for the conduct that gave rise to the criminal and administrative actions filed against him. He admits that he was not licensed, but argues that he was not required to be licensed.

Again, Mr. Rowley fails to marshal any evidence in the record to demonstrate that the Division's findings/conclusions are not supported by substantial evidence. Rather, he relies on alleged conversations with Division staff, which are hearsay, for which there is no corroborating evidence, and for which there is absolutely no evidence in the record. The product(s) sold by Mr. Rowley in 2003 have already been deemed in the 2005 criminal and administrative actions, including by his own admission, to be securities. The law requires individuals selling securities

in this state to be licensed by the State of Utah. Utah Code Ann. §61-1-3(1). The Division's finding/conclusion that Mr. Rowley was not licensed in 2003 for the conduct at issue is supported by substantial evidence.

g. Best Interests of Public

Mr. Rowley disputes the conclusion of the Order that it is in the public's best interests that his application for a securities license be denied. That is not a finding, it is a legal conclusion which, as set forth above, is fully supported by the Division's record in this matter. The Division does not take lightly its duty to protect the investing public. As indicated in the Order, Exhibit C, ¶7, and admitted by Mr. Rowley in the Consent Order, his conduct was not an isolated or single occurrence and caused serious harm to Utah investors. Mr. Rowley sold securities to 21 Utah residents, collecting approximately \$1.4 million,<sup>4</sup> for which he was paid significant commissions. While he may have successfully completed the terms of his plea in abeyance, his investors lost and are still owed more than \$1.2 million. Based on his experience as a licensed securities agent for ten years prior to the conduct which resulted in the 2005 criminal and administrative actions against him, he should have had the required skill and knowledge to understand and comply with securities registration and licensing requirements.

### CONCLUSION

Mr. Rowley failed to comply with the requirements of applicable statutes and rules regarding requesting a review of agency action. His request also lacks any merit. The Department should deny and dismiss Mr. Rowley's request for agency review of his license denial.

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<sup>4</sup>As indicated in the Order, Exhibit C. ¶26, Mr. Rowley was one of several agents who participated in a fraud scheme that collected 19 million dollars from Utah investors.

Respectfully submitted this 9<sup>th</sup> day of April, 2009.



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D. Scott Davis  
Assistant Attorney General  
Attorney for the Utah Securities Division

**Certificate of Mailing**

I certify that on the 15<sup>th</sup> day of April, 2009, I mailed a true and correct copy of the Memorandum in Response to Request for Agency Review and Request for Dismissal to:

Roger Bryce Rowley  
3366 E. Sweetwater Springs Dr.  
Washington, Utah 84780



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Executive Secretary