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

IN THE MATTER OF:

**DAVID STERLING JENSEN,
CRD#1109598**

Respondent.

**MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS**

Docket No. SD-09-0040

Pursuant to the Utah Department of Commerce Administrative Procedures Act Rules, Rule R151-46b-7(6)(c), the State of Utah, Division of Securities (“Division”), files this memorandum opposing the Respondent’s Motion to Dismiss.

ARGUMENT

I. RESPONDENT’S MOTION IS UNTIMELY AND FAILS TO COMPLY WITH UTAH DEPARTMENT OF COMMERCE ADMINISTRATIVE RULES

Respondent’s motion is untimely. Respondent filed a motion to dismiss based upon a statute of limitations defense, requesting that this case be dismissed with prejudice. His motion was filed on September 16, 2009.

Utah Department of Commerce Administrative Rule R151-46b-7(6)(b) states:

Any motion to dismiss on a ground described in Rule 12(b)(1) through (7) of the Utah Rules of Civil Procedure shall be filed prior to filing a responsive pleading if

such a pleading is permitted unless ... the presiding officer allows additional time upon a determination of good cause.

(emphasis added).

Respondent's motion is tantamount to a Rule 12(b)(6) motion – failure to state a claim upon which relief can be granted – because of an alleged statute of limitations defense.

Accordingly, Rule R151-46b-7(6)(b) applies.

Respondent's motion is clearly untimely because it was not filed prior to the filing of his answer, which was filed on September 8, 2009. If he intended to file a dispositive motion, he should have filed a motion to dismiss instead of an answer at that time. Moreover, neither the presiding officer in this matter, the Utah Securities Commission, nor its delegate, the Administrative Law Judge, has made any determination of “good cause” or otherwise granted Respondent additional time to file the instant motion. For these reasons the motion to dismiss must be denied.

Furthermore, during a September 22, 2009 scheduling conference with the Administrative Law Judge and the Division, Respondent indicated he intends on filing five more motions to dismiss. The Division requests that before the filing of any such motions by Respondent that the presiding officer first determine there is good cause for such – in accordance with Rule R151-46b-7(6)(b) – and grant Respondent leave for any such motion.

II. THE CITED STATUTES DO NOT APPLY TO THIS ACTION

A. Utah Code Ann. § 78B-2-115 Is Inapplicable To This Administrative Proceeding.

Respondent, in Paragraph 1 under the heading Legal Authority, cites a provision of the Utah Code which indicates that with the exception of asbestos damages cases, the statutes of

limitation contained in that chapter apply to “actions brought in the name of or for the benefit of the state or other governmental entity” in the same manner such statutes of limitation apply to private parties. However, Respondent cites no specific statute of limitation and makes no argument as to which, if any, of the numerous statutes of limitation contained in Chapter 2 would apply to bar this action. On this basis alone, the motion to dismiss is deficient for lack of specificity.

Most significant, however, and fatal to his claim, is the definition of “action” set forth in Section 78B-2-101(1):

The word ‘action’ as used in this chapter includes counterclaims and cross-complaints and all other civil actions in which affirmative relief is sought.

By definition, therefore, Section 78B-2-115 and the specific statutes of limitation which are contained in the chapter are limited to civil actions. This matter is not a civil action. It is an administrative action brought pursuant to specific statutory authority under Section 61-1-20 of the Utah Uniform Securities Act (“Act”). Accordingly, neither Section 78B-2-115, cited by Respondent, nor any of the specific statutes of limitation which are set forth in the chapter are applicable. Moreover, none of those provisions purport to preclude administrative cases brought under Section 61-1-20 of the Act, or otherwise suggest that such limitations would apply to an administrative action. Rather, the limitations are explicitly limited to civil actions.¹

Utah precedent requires the same result. In *Rogers v. Div. of Real Estate*, 790 P.2d 102

¹Even if this Court determined that the general four-year statute of limitations contained in Section 78B-2-307 somehow applied to the Division’s action, the statute would not yet have run because four years have not passed since the conduct at issue took place. *See* OSC at 2, para. 4.

(Ut. App. 1990), a case involving an administrative action filed by the state real estate division, the Utah Court of Appeals rejected application of the four-year statute of limitations currently codified as Section 78B-2-307, and further stated:

Because we have determined that administrative disciplinary proceedings are not “actions,” they are likewise, not subject to the limitations of section 78-12-33,² regarding commencement of actions by the state.

Id. at 106.

B. Utah Code Ann. § 61-1-22(7)(a) Is Inapplicable To This Administrative Proceeding.

Paragraph 2 of Respondent’s Legal Authority cites Section 61-1-22(7)(a) of the Act and his argument focuses on facts relating to that statute of limitations. This action was not brought pursuant to Section 61-1-22, however, and by its own limiting language the statute of limitations contained therein does not apply.

Section 61-1-22 is a “private cause of action” statute, which provides a party, usually an investor, with the means to seek redress for conduct relating to the purchase or sale of a security under certain circumstances. *See* Section 61-1-22(1)(a)(i)-(ii) (setting forth specific violations giving rise to liability). The Division does not bring cases under this section because it does not have statutory authority to do so. Rather, such actions may only be brought directly by the injured party, through a civil action. *See* Section 61-1-22(1)(b) (injured party “may sue either at law or in equity” to recover consideration paid for a security). Again, the Division has alleged no violations in this action under Section 61-1-22 and there is nothing in the statute remotely suggesting the limitations period would apply to a Division administrative action filed under

²The cited section is the predecessor of and identical in substance to Section 78B-2-115, cited by Respondent.

Section 61-1-20.

Indeed, the plain language of the section cited by Respondent renders it inapplicable:

(7)(a) An action may not be maintained to enforce liability under this section³ unless brought before the earlier of:

(i) the expiration of five years after the act or transaction constituting the violation; or

(ii) the expiration of two years after the discovery by the plaintiff of the facts constituting the violation.

(emphasis added).

Because the Division is not seeking to enforce liability under 61-1-22, the statute does not apply. In addition, the “discovery” language upon which Respondent’s argument is based pertains to the complaining party, C.J., not the Division.⁴ C.J. is not the plaintiff in this matter, and while the statute of limitations might be a viable defense if C.J. had sued Respondent under Section 61-1-22, it has no bearing here.

III. STATUTES OF LIMITATION ARE INAPPLICABLE TO ADMINISTRATIVE PROCEEDINGS

As discussed above, statutes of limitation apply to civil actions. With regard to administrative actions, the Utah Court of Appeals has ruled:

. . . 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

³Subsection (10)(b) makes clear that claims brought under the statute are limited to those actually set forth in Section 61-1-22(1)(a)(i) and (ii):

This chapter does not create a cause of action not specified in this section or Subsection 61-1-4(6).

⁴The complaint underlying the Division’s action was received August 27, 2008. The Division filed its action on August 5, 2009 – less than a year after receipt of the complaint.

maintain sound professional standards of conduct and to protect the public.

Rogers, 790 P.2d at 105-106 (citations omitted). The court also ruled “[i]n the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings.” *Id.* at 105.

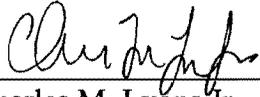
Respondent cites no specific legislative authority applying a statute of limitation to the Division’s administrative Order to Show Cause proceeding against him, and there is none. Accordingly, his motion to dismiss arguing violation of a statute of limitation must be denied.

CONCLUSION

For the above reasons, Respondent’s motion must be denied. The Division further requests an affirmative ruling that before any other motions to dismiss are filed by Respondent, that leave for such motions first must be sought and a determination of good cause made by the presiding officer in the case. Such will not only abide by the rules but conserve judicial resources and promote efficiency in the resolution of this matter.

Respectfully submitted this 28th day of September, 2009.

UTAH SECURITIES DIVISION

By: 

Charles M. Lyons Jr.

Certificate of Mailing

I certify that on the 28th day of SEPTEMBER, 2009, I mailed, by first class mail, a true and correct copy of the foregoing Notice of Initial Pre-hearing Conference to:

David Sterling Jensen
75 East 1860 North
Tooele, Utah 84074-8022

PAMALA RADZINSKI