

D. Scott Davis, #8934
Assistant Attorney General
MARK L. SHURTLEFF, #4666
Utah Attorney General
160 East 300 South, Fifth Floor
Box 140872
Salt Lake City, Utah 84114-0872
Telephone: (801) 366-0310
Attorneys for Utah Securities Division

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

IN THE MATTER OF:

**BRIAN Y. HORNE, CRD#1830136
KEVIN D. KUNZ, CRD#1274540
INVESTMENT MANAGEMENT
CORPORATION, CRD#37196
DESERET FINANCIAL SERVICES, INC.
HORNE FINANCIAL, INC.
TWIN K INVESTMENTS, INC.
MODENA HILLS, INC.**

Respondents.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT TO DISMISS
(SIC), AND IN SUPPORT OF
DIVISION'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

**Docket No. SD-11-0017
Docket No. SD-11-0018
Docket No. SD-11-0019

Docket No. SD-11-0020
Docket No. SD-11-0020
Docket No. SD-11-0021
Docket No. SD-11-0022**

The State of Utah, Department of Commerce, Division of Securities ("Division"), pursuant to Utah Code 63G-4-102(4)(b), Utah Department of Commerce Administrative Procedures Act Rule R151-46b-7, and Rules 7 and 56 of the Utah Rules of Civil Procedure, submits this memorandum of points and authorities opposing Respondents' "Motion for

Summary Judgment to Dismiss” (sic)¹ (“Motion”), and in support of the Division’s motion for partial summary judgment.

INTRODUCTION

The Respondents’ “Answer” to the Division’s Order to Show Cause raises defenses that the Division asserts are precluded by law, and for which the Division is entitled to partial summary judgment. The Respondents’ motion to dismiss raises the same precluded defenses.

STATEMENT OF UNDISPUTED FACTS

1. On or about March 10, 2011, the Division filed and served on the Respondents a Notice of Agency Action and an Order to Show Cause (“OSC”).

2. The Respondents filed an “Answer” on or about April 1, 2011.²

3. The Respondents’ answer raises the specific defenses: statute of limitation, double jeopardy, and legislative audit. See, Answer, pp. 1-8, & 23.

4. The Respondents’ answer raises generally the defenses of waiver, estoppel, laches and unclean hands. Answer, p. 23.

5. The Respondents’ answer asserts as a defense “[t]he matters complained of in the Verified Complaint (sic) were proximately caused, in whole or in part, by the acts or omissions of a third party or parties or by the Division. Accordingly, the liability of Respondents and

¹Respondents’ motion is incorrectly titled. The title states it is both a motion for summary judgment and a motion to dismiss, but the body of the pleading is a motion to dismiss. To the degree it is intended to be a Rule 12(b)(6) motion, it is untimely because the Respondents have filed an Answer.

²Respondents’ answer is 25 pages in length, including the certificate of service page. Although the pages are not numbered, this memorandum will refer to page numbers in the answer to assist the reader in finding specific statements being referenced. Likewise, the 10 pages in Respondents’ motion are not numbered.

responsible parties, named[] or unnamed, should be apportioned and the liability, if any, of Respondents should be reduced accordingly taking into account the sanctions, fines, judgment, and/or the disgorgement or return of commissions that had already taken place.” Answer, p. 23.

6. The Respondents filed a motion to dismiss dated, June 27, 2011, but mailed to the counsel for the Division on July 2, 2011,³ alleging as grounds for summary judgment that the Division’s action is barred by statutes of limitation and double jeopardy.

ARGUMENT

A. Introduction

Summary judgment must be rendered when a party demonstrates that no genuine issues of material fact exist, and that the party is entitled to a judgment as a matter of law. Utah Rules of Civil Procedure 56(c). The Respondents’ Answer and Motion claim the Division’s action is barred by statute of limitation and double jeopardy defenses, and must be dismissed on those grounds. The Division asserts that it is entitled to a judgment barring the defenses raised by the Respondents.

B. The Statute of Limitation Defense Raised by Respondents Under Utah Code 13-11-19(8) is Inapplicable.

The Respondents raise, and rely on, in both their answer and motion, section 13-11-19(8) as a statute of limitation applicable to this case Utah Code 13-11 is entitled the “Utah Consumer Sales Practices Act.” Answer, page 1, Motion, page 1. It is not applicable to violations of securities laws.

Section 13-11-19 pertains to actions that a consumer can bring seeking a declaratory

³The Certificate of Service states it was mailed June 27, but it is postmarked July 2, 2011.

judgment that an act or practice violates the chapter, or to enjoin a supplier who is violating or likely to violate the chapter. Utah Code 13-11-19(1)(a) and (b). Section 13-11-19(8) provides a two year statute of limitation for such actions.

On its face, section 13-11-19 does not, and cannot, apply to actions brought by the Division under section 61-1-1 *et seq.* Nothing in the cited statute pertains to actions brought by the Division for securities law violations.

The Division is entitled to a judgment as a matter of law that the statute of limitation defense asserted by the Respondents under Utah Code 13-11-19(8) is inapplicable to the Order to Show Cause filed by the Division against the Respondents in this matter.

C. The Statute of Limitation Defense Raised by Respondents Under Utah Code 61-1-22(7)(a) is Inapplicable.

The Respondents also raise, and rely on, Utah Code 61-1-22(7)(a) as a statute of limitation applicable to this case. Nothing in this statute applies to actions brought by the Division.

Section 61-1-22(1)(b) provides a private cause of action for a “. . . person selling the security to or buying the security from the person described in Subsection (1)(a). . . .”

Subsection (1)(a) “. . . applies to a person who:

- (i) offers or sells a security in violation of:
 - (A) Subsection 61-1-3(1);
 - (B) Section 61-17;
 - (C) Subsection 61-1-7(2);
 - (D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used; or
 - (E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7); or
- (ii) offers, sells or purchases a security in violation of Subsection 61-1-1(2).”

See, e.g., *Gohler v. Wood*, 919 P.2d 561, 562 (Utah 1996)(deciding on certification from the

United States District Court for the District of Utah “. . .whether reliance upon an alleged untrue statement or misleading omission is an essential element of a private cause of action under sections 61-1-1(2) and -22 of the Utah Code[.]”). Under (b), a person “may sue either at law or in equity to recover the consideration paid for the security[.] . . .”

By its terms, subsection 61-1-22(b) applies only to private causes of action brought in courts of law or equity and does not apply to administrative actions brought by the Division under other sections of 61-1. The Division’s OSC alleges violations of 61-1-1(2) &(3), -3(1), and -16 of the Act. Nothing in those subsections, or in other provisions of the Act, provides a limitation period for the relief requested in the OSC.

The limitation period in subsection 61-1-22(7) does not apply to actions brought by the Division. The Division is entitled to a judgment as a matter of law so stating.

D. Any limitation periods in the Securities Acts of 1933 and 1934 are Inapplicable.

The Respondents’ answer and motion asserts that a 5 year limitation period contained in the Securities Acts of 1933 and 1934 bars the Division’s OSC in this matter.⁴ See, Answer, p. 2, ¶4, Motion, page 4, ¶4. The Respondents fail to cite which provisions of the 1933 and 1934 Securities Acts contain the alleged limitation periods.

The Securities Act of 1933 Sections (11) and (12) provide civil liabilities and causes of actions, at law or in equity, in courts of competent jurisdiction. Section (13) provides a limitation period for those civil court actions. Nothing in the statute limits administrative actions brought by the State of Utah or any other state. Likewise, there is nothing in the 1934 Securities

⁴The 1933 Act does not contain a 5 year statute of limitation. It provides a one year limitation period and a three year statute of repose. See, section 13.

Act which provides a limitation on when states may initiate administrative actions.

The Division is entitled to a judgment as a matter of law that nothing in the Securities Acts of 1933 or 1934 limits the time in which the Division is required to initiate administrative proceedings under Utah Code 61-1, *et seq.*

E. The cases cited and relied on by Respondents are inapplicable to this action.

In their Answer and Motion, the Respondents cite and rely on *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), for their argument that a five-year statute of limitation precludes the Division's administrative action against them.⁵ Answer, p 2, ¶ 5, Motion, pp. 4-5. This case is inapplicable to pending administrative action against the Respondents.

In *Johnson*, the D.C. Circuit Court reaffirmed a prior ruling that the five-year limitation period in 28 U.S.C. § 2462 applies to federal administrative proceedings as well as judicial proceedings. *Id.*, at 485 and 492 (internal citations omitted). 28 U.S.C. provides

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Nothing in 28 U.S.C. 2462, nor in any of the cases applying it, nor in the cases cited by the Respondents,⁶ holds that the limitation period in the statute applies to any state judicial or administrative proceedings.

⁵The prior case reaffirmed in *Johnson*, was *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) cited and relied in Respondents' Motion, p. 4.

⁶In addition to *Johnson* and *3M*, the Respondents cite in their motion *Securities and Exchange Commission v. Jones*, and *Securities and Exchange Commission v. Kulak*, Motion, pp. 5-7.

Statutes of limitation are creations of the legislative (lawmaking) body enacting them. Legislative bodies are created by governing constitutions, and are authorized by their respective constitutions to enact laws to conduct and regulate legal and administrative proceedings, among many other things, in their respective jurisdictions. But these legislative bodies are not authorized to enact laws applicable to matters exclusive to other jurisdictions. For example, Congress cannot and does not enact statutes of limitation that apply to state legal and administrative proceedings, and Utah cannot and does not enact statutes of limitation that apply to other states' legal and administrative proceedings.

In Utah, the legislature enacted the Uniform Securities Act, Utah Code 61-1 *et seq.*, which, significantly, provides statutes of limitation for civil and criminal judicial proceedings. As discussed above, Utah Code 61-1-22(7) provides a four-year statute of limitation for private judicial causes of action. Similarly, Utah Code 61-1-21.1 provides a five-year statute of limitation for criminal and civil judicial actions brought by the State of Utah. The Act contains no provisions setting forth a limitations period for administrative actions such as this matter which was brought pursuant to Section 61-1-20(1).

Unlike 28 U.S.C. 2462 which limits actions, suits or proceedings (including administrative proceedings) seeking to impose a civil fine or penalty, there is no such limitation in Utah's securities or other statutes. If the Utah legislature had wanted or intended to limit other administrative actions by the Division it clearly could have done so, but it did not.

This argument is supported by a Utah Court of Appeals' ruling ". . . in the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings." *Rogers v. Division of Real Estate*, 790 P.2d 102, 105 (Utah App.

1990). This holding differs from the federal court decisions cited and relied on by the Respondents, and it is directly applicable and controlling Utah law for purposes of this case.

F. Double jeopardy does not apply to this proceeding.

Respondents assert double jeopardy as a defense to the Division’s administrative action against them. Answer, pp. 3-5, 12-21, Motion, pp. 3-4. Double jeopardy applies only to successive criminal prosecutions for the same act, and has no application to this action.

The United States Constitution, Amendment V, by its express terms applies only to criminal proceedings and prohibits a person from being criminally “. . . subject for the same offence to be twice put in jeopardy of life or limb[.]” The Utah Court of Appeals recently cited the United States Supreme Court’s holding “the [Double Jeopardy] Clause protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings.” *State v. Bushman*, 231 P.3d 833, 836 (Utah App. 2010), quoting *Hudon v. United States*, 522 U.S. 93, 98-99, 118 S.Ct. 488 (1997).

This is not a criminal proceeding, nor are the other actions Respondents refer to in their Answer and Motion. Therefore, double jeopardy does not apply in any respect to this case.

G. Administrative agencies lack jurisdiction to rule on equitable defenses.

The Respondents’ answer raises generally the defenses of waiver, estoppel, laches and unclean hands. Answer, p. 23. These are equitable defenses.

Administrative agencies are not courts of general jurisdiction. *Avis v. Board of Review of the Industrial Commission*, 837 P.2d 584, 586 (Utah App. 1992). Nor are they courts of equity. *Bevans v. Industrial Commission*, 790 P.2d 573, 576 (Utah App. 1990).

In *Bevans* the issue was whether the Industrial Commission acted appropriately in

affirming an Administrative Law Judge's order allowing an equitable adjustment in the amount of workers' compensation benefits paid to Bevans, by crediting his employer for benefits previously paid to Bevans. *Id.*, at 574-575. The Court of Appeals vacated and remanded the Industrial Commission's order and held

Regardless of the fairness or appropriateness of Bevans's retention of the no-fault benefits in addition to workers' compensation benefits, the Industrial Commission remains a statutorily-created agency, not a court of equity. As such, the Industrial Commission only has those powers expressly or impliedly granted to it by the legislature.

Id., at 576.

Nothing in the Utah Administrative Procedures Act, Utah Code 63G-4 *et seq.*, nor in the Utah Uniform Securities Act, Utah Code 61-1 *et seq.*, confers equitable powers on the Department of Commerce or the Securities Division. Nothing in either act vests the Department or the Division with the authority to consider equitable defenses raised in adjudicative proceedings.

This reasoning is supported by the fact that in administrative proceedings the Division is not authorized to order restitution, an equitable remedy. That relief is only available in civil or criminal proceedings.

Utah Code 61-1-6 and 61-1-20(1) provide the remedies and sanctions available in administrative proceedings against licensed and unlicensed persons. For licensees, those remedies include suspending or revoking a license; barring or censuring a licensee or officer, director, or partner from employment with a licensed broker-dealer or investment adviser; imposing a fine, or any combination of those remedies/sanctions. 61-1-6(1)(a)(i-iv). For unlicensed persons the remedies/sanctions include a cease and desist order; imposing a fine,

barring or suspending the person from associating with a Utah licensed broker-dealer or investment adviser; or any combination of those remedies/sanctions. 61-1-20(1) (e-h).

Utah Code 61-1-20(2)(b) provides the remedies/sanctions a district court may impose in a civil action:

- (i) issue a permanent or temporary, prohibitory or mandatory injunction;
- (ii) issue a restraining order or writ of mandamus;
- (iii) enter a declaratory judgment;
- (iv) appoint a receiver or conservator for the defendant or the defendant's assets;
- (v) order disgorgement;
- (vi) order rescission;
- (vii) order restitution;
- (viii) impose a fine of not more than \$10,000 for each violation of the chapter; and
- (ix) enter any other relief the court considers just; . . .

Utah Code 61-1-21(4) allows the district court in a criminal proceeding to impose the sanctions and remedies in Subsection 61-1-20(2)(b) in addition to other criminal penalties available to the court.

The legislature authorized district courts in civil and criminal proceedings to provide equitable remedies such as disgorgement, rescission, restitution and injunctive relief, but did not authorize the Division to provide any equitable remedies or sanctions in its administrative proceedings. It logically and legally follows that if the Division is not statutorily-authorized to impose equitable remedies and sanctions, it may not consider equitable defenses when the legislature has not empowered it to do so.

H. The other "defenses" raised in Respondents' Answer are invalid and inapplicable.

1. Legislative Audit

Respondents raise the 2008 Legislative Audit regarding the Division as a "defense" to this proceeding. Answer, p. 6. The audit is not a defense available at law or in fact. The audit —

contains nothing that establishes, prohibits, proves or disproves in any way the allegations in the Division's Order to Show Cause, or in the claims or defenses raised in the Respondents' Answer. The audit is simply irrelevant to this proceeding.

2. "Proximate Cause" defense

The Respondents claim "[t]he matters complained of in the Verified Complaint (sic)⁷ were proximately caused, in whole or in part, by the acts or omissions of a third party or parties or by the Division. Accordingly, the liability of Respondents and responsible parties, named[] or unnamed, should be apportioned and the liability, if any, of Respondents should be reduced accordingly taking into account the sanctions, fines, judgment, and/or the disgorgement or return of commissions that had already taken place." Answer, p. 23. Apportionment defenses such as proximate cause, contributory negligence, etc., pertain to tort causes of action, and are simply inapplicable to administrative proceedings to enforce state law and regulations and to address violations of state law and regulations. There is no authority which applies a proximate cause defense to administrative proceedings.

CONCLUSION

A. Respondents' Motion to Dismiss

Respondents' Motion to Dismiss is supported by two arguments: 1) the Division's action is barred by statutes of limitation, and 2) the Division's action is barred by double jeopardy. Neither statutes of limitation or double jeopardy require dismissal of the OSC in this matter. Respondents' Motion to Dismiss must be denied.

⁷There is no Verified Complaint in this matter. Division's action is based on the Notice of Agency Action and the Order to Show Cause filed on or about March 10, 2011.

1. Statutes of Limitation

As argued above, none of the statutes of limitation asserted by the Respondents are applicable in this case. Indeed, there is no statute of limitation that applies to or bars the Division's pending Notice of Agency Action and Order to Show Cause.

2. Double Jeopardy

Double jeopardy applies only to successive criminal prosecution for the same acts and events. It has no application to civil or administrative proceedings brought by the Division.

B. Division's Motion for Partial Summary Judgment

None of the defenses raised by the Respondents in their Answer or in their Motion are applicable or valid in this proceeding. The Division respectfully requests that summary judgment enter ruling that the Respondents' statute of limitation, double jeopardy, waiver, estoppel, laches, unclean hands, legislative audit, and proximate cause are invalid and inapplicable in this proceeding.

Respectfully submitted this 14th day of July, 2011.



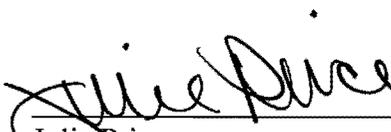
D. Scott Davis
Assistant Attorney General
Counsel for the Division

CERTIFICATE OF MAILING

I, Julie Price, hereby certify that on the 14th day of July 2011, I mailed, by regular mail, a true and correct copy of the forgoing **Motion for Partial Summary Judgment & Memorandum of Points and Authorities in Opposition to Respondents' Motion for Summary Judgment to Dismiss (SIC), and in Support of Division's Motion for Partial Summary Judgment** to:

Brian Y. Horne
Investment Management Corp.
Deseret Financial Services, Inc.
P.O. Box 1215 Centerville, UT 84014

Kevin D. Kunz
Twin K Investments, Inc.
Modena Hills, Inc.
907 E. Old Farm Rd.
Fruit Heights, UT 84037



Julie Price
Executive Secretary