

2007

IRA Sachs v. Joseph S. Lesser, Loeb Investors Co. XL, and United Park City Mines Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

IRA SACHS,

Plaintiff/Appellee,

vs.

JOSEPH S. LESSER, LOEB
INVESTORS CO. XL, AND UNITED
PARK CITY MINES COMPANY,

Defendants/Appellants.

Case No. 20040802-SC

20070402-SC

REPLY BRIEF OF THE APPELLANTS

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RESPONSES TO SACHS' STATEMENT OF FACTS

Sachs' brief contains a number of "facts" that are incomplete, irrelevant and/or impermissible legal assertions. Appellants respond to these specific assertions as follows:

Fact No. 4: The principal business of [United Park City Mines Company ("UPCM")] was the leasing, development and sale of its real property in Utah. *See* Pltf. Mem. Op. L&L, ¶ 7, R. 1322; Pltf. Mem. Op. UPCM, ¶ 7, R. 1625; Verified Complaint, ¶¶ 10-11, R. 3-4.

Appellants' Response: Sachs' assertion is true but incomplete. The principal business of UPCM was the leasing, development and sale of its real property in Utah. Further, the "real property in Utah"—consisting of the surface estate to more than 8,300 acres of land in the Park City area (along with entitlements to develop such property)—was UPCM's "only asset of any significance whatsoever." (R. at 3, 1115; 1210, 1257.)

Fact No. 10: Although the specific amount of the finder's fee was not discussed at their May 2, 2007 meeting, both Lesser and Sachs understood that Plaintiff Sachs would receive a usual and customary finder's fee for his efforts. A usual and customary fee for assisting in locating a buyer for a company is 3% of the sale price of the corporation. *See* Pltf. Mem. Op. L&L, ¶ 16, R. 1323; Pltf. Mem. Op. UPCM, ¶ 16, R. 1627; Verified Complaint, ¶¶ 28-29, R. 6.; Sachs Dep. R. 1357, 1373, at 95:23-96:16; 1384-1386, 145:8-148:8; 149:15-150:5; Tesch Memo, R. 1484.

Appellants' Response: Disputed but immaterial to the questions for which certiorari was granted.

Fact No. 11: Plaintiff Sachs does not have a real estate broker's license and was not acting as a broker, but as a professional business finder, in locating a buyer for UPCM, a New York Stock Exchange company, in response to Lesser's request. *See* Pltf. Mem. Op. L&L, ¶ 63, R. 1331; Pltf. Mem. Op. UPCM, ¶ 63, R. 1634; Sachs Dep. R. 1357, 1384-1385, 147:20-148:8.

Appellants' Response: As confessed by Sachs, he does not have a real estate broker's license. His assertion regarding "not acting as a broker" is a legal conclusion.

Fact No.13: On the morning of May 17, 2001, Plaintiff Sachs delivered a letter to Rothwell regarding Sachs' prior introduction of Granite and the finder's fee expected for locating a joint venturer or buyer for UPCM, stating

I write this letter to remind you that I will expect a modest finder's fee if an agreement comes to fruition. This could be cash, a couple of prime developed lots in the new project, or some other consideration acceptable to both of us. While I believe that we have an understanding as to this finder's fee, I do think that matters of this sort ought to be out on the table early on, and I hope that you feel the same. Please let me know if you have any questions concerning such a finder's fee.

Appellants' Response: Disputed but immaterial to questions presented on appeal.

Fact No. 22: Lesser agrees that Plaintiff Sachs would have been entitled to a finder's fee if Granite had purchased UPCM or if Sachs had located Jackson to purchase UPCM, but denies that Plaintiff Sachs found Jackson to purchase UPCM. *See* Pltf. Mem. Op. L&L, ¶¶ 55, 61, R. 1329-1330; Pltf. Mem. Op. UPCM, ¶¶ 55, 61, R. 1632-1634; Lesser Dep. R. 1399, 1411-1412 at 129:6-130:17.

Appellants' Response: Disputed but immaterial to questions presented in this appeal.

ARGUMENT

I. SACHS' ASSERTIONS THAT DEFENDANTS HAVE RAISED NEW ISSUES IN THIS APPEAL ARE ERRONEOUS.

Sachs repeatedly argues that Defendants failed to preserve various arguments set forth in their appellate brief. According to Sachs, Defendants are not permitted to respond to the Court of Appeals' newly articulated view of the law but are limited to rehashing arguments in the summary judgment briefs presented to the trial court. Defendants undoubtedly preserved the issue of whether the Utah Real Estate Brokers Act ("UREBA") encompassed Sachs' activities in this matter. Defendants are entitled, indeed required, to respond to the Court of Appeals' ruling that UREBA does not apply, a rationale that Sachs himself did not argue to the Court of Appeals. See Colosimo v. Roman Catholic Bishop of Salt Lake City, 2007 UT 25, ¶ 11, 156 P.3d 806 ("On certiorari review, this court reviews the decision of the court of appeals, not the decision of the district court.").¹

The central issue that is presented to this Court is the same issue that was presented to both the Court of Appeals and the trial court, namely whether UREBA precludes Sachs from recovering a finder's fee. Presenting additional arguments to this

¹ Moreover, while the parties addressed numerous issues before the Court of Appeals, including whether a contract even existed, this Court's grant of certiorari review narrowed the issues considerably. As such, Defendants addressed these issues, which were preserved below, in more depth in their brief to this Court.

Court in support of a position that a party has taken from the outset is not prohibited by Tindley v. Salt Lake City School District, 2005 UT 30, 116 P.3d 295, or Espinal v. Salt Lake City Board of Education, 797 P.2d 412 (Utah 1990). In both Tindley and Espinal, this Court refused to consider constitutional arguments raised for the first time on appeal. See Tindley, 2005 UT 30, ¶ 10 n.2; Espinal, 797 P.2d at 413. In both cases, the party bringing the constitutional challenge failed to raise the issue in the court below. Those cases are easily distinguishable from the present, because Defendants have argued from the outset that UREBA applies to Sachs' purported finder's fee agreement.

This Court has inherent authority to consider any issue on appeal, including issues not raised by the parties, Kaiserman Associates, Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998), and it must consider all information bearing upon the proper interpretation of a statute. “[B]ecause issues concerning what a statute means or what a legislature intended are essentially issues of fact, even though they are decided by the judge and not by a jury, a court should never exclude relevant and probative evidence from consideration.” Summit Water Distrib. Co. v. Summit County, 2005 UT 73, ¶ 27 n. 4, 123 P.3d 437 (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 45:02, at 14-15 (6th ed. 2000)). Sachs asks this Court to interpret UREBA on the basis of incomplete information. However, it is this Court's ultimate responsibility to interpret the statute correctly and to consider all evidence relevant to and probative of that determination.

II. UREBA PRECLUDES SACHS' CLAIMS FOR A FINDER'S FEE

A. Sachs Was Purportedly Hired to Find a Buyer for UPCM, Not Its Stock.

The linchpin of Sachs' argument to this court is that Defendants purportedly hired him to find a buyer—not just for UPCM—but specifically for the Company's capital stock. By assuming that the sale of a corporation is the equivalent of—or is always accomplished through—the sale of the corporation's stock (see, e.g., Sachs' Br. 15), Sachs attempts to turn a purported contract to find a buyer for UPCM into a contract to find a buyer for UPCM's stock. However, the record is devoid of evidence supporting Sachs' new inference.

Because this is an appeal from a summary judgment in favor of Defendants, only facts supported by evidence presented in Sachs' summary judgment memoranda, as well as reasonable inferences therefrom, may be considered by this Court. Hermansen v. Tasulis, 2002 UT 52, ¶ 10, 48 P.3d 235. Sachs' summary judgment briefs are replete with references to his purported agreement with Defendants. Although variously described, Sachs argued on summary judgment that he was employed to “find” a “purchaser” (or “buyer”) for “UPCM” (or “the company”) (see, e.g., R. at 1604, 1606, 1608-09, 1612-13, 1618, 1620-24, 1627-34 (Sachs' Opp'n to UPCM's Mot. for Summ. J.); R. at 1316, 1318-20, 1323-25, 1327-28, 1330-31 (Sachs' Opp'n to Lesser/Loeb's Mot. for Summ. J.)) or, alternatively, to “sell[] the company” (or “sell UPCM”) (see, e.g., R. at 1615, 1618, 1626, 1629 (Sachs' Opp'n to UPCM's Mot. for Summ. J.); R. at 1317, 1323 (Sachs' Opp'n to Lesser/Loeb's Mot. for Summ. J.)). Indeed, Sachs never

presented any evidence or argument to the trial court in support of his revisionist view that he was employed to sell the stock.

It is axiomatic that a “business can be transferred two ways: the corporation may sell all of its assets, then liquidate and distribute to investors the cash received from the buyer; or the investors may sell their securities directly to the buyers.” Commodity Futures Trading Comm’n v. Zelener, 373 F.3d 861, 866 (7th Cir. 2004); Snow Country Constr. v. Laabs, 989 P.2d 847, 849 (Mont. 1999) (“[T]here is no substantive difference between the sale of all of a company’s stock and the sale of a company’s goodwill in some other form.”); see also Cooney v. Ritter, 939 F.2d 81, 87 (3d Cir. 1991) (“The transfer of a business can assume many forms, e.g., a sale of assets, including real estate, or the transfer of stock.” (quoting Kazmer-Standish v. Schoeffel Instruments Corp., 445 A.2d 1149, 1151 (N.J. 1982))).

Sachs belatedly argues that because he knew “UPCM was a publicly held corporation, [he] could reasonably infer that Capital [Growth Partners’] purchase of UPCM would involve the acquisition of 100% of UPCM’s outstanding capital stock” (Sachs’ Br. 39). The evidence in the record on this issue directly refutes Sachs’ assertion. It is undisputed that the same week Sachs allegedly first contacted Capital Growth Partners about purchasing UPCM, an article appeared in the local Park City newspaper explaining that UPCM was “exploring strategies to raise money,” including “a sale or exchange of [UPCM’s] capital stock, assets, projects or business to one or more parties.” (R. at 1619.) Sachs’ cites no evidence offered in opposition to Defendants’ summary

judgment motions to support his subjective, undisclosed assumption that it would be a stock sale.

Sachs' "assumption" that the acquisition would necessarily involve the sale of UPCM's capital stock is a carefully crafted position for this appeal that does not accord with customary business practices. The parties to a transaction of this type usually do not decide whether to transfer a corporation by its stock or its assets until the final negotiations because the decision often depends on complex tax considerations and the parties' relative bargaining power. See, e.g., Stern v. Bristol Corp., 77 N.Y.S.2d 324, 329 (N.Y. App. Div. 1948) ("[W]hat the parties had in mind was the purchase and sale of a going business; the sale of the certificates of stock was the form which the transaction took for tax purposes."); In re Ulupalakua Ranch, Inc., 481 P.2d 612, 614 (Haw. 1971) ("[T]he form in which the transaction was cast was dictated to a large extent by the executor's insistence upon the stock sale as opposed to a sale of the assets."); Stuart A. Fredman & Jessica Woodhouse, Tax Considerations in Buying or Selling a Business, in Considerations in Buying or Selling a Business in Utah 41-42 (National Business Institute 2002) (discussing how the tax consequences of stock sales are generally favorable to sellers, whereas asset sales are generally favorable to buyers); Inc.com, Buying a Business or Its Assets, Jan. 2002, <http://www.inc.com/articles/2002/01/14631.html> (last visited Dec. 17, 2007) ("Whether you buy corporate shares or its assets instead is a crucial choice, because[i]f you buy only a corporation's assets, you don't assume its liabilities, including taxes. . . . [However,] some owners will sell only if the buyer takes

corporation stock . . . [because the] seller may have a tax reason for selling stock instead of assets.”).

Moreover, as the Court of Appeals’ acknowledged, it was Capital Growth Partners that “chose to structure its acquisition of UPCM as a stock rather than an asset purchase,” not Defendants, the parties that allegedly employed Sachs to find a buyer. Sachs v. Lesser, 2007 UT App 169, ¶ 51, 163 P.3d 662. If the decision to structure the transaction as a stock rather than an asset deal was made by the buyer, then at the time Sachs was purportedly employed to find a buyer, no one—including Sachs—knew what form the transaction would ultimately assume.

Thus, despite Sachs’ newly disclosed, subjectively held belief about the form of the future transaction, the record establishes that no one knew what form the transaction would ultimately take. This is pivotal because Sachs (1) claims a commission merely for “introduc[ing] the parties who eventually consummated the transaction,” and (2) admits that the “terms of the sale of UPCM ‘were negotiated and concluded without [his] involvement’” (Sachs’ Br. 16-17).² At the time Sachs purportedly introduced UPCM and Capital Growth Partners’ principal, it was quite possible that the transaction would involve the sale of UPCM’s assets.

Therefore, Sachs’ repeated arguments that the purported finder’s “agreement only involved the sale of UPCM’s stock” (see, e.g., Sachs’ Br. 16), as well as all legal

² Sachs admits that finder’s agreements are generally subject to UREBA. (Sachs’ Br. 15.)

arguments that follow therefrom, rest on an anachronistic view of the facts with no basis in the record. Sachs never advanced this argument to the trial court and only does so now to take advantage of the Court of Appeals' erroneous interpretation of UREBA.

B. Sachs Does Not Substantively Dispute Defendants' Plain-Language Interpretation of UREBA.

Without addressing Defendants' plain-language interpretation of the term "business opportunities involving real property," Sachs contends that the Court of Appeals correctly determined that the phrase was ambiguous because the parties argued for differing applications of the phrase. The Court of Appeals, however, placed the cart before the horse when it concluded that the phrase was ambiguous because the parties urged different applications without first determining whether the phrase could be interpreted according to its ordinary, plain meaning. The Court of Appeals failed to analyze the ordinary English meaning of the phrase "business opportunities involving real property" as required by this Court's clear precedent. See, e.g., Utah State Bar v. Summerhayes & Hayden, 905 P.2d 867, 871 (Utah 1995).³

Notably, Sachs does not dispute Defendants' plain-language interpretation of the phrase, which applies standard dictionary definitions as well as definitions mandated by statute, to interpret the phrase. As such, this Court should interpret the term "business

³ Sachs' argument that the phrase "business opportunities involving real property" is ambiguous because the trial court and the Court of Appeals applied the phrase differently underscores the Court of Appeals' error. Because the Court of Appeals failed to construe the phrase according to its plain meaning before applying it, the Court of Appeals' application is necessarily insufficient.

opportunity” according to its ordinary English meaning: “good commercial prospect.” Although it is true, as Sachs argues, that courts must interpret statutory terms “in harmony with other provisions in the same statute,” Sachs fails to demonstrate how the ordinary meaning of the term “business opportunity” contradicts or conflicts with other parts of the statute (Sachs’ Br. 21). On the contrary, not only is the plain meaning of the term consonant with all other provisions of the statute, it is the only interpretation that does not nullify the term.

C. Sachs’ Reliance on an Informal Attorney General Opinion Addressing a Different Issue is Misplaced.

In the event this Court determines that the phrase “business opportunities involving real property” is ambiguous, the relevant evidence of legislative intent requires this Court to interpret the phrase consistent with the prior statutory definition.

In contrast, Sachs contends that the prior definition of the term “business opportunity” is itself ambiguous, relying upon a 1978 informal opinion from an assistant attorney general. Sachs’ contention is erroneous for a variety of reasons.

First, the relevance and rationale of the opinion is dubious because the facts to which the opinion is applied are ambiguous. While the preface describes a circumstance in which a purchaser buys “all of the stock of the corporation” owning real property, the opinion instead applies the statute to a “sale of a controlling share of stock in a corporation.” Informal Op. Utah Att’y Gen. 78-233 (1978), 1978 WL 25792. With respect to the latter, the opinion concludes that “a Utah Court would probably find” the sale of a controlling share “too far removed in nature from a real estate transaction.” Id.

A careful reading of the opinion reveals that the assistant attorney general found the term “business opportunity” ambiguous only with respect to sales of less than all of a corporation’s stock:

There are too many variables involved in determining what constitutes a sale of control of a corporation. Less than [sic] 51% may be sufficient to control for certain purposes. To avoid any disputes which may arise from the nebulous definition of that term ‘control’ it would be best to adopt a mechanical rule to the effect that only sales of assets of a business qualify as the sale of a ‘business opportunity’ under the statute.

Thus, the opinion simply does not address a situation in which all of a corporation’s stock is transferred. Because the purchase of 100% of a corporation’s stock is not susceptible to the problems identified in the opinion, the opinion’s rationale is fully compatible with an application of UREBA to such a transaction.

Second, this Court owes no deference to the opinions. As the current Policy Manual of the Attorney General explains, “[c]ourts have discretion to accord to opinions of the Attorney General whatever weight, if any, they determine appropriate.” See Attorney General’s Policy Manual § 5.1(D)(3), a copy of which is attached hereto as Exhibit 1. See also Andresen v. Board of Regents, 58 S.W.3d 581, 588, n. 31 (Mo. Ct. App. 2001) (“Attorney General opinions are not entitled to any more deference than that of any other competent attorney.”); ATU Legislative Counsel v. Washington, 40 P.3d 656 (Wash. 2002) (“[T]his court gives little deference to attorney general opinions on issues

of statutory construction.”). For these reasons, this Court should afford the opinion no deference.⁴

D. Sachs’ Contention That the Legislature Did Not Intend for UREBA to Cover Business Opportunities Involving Real Property Transacted Through Corporate Stock Is Without Foundation.

Sachs further argues that the Court of Appeal’s view of the legislative history of UREBA—that the legislature intended a sharp departure from the past when it deleted the definition of “business opportunity” from the statute—is accurate, despite conceding that the Court of Appeals relied on an incomplete legislative history record in reaching that decision (Sachs’ Br. 24-27).

Sachs repeats the Court of Appeals’ argument that the legislature, by “govern[ing] real estate and securities under different chapters of the Utah Code,” intended to exempt all transactions involving securities from the real estate licensing statute. First, the Court of Appeals did not derive the legislature’s supposed intention from the statutory language or from the legislative history but rather from the overall structure of Utah Code.⁵ In

⁴ The Attorney General’s office also recognizes that “a court may grant more deference to an agency’s own interpretation of a statute it is charged with enforcing, or a regulation it has promulgated, than to the Attorney General’s interpretation of the same statute or regulation rendered in response to a request from the agency.” *Id.* As explained in Defendants’ opening brief, and further argued below, this Court should defer to the Real Estate Commission’s definition of the term “business opportunity,” which represents the agency’s considered interpretation of the term.

⁵ The Court of Appeals’ decision over-emphasizes the importance of the legislature’s creation of the Division of Real Estate in 1983. *See Sachs*, 2007 UT App 169, ¶¶ 47-48. The division of some responsibilities between two agencies does not, without more, signal that the legislature intended to erect an impenetrable firewall between the administrative responsibilities of the two agencies.

doing so, the Court of Appeals ignored that the legislature, in the process of dividing enforcement of the securities laws and real estate licensing laws among two administrative agencies, expressly retained the term “business opportunity” in the definition of “real estate” in UREBA (and has done so through eight subsequent amendments) and retained the definition of the term “business opportunity” in the statute. Had the legislature intended the radical departure suggested by the Court of Appeals, the relevant legislation (or the sponsors thereof) would have expressly stated as much.

Moreover, even the cases that Sachs relies upon do not draw a sharp distinction between securities and asset transactions. For example, Transamerica Case Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24 (Utah 1990), addressed the corporate law doctrine of alter ego, which permits courts to disregard the corporate form in certain circumstances. Transamerica did not hold that a court can never treat a stock sale as the legal equivalent of a sale of assets under appropriate circumstances, such as when statutorily mandated. Likewise, Decius v. Action Collection Serv., Inc., 2004 UT App 484, 105 P.3d 956, does not hold that a sale of stock and a sale of assets are distinctly different and actually discusses circumstances in which the two are considered legally equivalent.⁶

⁶ The Court of Appeals’ reliance on Evans v. Prufrock, 757 S.W.2d 804 (Tex. App. 1988), is likewise misplaced. While Evans held that a sale of corporate stock was a “sale of personalty rather than realty,” it did so under Texas’ real estate licensing statute, which, at the time Evans was decided, did not define “real estate” to include “business opportunities.” Tex. Rev. Civ. Stat. art. 6573a, § 2(1) (1988). (Notably, however, even though Texas’ statute did not textually encompass “business opportunities,” the Texas courts had, by the time Evans was decided, construed the statute to apply to any

(continued...)

Finally, the distinction drawn by Sachs and the Court of Appeals between stock and asset deals is irrelevant under UREBA. Recall that Sachs (1) claims a commission merely for “introduc[ing] the parties who eventually consummated the transaction,” and (2) admits that the “terms of the sale of UPCM ‘were negotiated and concluded without [his] involvement’” (Sachs’ Br. 16-17). Because the critical inquiry under UREBA is whether the “person was duly licensed . . . at the time” of the “act” for which he claims a commission, the applicability of UREBA must be determined—as it must for all finder’s agreements—without regard to the ultimate form of the transaction. Utah Code Ann. § 61-2-18(1) (emphasis added). Thus, the “business opportunity at issue is [not] the purchase of all of UPCM’s capital stock,” as the Court of Appeals’ erroneously held, but is rather just the purchase of UPCM (whose only asset of any significance was real estate and the entitlements to the same)—in a form to be determined later. Sachs, 2007 UT App 169, ¶ 40.

Legislative History of 1985 Legislation

Sachs’ contention that the legislature intended to substantively amend UREBA in 1985, when it deleted the definition of “business opportunity” from the statute, ignores the legislative history of those amendments. As both cases cited by Sachs, State v. Yates,

(...continued)

transaction that “primarily dealt with real estate,” regardless of “the form which the principals’ transaction ultimately takes.” Evans, 757 S.W.2d at 805 (internal quotation marks omitted).) The Evans court primarily determined that the licensing statute did not apply because the only “real estate” involved in the transaction, which involved the sale of several restaurants, was a request that the seller “make its best effort to get extensions on its leases.” Id.

834 P.2d 599 (Utah Ct. App. 1992), and Madsen v. Borthick, 769 P.2d 245 (Utah 1988), recognize, clarifying amendments are not presumed to have any substantive effect. For example, in Madsen, this Court followed the presumption that amendments are substantive because it found “no indication” that the “amendment was intended to clarify preexisting intention.” 769 P.2d at 252, see also Yates, 834 P.2d at 601 (“[E]very amendment not expressly characterized as a clarification carries the rebuttable presumption that it is intended to change existing legal rights and liabilities.” (emphasis added)). Here, both sponsors of the 1985 legislation expressly stated that it was intended merely to “clarify” the existing statutory language.

Sachs attempts to downplay the effect of these statements by seizing upon Senator Overson’s statement that the 1985 legislation was intended “clarify some things [the legislature] did back in 1983.” Floor Debate, 46th Leg., Gen. Sess. (Utah Feb. 27, 1985) (Senate recording disc no. 124) (statements of Sen. Overson) (emphasis added by Sachs) (Exhibit G to Appellants’ opening brief). From this slender reed, Sachs argues that portions of the 1985 amendments were intended to clarify the 1983 amendments, while others—namely the portion deleting the definition of “business opportunity—were intended to have substantive effect. The obvious problem with this convoluted argument is that no legislator ever addressed the provision deleting the “business opportunity” definition from UREBA during the floor debates. It is inconceivable that the legislators would discuss, in some detail, the clarifying portions of the legislation but not utter one word about the supposed substantive portions of the bill. Moreover, while Sachs speculates about the hidden meaning in Senator Overson’s statement, Representative

Bradford, the primary sponsor of the 1985 legislation, House Bill 284, explained that it was intended to generally “clarify and clean up the existing statute.” Floor Debate, 46th Leg., Gen. Sess. (Utah Feb. 22, 1985) (House audograph discs nos. 8 & 9) (statements of Rep. Bradford) (Exhibit F to Appellants’ opening brief). Because all available legislative history “indicat[es]” that the 1985 “amendment was intended to clarify” the preexisting statute, the amendment is presumed not to have substantively modified UREBA.

Madsen, 769 P.2d at 252.

E. Sachs’ Arguments Against Deferring to the Real Estate Commission’s Definition of “Business Opportunity” Are Meritless.

Sachs’ arguments against the Real Estate Commission’s (“Commission”) definition of the term “business opportunity” miss the mark. First, Sachs suggests that the definition of “business opportunity” contained in the Real Estate Commission’s rules only applies to those rules—not to the statute—because the rule provides that the definitions are for the “[t]erms used in these rules.” Utah Admin. Code r. 162-1-2(1.2). Sachs argument is untenable because the term “business opportunity” does not appear anywhere else in the Commission’s rules, see generally id. rr. 162-1 to 162-210, and the rules were plainly implemented to enforce UREBA. Thus, the only term that the Commission could be construing is the statutory term.⁷

⁷ Rule 162-1-2(1.2) also contains a definition for the term “branch manager,” which appears in UREBA without a definition, Utah Code Ann. § 61-2-11(14), but does not otherwise appear in the Real Estate Commission’s rules, see generally id. rr. 162-1 to 162-210.

Sachs attempts to distinguish Morton International, Inc. v. Auditing Division, 814 P.2d 581, 588 (Utah 1991), on its facts but fails to recognize that Morton is a seminal case in Utah administrative law that sets forth broadly applicable deference rules. Because this case does not involve “state agency action that determines the legal rights . . . of an identifiable person,” the Utah Administrative Procedures Act (“UAPA”) is not applicable. Utah Code Ann. § 63-46b-1(1)(a). However, the pre-UAPA, common law rules discussed in Morton are still applicable. Morton Int’l, Inc., 814 P.2d at 585-87; Bhatia v. Dep’t of Employment Sec., 834 P.2d 574, 581 n.5 (Utah Ct. App. 1992) (Bench, J., concurring) (noting that the common law rules of deference discussed in Morton “are still applicable in non-UAPA cases”).

Because the pre-UAPA common law rules of deference are still applicable in appropriate circumstances, and UAPA applies to all “agency action[s],” Sachs’ attempt to limit deference to “proceedings before the commission” has no support (Sachs’ Br. 33). Moreover, the common law deference rules apply, by their own terms, to an agency’s “interpretations of the operative provisions of the statutory law it is empowered to administer,” whether the court is reviewing the agency’s action or not. Utah Dep’t of Admin. Servs. v. Pub. Serv. Comm’n, 658 P.2d 601, 610 (Utah 1983); see also, e.g., Morton Int’l, Inc., 814 P.2d at 586 (noting deference is available to an agency “construing statutory terms or applying statutory terms to the facts” (emphasis added)); Wells Fargo Armored Serv. Corp. v. Pub. Serv. Comm’n, 626 P.2d 450, 451 (Utah 1981).

As Morton explains, under the pre-UAPA common law rules, courts defer to an agency’s interpretation of a statute: (1) when “the agency, by virtue of its experience or

expertise, is in a better position than the courts” to construe the term, or (2) when the statute contains an “explicit or implicit grant of discretion.” Morton Int’l, Inc., 814 P.2d at 586, 588. The Commission’s interpretation of the term “business opportunity” is owed deference under both tests. Sachs’ argument that “there is nothing to suggest that the Commission is in a better position than the Court to construe” the term “business opportunity” (Sachs’ Br. 33) is ironic given that the 1985 legislation amending UREBA, which removed the statutory definition for the term “business opportunity,” “came from the Real Estate Division,” Floor Debate, 46th Leg., Gen. Sess. (Utah Feb. 22, 1985) (House audograph discs nos. 8 & 9) (statements of Rep. Bradford); Floor Debate, 46th Leg., Gen. Sess. (Utah Feb. 27, 1985) (Senate recording disc no. 124) (statements of Sen. Overson), for which the Commission is empowered to promulgate rules, Utah Code Ann. § 61-2-5.5. Since the legislature adopted the agency’s proposed legislation wholesale, this Court should grant the agency similar deference with respect to its interpretation of a statutory change made by that same legislation.

F. The Licensing Statutes Applied in the Cases That Sachs Cites Are Less Similar to UREBA Than Those Applied in Defendants’ Cases.

While the “majority rule” is that a “sale of a business [that] involves any real estate component” requires a real estate license, cases applying the real estate licensing statutes of sister states have resolved the issue presented in this case variously. GDC Env’tl. Servs., Inc. v. Ransbottom Landfill, 740 N.E.2d 1254, 1258 (Ind. Ct. App. 2000). While the Court of Appeals noted that “statutory differences” often account for the different outcomes, the Court of Appeals followed case law from states whose statutes

are distinctly different than UREBA and rejected case law from states whose statutes more closely align with it.

State licensing statutes are roughly divided into two camps: (1) those that define real estate to include “business opportunities,” and which further define the term “business opportunity,”⁸ and (2) those that do not apply to “business opportunities” whatsoever.⁹ Perhaps not surprisingly, courts interpreting statutes in the first camp hold that assisting the sale of company with real property assets, even if accomplished by a sale of the corporation’s stock, requires a real estate broker’s license,¹⁰ whereas courts interpreting statutes in the second camp often do not.¹¹

Because UREBA expressly requires a license for transactions relating to “business opportunities involving real property,” it is more analogous to the state statutes in the first camp. Unlike the statutes in the second camp—which do not apply to, or reference,

⁸ See, e.g., Colo. Rev. Stat. § 12-61-101(2)(i); Idaho Code Ann. § 54-2004; Fla. Stat. § 475.01(1)(a); Wash. Rev. Code. § 18.85.010.

⁹ See, e.g., Ala. Code § 34-27-1 to -11 (1975); Ark. Code Ann. §§ 17-35-101, 102 (1987) (renumbered and re-codified from Ark. Stat. Ann. § 71-1302 (1947)); Mass. Gen. Laws ch. 112, § 87PP (1987); 63 Pa. Cons. Stat. § 455.201 (1990).

¹⁰ See, e.g., Broughall v. Black Forest Dev. Co., 593 P.2d 314, 316 (Colo. 1978); Lieff v. Medco Prof'l Servs. Corp., 973 P.2d 1276, 1278 (Colo. Ct. App. 1998); Shochet Secur., Inc. v. First Union Corp., 663 F. Supp. 1035, 1037 (S.D. Fla. 1987) (applying Florida law); Springer v. Rosauer, 641 P.2d 1216, 1219 (Wash. Ct. App. 1982); Schmitt v. Coad, 604 P.2d 507, 509 (Wash. Ct. App. 1979).

¹¹ See, e.g., Abramson v. Gulf Coast Jewelry & Specialty Co., 445 F.2d 802 (5th Cir. 1971) (applying Alabama law); Frier v. Terry, 323 S.W.2d 415 (Ark. 1959); Turnpike Motors, Inc. v. Newbury Group, Inc., 528 N.E.2d 1176 (Mass. 1988); Gruber v. Owens-Illinois Inc., 899 F.2d 1366 (3d Cir. 1990) (applying Pennsylvania law).

“business opportunities” at all—UREBA expressly defines real estate to include “business opportunities.” As such, if this Court draws upon the case law of sister states, it should look to cases construing statutes that, like UREBA, expressly apply to “business opportunities.”

G. Sachs’ Construction of “Business Opportunity” Renders the Term Superfluous.

While Sachs agrees that this Court must “avoid interpretations that will render portions of a statute superfluous or inoperative,” Hall v. Dep’t of Corr., 2001 UT 34, ¶ 15, 24 P.3d 958, he makes no effort to identify what types of transactions the term “business opportunity involving real property” encompasses. (Sachs’ Br. 38.) Further, by defining the term negatively—claiming that the term does not include the sale of a company by a stock purchase—Sachs arrives at an interpretation that leaves the term without any residual meaning.

Simple logic dictates that, if the Court of Appeals’ decision stands, the term “business opportunities involving real property” has no substantive meaning. For example, the term is unnecessary to bring the transfer of a company by the sale of its real property assets within the ambit of the statute because other statutory provisions already apply to such transactions. See Utah Code Ann. § 61-2-2(12)(a), (c), (d). Additionally, it would be absurd to construe the term to not apply to the sale of an entire company, but then apply it to transactions amounting to something far less than the sale of an entire company, such as transactions involving a prospective company, a business franchise, or the subsidiaries, divisions, or business units of an existing company. In short, the Court

of Appeals’ construction of the term leaves it a vestigial appendage in violation of basic rules of statutory construction.

H. Sachs’ Interpretation of UREBA Is Constitutionally Suspect.

Sachs resorts to an artificial view of finders’ agreements to avoid the constitutional infirmities of the Court of Appeals’ interpretation of the statute. According to Sachs, the due process concerns raised by the Court of Appeals’ interpretation can be avoided if the finder simply agrees, at the outset, that he will only locate a buyer for the company’s stock. (Sachs’ Br. 40.) Sachs admits that, under this strained hypothetical, the finder’s agreement is easily voided if the parties decide, after the finder has completed his task, to transfer the company as an asset sale instead. (*Id.*)

Sachs’ response not only fails to accord with common business practices, it contravenes the evidence of this case. As explained above, *see* Part IIA, *supra*, until his brief to this Court, Sachs only claimed that he was hired to find a buyer/purchaser for UPCM, not particularly a buyer for its stock. Typically, the decision whether to transfer a company by way of a stock sale versus an asset sale is not made until the final negotiations between the parties, and finders’ agreements rarely, if ever, specify what form the transaction will ultimately assume. As such, the Court of Appeals’ construction of UREBA injects constitutional infirmity into the vast majority of finders’ agreements. *Colorado v. Vinnola*, 494 P.2d 826, 831 (Colo. 1972) (holding that a statute violates the Due Process and Equal Protection Clauses when the after-the-fact discretionary “action of a third party” is a “factor which determines whether guilt attaches”).

Under the Court of Appeals’ construction, if an unlicensed finder seeks a commission after locating a buyer for a company, but the parties later transfer the company via an asset sale, rather than a stock sale, the after-the-fact actions of those parties cause the finder to violate UREBA’s criminal provision. Utah Code Ann. § 61-2-17. As such, the Court of Appeals’ construction must be avoided. See Thurnwald v. A.E., 2007 UT 38, ¶ 42, 163 P.3d 623.

Sachs’ contentions regarding purported violations of the “one subject” rule are also erroneous. Relying on a federal court’s interpretation of Florida’s Constitution in Shochet Securities, Inc. v. First Union Corp., 663 F. Supp. 1035 (S.D. Fla. 1987), Sachs argues that Defendants’ interpretation of UREBA violates Article VI, Section 22 of the Utah Constitution, which provides that “no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.” However, under the one-subject rule of Section 22, “[a]ll that is required is that the subject matter of the act be reasonably related to the title and that all parts of the act be reasonably related to each other.” State v. Twitchell, 333 P.2d 1075, 1078 (Utah 1959). Since Defendants’ interpretation only applies UREBA to transactions involving businesses having real property assets, Defendants’ interpretation maintains a reasonable relationship between the title and all parts of the statute and does not run afoul of the one-subject rule, even if the one-subject rule applied in Utah.

I. Sachs' Argument That UREBA Is a Penal Statute That Must Be Narrowly Interpreted Is Flawed.

Sachs also argues that this Court must interpret UREBA in his favor because it is a penal statute. Even assuming UREBA is a penal statute, which it is not, see, e.g., Evelyn v. Commonwealth, 621 S.E.2d 130, 136 (“[A] statute is not penal simply because its violation is a Class [A] misdemeanor.”), Utah has abolished the common law rule that penal statutes are construed differently than other types of statutes. Utah Code Ann. § 76-1-106 (“The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state.”).

J. Defendants' Interpretation of UREBA Best Accords with Its Purpose.

Sachs also argues that the Court of Appeals' interpretation better aligns with UREBA's purpose because the statute is purportedly not designed to protect sophisticated investors but only unsophisticated members of the public. (Sachs' Br. 46.) Both Sachs and the Court of Appeals' incorrectly assume that any deal that involves the sale of corporate stock necessarily involves sophisticated business entities, ignoring that limited liability companies and closely held corporations are often formed to operate small, family-owned businesses.

While Sachs criticizes the Defendants' interpretation on the grounds that it is unclear how much real property a corporation must own to become a “business opportunity involving real property,” Sachs fails to explain how the Court of Appeals' exception for “sophisticated” parties can be effectively administered, i.e., how much

“sophistication” is required and how it is measured.¹² Even though this Court need not address Sachs’ concern, since UPCM’s only notable asset was its real property, Utah courts will be able to draw upon the wealth of existing case law, perhaps with guidance from this Court, when confronted with the question of how much real estate a company must own to constitute a “business opportunity involving real property.”¹³

In sum, the “presumed purpose” of UREBA should not “override[] its literal terms.” Andalex Res., Inc. v. Myers, 871 P.2d 1041, 1045 (Utah Ct. App. 1994).

Moreover, “nothing suggests that ‘sophisticated’ corporate entities should not be entitled to the same protections as the general public” under UREBA. Id.

III. UTAH’S STATUTE OF FRAUDS PRECLUDES SACHS’ CLAIMS FOR A FINDER’S FEE

Sachs nominally argues that the real estate broker provision of the statute of frauds, Utah Code Ann. § 25-5-4(1), should not be read in pari materia with UREBA because “it is not cross-referenced to UREBA” (Sachs’ Br. 48). Sachs does not, however, refute that the two statutes relate to the same class of persons (real estate

¹² Global Recreation, Inc. v. Cedar Hills Development Co., 614 P.2d 155, 158 (Utah 1980), on which Sachs and the Court of Appeals rely, is inapposite because this Court found that the “salesman involved in the transaction and employed by [the plaintiff] was a licensed real estate salesman.” Likewise, American Rural Cellular v. Systems Communication Corp., 890 P.2d 1035 (Utah Ct. App. 1995), applied long-standing common law exceptions to the contractor’s licensing statute, not generally applicable exceptions.

¹³ Courts have adopted a variety of strategies for answering this question, from a “merely incidental” rule, see, e.g., Frier v. Terry, 323 S.W.2d 415 (Ark. 1959), to an apportionment rule, see, e.g., Kazmer-Standish Consultants v. Schoeffel Instruments Corp., 445 A.2d 1149 (N.J. 1982).

brokers) and things (compensation for selling real estate) and have the same basic purpose (the prevention of fraud by unscrupulous brokers). As such, the two statutes are considered in pari materia and should be “construed with reference to one another.” Utah County v. Orem City, 699 P.2d 707, 709 (Utah 1985).

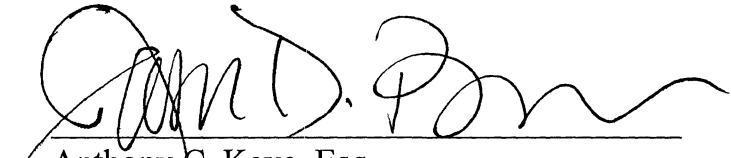
Relying on Utah Code Ann. § 70A-8-112, Sachs argues that because his alleged agreement was “for the sale or purchase of a security” it “is enforceable whether or not there is a writing.” Again, this flatly contradicts the Court of Appeals’ own finding that the buyer that Sachs allegedly found, and not Defendants, “chose to structure its acquisition of UPCM as a stock rather than an asset purchase.” Sachs, 2007 UT App 169, ¶ 51. If the decision to structure UPCM’s purchase as a stock sale, as opposed to an asset sale, was not made until after Sachs performed under the purported agreement, then Sachs’ purported contract was not “for the sale or purchase of a security” under Utah Code Ann. § 70A-8-112.

Instead, Sachs was allegedly employed to find a buyer/purchaser for UPCM, see Part IIA, supra, which was a business opportunity involving real property and, therefore, “real estate” under Utah Code Ann. § 61-2-2(14). Thus, the purported agreement between Sachs and Defendants is void for want of a writing. Id. § 25-5-4.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the decision of the Court of Appeals. In addition, Appellants respectfully request that the Court remand this case to the Court of Appeals with instructions to enter an order affirming the Order and Judgment entered by the district court.

DATED this 20th day of December 2007.

A handwritten signature in black ink, appearing to read "Anthony C. Kaye", written over a horizontal line.

Anthony C. Kaye, Esq.

Jason D. Boren, Esq.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

Attorneys for Defendants Joseph S. Lesser

and Loeb Investors Co. XL

A handwritten signature in black ink, appearing to read "Laura S. Scott", written over a horizontal line.

Laura S. Scott, Esq.

Shane D. Hillman, Esq.

PARSONS BEHLE & LATIMER

Attorneys for Appellant/Defendant United

Park City Mines Company

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December 2007, I caused a true and correct copy of the **REPLY BRIEF OF THE APPELLANTS** to be served via First

Class Mail to:

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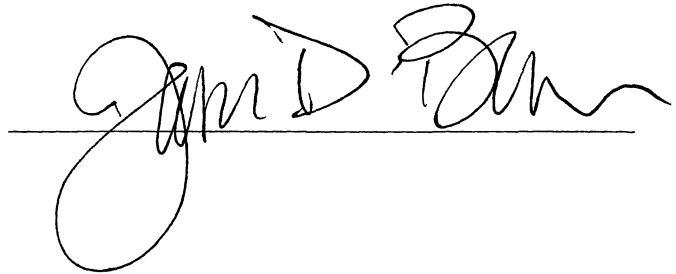
A handwritten signature in black ink, appearing to read "J. D. Scott", is written over a horizontal line.

Exhibit 1

5.10 Opinion Policy Updated 10-11-05

Introduction. Utah law requires the Attorney General to "give the attorney general's opinion in writing and without fee to the Legislature or either house, and to any state officer, board, or commission, and to any county attorney or district attorney, when required, upon any question of law relating to their respective offices." (**Utah Code Ann. § 67-5-1(7)(2004)**)

The Attorney General and his or her staff will determine whether issues presented by agencies or officials authorized to request opinions should be addressed in a written, published opinion, or whether the request requires another form of legal advice. Either response fulfills the Attorney General's statutory responsibility to render opinions to public officials and the Executive Branch. In general, formal published opinions will be issued only when private legal advice is inadequate to resolve the issue.

A. Appropriate subjects. As a guide, the following types of legal questions are appropriate subjects for an opinion:

1. Questions relating to the legal duties of the political official requesting the opinion; and
2. Questions that raise legal issues of wider interest or importance in a specific factual context.

B. Inappropriate subjects. In general, the following types of issues are not appropriate subjects for an opinion:

1. Issues that are hypothetical or abstract;
2. Issues that are the subject of pending or likely litigation, or that resolve liability issues;
3. Issues that are subject to a pending collective bargaining process;
4. Issues that relate to the wisdom or judgment of the Legislature or of administrative or executive policies;
5. Issues that involve construing federal statutory requirements;
6. Issues concerning the constitutionality of enacted or proposed legislation;
7. Issues that involve the interpretation of a charter, local law, ordinance or resolution; and
8. Requests from or responses to agency clients that implicate attorney-client privilege or fall under the category of attorney-client work product.

Most legal advice or opinions are provided in the ordinary course of legal representation and do not require a published Attorney General Opinion.

C. Who may request. Formal Attorney General Opinions may be requested by the following:

1. The Executive Branch, including the Governor's office and all executive branch agencies. The request must be in written form and must be received from the agency head or staff counsel. If the state agency is headed by a multi-member body, the request must be from the presiding officer, the

executive director, or legal counsel. All executive branch requests for opinions should be routed through the Governor's office.

2. The Legislative Branch, including the House, the Senate or the Management Committee. The request must be received from the President of the Senate, the Speaker of the House, or the Management Committee, not from an individual member of the body.

3. The Judicial Branch. The request must be received from the Office of the Court Administrator.

4. County Attorneys or District Attorneys. As a general rule, the requesting officer will be required to give an opinion on the matter at the time the request is made.

The statute authorizing the giving of opinions does not authorize the Attorney General to render opinions to municipal agencies or their attorneys. Additionally, the Attorney General is not permitted to render opinions at the request of members of the general public.

D. Effect of Opinion.

1. For the Attorney General. A formal opinion constitutes the Attorney General's carefully considered judgment as to what the law requires in the circumstances presented by the request. Absent a change in law, factual circumstances or overriding public policy, the Attorney General ordinarily will be guided by prior published opinions and legal precedents.

2. For the requesting official. An opinion has no legal binding effect on the requesting officer. However, if an official disregards an opinion without a valid basis and if litigation results, the Attorney General may decline to represent the official with respect to some or all of the issues involved. In unusual circumstances, the Attorney General may decline to permit the official to obtain representation through a Special Assistant Attorney General.

3. For the Courts. Courts have discretion to accord to opinions of the Attorney General whatever weight, if any, they determine appropriate. Opinions may be treated as persuasive. A court may grant more deference to an agency's own interpretation of a statute it is charged with enforcing, or a regulation it has promulgated, than to the Attorney General's interpretation of the same statute or regulation rendered in response to a request from the agency.

E. Attorney General's Method of Processing Requests – All opinion requests are assigned to the appropriate Chief Deputy. Upon receipt, the Chief Deputy will determine if the request is an appropriate matter for an Attorney General Opinion; if so, it will be assigned an Attorney General Opinion number. The request will then be forwarded to the appropriate Division Chief to assign for processing. The receipt and assignment of the request will be acknowledged by the Chief Deputy to the requesting party. If the request is determined not to be a proper subject for

an Attorney General Opinion, the matter will be formally declined and a letter of notification of disposition will be given to the person requesting the opinion.

F. Processing an Opinion

1. Due date. The attorney assigned to render the opinion will be notified of the date an initial draft is due. If the attorney anticipates this deadline is not realistic, he or she should immediately notify the Chief Deputy of the need for an extension and a new completion date will be determined.

2. Third-party input. In some instances, it may be appropriate to obtain input from third parties. In such event, the drafting attorney should seek prior approval from the Chief Deputy to request such input. Third-party input should be balanced on both sides of an issue. Whether this third-party information is incorporated in the opinion is the decision of the drafting attorney in consultation with his or her Division Chief and the Chief Deputy.

3. Working Drafts. A typed notation "Draft" and the date of the draft should appear on each draft. Working drafts shall not be distributed outside the Attorney General's Office without written authorization from the assigning Chief Deputy.

4. Processing of Drafts. The proposed draft shall be submitted and e-mailed to the Division Chief and then to the Chief Deputy for review.

(a) The Division Chief may edit the opinion in consultation with the drafting attorney. The opinion is then forwarded to the Chief Deputy.

(b) The Chief Deputy may edit the draft in consultation with the Division Chief and the drafting attorney.

(c) After final editing, the Chief Deputy shall return the draft to the drafting attorney for preparation of the final draft and the narrative summary (see 5. below).

(d) The drafting attorney shall submit the final draft to the Attorney General for final edit and signing.

(e) A hard copy of the final opinion shall be filed in the Executive Division.

(f) The Executive Division shall forward an electronic copy of the opinion to the office IT Analyst II for posting on the AG web site and distribution to vendors wishing to publish the opinion.

5. Narrative Summary of Opinions. The drafting attorney shall prepare and include in the opinion a narrative summary. The narrative summary shall include at least the following information:

(a) A short narrative of questions asked and answers given:

- (b) A discussion of how this opinion impacts the State agency;
- (c) A discussion of how this opinion impacts the public; and
- (d) A discussion of the important legal or public policy at issue.

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