

2016

**Jack Phillips, Petitioner/Appellant v. Utah Department of
Commerce, and Utah Securities Commission, Respondents/
Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JACK PHILLIPS,

Petitioner/Appellant,

v.

UTAH DEPARTMENT OF COMMERCE,
and UTAH SECURITIES COMMISSION,

Respondents/Appellees.

**REPLY BRIEF OF THE
PETITIONER/APPELLANT**

Appellate Case No. 20150534-CA

Agency Case No. SD-12-0001

Sean D. Reyes
Attorney General
Brent A. Burnett
Assistant Attorney General
160 E 300 S, Fifth Floor
P.O. Box 140858
Salt Lake City, UT 84114

*Attorney for Respondents/Appellees
The Utah Department of Commerce
The Utah Securities Commission*

Maria E. Windham (10761)
Beth J. Ranschau (13846)
Whitney H. Krogue (15184)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, Utah 84111

*Attorneys for Petitioner/Appellant Jack
Phillips*

**FILED
UTAH APPELLATE COURTS**

APR 01 2016

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160 E 300 S, Fifth Floor
P.O. Box 140858
Salt Lake City, UT 84114

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Beth J. Ranschau (13846)
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RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, Utah 84111

*Attorneys for Petitioner/Appellant Jack
Phillips*

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ARGUMENT¹

I. THE AGENCY'S ORDER IMPOSING A PENALTY OF \$413,750 UNDER SECTION 61-1-20 IS CONTRARY TO THE PLAIN LANGUAGE OF UTAH'S UNIFORM SECURITIES ACT.

The Utah Department of Commerce (the “Department”) and the Utah Securities Commission (the “Commission” and together, the “Agency”) erroneously argues that there are “two distinct enforcement procedures” outlined by Utah Code § 61-1-20. The Agency’s position also suggests that the remedies it may impose in administrative proceedings are *unlimited* and are also *far broader than the remedies a district court may impose* under the same section. (See Appellee Br. at 5-8.) However, the Agency’s misinterpretation of Section 61-1-20 would turn the Legislature’s allocation of authority between the Agency and the courts on its head. The Agency’s power under the plain language of the Utah Uniform Securities Act (the “Act”) is not so absolute, and the statutory scheme is not as nonsensical as the Agency would have this Court believe.

Instead, the Agency’s power in administrative proceedings is limited to the actions and remedies detailed in Utah Code § 61-1-20(1). Under this section, the Agency may impose a fine. But, “to *enforce* compliance with...a rule or order under [the Act]” — including an order imposing a fine—the Agency must bring an action in district court to enforce compliance with its Order as outlined in Utah Code § 61-1-20(2). Only then—

¹ The Agency concedes that Phillips preserved the issues raised in Phillip’s Appellant’s Brief. (See Appellee Br. 1-2.) The Agency also concedes that Phillips timely filed his appeal of the Agency’s final agency action. (See Appellee Br. 3 (“Phillips timely filed his petition for judicial review.”).) Because Phillips’ right to raise these issues on appeal is undisputed, this Court should reach the merits of these issues fully outlined in Phillip’s Appellant’s Brief.

“upon a proper showing,” subject to the due process requirements observed in district courts, and the limitations on the penalties enforced—can the Agency enforce the fine. *See* Utah Code § 61-1-20(2). Under this enforcement structure, outlined in the plain language of § 61-1-20, the maximum enforceable fine is \$10,000 per violation. *See State v. Bushman*, 2010 UT App 120, ¶ 21 n.4, 231 P.3d 833 (interpreting section 61-1-20 and noting that “the fines that the [Agency] could impose and judicially enforce...are now limited to \$10,000 per violation”).

Importantly, the Agency fails to identify any legal method whatsoever by which it would enforce its excessive \$413,750 penalty against Phillips. Phillips is an Oregon resident (*see* R. 1233-34), and to enforce its order, the Agency must exercise its authority pursuant to Section 61-1-20(2)(a) and bring an action in “the appropriate district court of this state or the appropriate court of another state.” This enforcement action would necessarily trigger all accompanying limitations on the district court’s enforcement contained in Section 61-1-20(2)(b), including the \$10,000 limitation on the amount of the fine in Section 61-1-20(2)(b)(viii).

By failing to set forth any alternative method of enforcement, the Agency impliedly asks this Court to take it on faith that somehow the Agency could avoid the district court proceeding of Section 61-1-20(2)(a) and the important limitations on enforceability of orders attached thereto in Section 61-1-20(2)(b). This highlights the Agency’s gross misinterpretation of the operation of Section 61-1-20. In Phillips’ administrative appeal before the Utah Department of Commerce, the Utah Attorney General’s Office argued that there are other methods by which the Agency might enforce

its administrative order against Oregon resident Phillips (R. 1233-34), but the Agency has not briefed these arguments on appeal. Accordingly, those arguments are waived. *See, e.g., Broderick v. Apartment Mgmt. Consultants, LLC*, 2012 UT 17, ¶¶ 10-19, 279 P.3d 391 (holding that the appellee waived its arguments on appeal, explaining that “we . . . require ‘the brief of the appellee [to] contain the contentions and reasons of the appellee with respect to the issues presented in the opening brief.’”)²

² In any event, the Agency’s prior arguments—which have not been briefed and should not be considered on appeal—are unavailing. (*See* R. 1254-1256.) For instance, in its briefing in the administrative appeal, the Agency argued it might enforce its penalty against Phillips using the general judicial enforcement authority of Utah Code Ann. § 63G-4-501. (R. 1233.) However, “it has been consistently held that specific statutes prevail over general statutes.” *State v. Moore*, 802 P.2d 732, 737 (Utah 1990). Section 61-1-20 specifically applies to enforcement of Agency orders under the Utah Uniform Securities Act. Utah Code Ann. § 61-1-20(2)(a). And, in any case, Section 63G-4-501 requires the Agency to file a civil complaint in district court, in which Section 61-1-20(2) and all its attached limitations on the district court’s enforcement of orders under the Act would still necessarily apply. *See Career Serv. Review Bd. v. Utah Dep’t of Corr.*, 942 P.2d 933, 940-41 (Utah 1997) (“[A] suit to enforce such an administrative decision or order is an original and independent proceeding, and such actions are actions at law, even though equitable relief is sought, and are not actions on the administrative decision or order.”) The Agency also argued in the administrative appeal that it could simply file an “abstract of award”, rather than a civil complaint in an enforcement proceeding. (R. 1233-34.) But, it cited to no statutory authority for that proposition. (*See id.*) While statutes governing other administrative proceedings in some special circumstances provide a procedure to file an “abstract of award” and avoid an enforcement proceeding in district court, the Utah Uniform Securities Act does not authorize such a procedure. *Compare, e.g., Utah Child Support Services Act*, Utah Code Ann. § 62A-11-304.2(2)(a) (2014) (“An abstract of a final administrative order issued under this section [of the Utah Child Support Services Act] . . . may be filed with the clerk of any district court.”) *with Utah Uniform Securities Act*, Utah Code Ann. § 61-1-20 (2)(a) (“The director may bring an action in the appropriate district court of this state or the appropriate court of another state . . . to enforce compliance with . . . a rule or order under [the Utah Uniform Securities Act].”). In sum, the Agency failed to cite any alternative to Section 61-1-20(2)(b) in its appellate brief because *there simply is no other method provided by statute by which the Agency may obtain the fine it imposes*. The Utah Court of Appeals properly interpreted Section 61-1-20 in *State v. Bushman*, 2010 UT App 120, ¶ 21 n.4, when it

Similarly, under the plain language of the statute, the Agency cannot impose and enforce a remedy of restitution. Restitution is only available upon order of the district court when, in the first instance, the Agency files “an action to enforce compliance with [the Utah Uniform Securities Act]” in district court. *See* Utah Code § 61-1-20(2)(b)(vii). The Agency is not permitted to order restitution in an administrative proceeding. *See* Utah Code Ann. § 61-1-20(1)(a)-(h).

A. The Fine Imposed by the Agency Exceeds the Statutory Maximum.

Despite the limitations imposed on its power by the plain language of the statute, the Agency attempts to impose and enforce a monetary penalty against Phillips of \$413,750 for four violations of the Act. The Agency expressly designated \$78,750 of this penalty as a “fine.” (Appellant Br. at 1.) Whether the entire \$413,750.00 penalty is characterized as the “fine”—as the Agency argues in its brief—or the “fine” is \$78,750, the amount of the fine imposed far exceeds the maximum \$40,000 fine allowed by § 61-1-20.

In *State v. Bushman*, this Court noted that under Section 61-1-20(2) of the Utah Uniform Securities Act, “the fines that the [Agency] could impose and judicially enforce...are now limited to \$10,000 per violation.” 2010 UT App 120, ¶ 21 n.4. The Agency attempts to undermine this precedent by pointing out that the ultimate question in *Bushman* was different than the question in this case, because *Bushman* dealt with double jeopardy. However, the fact that double jeopardy is not at issue here does not change the

observed “the fines that [the Agency] could impose *and judicially enforce*...are now limited to \$10,000 per violation.” *Id.*

fact that this Court has already considered Section 61-1-20 and found its limitation of the maximum fines to \$10,000 per violation. Indeed, the *Bushman* court found it constitutionally significant in that the limited fine is “not excessive in relation to its beneficial and remedial purpose.” *Id.* at ¶ 21.

B. Restitution Is Not Available in Administrative Proceedings.

Undaunted by the legislature’s direction that restitution may be obtained solely through a proceeding before the district court, the Agency has administratively ordered Phillips to pay \$340,000 in restitution—\$315,000 in “investor losses” and \$25,000 in “investigative costs”—in addition to the \$78,750 expressly attributed to the “fine.” In doing so, the Agency overstepped the bounds of the power granted it by the plain language of Section 61-1-20.

In its response brief, the Agency fails to address Phillips’ argument that restitution is only available through a district court order. Instead, the Agency argues that its ability to impose monetary penalties is *unlimited*. Apparently, the argument is that since the statute “does not limit the amount of fines that can be imposed in administrative proceedings,” (Appellee Br. at 7), the allocation of those fines are equally unlimited. This interpretation renders the statute’s distinction between the words “fine” and “restitution” superfluous and inoperative. But this Court must “avoid interpretations that will render a statute superfluous and inoperative.” *Hall v. Dep’t. of Corr.*, 2001 UT 34, ¶ 15. Therefore, the Agency’s proposed interpretation impermissibly runs contrary to the plain language of the statute.

II. THE MONETARY PENALTY IMPOSED BY THE AGENCY IS UNCONSTITUTIONALLY EXCESSIVE.

The Agency faults Phillips for “only look[ing] at one portion of the test used by Utah’s courts.” (Appellee Br. at 9.) Utah courts determine the constitutionality of penalties “by balancing a number of factors including the ‘gravity of the offense, the maximum fine that could be imposed, the extent of the unlawful activity, the amount of illegal gain in relation to the penalty, and the harm caused.’” (Appellee Br. at 10 (quoting *Brent Brown Dealerships v. Tax Comm’n Motor Vehicle Enforcement Div.*, 2006 UT App 261, ¶ 18, 139 P.3d 296).) As outlined in Phillips’ principal brief, under the balance of these factors, the Agency’s fine is unconstitutionally excessive.

The most prominent issue in this case is whether the penalty imposed by the Agency is grossly disproportionate to the maximum penalty authorized by the legislature. As discussed *supra*, the Agency’s monetary penalty of \$418,750 far exceeds the maximum fine permitted under the statute. The remaining factors also demonstrate that the penalty is unconstitutional.

First, the penalty imposed by the Agency is grossly excessive in light of the gravity of the offense. For instance, the majority of states that have adopted the Uniform Securities Act have capped the fine for similar infractions in the range of \$10,000 per violation. (See Appellant Br. at 5 n.7.) Here, on the other hand, the Agency has fined Phillips over \$100,000 per violation.

Similarly, as noted in Phillips’ principal brief, the “extent of the unlawful activity” and the “amount of illegal gain in relation to the amount of the penalty” factors both

weigh heavily against the constitutionality of the Agency's penalty. Indeed, the Agency found no evidence that Phillips had a "history of previous violations," and "no evidence...that [Phillips] received any meaningful financial benefit, enrichment, commission, fee or other reconsideration from the transactions involving the Persches and Reutlingers." (R. at 001092.) Instead, the Agency relies on its unilateral assessment of the harm caused by the violation. However, "harm is but one factor in the analysis," *Brent Brown Dealerships*, 2006 UT App 261, ¶ 24, and the balance of the factors strongly weigh against a finding of constitutionality.³

III. THIS ACTION IS TIME-BARRED

As extensively briefed in Phillips' opening brief, this action is time-barred under the applicable statute of limitations. (See Appellant Br. at 14-21.) The Agency responds by arguing that the plain language of the statute does not permit such an interpretation. (Appellee Br. at 8.) But the plain language of Utah Code § 61-1-21.1(1) states that no "civil complaint" may be filed "more than five years after the alleged violation," and a "civil complaint" includes any authority exercised by the Division under the Securities Act. *Id.*

The Agency also cites *Rogers v. Div. of Real Estate*, 790 P.2d 102, 105 (Utah 1990) for the general proposition that administrative proceedings are not civil actions. (Appellee Br. at 8.) But *Rogers* held that it is only where there is an "absence of specific

³ Additionally, the Agency's determination of the "harm" cannot justify such a large fine where the Agency improperly shifted its burden of proof on the issue of harm to Phillips by requiring Phillips to prove the value of the emeralds the Agency admits were kept by the Persches. (See *infra*, Part V.)

legislative authority” that “civil statutes of limitation are inapplicable to administrative disciplinary proceedings.” *Id.* (emphasis added). Rogers attempted to apply the general catch-all provision in section 78-12-25(2), to an administrative action seeking disciplinary suspension of her real estate license. *Id.* This “catch-all” statute of limitation stated that “an action for relief *not otherwise provided for by law*” must be commenced within four years. *Id.* (emphasis added). Rogers did not argue that there was any other limitation within the applicable statutory scheme regarding disciplinary revocation of Rogers’ real estate license.⁴ *See id.* By contrast, here, the administrative proceeding at issue is not a disciplinary proceeding concerning an agency-licensed individual. And the Utah Securities Act does provide “specific legislative authority” implementing a five-year statute of limitations for securities violations. *See* Utah Code Ann. § 61-1-21.1(1). At the very least, the statute of limitations in Section 61-1-21.1(1) prohibits the Agency from filing a civil complaint in district court to enforce an Order pursuant to the authority of Section 61-1-20(2)(a), “more than five years after the alleged violation.”

The Agency’s position essentially advocates for no statute of limitations in an administrative proceeding whatsoever. This would create an absurd result where an

⁴ While *Rogers* did deal generally with Title 61, *Rogers* focused on revocation of a real estate license under Utah Code sections 61-2-11 (1986) and 61-2-11(15), Title 61, Part 1, chapter 2 – Division of Real Estate. By contrast, the Department brought its claims against Phillips under Chapter 61, part 1, Chapter 1 – Utah Uniform Securities Act. The Utah Uniform Securities Act does include specific legislative authority applying a five-year statute of limitations, stating “[n]o indictment or information may be returned or civil complaint filed *under this chapter* more than five years after the alleged violation.” *See* Utah Code Ann. § 61-1-21.1(1) (emphasis added).

enforcement agency is time-barred from bringing claims in civil court, with all of the due process protections afforded in that forum, but there is no similar restraint in administrative proceedings. In other words, according to the Agency, any time it misses the five-year statute of limitation for bringing claims in court—where the fine per violation is clearly limited to \$10,000—it can bring an administrative action and impose an unlimited fine without any time limitation. This is an impermissible and absurd reading of the statute. *See, e.g., Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 26, 267 P.3d 863 (“Generally, when interpreting statutes we seek to avoid interpretations which render some part of a provision nonsensical or absurd. Thus, when statutory language . . . presents the court with two alternative readings, we prefer the reading that avoids absurd results.” (internal quotations omitted)).

IV. THE AGENCY IMPROPERLY USED POST HOC RATIONALIZATIONS TO BOLSTER ITS UNLAWFUL FINE.

Utah Administrative Code R164-31-1(B)(1) provides that the Commission “shall” consider numerous factors “[f]or the purpose of determining the amount of an administrative fine.” Utah Admin. Code R164-31-1(B)(1). In this case, the Commission failed to consider these factors—instead relying exclusively on “investor losses” to assess the \$315,000 portion of the civil penalty imposed. Despite the Commission’s failure to consider the other factors in determining the amount of the fine as required by the rule, the Department affirmed the *amount* of the fine, but remanded “solely” to permit the Commission to consider the other factors and articulate a justification for the previously determined amount. (R. 1284.) In doing so, the Agency applied the rule in reverse and

V. THE AGENCY IMPROPERLY SHIFTED THE BURDEN OF PROOF ONTO PHILLIPS.

Utah Administrative Code R151-4-709 clearly states that “the department has the burden of proof in a proceeding initiated by a notice of agency action.” Utah Admin. Code R151-4-709(1). The Agency does not dispute or distinguish this rule. Instead, the Agency simply states that the value of the emeralds is an “offset” and then concludes, without citation, that assigning this terminology relieves the Agency of the unequivocal burden imposed by R151.⁵ Interestingly, although the entirety of the Agency’s brief relies on its delineation between administrative action and court proceedings, neither case it cites in support of its “offset” argument deals with any aspect of administrative law. (Appellee Br. at 11.) The Agency has not cited any case, statute, or rule which allows it to shift burdens of proof in contravention of Utah Administrative Code R151-4-709.

CONCLUSION

For the foregoing reasons, and those discussed in Phillips’ principal brief, the Court should find that the Agency acted unlawfully when it imposed the monetary penalty on Phillips.

⁵ The Agency wrongly claims Phillips did not challenge the sufficiency of its evidence concerning damages. While Phillips does not challenge the findings of fact, he does challenge the conclusion that the agency has sufficiently found the existence of “damages” when the agency itself recognized that the emeralds in the victims’ possession have unknown value. (Appellant Br. At xvii-xviii, 21-22 (arguing that “[t]he key to determining . . . investor loss is the value of the ‘emeralds.’”).)

engaged in exactly the type of post hoc rationalization prohibited by federal and Utah law. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) (“[P]ost hoc rationalizations of the agency...cannot serve as a sufficient predicate for agency action.”); *State v. Hansen*, 857 P.2d 978, 982 n.4 (Utah Ct. App. 1993) (“[A] remand is not intended to be a mere bolstering of the [factfinder’s] previous decision.”)

The Agency cites *LaSal Oil Co. v. Dep’t of Environmental Quality*, 843 P.2d 1045 (Utah App. 1992) to support its argument that it may set the amount of a fine and then later, on remand, analyze for the first time the factors it was required to consider in setting said fine. (*See Appellee Br.* at 10-11.) However, *LaSal* does not support such action. In *LaSal*, the Court of Appeals found that the findings of the Department of the Environmental Quality were too broad and conclusory to permit proper review of an Order to Abate. 843 P.2d at 1049. Therefore, this Court reversed the Order and remanded for the entry of adequate findings. *Id.*

In *LaSal*, there was no question that the agency had considered certain factors required by law in reaching its determination. *See id.* And the *LaSal* court did not permit the agency to work backwards in justifying a previously determined fine. *See id.* Rather, the Executive Director was merely ordered to delineate which of the hearing officer’s proposed findings the Executive Director had accepted and which it had rejected. *Id.* Importantly, the *LaSal* court did not allow the type of impermissible post-hoc rationalization used in this case.

DATED this 1st day of April, 2016.

RAY QUINNEY & NEBEKER, P.C.



Maria E. Windham

Beth J. Ranschau

Whitney H. Krogue

Attorneys for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because: This brief contains approximately 3,861 words.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because: The Brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman 13.

DATED this 1st day of April, 2016.

RAY QUINNEY & NEBEKER, P.C.



Maria E. Windham

Beth J. Ranschau

Whitney H. Krogue

Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing **BRIEF OF THE PETITIONER** on the parties of record in this proceeding set forth below by U.S. first class mail, postage prepaid, to:

Keith Woodwell
Director
UTAH DIVISION OF SECURITIES
160 E 300 S, 2nd floor
P.O. Box 146760
Salt Lake City, UT 84114-6760

Sean D. Reyes
Attorney General
Brent A. Burnett
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 E 300 S, 5th Floor
P.O. Box 140858
Salt Lake City, UT 84114

Tom Melton
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 E 300 S, 5th Floor
P.O. Box 140872
Salt Lake City, UT 84114

DATED this 1st day of April, 2016.



Pauline Langston

INDEX TO SUPPLEMENTAL ADDENDUM

6. Memorandum in Opposition to Respondent's Memorandum in Support of Request for Agency Review (R. 1226-1251.)
7. Respondent's Reply Memorandum in Support of Request for Agency Review (R. 1252-1264.)

Tab 6

PAUL G. AMANN (6465)
Assistant Attorney General
SEAN D. REYES (7969)
Utah Attorney General
Attorneys for the State of Utah
160 East 300 South, 5th Floor
P.O. Box 140872
Salt Lake City, Utah 84114-0872
Telephone (801) 366-0196
Facsimile: (801) 366-0315
Email: pamann@utah.gov

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

IN THE MATTER OF,

JACK PHILLIPS,

RESPONDENT.

MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MEMORANDUM IN SUPPORT OF
REQUEST FOR AGENCY REVIEW

CASE NO. SD- 12-0001

The undersigned Assistant Attorney General, Paul G. Amann, on behalf of the State of Utah, Department of Commerce, Securities Division (Division), hereby submits the following Memorandum in Opposition to Respondent's Memorandum in Support of Request for Agency Review and Memorandum in Support.

PROCEDURAL BACKGROUND

On December 29, 2011, the Division filed an Order to Show Cause against Respondent and served him with it and a Notice of Agency Action on January 3, 2012. This matter was tried before the Securities Commission (Commission) on March 27 and April 21, 2014. The Commission entered its Findings of Fact, Conclusions of Law and Order (Order) on May 23, 2014. On June 10, 2014, Respondent filed his Request for Agency Review. After receiving the transcripts of the proceedings, Respondent filed his Memorandum in Support ("Respondent's Brief") on July 16, 2014. This Memorandum is submitted in response to Respondent's Brief.

Petitioner objects to Respondent's Statement of Facts. Respondent's putative Statement of Facts is largely argument. For example, in paragraph 18 of his "facts," Respondent states, regarding one of the Commission's findings, "This conclusion is legal error and is not supported by substantial evidence." Respondent's Brief at 5, ¶ 18. While Respondent may quibble with the Securities the Commission's Findings of Fact, it is improper to do so through a putative "Statement of Facts."

The entirety of paragraph 18 of Respondent's would-be facts is nothing more than argument - argument which is unsupported by the evidence. Respondent's Statement of Facts should be stricken from the record and, if it is his desire to submit a Statement of Facts, he should be ordered to cite to the record for each and every fact. Respondent should further be directed not to include facts that were not found by the Commission, but that he merely wishes the Commission had found. See, for example paragraphs 15 ("The Commission did not make findings . . ."), 16 ("The Commission also made no findings . . ."), and 17 ("It made no findings . . .") at page 4 of Respondent's Brief. The proper venue for disputing the Commission's findings is not in Respondent's own putative "Statement of Facts," but rather in the "Argument" portion of his brief.

RELEVANT LEGISLATIVE CONTEXT

The duty to protect the public is of paramount concern for the Utah Department of Commerce and its various Divisions. In accordance with this duty, § 13-1-1 of the Utah Code Annotated provides "Legislative findings and declarations," to wit:

The Legislature finds that many businesses and occupations in the state have a pronounced physical and economic impact on the health, safety, and welfare of the citizens of the state. The Legislature further finds that while the overall impact is generally beneficial to the public, the potential for harm and injury frequently warrants intervention by state government.

The Legislature declares that it is appropriate and necessary for state government to protect its citizens from harmful and injurious acts by persons offering or providing essential or necessary goods and services to the general public. The Legislature further declares that business regulation should not be unfairly discriminatory. However, the general public interest shall be recognized and regarded as the primary purpose of all regulation by state government.

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STATEMENT OF RELEVANT FACTS¹

1. Respondent is a resident of Oregon.
2. Respondent has never been licensed to sell securities.
3. Respondent has a criminal record. On or about October 29, 2002, Respondent was convicted of unlawful gambling in the first degree (case number 00112764, Linn County Circuit Court, State of Oregon).
4. At relevant times, Respondent has been involved in a multi-level marketing company called Guardian International Travel ("GIT").
5. Elliott James ("James") was Respondent's sponsor and a vice president at GIT.²
6. Respondent sold the GIT opportunity and was paid commissions for doing so. Respondent was extremely [successful] in marketing GIT and was rewarded for his success through bonuses and gifts.
7. Respondent was the first and primary source of information for Bill and Gidgette Persch ("the Persches") and for Paul and Sherry Reutlinger ("the Reutlingers") regarding GIT.
8. In soliciting the Persches to participate in GIT, Respondent assured them that they did not have to do anything other than invest in order to realize a return. In addition, Respondent made the following assurances and representations:
 - a. The investments would be used for FOREX trading.³
 - b. Any investment would generate a five-fold return within 18 months.
9. In soliciting the Persches to invest in GIT, Respondent omitted to disclose the following:
 - a. The fact that Respondent had been convicted for illegal gambling.
 - b. The risks involved in trading foreign currencies.
 - c. The track record of GIT and its [principals].
 - d. Whether the GIT investment opportunity was registered as a security or exempt from

¹ This is, (with the addition of the following footnote) verbatim, the Findings of Fact from the Commission's Findings of Fact, Conclusions of Law and Order from May 23, 2014. The Division adopts and reiterates the Findings here due to their accuracy and for the convenience of the reader.

² The Division also brought an action against Elliott James with respect to the subject emerald scheme. See *In the Matter of Elliott James*, SD-12-0002. The Commission entered James' default on February 20, 2013. See Order on case no. SD-12-002. James was ordered to pay a fine of \$412,500. *Id.* (This footnote was not contained in the Commission's Findings of Fact.)

³ The Commission takes notice that FOREX trading, also known as the foreign exchange market, is a global decentralized market for the trading of currencies.

registration.

e. Whether Respondent was licensed to sell securities or exempt from licensure.

10. In or about July 2006, the Persches tendered \$25,000 to GIT through Respondent.
11. The Persches' investments were not used for FOREX trading. While the Persches received nominal payments for a time, they never made back their initial investments or realized any profits.
12. In or about November 2006, James approached Phillips with a deal involving the purchase, importation, and sale of emeralds.
13. Among other things, James told Respondent that James could arrange for the purchase and importation of emeralds, which would sell within 90 days for three times the value paid by an investor ("the emerald deal").
14. On or about November 14, 2006, Respondent invested in the emerald deal.
15. Shortly thereafter, Respondent began soliciting the Persches and Reutlingers to join a conference call in which James would invite them to invest in the emerald deal. This solicitation took place in Utah.
16. In soliciting the Persches and Reutlingers to participate in the conference call, Respondent assured them that they would have no responsibility to operate the enterprise or manage the investment. In addition, Respondent made the following representations:
 - a. The emeralds were gem-quality.
 - b. There was a buyer on board to purchase the emeralds.
 - c. Investment capital was needed solely to establish proof of funds; therefore, money tendered by investors would not leave the country, but would be held in an escrow account.
 - d. An investor would make three times the investment amount within a maximum of 90 days.
 - e. There was no risk. The worst possible scenario would be a return of the initial investment.At hearing, Respondent urged that James made these representations to him, thus inducing him to invest, and that he merely repeated the information to those he solicited. The Commission did not find Respondent's testimony credible.
17. In soliciting the Persches and Reutlingers to invest in the emerald deal, Respondent omitted to explain or disclose the following:
 - a. The fact that Respondent had been convicted for illegal gambling.

- b. The identity of the buyer who would purchase the emeralds from James.
 - c. What risk factors were attached to the investment.
 - d. The number of investors.
 - e. The amount of money that needed to be raised.
 - f. Suitability factors for the investment and investors.
 - g. The nature of any competition.
 - h. Whether the emeralds investment opportunity was registered as a security or exempt from registration;
 - i. Whether Respondent was licensed to sell securities or exempt from licensure.
18. On or about January 26, 2007, Bill Persch invested \$30,000 in the emerald deal.
19. On or about February 14, 2007, Bill Persch invested an additional \$270,000 in the emerald deal.
20. Between approximately February 27, 2007 and March 5, 2007, the Reutlingers invested \$30,000 in the emerald deal.
21. The money tendered by the Persches and Reutlingers was not held in escrow. Some of it was used to purchase emeralds, but they were not gem-quality. Much of it was used by James at his discretion. No buyer for the emeralds was in place at any relevant time. The investors have not realized any profits from the emerald deal. There was no credible or admissible evidence presented that the Persches or Reutlingers would ever realize any profits from the emerald deal.
22. When the Persches and Reutlingers made their February and March 2007 investments, around 90 days had passed since Respondent's initial investment in the emerald deal. Respondent had not received a return on his investment. He did not inform the Persches and Reutlingers of this delinquency before or shortly after the Persches and Reutlingers invested in the emerald deal.
23. The emeralds purchased by James and his associates were shipped to the United States. Currently, at least some of the emeralds are in the custody of the Persches. There is insufficient information or admissible evidence in the record from which to calculate or estimate the commercial value of the gems, if any.

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STATEMENT OF LAW

Utah Code Ann. § 61-1-20. **Enforcement.**

(1) Whenever it appears to the director that a person has engaged, is engaging, or is about to engage in an act or practice constituting a violation of this chapter or a rule or order under this chapter, in addition to specific powers granted in this chapter:

- (a) the director may issue an order directing the person to appear before the commission and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing an act in furtherance of the activity;
- (b) the order to show cause shall state the reasons for the order and the date of the hearing;
- (c) the director shall promptly serve a copy of the order to show cause upon a person named in the order;
- (d) the commission shall hold a hearing on the order to show cause no sooner than 10 business days after the order is issued;
- (e) after a hearing, the commission may issue an order to cease and desist from engaging in an act or practice constituting a violation of this chapter or a rule or order under this chapter;
- (f) *the commission may impose a fine;*
- (g) the commission may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state; and
- (h) the commission may impose a combination of sanctions in Subsections (1)(e) through (g).

(Emphasis added.)

Utah Admin. Code Rule 151-4-902(2) and (3):

(2) A party requesting agency review shall set forth any factual or legal basis in support of that request, including adequate supporting arguments and citation to:

- (a) appropriate legal authority; and
- (b) the relevant portions of the record.

(3)(a) If a party challenges a finding of fact, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence.

(b) A party challenging a finding of fact bears the burden to:

- (i) marshal or gather all the evidence in support of the finding; and
- (ii) show that despite that evidence, the finding is not supported by substantial evidence.

(c) The failure to marshal the evidence permits the executive director to accept a division's findings of fact as conclusive.

(d) A party challenging a legal conclusion must support the argument with citation to:

- (i) relevant authority; and
- (ii) the portions of the record relevant to the issue.

ARGUMENT

I. THE SECURITIES COMMISSION HAS THE AUTHORITY TO IMPOSE FINES AS IT DEEMS FAIR, JUST AND EQUITABLE.

A. Respondent's reliance on § 61-1-20(2)(b) of the Utah Code is misplaced.

The Division does not cite to § 61-1-20(2)(b) of the Utah Code (UTAH CODE ANN. 2011) in its Statement of Law just above, because it is not germane to Respondent's case. However, because Respondent inappropriately relies on it, Petitioner notes here that Section 61-1-20(2)(b) states:

- (b) Upon a proper showing in an action brought under this section, *the court may*:
 - (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.

(Emphasis added.)

This section governs actions brought in a court. It does not govern administrative actions brought before the Utah Securities Commission. The section which governs administrative actions, § 61-1-20(1)⁴, comes before and is directly above § 61-1-20(2)(b). Section 61-1-20(1) states, in relevant part:

- (e) after a hearing, the commission may issue an order to cease and desist from engaging in an act or practice constituting a violation of this chapter or a rule or order under this chapter;
- (f) the commission may impose a fine;
- (g) the commission may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state; and
- (h) the commission may impose a combination of sanctions in Subsections (1)(e) through (g).

Section 61-1-20(2)(b) imposes a limitation on the amount that may be awarded in court as a fine. Section 61-1-20(1)(f) states that the Commission may impose a fine, but gives no limit. The fact that the legislature wanted to limit the fine obtainable in civil court is clear from the language of § 61-1-20(2)(b). The fact that the legislature is capable of establishing limits on fines is equally evident from the language of § 61-1-20(2)(b). The legislature's intention not to impose a limit on the fines which the Commission may levy is equally evident from the lack of any statutory limit in

⁴ Section 61-1-20(1) is cited *supra* in full in Petitioner's Statement of Law.

§ 61-1-20(1)(f). If the legislature meant for there to be a limit in § 61-1-20(1)(f), it would have enacted one.

The statutory construction of *inclusio unius est exclusio alterius* is applicable here. This maxim decrees that “where a law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is omitted or excluded was intended to be omitted or excluded. McKinney's Statutes section 240; *Golden v. Koch*, 49 N.Y.2d 690, 427 N.Y.S.2d 780, 404 N.E.2d 1321.” *Kevin McC. v. Mary A.*, 473 N.Y.S.2d 116, 118 (1984) cited in BLACK’S LAW DICTIONARY, Sixth Ed., at 763. Thus, where the law provides a specified maximum fine in one section and not in the other, an irrefutable inference must be drawn that the fact that the limitation on the fine excluded from § 61-1-20(1)(f) was intended to be omitted or excluded.

B. There is no mandate that the Director file any given case in district court.

Respondent states, “To enforce an order entered by the Commission under the Securities Act, the Director must file an action in district court pursuant to § 61-1-20(2)(a).” Respondent’s Brief at 11. Respondent takes indecent liberties with the statute which actually reads, “The director *may* bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin an act or practice and to enforce compliance with this chapter or a rule or order under this chapter.” (Emphasis added.) The plain language of the statute is that the Director may bring an action in district court. Filing in district court is elective, not compulsory. The Director thus has the option of bringing matters before the Commission or the district court.

Additionally, the Utah Administrative Procedures Act provides in § 63G-4-501(1)(a): “In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.” “Civil enforcement in the district court” does not mean filing a civil action in district court. Once the Division has obtained an Order from the Securities Commission, that Order may be abstracted in the district court by filing an “Abstract of Award.” Such filings are made daily by the Utah State Office of Debt Collection. Once the abstract is recorded, Orders such as the Division’s Order against Respondent are given a civil district court case number and collection activities such as garnishments and executions through writs begin.

Thus, notwithstanding Respondent’s effort to render the Securities Commission powerless, the Commission’s orders are enforceable, without filing actions in district court. If that were not the case, there would be no reason to file any case before the Commission. The Director would be compelled to file every case in district court if the Commission’s orders were unenforceable. That

would render this Commission and § 61-1-20(1) meaningless. That is clearly not what the legislature intended.

C. *Bushman* supports the fine ordered in this case.

It is noteworthy that Respondents cite to *State v. Bushman*, 231 P.3d 833 (Utah App. 2010). Harold Earl Bushman argued that an administrative fine was a criminal punishment that triggered double jeopardy protections. *Id.* The Utah Court of Appeals disagreed. *Id.*

Respondents erroneously assert, "the Commission has no authority to impose or enforce a fine (or monetary penalty, however designated) greater than \$10,000 per violation as set forth in § 61-1-20(2)(b) and *State v. Bushman*, 231 P.3d 833, 839 n.4 (Utah Ct. App. 2010)('The fines that the Division could impose and judicially enforce are now limited to \$10, 000 per violation.')" Respondent's Brief at 10. First, the primary significance of the *Bushman* ruling is that fines imposed by the Division are *not* punishment and therefore *do not trigger* double jeopardy. *See Bushman*, 231 P.3d 833, generally. It is disingenuous to cite to *Bushman* as authority and then quibble with its import by referring to a fine as a "monetary penalty, however designated." The *Bushman* Court ruled that Bushman's fine was not a penalty. *Id.* Bushman's fine, and Phillips' fine, are remedies, not penalties.

Ironically, Harold Bushman was ordered to pay \$19,300, "reduced dollar for dollar for any amount paid to the victims." *Id.* at 835. Thus, the structure of Bushman's order is mirrored by Phillips' order insofar as both allow a dollar for dollar reduction for restitution.

Bushman's order further mandated, "If Bushman fails to pay the victims in full by July 15, 2007, the entire amount of the fine (minus any amounts actually paid to the victims) will be due to the Division by October 1, 2007." *Id.* at 835. Thus the option existed that all of the \$19,300 would go to the Division as a fine.

Yet, structuring an order to allow for restitution is lauded in the *Bushman* opinion. "Certainly, the structured fine in the Consent Order (citation omitted) was intended to encourage Bushman's prompt restitution to his victims, a purpose that is clearly nonpunitive." *Id.* at 838. The *Bushman* ruling continues, "Although a small portion of the overall fine did not go towards restitution, securities regulations such as the Act also 'regulate a lawful and important financial industry so that investors are not deceived or swindled through acts and practices our Legislature believes to be wrongful and harmful to society.' *State v. Kirby*, 2003-NMCA-074, ¶ 36. 133 N.M. 782, 70 P.3d 772; *see also Securities & Exch. Comm'n v. Palmisano*, 135 F.3d 860, 866 (2d

Cir.1998) ('[T]he deterrence of securities fraud serves other important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry.'). Additionally, fines imposed by the Division go into a fund for investor education and training, further supporting the nonpunitive nature of such fines. See Utah Code Ann. § 61-1-18.7 (Supp.2009); cf. Kirby, 2003-NMCA-074, ¶ 36 ('The Legislature has added substance to the remedial purposes of the Act by earmarking the . . . funds for public education and training on securities matters.'). For these reasons, we determine that the Act's administrative sanctions may be rationally connected to purposes other than punishment." *Id.* at 838.

Respondent has cited to the language of footnote 4 of *Bushman* for the proposition that "the Commission has no authority to impose and enforce a fine . . . greater than \$10,000 per violation" Respondent's Brief at 10. This is ironic because, at the time of the entry of the order in *Bushman*, "the fines that the Division could impose and judicially enforce were limited to \$500 for each violation." *Bushman*, 231 P.3d 833, fn. 4. Nonetheless the fine ordered in *Bushman* was \$19,500 – thirteen times the amount for which the Division had "authority to impose and enforce" fines for *Bushman*'s three violations. *Id.* at 835, and see Consent Order dated July 3, 2009, case no. SD-07-0030. Yet the Court held that the fine was not excessive in relation to its beneficial and remedial purpose. *Bushman*, 231 P.3d 839. No one involved in that case, including the Court, took issue with a fine thirteen times the amount Respondent suggests is the maximum allowed.

Excluding the restitution payment, the fine to the Division in *Bushman* was \$2,500. *Id.* at 835. This was also in excess of the amount Respondent asserts the Division could "impose and judicially enforce." *Bushman* admitted to three violations. See Consent Order dated July 3, 2009, Case No. SD-07-0030. Nonetheless, the amount was not found excessive. Respondent Phillips would have limited *Bushman*'s fine to \$1,500.00. He is alone in that. *Bushman* himself never argued for that.

The Commission found that Phillips committed four violations. By Respondent's lights, applying the wrong statutory provision, the Commission is limited to ordering a fine of \$40,000. However, if Phillips were fined as *Bushman* was, (thirteen times) his fine would be \$520,000. The fine Phillips is ordered to pay, \$413,750, is significantly less than thirteen times the factor by which *Bushman* was fined.

The obligation of any tribunal, in interpreting a statute, is to effectuate legislative intent. "Our objective in interpreting a statute is to effectuate legislative intent, and that intent is most

readily ascertainable by looking to the plain language of the statute.” *Bluffdale Mountain Homes, LC v. Bluffdale City*, 167 P.3d 1016, 1026 (Utah 2007) citing *State v. Carreno*, 2006 UT 59, ¶ 11, 144 P.3d 1152. The plain language of §61-1-20(1)(f) does not limit the Commission’s ability to impose a fine.

II. THE COMMISSION ACTED WITHIN ITS AUTHORITY IN IMPOSING A FINE THAT ALLOWS FOR A RESTITUTION OFFSET.

The issue herein is whether the Commission may enter an order which allows an offset of its fine by restitution payments. This question is settled by the *Bushman* case Respondent cited. 231 P.2d 833 (Utah App. 2010). *Bushman* was ordered by the Securities Division Director⁵ to pay a fine of “nineteen thousand three hundred dollars (\$19,300) . . . reduced dollar for dollar for any money paid to the victims.” *Id.* at 835.

The *Bushman* Court noted that “while the civil penalty may by its nature have effects of deterrence and punishment, those effects are incidental to and do not override the Act’s and the civil penalty’s primarily remedial purpose.” *Id.* at 838 (citation omitted). Given that the Act’s purpose is primarily remedial, it is axiomatic that there be an allowance for an offset of any fines with repayment to victims.

III. PHILLIPS’ FINE IS WARRANTED.

Can the Commission impose the fine it deems appropriate? Respondent relies on the case of *U.S. v. Bajakajian*, 524 U.S. 321 (1998) to say that it cannot. That reliance is infirm.

Bajakajian was trying to leave the United States with \$357,144, without reporting it. *Id.* This was a federal violation. *Id.* The federal sentencing guideline fine associated with his crime was \$5,000. However, the trial Court, disregarding the federal sentencing guidelines, expressed that a \$5,000 fine was too little and ordered forfeiture of \$15,000 plus a \$5,000 fine.

The government appealed, seeking to forfeit the entire \$357,144 that *Bajakajian* tried to transport. Justice Thomas, writing for the Supreme Court, determined that it was violation of the

⁵ The *Bushman* Order predated the inception of the Securities Commission in 2008. Prior to the existence of the Securities Commission orders were entered by the Securities Division Director.

Excessive Fine Clause of the Eighth Amendment to the United States Constitution.⁶ *Bajakajian* did not contest the \$20,000 penalty against him, though it was four times the guideline amount.

However, discussion of *Bajakajian* is purely academic. Though Respondent fails to disclose it, the *Bajakajian* case is of little or no precedential value because that ruling has been superceded by statute as stated in *U.S. v. Del Toro-Barboza*, 673 F.3d 1136 (9th Cir. (Cal.) 2012). In *Del Toro-Barboza*, Defendant argued that his fine was “a penalty for loss and that, in *United States v. Bajakajian*, the Supreme Court held that failure to report currency caused no loss to the public fisc and only caused a deprivation of the information that money had left the country.” *Id.* at 1154, citing 524 U.S. 321, 339, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

The defendant in *Del-Toro Barboza* received a 14-level enhancement of his sentence. *Id.* at 1154. He argued that the *Bajakajian* court held that because there was no loss to the public fisc, he could not be subjected to the enhancement. *Id.* at 1154. The *Del-Toro Barboza* court rejected that argument, stating, “as noted by the First Circuit, after *Bajakajian*, Congress enacted the USA PATRIOT Act, which defined the ‘new’ crime of bulk cash smuggling at § 5332. *United States v. Jose*, 499 F.3d 105, 109 (1st Cir.2007). The First Circuit in *Jose* noted that by enacting the bulk cash smuggling statute, Congress was demonstrating its ‘view that defendant’s violation of the bulk cash smuggling statute constitutes a significant harm.’ *Id.* at 112.” The *Bajakajian* ruling is of no relevance to Respondent Phillips’ case, or any other.

Even assuming *Bajakajian* had not been superceded by statute, Phillips’ case is readily distinguishable from *Bajakajian*’s. The assertion in *Bajakajian* was that there was “no loss to the public fisc.” *Id.* In Phillips’ case, by contrast, the loss to the “public fisc” was \$330,000. There was no evidence that *Bajakajian* was involved in a scam defrauding investors of that \$357,144. *Id.* He was merely trying to leave the country without reporting it. Phillips, on the other hand, was directly involved with the victims in this case losing \$330,000. But for Phillips’ actions in support of the emerald scheme, the investors would not have lost their money. Because Phillips invested in the emerald scheme himself, he benefitted from his victims’ support of the scheme, collectively with his own.

Respondent cites to the *Brent Brown Dealerships v. Tax Comm.* case. 139 P.3d 296 (Utah

⁶ Although Respondent makes no mention of it, the Utah Constitution provides the same protection. Utah Const. art. I, § 9. (“Excessive bail shall not be required; excessive fines shall not be imposed; nor cruel and unusual punishments inflicted.”) Inasmuch as Respondent utterly fails to even mention state law, Petitioner consequently does not provide a state law analysis.

App. 2006). Respondent's Brief at 15. In *Brent Brown* the Utah Court of Appeals upheld a fine of \$135,000, that Brent Brown had challenged as a violation of the Excessive Fines Clause. *Id.* Brent Brown was fined because unlicensed salespeople were selling cars. The victims in that case received the benefit of their bargains. They got cars. The victims in Phillips' case, on the other hand, got nothing. They lost all their money. The *Brent Brown* Court noted that the violations in that case could not be "viewed as a benign violation simply because of the clerical or technical nature of the violated regulations." *Id.* at 303. Yet, the violation in *Brent Brown* was relatively benign in comparison to Phillips'. The *Brent Brown* victims did not lose hundreds of thousands or even tens of thousands of dollars. They received the cars they purchased, yet the Commission enforced and the Court of Appeals upheld the fines.

We learn from *Brent Brown* that, "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 301 citing *Bajakajian* at 334, 118 S.Ct. 2028. "Recognizing that proportionality is a relative concept, the Supreme Court relied on two considerations in deriving a constitutional excessiveness standard. The first of these is that 'judgments about the appropriate punishment for an offense belong in the first instance to the legislature.'" *Id.* at 336, 118 S.Ct. 2028 (citing *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). In the legislature's judgment, there was no such cap as Respondent would impose. Perhaps recognizing the inherent ability of the experts appointed to the Securities Commission to determine an appropriate penalty, the legislature gave the responsibility for imposing fines to the Commissioners and only included a limit it as regards civil cases – civil cases which would come before jurists who most likely have no expertise as regards securities.

"The second consideration is that 'any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.'" *Id.* The *Bajakajian* Court concluded that recognition of these principles supports a standard that a "punitive forfeiture clause" violates the Excessive Fines Clause *only* if it is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian* at 334, 118 S.Ct. 2028.

Like the *Brent Brown* opinion, Respondent cites *State Air Quality Bd. v. Truman Mortensen Family Trust*, 8 P.3d 266 (Utah App. 2000) for the proposition that "a fine is unconstitutional when it is grossly disproportionate to the maximum statutorily authorized penalty." Respondent's Brief at 15. Respondent's reference to this case is inapposite. There is no maximum statutorily authorized penalty, as explained herein, and as is clear from the face of the statute.

IV. THE COMMISSION GAVE DUE CONSIDERATION TO RULE 164-31 FACTORS.

Utah Administrative Code Rule 164-31-1 lists the following considerations in determining a fine:

(A) Authority and purpose.

(1) The Division enacts this rule under authority granted by Sections 61-1-6, 61-1-12, 61-1-14, 61-1-20 and 61-1-24.

(2) This rule identifies guidelines for the assessment of administrative fines. The guidelines should not be considered all-inclusive but rather are intended to provide factors to be considered when imposing a fine.

(B) Guidelines.

(1) For the purpose of determining the amount of an administrative fine assessed against a person under the Utah Uniform Securities Act, the Commission shall consider the following factors:

(a) the seriousness, nature, circumstances, extent, and persistence of the conduct constituting the violation;

(b) the harm to other persons, including the amount of investor losses, resulting either directly or indirectly from the violation;

(c) any financial benefit, enrichment, commission, fee or other consideration received directly or indirectly by the person in connection with the violation;

(d) cooperation by the person in any inquiry conducted by the Division concerning the violation, efforts to prevent future occurrences of the violation, and efforts to mitigate the harm caused by the violation, including any restitution paid or disgorgement of ill-gotten gains to persons injured by the acts of the person;

(e) the history of previous violations by the person;

(f) the need to deter the person or other persons from committing such violations in the future;

(g) the costs of the Division incurred in investigating and prosecuting the action; and

(h) such other matters as justice may require.

Ironically, Respondent cites to this rule, then states, "The Commission failed to do this analysis, and specifically failed to consider evidence that the . . . victims in this matter had in their possession some of the gems from the emerald transaction in setting the amount of the fine."

Respondent's Brief at 16. Respondent's assertion is not referenced in any of the guidelines.

However, through considering the actual delineated guidelines,

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(a) *"the seriousness, nature, circumstances, extent, and persistence of the conduct constituting the violation"* – Respondent's conduct was very serious given that he had placed himself in a position of special trust with the victims. He was the primary source of information for the victims. He assured the victims they would not have to do anything to realize a return. He promised a five-fold return on their GIT investments. He told them the emerald deal was his deal. He told them there was no risk. He promised a three-times return on the emeralds. He stated that the worst case scenario was that they would get their money back.

(b) *the harm to other persons, including the amount of investor losses, resulting either directly or indirectly from the violation;* The harm that resulted from the emerald scheme was \$30,000 lost by Paul and Sherry Reutlinger and \$300,000 lost by Bill and Gidgette Persch. This loss was directly as a result of Respondent's actions.

(c) *any financial benefit, enrichment, commission, fee or other consideration received directly or indirectly by the person in connection with the violation;* The benefit that Respondent received was that of having other investors promoting the same scheme he had invested in. Though Respondent may have ultimately lost money too, he stood to gain by getting others involved in the enterprise. That was his sole purpose in getting others involved in the enterprise.

(d) *cooperation by the person in any inquiry conducted by the Division concerning the violation, efforts to prevent future occurrences of the violation, and efforts to mitigate the harm caused by the violation, including any restitution paid or disgorgement of ill-gotten gains to persons injured by the acts of the person;* No testimony was offered by Respondent regarding his level of cooperation, the Commission therefore had no ability to make any finding that Respondent was cooperative with the investigation. Respondent has taken no measures whatsoever that would manifest any effort on his part to prevent future occurrences of his violations. Respondent made no efforts to mitigate the hard loss to the victims and instead appears to hinder acrimonious feelings

toward his victims. No testimony was adduced at trial that there has been any restitution paid to the victims in this case, nor any attempt on the part of Respondent to pay the victims back any of their money.

(e) *the history of previous violations by the person*; Phillips was charged with 9 counts of Racketeering in Linn County, Oregon, on August 14, 2002. He was ultimately convicted of Unlawful Gambling in the First Degree and ordered "not to engage in financial services/counseling which would involve fiduciary duties to clients." Phillips failed to advise his victims of his conviction. They would not have invested in the emerald scheme if they knew of Phillips' felony conviction. TR, Vol.1 at 187, lines 4-5 and 201, line 25, see also, Order at 2, ¶ 3.

(f) *the need to deter the person or other persons from committing such violations in the future*; The Commission is cognizant of the need to deter others from committing such a violation. It is also necessary to deter Respondent from further violations. Respondent is still actively pitching other schemes. There is a risk to the community, not only in Utah, but throughout the United States, that Respondent will continue his predatory practices.

(g) *the costs of the Division incurred in investigating and prosecuting the action*; The Division has indicated, through Director Woodwell, that the costs of investigating and prosecuting this matter were \$25,000. The Commission ordered repayment of precisely the same amount. That is well within the Commission's purview.

(h) *[and] such other matters as justice may require*. Justice requires consideration of the impact of the loss of these resources had on the victims. The Reutlingers had planned to use the money they lost to help their severely handicapped granddaughter. TR, Vol. 1 at 191, lines 13 -19. The Persches sold a long held family furniture business through which they employed a dozen people. TR., Vol. 1 at 74. The Persches and the Reutlingers together lost \$330,000 just on the investment. The Persches undertook extraordinary measures including travel and rental fees in an

effort to bring Respondent to justice. See TR., Vol. 1 at 78 *et seq.* Thus they have lost additional sums which they will not be able to recoup in the interests of bringing Respondent to justice.

For these reasons, \$413,750 fine ordered by the Commission should be upheld.

V. THERE IS NO STATUTE OF LIMITATIONS GOVERNING ADMINISTRATIVE ACTIONS.

Respondent contends that the Division's actions regarding the GIT investments is barred by the statute of limitations. However, there is none. There is no statute of limitations on administrative actions brought before the Securities Commission. Respondent's argument is unfounded. Just as the legislature did not limit the amount of fine that could be ordered in this action, it did not limit the time within which this action could be brought.

Respondent cites to the section of the Act governing criminal and civil actions. § 61-1-21.1(1) (Utah Code Ann. 2008). This section states, "61-1-21.1. **Limitation of prosecutions** (1) No indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation."

There was no civil complaint filed in this case. This is not about a criminal indictment. That statute is therefore inapplicable.

Respondent first made this same argument through a Motion for Summary Judgment which he filed on February 28, 2014. Approximately one month later, on March 27, 2014, after hearing argument on the Motion for Summary Judgment, the Commission agreed that the civil statute of limitations is not applicable to this administrative action and entered an order denying the Motion for Summary Judgment.

Undeterred, Respondent raised the argument again at trial on this matter. The Commission again disagreed with Respondent's argument and denied the motion. See Order at 8, ¶ 4. ("The

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Commission has previously ruled that no statute of limitations applies. Regardless, Respondent argues that the age of the transaction should insulate him, in part if not in whole, from any liability regarding it. The Commission disagrees.”)

The Utah case that governs this issue is *Rogers v. Div. of Real Estate*, 790 P.2d 102 (Utah App. 1990). In *Rogers* the Court held, “In the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings.” *Id.* at 105. There is no specific legislative authority creating a statute of limitations governing matters before the Utah Securities Commission and Respondent therefore cannot cite to one. The *Rogers* Court continues, “Contrary to Rogers’ assertion, an administrative disciplinary hearing is not a civil proceeding.” *Id.* at 105 (citations omitted). “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 maintain sound professional standards of conduct and protect the public.” *Id.* at 106 (citation omitted).

Respondent makes numerous claims, all of which are specious. Respondent makes a plain language argument. Respondent’s Brief at 18. Yet, despite invoking plain language, Respondent ignores the plain language of the statute which makes no reference to administrative proceedings. *Id.* and Utah Code Ann. § 61-1-21.1(1).

The Utah legislature has exhibited its ability to establish a statute of limitations in the recent past. For example, during the 2013 General Session, the legislature enacted a 10 year limit on the filing of actions brought by the Division of Occupational and Professional Licensing (DOPL). Section 58-1-401(6)(b) of the Utah Code now reads: “[DOPL] may not take disciplinary action against a person for unprofessional or unlawful conduct more than 10 years after the occurrence of the conduct, unless the proceeding is in response to a civil or criminal judgment or settlement and the proceeding is initiated within one year following the judgment or settlement.”

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The lack of any intention on the part of the legislature to enact such a section in the Act is evident in the lack of any such section. That is, if the legislature intended or intends to limit the time during which the Securities Division may bring an action, such a statutory revision is necessary. Indeed, rather than lobby for enforcement of a law that does not exist, Respondent's efforts may be better directed toward lobbying for changes to existing law that would allow for the accommodation of his proscribed activity.

Respondent claims, "Ultimately, a civil complaint is necessary before the Division can enforce any order related to an alleged violation. To enforce an order entered by the Commission under the Securities Act, the Director must file an action in district court pursuant to § 61-1-20(2)(a)." Respondent's claim has no basis in law or in fact. If there were any veracity to Respondent's claim, it would make the Securities Commission and each of its appointees entirely superfluous. Orders of the Commission are enforceable independently of any civil action in district court.

In arguing for the existence of a non-existent five year statute of limitations, Respondent argues, "unlike traditional crimes such as theft or murder where it may take law enforcement many years to identify a potential defendant, in securities fraud cases the identity of the potential defendant is almost always known and easily identifiable." Respondent's Brief at 19. Respondent's argument is infirm for numerous reasons, including:

- 1.) The crime of theft has a statute of limitations.
- 2.) The crime of securities fraud also has a statute of limitations.
- 3.) Securities fraud crimes are often concealed for years and the suspect is necessarily unknown in such cases.
- 4.) Statutes of limitations regarding crimes are inapposite as regards this administrative action.

Respondent expresses concern that the Division could bring an action from the 1970s.

However, he has no standing to raise such a claim. Respondent's securities violations were not in the 1970s, the 1980s, or even the 1990s – nor does Respondent cite to any such case, or any forty, thirty, twenty, or even ten year old case. There aren't any. In this instance, Respondent's *reductio ad absurdum* is merely absurd.

Respondent takes language from the Commission's Order and contorts it beyond what the Commission intended into something completely different than the Order's actual language. The Order states, "The Division has the discretion to prosecute any case, regardless of its age. While the Division might make it a practice on an ad hoc basis to decline a prosecution of a violation that occurred more than five years prior to the date a complaint is submitted, it is not required to adhere to such a practice without exception, and does not. It is a question of agency discretion." Order at 8, ¶ 5. That is, the Division had the discretion to bring the Phillips case.

Respondent turns this Conclusion of Law into an "admission" by the Division that its "regular practice" is not filing cases outside of five years. Respondent's Brief at 20. Respondent then claims "the Division has acted contrary to an admitted agency rule." *Id.* at 21. There is no such rule. After his unsuccessful attempt at creating statutes, Respondent now seeks to create rules. Respondent's argument is frivolous. Respondent justifiably anticipates the Division will prevail on this issue: "if the Division successfully argues that the Division's policy is not an explicit rule" *Id.*

At trial on this matter, and at the hearing on the Motion for Summary Judgment, Petitioner's expressed position was that Respondent's actions were egregious enough to warrant pursuing the GIT matter, particularly in conjunction with its action against Respondent for his emerald scheme, although the Division may have brought the GIT matter sooner. Respondent's claim that "the agency utterly failed to provide [Respondent] with any rationale why the Division chose to pursue Mr. Phillips over the countless other stale claims the Division disregards every year" is also false for

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numerous reasons, including:

- 1.) The Division expressed to Respondent numerous times that it was pursuing justice for Respondent due to the egregious nature of his violations.
- 2.) The number of claims the Division addresses each year is not countless; the Division tracks claims fastidiously.
- 3.) The Division does not disregard any claims. Each claim made to the Division is given individual attention and processed scrupulously.

In sum, argument regarding statute of limitations is not based in reality. It is based upon Respondent's desire for the enactment of a statute and a rule which do not exist.

Finally, as regards the public policy behind granting the Division to ability to proceed against Respondents without imposition of any statute of limitations, one only need consider such Ponzi schemes as Bernie Madoff perpetrated. Madoff, and perpetrators like him, are able to lull their victims into inactivity for years and years through hosts of devious machinations that often involve untold accomplices and are inherently designed to avoid detection. Similarly, Respondent Phillips promised his victims significant profit within 90 days. When that did not occur, Respondent made additional misrepresentations in an effort to preclude action on the part of the investors. Often, in such cases, investors are coaxed out of even more of their assets. The perpetrators of these securities fraud cases are often beloved family members, church or business associates whose faith in the perpetrators is the perpetrators' greatest ally. That faith allows the victims to be taken advantage of in the first place and is also often relied upon to extend deadlines for years – often beyond criminal and civil statutes of limitations. In such cases, the perpetrators would escape justice entirely if a statute of limitations were imposed on administrative actions. Public policy militates against the imposition of a time limit on the filing of administrative actions.

VI. RESPONDENT MADE UNTRUE STATEMENTS.

Respondent made untrue statements to his victims, the Persches and the Reutlingers. He was not merely an "intermediary" as Respondent suggests. When asked about the emerald scheme and how it was presented, Bill Persch testified,

He said, "Bill, what do you know about emeralds?" I said, "Nothing."
[Respondent replied] "Well, I do, and I have" -- "I have a situation, because of what you've done on the GIT thing, making the maximum investment and because I love you kids and you guys do so many good things and so many donations you do, I can pick and choose who I can bring in, and I bring in you on my deal." He called it his deal.

TR. Vol. I at 51, lines 11-18.

Respondent went on with further representations, according to Persch:

He's the one that picked and chose who came in, and he said, again, "It's an absolute insured gem quality emerald investment. You will make your money back in 90 or probably less, but, worst-case scenario, 90 days. We're going to make so much money on this that I can again pay you three times and they'll still be funds left over."

TR. Vol. I at 51, lines 19-25.

Though Respondent may not have been the "ultimate authority" on emerald transactions, he conveyed to his victims that he was.

As Respondent sought to enact legislation and rules as regards Statutes of Limitations, here he seeks to introduce concepts which have no relevance to Respondent's culpability for violations of the Act. He states that he "had no fiduciary duty that would impose an obligation to do due diligence on behalf of the alleged investors." Respondent's Brief at 23. Respondent's repeated references to "alleged investors" is an affront to the evidence in this case. There is no question that the Persches and the Reutlingers lost \$315,000 due to Respondent's actions. They were investors. It is bad faith for Respondent to now deny that these victims were investors.

There was no evidence adduced by Respondent that the Persches and Reutlingers were not

investors or that they did not lose \$315,000.

The Commission considered and rejected Respondent's *Janus Capital* argument. Order at 11 - 12 (citing *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296 (2011)). The Commission notes that the *Janus Capital* test has not been adopted in Utah. Order at 11, ¶ 15. "[T]he applicable law does not distinguish the creator of a false statement from a person who repeats or passes along information." *Id.*

"Second, even if the Janus Capital test were the law in Utah, Respondent did have authority over the content and dissemination of the statements he made." *Id.* at ¶ 16. Respondent "personally sought out investors and made verbal representations and promises to them." *Id.* at 12, ¶ 16. As Petitioner notes above, the Commission noted "Respondent described the emerald deal as 'his deal'." *Id.* "He had control over the statements he made. He had complete discretion regarding to whom he made the statements." *Id.* The Commission goes on to conclude that Respondent is not credible in his "argument to the effect that he couldn't have known he was sharing untrue information." *Id.* The Commission concludes that "Respondent is liable for the statements he made to the Persches and the Reutlingers." *Id.*

VII. RESPONDENT HAS FAILED TO MAKE OUT ANY CLAIM FOR OFFSET.

The issue herein is: does Respondent bear the responsibility for successfully supporting his defenses. Of course he bears that burden. Respondent claims that there is some inherent value in the green rocks that were involved in the emerald scheme. In his testimony, Bill Persch indicated that Mike's Jewelry in Salt Lake said that the rocks were "gravel." TR, Vol. I, at 223 - 224.

Respondent never took any action to report the rocks stolen. Respondent never brought any lawsuit to retrieve the rocks. Indeed, throughout this proceeding, while his counsel attempted to assert that there may be some astronomical value in these rocks, Respondent himself

never once expressed any desire to have to have the rocks in his custody. Respondent failed to adduce any credible evidence at trial that the value of the green rocks was anything but negligible.

The rocks have been stored by the Persches merely for evidentiary purposes. The Persches have paid all the costs associated with storing the rocks. Respondent never even offered to pay those costs. As stated by the Commission, the Persches' aim in entering the emerald scheme was not to obtain green rocks, or even genuine gemstone quality emeralds. "Their objective was to realize a financial profit." Order at 13, ¶ 19. That's what Respondent enticed them into believing would occur: that they would realize financial profit.

Despite Respondent's claims, the Division has no obligation to prove Respondent's defense or defenses. Respondent "failed to provide admissible, credible evidence sufficient to establish a basis for offsetting the fine requested by the Division." *Id.* The green rocks/gravel are of little or no value as evidenced by all the facts of this case. The requested, and now imposed fine, takes this into consideration. If Respondent had any evidence to the contrary, it was his duty to introduce it at trial.

VIII. RESPONDENT HAS FAILED TO COMPLY WITH RULE 151-4-902 OF THE UTAH ADMINISTRATIVE CODE.

Respondent has failed to comply with the rules governing his appeal. Respondent has not met the substance of this rule. Rule 151-4-902(2) of the Utah Administrative Code mandates that Respondent "set forth any factual or legal basis in support of [his] request, including adequate supporting arguments and citation to: (a) appropriate legal authority; and (b) the relevant portions of the record." Respondent has not supplied legal authority, nor relevant portions of the record that would provide any basis for overturning the Order of the Securities Commission.

Utah Admin. Code Rule 151-4-902(3) of the mandates,

- (a) If a party challenges a finding of fact, the party must demonstrate, based on the entire record, that the finding is not supported by substantial evidence.
- (b) A party challenging a finding of fact bears the burden to:
 - (i) marshal or gather all the evidence in support of the finding; and
 - (ii) show that despite that evidence, the finding is not supported by substantial evidence.
- (c) The failure to marshal the evidence permits the executive director to accept a division's findings of fact as conclusive.
- (d) A party challenging a legal conclusion must support the argument with citation to:
 - (i) relevant authority; and
 - (ii) the portions of the record relevant to the issue.

Respondent has failed to demonstrate that the findings of the commission are not supported by substantial evidence. That was Respondent's burden. UTAH ADMIN. CODE R151-4-902(3)(b).

He has not shown that, despite the evidence, the finding is not supported. The executive director can and should accept the Commission's findings of fact as conclusive. UTAH ADMIN. CODE R151-4-902(3)(c).

CONCLUSION

For the reasons stated herein, Respondent's Request should be denied and he should take nothing thereby. The Commission's Order should be affirmed.

DATED this 15 day of August, 2014.



PAUL G. AMANN
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2014, I sent via email a true and correct copy of the foregoing to the following:

Maria E. Heckel, Esq.
Mark W. Pugsley, Esq.
Jared N. Parrish, Esq.
Email: mheckel@rqn.com
Email: mpugsley@rqn.com
Email: jparrish@rqn.com

Counsel for Respondent

and hand-delivered a copy to:

Francine Giani, Executive Director
Utah Department of Commerce

Masuda Medcalf, Administrative Law Judge
Utah Department of Commerce

Jennie Jonsson, Administrative Law Judge
Utah Department of Commerce

Ann Skaggs, Analyst
Utah Securities Division



Tab 7

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UTAH DEPT. OF
COMMERCE

Maria E. Heckel (10761)
Mark W. Pugsley (8253)
Jared N. Parrish (11743)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
mheckel@rqn.com
mpugsley@rqn.com
jparrish@rqn.com

Attorneys for Respondent Jack Phillips

BEFORE THE EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF COMMERCE
FOR THE STATE OF UTAH

IN THE MATTER OF:

JACK PHILLIPS,

Respondent.

REPLY MEMORANDUM IN SUPPORT
OF REQUEST FOR AGENCY REVIEW

Case No. SD-12-0001

INTRODUCTION

Jack Phillips ("Phillips"), through the undersigned counsel of record and pursuant to Utah Code Ann. § 63G-4-301 and Utah Admin. Code R. 151-4-901 et seq. hereby submits his Reply Memorandum in Support of Request for Agency Review. As set forth in Phillips' opening memorandum, the Utah Securities Commission ("Commission") grossly exceeded its statutory authority and violated Phillips' Eighth Amendment rights by imposing a civil penalty far in excess of \$10,000 per violation and ordering restitution. The Utah Division of Securities' ("Division") response that it is not bound by the limitation on the amount of the fine in Section 61-1-20 because it is not required to enforce an award in district court is entirely without merit and contrary to Utah Court of Appeals precedent. There is no statutory authority for the Division

to skip civil enforcement and file an "Abstract of Award", as is the Division's apparent practice. Additionally, neither the statute nor the constitution, grants the Division limitless authority to impose a fine in its discretion as the Division claims. Nor does the statute free the Division from the statute of limitations. Finally, the Commission also erred in shifting the burden of proof concerning the "investor loss" factor and in interpreting the Utah Securities Act to impose a duty of due diligence on a layperson investor who does not receive a payment or commission for his involvement in bringing additional investors into a scheme.

RESPONSE CONCERNING THE DIVISION'S ATTACK ON PHILLIPS'
"STATEMENT OF FACTS"

1. The Statement of Facts Cannot Be Stricken on an Unstated Procedural Rule

The Division suggests that Phillips violated "procedure" and thus Phillips' "Statement of Facts" should be stricken as a sanction because, according to the Division, Phillips should have marshalled the evidence and made arguments concerning whether the Commissions' findings of fact are supported by substantial evidence in the "Argument" section of the brief, rather than in a section with the heading "Statement of Facts." However, the Division cites no administrative rule that sets out such formatting requirements, and Phillips' alleged violation of an (unstated) procedural rule is not a valid basis for disregarding a section of Phillips brief.

2. Phillips Properly Marshalls the Evidence in His Statement of Facts

Furthermore, Phillips' statement of facts is not argumentative, as it accepts as true the findings of fact with the exception of paragraph 17. Phillips' opening brief therefore properly marshalls the evidence in support of the agency's findings of fact. It then properly supplements the accepted findings of fact with specific citations to the stipulated facts officially entered into the record of the proceeding and appropriately identifies stipulated evidence on which the Commission made no contrary findings. With regard to paragraph 17, Phillips expressly

marshalled all the evidence that favors the Commission's findings. No more is required by the applicable administrative rules. The Division's attempt to exclude a section of Phillips' brief on unstated procedural technicalities, together with the Division's lack of a substantive response to Phillip's Statement of Facts, is evidence that the Statement of Facts in Phillips' opening brief is well founded in the evidence of the case.

ARGUMENT

I. THE DIVISION'S BRIEF ADDS NO LEGAL SUPPORT FOR THE ORDERED FINE, WHICH IS WITHOUT STATUTORY AUTHORITY, EXCESSIVE, AND UNCONSTITUTIONAL.

A. The Division Is Entirely Without Statutory Authority to File an "Abstract of Award" In Lieu of Observing the Limitations of § 61-1-20(2)(b)(viii). Its Proclaimed Practice of Filing an Abstract of Award Is a Power Grab Improperly Designed to Avoid District Court Review of the Division's Observance of Its Statutory Jurisdiction Prior to Enforcement

In *State v. Bushman*, 231 P.3d 833 (Utah Ct. App. 2010), the Utah Court of Appeals based its holding that the administrative sanctions permitted under the Utah Securities Act are on their face not excessive in relation to their purpose for the purpose of the double jeopardy analysis on the fact that *the fines the Utah Division of Securities can impose and judicially enforce are limited to \$10,000 per violation*. *Id.* at 839 n.4. The Division's brief twists and attempts to distract from this governing Utah Court of Appeals precedent, ultimately ignoring the fact that, under any reading of the case, the Utah Court of appeals necessarily read and relied on Utah Code Ann. § 61-1-20(2)(b)(viii) as limiting the amount of the enforceable fine under section 61-1-20(1).¹ *Bushman* must be followed and the amount of Phillips' penalty must be reduced accordingly in this case.

¹ The Division erroneously argues the facts of the *Bushman* case as if legal issues other than double jeopardy had been considered by the Court. For instance, the Division argues that the actual fine awarded against the defendant in that case exceeded the \$500 statutory maximum at the time of the consent order, and therefore that the Utah Court of Appeals could not possibly mean what it said (that the judicially enforceable maximum penalty

Instead of following the limitations on the fines that may be imposed as interpreted in *Bushman*, the Division seeks to expand its jurisdiction far beyond the limitations of its governing statutes by arguing that, in lieu of filing a civil action, (in which it would be required to observe the statutory limitations on the amounts of fines under Section 61-1-20(2)(b)(viii)), it can file an "Abstract of Award" and avoid the statutory provisions allowing the respondent a defense of an enforcement proceeding in the district court. Notably, the Agency cites to no statutory authority in support of the proposition that that it is granted authority to file an "*Abstract of Award*" rather than a civil complaint in an enforcement proceeding. All the Agency can cite in support is its *past course of conduct*, which is nothing but a previously unchallenged power grab utterly without legal authority. Certain statutes, *none of which are applicable to the Utah Division of Securities*, expressly provide for recovery of specified administrative awards through an "abstract of final order providing an award" without an enforcement proceeding that would give the respondent an opportunity to raise enforcement-related defenses in the district court.² However, nowhere in the Utah Securities Act, or in the Administrative Procedures Act, is there any authority whatsoever that would allow the Utah Division of Securities to shortcut a civil enforcement proceeding by filing an "abstract of award."³ Even if Section 63G-4-501 of the

that can be imposed by the Utah Division of Securities is \$10,000 per violation). However, the amount of the fine was not challenged as in excess of statutory authority granted by Section 61-1-20 by the defendant in that case. *Bushman* considered only the issue of double jeopardy, and therefore the correctness of the amount of the fine would not have been properly considered by the Court. The Court considered only the maximum penalty permitted under the language of the statute and determined as a matter of law that based on the \$10,000 limit per offense the statute was not punitive. Therefore, the amount of the award in that case has no bearing on the Utah Court of Appeals pronouncement on the interpretation of Section 61-1-20. Similarly, the Court did not consider whether the Commission could impose a penalty of restitution, contrary to the Division's arguments, because that issue also was not raised on appeal. Moreover, as described in Section I.B. below, the fine was offset by restitution paid. There was not an award of restitution, in contrast to the Commission's order in this case.

² Namely, these statutes are in the Utah Labor Code, *see* Utah Code Ann. § 34A-2-212 (2014), the Child Support Recovery Act, *see id.* § 62A-11-304.2 (2014), and the act providing for collection of student loans, *see id.* § 53B-14-106 (2014).

³ The very maxim of statutory construction cited by the Division in its brief, *expressio unius est exclusio alterius* or, "the expression of one thing is the exclusion of another" is applicable here. *Kocherhans v. Orem City*, 2011 UT App, ¶ 14. Where other agencies are expressly granted the authority to skip further legal review in

Administrative procedure act applies, which is the only legal enforcement authority cited by the Division, section 63G-4-501 expressly requires the Division to seek an order from the district court enforcing an award, and the Respondent is entitled to raise defenses, including the defense of lack of jurisdiction therein.⁴ Therefore, the Division's claim that the commission can enforce its orders without filing an action in district court is clearly erroneous.⁵

With regard to the question whether the Division can avoid the imposition of limitations on the amount of the fine by enforcing its order through section 63G-4-501 rather than by section 61-1-20(b), the answer is it cannot. Both section 63G-4-501 and section 61-1-20 provide for the filing of an enforcement proceeding in district court. Therefore, either the provisions of both apply in such a proceeding, or, as the statute specific to judicial enforcement of administrative orders in the context of the Utah Securities Act, the enforcement provisions of the securities Act applies. "It has been consistently held that specific statutes prevail over general statutes." *State v. Moore*, 802 P.2d 732, 737 (Utah 1990). In either case, the Court will apply the \$10,000 per violation limitation on the Divisions sanctions set forth in section 61-1-20.

enforcement of orders and file an "abstract of final order providing an award" the absence of such express authority indicates this power was not granted to the Utah Division of Securities. Indeed the Division's proclaimed practice of filing an abstract of award is contrary to the procedure required by either Utah Code Ann. § 61-1-20 or Utah Code Ann. § 63G-4-501 (the only Section cited by the Division).

⁴ Utah Code Ann. § 63G-4-501 provides, in relevant part, as follows:

(1)(a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

(b) The *action* seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

...

(d) The action may request, *and the court may grant*, any of the following: (i) declaratory relief; (ii) temporary or permanent injunctive relief; (iii) any other civil remedy provided by law; or (iv) any combination of the foregoing.

...

(3) *In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the ground that:*

(a) The order sought to be enforced was issued by an agency without jurisdiction to issue the order; . . .

(4) Decisions on complaints seeking civil enforcement of an agency's order are reviewable in the same manner as other civil cases."

⁵ See also *Career Serv. Review Bd. v. Utah Dep't of Corrections*, 942 P.2d 933, 940-941 (Utah 1997) ("[A] suit to enforce such an administrative decision or order [under predecessor statute Utah Code Ann. § 63-46b-19(1)(a) (1993)] is an original and independent proceeding, and such actions are actions at law. . . and are not actions on the administrative decision or order.").

Finally, the application of the limitation on enforcement of any fine in excess of \$10,000 per violation as provided by section 61-1-20)(b)(viii) makes logical sense. It would be irrational for the legislature to allow the Commission to impose a higher fine than the Director is capable of enforcing in the district court, given that greater due process protection is granted to the defendant in district court. This interpretation is also consistent with the application of the Uniform Securities Act in other states (see opening Mem. in Supp. footnote 5). The Division's argument that the maxim *unius est exclusio alterius* applies to the separate subsections of 61-1-20 is incorrect because these sections work together in concert, as held by the Utah Court of Appeals in *Bushman*. *Bushman* 231 P.3d at 839 n.4. In response to the Division's lamentation that the requirement under either 61-1-20 or 636-4-501 that it seek civil enforcement of its orders in district court would do away with the usefulness of the administrative proceeding, this worry is overblown and invalid. The role of the District Court in an action to enforce an order is more limited than in an original enforcement proceeding brought in district court. In the former, the Court is focused on whether the Division has exceeded its jurisdiction by, for example, imposing a fine that cannot be rendered into a judgment within the terms of Section 61-1-20. Presumably, if the agency limits its actions to within the scope of its proper jurisdiction, the enforcement action will not be a substantial hurdle to the enforcement of administrative orders.

B. The Commission Improperly Imposed Restitution by Establishing the Fine at the Amount of Investor Losses, Rather than Permitting Setoff of an Appropriately Calculated Fine for Restitution Actually Paid

The Division's brief devotes little attention to the Commission's lack of authority to award restitution. Its only argument in favor of the award of restitution is that the Utah Court of Appeals allowed a reduction of the fine for restitution paid in *Bushman*. As described above, the Court in *Bushman* did not consider the issue raised here concerning the authority of the

Commission to order restitution. Additionally, the setoff of the fine for payment of restitution in *Bushman* is wholly different from the Commission's improper award of a civil penalty of restitution in this case. In Phillips' case, the Commission expressly considered the amount of restitution when imposing a civil penalty and improperly awarded an amount in full payment of restitution, specifically imposing a civil penalty of \$315,000 representing "investor losses", (Order, at 13), which it stated separately from the "fine" for violations of Utah Code 61-1-1 of \$78,750, and \$25,000 in "investigative costs." Again, the restitution penalty that may be imposed by a district court under section 61-1-20(2) is not available to the Commission. Nowhere does legislature grant the Commission authority to issue any form of restitution. The Commission improperly imposed restitution in excess of its statutory authority. Therefore, the Order imposes an unlawful civil penalty and must be overruled.

C. The Commission's Fine Also Violates Phillips' freedom against excessive fines under the Eighth Amendment.

The Division's attempts distinguish the case of *U.S. v. Bajakajian*, 524 U.S. 321 (1998) on its facts are irrelevant. *Bajakajian* is cited for the test adopted by Utah Courts for determining whether fines are excessive under the Eighth Amendment of the United States Constitution, which provides, "[e]xcessive bail shall not be required, nor excessive fines imposed . . ." U.S. Const. amend. VIII.; *see also*, Utah Const. art. I, § 9. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *State v. Real Property at 633 E. 640 N.*, 2000 UT 17, ¶ 14, 994 P.2d 1254. In the context of administrative proceedings, Utah courts apply this test by balancing a number of factors including the "gravity of the offense, the

maximum fine that could be imposed, the extent of the unlawful activity, the amount of illegal gain in relation to the penalty, and the harm caused." *Brent Brown Dealerships v. Tax Comm.*, 2006 UT App 261, ¶ 18, 139 P.3d 296.

The Division's argument that the \$413,750 penalty imposed in this case on a defendant who did not receive the investor money stolen by third parties is justified is based solely on the Division's improper presumption that the legislature intended to grant the Commission limitless authority to sanction a securities defendant in the Commission's best judgment and that it is the constitutionality of that judgment should not be challenged. As argued above, this is an incorrect interpretation of the statute, and the legislative intent. Additionally, even if a court were to determine that the Division's authority to set the amount of the fine was without express statutory limit, the constitutional cap on the amount of the fine imposed by the Eighth Amendment of the United States Constitution is still in place and it becomes all the more important. The proper comparison by which a court should determine what the legislature considers an appropriate maximum penalty for conduct in violation of the Utah Securities Act is the maximum \$10,000 per offense applicable to district court proceedings as stated in 61-1-20(2)(b)(viii). Additionally, a court considering the constitutionality of the amount of the fine should reference the similar maximum penalties permitted by other states that have adopted the Uniform Securities Act. (See Phillips' opening brief). Under this analysis, a fine of \$413,750 against an unlicensed individual who did not receive the investor moneys is clearly excessive, especially where, as here, it is so harsh as to make the defendant Phillips impecunious.

D. The Executive Director Cannot Substitute the Division's Post Hoc Rationalizations for the Reasoning of the Commission.

The Division attempts to remedy deficiencies in the Commission's findings of fact by supplementing the record with its own post hoc analysis. This is improper post hoc

rationalization by the Division's counsel. It is a well-established principle of law that courts "may not accept appellate counsel's post hoc rationalizations for agency action", but instead require "that an agency's . . . order be upheld, if at all, on the same basis articulated by the agency itself." *Talk AM, Inc. v. Mich Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Utah Admin. Code R. 164-31 provides that *the Commission* shall consider the following factors in setting a fine:

(a) the serious, nature, circumstances, extent, and persistence of the conduct constituting the violation; (b) the harm to other persons, including the amount of investor losses, resulting either directly or indirectly from the violation; (c) any financial benefit, enrichment, commission, fee or other consideration received directly or indirectly by the person in connection with the violation; (d) cooperation by the person in any inquiry . . . , efforts to prevent future occurrences of the violation, and efforts to mitigate the harm caused by the violation, including any restitution paid or disgorgement of ill-gotten gains to persons injured . . . ; (e) the history of previous violations by the person; (f) the need to deter the person or other persons from committing such violations in the future; (g) the costs of the Division incurred in investigating and prosecuting the action; and (h) such other matters as justice may require.

There is no evidence whatsoever that *the Commission* considered and made findings on these factors. It certainly did not make the detailed factual findings suggested for the first time in the Division's brief. In fact, the evidence is to the contrary. The Division's Counsel invited error by arguing in the hearing that the Commission should simply award a "standard" 125% amount of the investor loss as a fine and add attorneys' fees to arrive at the civil penalty of \$315,000 "in investor losses", an additional "fine" of 78,750, and \$25,000 in investigative costs. (See Tr. 4-21-14 at 425-426). The Commission accepted the Division's suggestion verbatim without explanation. (See Order at 13.) The validity of the Commission's Order must be determined without reference to post hoc rationalizations.

II. THE DIVISION'S ACTION IN REGARDS TO THE GIT TRANSACTION IS BARRED BY THE STATUTE OF LIMITATIONS AND EQUAL APPLICATION OF THE DIVISION'S POLICY AGAINST BRINGING ENFORCEMENT PROCEEDINGS ON CLAIMS OLDER THAN FIVE YEARS.

The Division's argument that no statute of limitations applies is based on its improper reasoning that a civil enforcement action is not required. As demonstrated supra, the Division's attempt to avoid a civil enforcement action by claiming unwritten authority to file an "Abstract of Award" is an improper attempt to avoid the clear requirement of section 61-1-20(b) that the Division's orders be enforced, if at all, by filing a civil action in the district court. Again, the legislature never intended to write the Division a blank check to bring claims in its discretion whenever it pleases. Although the Commission was required to determine whether the Division's five year policy should be applied in this case, it improperly declined to make any findings concerning whether treatment of similarly situation defendants is equal and left the application of the five year rule entirely to the Division's agency discretion. "Agency discretion" cannot simply be an excuse for facially unequal treatment under the policy without or agency discretion would swallow the rule against unequal treatment.

III. THE UTAH SECURITIES ACTION SHOULD NOT BE GIVEN AN OVERBROAD INTERPRETATION THAT WOULD REQUIRE ALL PERSONS TO CONDUCT DUE DILIGENCE BEFORE DISCUSSING A SECURITY WITH A FRIEND.

As fully briefed in Phillips' opening brief, Phillips was not the legal "maker" of an untrue statement within the meaning of § 61-1-1(2), at least as to the emerald investment. Phillips as an unpaid source of an investment recommendation is not required to conduct "due diligence" when recommending an investment to friends. To require otherwise exposes countless uninformed persons giving no more than friendly advice to severe sanctions under Utah's Securities Act. This was not the intent of the Act. *Janus Capital* gives Utah Courts the pathway to make a necessary

distinction between the maker of a misleading statement and someone like Phillips who simply didn't do due diligence and was not in a fiduciary position.

IV. THE COMMISSION IMPROPERLY SHIFTED THE BURDEN OF PROOF TO PHILLIPS CONCERNING THE EXISTENCE OF INVESTOR LOSS.

Notwithstanding the Division's new characterization of the emeralds at issue in this case as "rocks", there can be no dispute on appeal of the administrative order that the emerald deal resulted in the importation of "31 barrels of "raw uncut emeralds". (See Stipulation of facts ¶20.) The Perschs admitted they were in possession of all or most of these barrels of emeralds. Although the Commission concluded they were not "gem quality emeralds", these emeralds are of potentially significant value. The question is whether, given the acknowledged existence of "emeralds" relating to the emerald deal in the Perschs possession, and the Commission's acknowledgement that "an offset [for the value of the emeralds] might be appropriate", (Order at 13), the Commission properly imposed the burden of proof relating to the existence of value on Phillips rather than imposing a burden of proof on the Division to show that the emeralds did not exceed the value of the Perschs cash expended in the deal. The answer is that the Commission's requirement that Phillips prove the value of the emeralds as an offset is in error because the only applicable statute clearly imposes the burden of proof on the Division. Under Utah Admin Code R. 154-4-708 the Division must show by a preponderance of the evidence that (1) Mr. Phillips' conduct violated the Securities Act and (2) that the penalties it requests are justified. This places a burden on the Division to provide enough evidence to the Commission that the Commission can properly impose the requested fine. The value of the emeralds in the Perschs' possession determines whether the Perschs suffered actual damage from the scheme. It is highly significant in this matter because the Commission relied exclusively on investor loss, and primarily the Perschs' alleged losses in the emerald deal, to determine the fine imposed on Mr. Phillips. (Order,

at 13). In shifting the Division's burden to Phillips, the Commission committed a reversible error. *See Harrington v. Office of Miss. Secy. of State*, 129 So.3d 153, 173-75 (Miss. 2013) (reversing a division's fine because the division failed to provide "evidence regarding the specific number of investors and the violations against each"). The Division's briefing on this issue is notably lacking citation to any legal authority that requires Phillips to prove the value of the emeralds as an offset.

CONCLUSION

In sum, on the basis of the arguments set forth above, Phillips requests that the Executive Director review the decision of the Commission and grant the relief requested in Phillips' opening brief.

Respectfully SUBMITTED this 25th day of August, 2014.

RAY QUINNEY & NEBEKER P.C.

/s/ Maria Heckel
Maria E. Heckel
Mark W. Pugsley
Jared N. Parrish
Attorneys for Respondent Jack Phillips

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document on the parties of record in this proceeding set forth below by electronic means and U.S. first class mail, postage prepaid, to:

Keith Woodwell
Director
UTAH DIVISION OF SECURITIES
160 E 300 S, 2nd floor
P.O. Box 146760
Salt Lake City, UT 84114-6760

Paul Amann
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 W 300 S, 5th Floor
P.O. Box 140814
Salt Lake City, UT 84114

Francine Giani
Executive Director
UTAH DEPARTMENT OF COMMERCE
160 E 300 S
SM Box 146701
Salt Lake City, UT 84114-6701

Dated this 25th day of August, 2014.


