

2016

Jack Phillips, Petitioner/Appellant v. Utah Labor Commission, and Scott Moulton, an Individual, Respondents/Appellees

Utah Court of Appeals

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Case No. 20150534-CA

IN THE UTAH COURT OF APPEALS

JACK PHILLIPS,

Petitioner/Appellant

v.

UTAH LABOR COMMISSION, and SCOTT MOULTON, an individual,

Respondents/Appellees

RESPONSE BRIEF OF RESPONDENTS/APPELLEES

Appeal from the Final Agency Action of Utah's Department of Commerce

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UTAH APPELLATE COURTS

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COUNSEL'S CERTIFICATE PURSUANT TO RULE 24(f)(1)(C)

I hereby certify that the Brief of Respondents contains 2,658 words, including headings, footnotes, and quotations, but excluding the Table of Contents, Table of Authorities, and the Addendum.

I have relied upon the word count of the word processing system, Word 2010, used to prepare this brief. The font used is Times New Roman, 13 point.

Certified this 4th day of February, 2016.

A handwritten signature in blue ink, reading "Brent A. Burnett", written over a horizontal line.

Brent A. Burnett
Assistant Attorney General
Attorney for Respondents

LIST OF ALL PARTIES

To the best of Respondents' knowledge, all interested parties appear in the caption of this Brief.

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Case No. 20150534-CA

IN THE UTAH COURT OF APPEALS

JACK PHILLIPS,

Petitioner/Appellant,

v.

UTAH DEPARTMENT OF COMMERCE, and UTAH SECURITIES COMMISSION,

Respondents/Appellees.

RESPONSE BRIEF OF RESPONDENTS/APPELLEES

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of this Court under Utah Code Ann. § 78A-4-103(2)(a)(i)(A) (West Supp. 2015).

STATEMENT OF ISSUES ON APPEAL

1. Utah law gives the Utah Securities Commission and the Utah Department of Commerce the ability to bring either administrative actions or judicial actions against those believed to have violated Utah's securities law. Did the respondents err in holding that the statutory provisions that expressly deal with judicial actions did not supplant the separate statutory provisions dealing with administrative actions?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: Respondents agree with Jack Phillips that this issue was preserved below. This issue raises a mixed

question of law and fact, which is more law than fact like and therefore reviewed for correctness. Murray v. Utah Labor Comm'n, 2013 UT 38, ¶¶ 33-34, 308 P.3d 461.

2. Did the Department of Commerce err in holding that an administrative agency action was not bound by a statute of limitations that the legislature made expressly applicable only to judicial actions?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: Same as Issue 1.

3. Did the Department of Commerce err in remanding this matter to the Securities Commission to make appropriate findings of fact and conclusions of law to support its decision even though the Department had already determined that the Commission's decision was upheld on review?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: Same as Issue 1.

4. Did the Department of Commerce err in not placing upon the agency the burden of proving the value of any offsets claimed by Phillips against the amount of fines imposed against Phillips?

ISSUE PRESERVED BELOW and STANDARD OF REVIEW: Same as Issue 1.

DETERMINATIVE STATUTES

All determinative statutes are found in Addendum A. Pertinent provisions include:

Utah Code Ann. § 61-1-20 (West 2012)

Utah Code Ann. § 61-1-21.1 (West 2012)

STATEMENT OF THE CASE

On January 3, 2012, Utah's Division of Securities issued an Order to Show Cause against Jack Phillips and another for engaging in acts and practices in violation of Utah's Uniform Securities Act. R. 486-501. On May 27, 2014, Utah's Securities Commission entered its Findings of Fact, Conclusions of Law, and Order. R. 1095-1109. This decision, with one exception, was affirmed on review by the Department of Commerce. R. 1263-1284. The Department remanded this action to the Commission for a "more detailed Order that discusses the Commission's thought process and analysis with respect to the Subsection R164-31-1(1) factors." R. 1282, ¶ 27.

The Commission entered its amended decision on February 4, 2015. R. 1285-1306. The Final Agency Action was entered on June 5, 2015. R. 1332-42. Phillips timely filed his petition for judicial review.

STATEMENT OF RELEVANT FACTS

Phillips has never been licensed to sell securities. R. 1096. He was involved in a multi-level marketing company called Guardian International Travel (GIT). R. 1096. Phillips sold GIT opportunities, being paid a commission for doing so. He was the first

and primary source of information about GIT to the Persches and Reutlingers. In soliciting the Reutlingers' involvement in GIT, Phillips "assured them that they did not have to do anything other than invest in order to realize a return." R. 1096, ¶ 8.

Phillips represented that the Reutlingers' money would be invested in foreign currency trading and that their investment would generate a five-fold return within eighteen months. R. 1096-97. Phillips did not tell the Reutlingers that: Phillips had been convicted of illegal gambling; the risks involved in trading foreign currencies; the track record of GIT and its investors; whether the GIT investment opportunity was registered as a security or exempt from registration; and, whether Phillips was licensed to sell securities or exempt from licensure. R. 1097.

Phillips also solicited the Persches and Reutlingers participation in a deal involving the purchase, importation, and sale of emeralds. R. 1097. Phillips assured the Persches and Reutlingers that they would have no responsibility for operating or managing the enterprise. Phillips represented to the Persches and Reutlingers that: the emeralds were gem-quality; there was a buyer on board to purchase the emeralds; their investment capital was only needed to establish proof of funds and would not leave the country but would be held in an escrow account; that they would make three times the investment within ninety days; and that there was no risk because the worst possible scenario was the return of their initial investment. R. 1098, ¶ 16.

The Commission did not find Phillips' testimony that he was simply repeating representations made to him by another to be credible. R. 1098. Phillips did not tell the Persches and Reutlingers that: Phillips had been convicted of illegal gambling; the identity of the buyer who would purchase the emeralds; the risk factors involved in the investment; the number of investors; the amount of money that needed to be raised; suitability factors for the investment and investors; the nature of any competition; whether the emeralds investment opportunity was registered as a security or exempt from registration; and, whether Phillips was licensed to sell securities or exempt from licensure. R. 1098-99, ¶ 17.

The Persches' and Reutlingers' money was not held in escrow. Some of it was used to purchase emeralds that were not gem-quality. R. 1099. At least some of the emeralds were 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." R. 1099-1100, ¶ 23.

SUMMARY OF ARGUMENT

Utah's Uniform Securities Act provides two distinct avenues for its enforcement. One is by means of administrative actions. The second is through judicial actions brought in the district courts. Phillips asks this Court to conflate these two separate proceedings by applying provisions that expressly relate to district court proceedings to administrative actions like the current matter. The legislature limited fines imposed by

the courts to \$10,000.00. No such limit is found in the statutes concerning administrative actions. There is a statute of limitations that is expressly limited to court actions, but Phillips asks this Court to apply it to this administrative proceeding.

Phillips also errs in challenging the Department of Commerce's remand of this matter to the Commission to provide a more detailed order concerning the rationale for the Commission's decision. The Department's action was no different from that of reviewing courts in remanding matters for the same reason. Nor did the respondents err in requiring Phillips to present evidence of the value of the emeralds that the Persches had received if he desired to use their value as an offset. Such an offset is in the nature of an affirmative defense on which Phillips had the burden of proof.

ARGUMENT

I. THE DEPARTMENT OF COMMERCE DID NOT ERR IN REFUSING TO INTERPRET UTAH'S UNIFORM SECURITIES ACT CONTRARY TO ITS PLAIN LANGUAGE

The primary goal of courts in interpreting a statute is to give effect to the legislature's intent as evidenced by the plain language of the statute. State v. Burns, 2000 UT 56, ¶25, 4 P.3d 795 ("We need look beyond the plain language only if we find some ambiguity."). There has been no claim that the statutes in question are ambiguous. Phillips asks this Court to interpret Utah Code Ann. 61-1-20 (West 2012) contrary to its plain language. Subsection one provides for enforcement of Utah's Uniform Securities Act through administrative agency actions. Subsection two provides for the act's

enforcement through court proceedings. The provisions of the two subsections are not the same. The legislature saw fit to limit the imposition of fines in court actions to \$10,000.00. Utah Code Ann. § 61-1-20(2)(b)(viii) (West 2012). But section 20(1)(f) does not limit the amount of fines that can be imposed in administrative proceedings.

Phillips asks this Court to amend the statute to place a similar limit on fines in subsection 1 even though the legislature did not see fit to do so. “Statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd.” Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980). See also Hall v. Dep’t of Corr., 2001 UT 34, ¶15, 24 P.3d 958 (“[W]e accordingly avoid interpretations that will render portions of a statute superfluous or inoperative.”). “This court presumes ‘that the terms of a statute are used advisedly’ by the legislature. ‘Therefore, effect should be given to each such word, phrase, clause, and sentence where reasonably possible.’” Sindt v. Retirement Bd., 2007 UT 16, ¶8, 157 P.3d 797 (citations omitted).

The legislature did not place a monetary limit on fines that could be assessed in administrative proceedings. This intentional act would be rendered irrelevant and meaningless if the limitation found in subsection 2 is read into a provision where the legislature refused to place it. Phillips’ reliance on State v. Bushman, 2010 UT App 120, 231 P.3d 833, is misplaced. The issue presented to this Court in that appeal was whether a prior administrative proceeding triggered the double jeopardy clause so as to preclude

future criminal prosecution. Id. at ¶ 7. This Court was not asked to determine the question presented here.

The same is true of Phillips' argument that a statute of limitations that expressly applies only to certain court proceedings should be amended by this Court to apply to administrative proceedings as well. Utah Code Ann. § 61-1-21.1 (West 2012). Section 21.1(1) expressly states that "[n]o indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation." It is significant that the legislature that created two distinct enforcement procedures in a prior section of the act saw fit to create a statute of limitations that only applied to one of the enforcement methods (judicial) and to any criminal prosecutions under Utah Code Ann. § 61-1-21 (West 2012).

When the question was presented to the Utah Supreme Court, it held that administrative proceedings are not civil actions. Rogers v. Div. of Real Estate of Dep't of Bus. Regulations, 790 P.2d 102, 105 (Utah 1990) ("In the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings.").

Phillips again asks this Court to amend the legislature's enactments to alter the plain language of the statutes. By its explicit language, the statute of limitations does not apply to administrative proceedings. The Department of Commerce did not err in

refusing to interpret these statutes contrary to the actual plain language that was used by the legislature.

II. THE FINE IMPOSED IS NOT UNCONSTITUTIONALLY EXCESSIVE UNDER THE EIGHTH AMENDMENT

In challenging the amount of the fine imposed, Phillips only looks at one portion of the test used by Utah's courts. In Brent Brown Dealerships v. Tax Commission, Motor Vehicle Enforcement Division, 2006 UT App 261, 139 P.3d 296, this Court identified five factors that should be considered in determining if a fine was excessive. This Court looked to "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." Id. at ¶ 18.

Phillips fails to consider all of the factors that should be addressed. Phillips has not challenged the factual finding of the monetary harm that his victims suffered. That amount was set at \$315,000.00. R. 1107. Nor has Phillips challenged the \$25,000.00 investigative costs that the State of Utah was forced to expend. Nor does Phillips consider the gravity of the offense. Most of Phillips' argument is based on his mistaken claim that all administrative fines are limited to the \$10,000.00 limit placed on judicial actions. Phillips has failed to show that the fine imposed was grossly disproportional to the gravity of Phillips' offense. Brent Brown, 2006 UT App 261 at ¶ 15.

III. THE DEPARTMENT CORRECTLY REMANDED THIS MATTER TO THE COMMISSION TO MAKE ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT ITS DECISION

The Department upheld the Commission's decision with lengthy conclusions of law. R. 1265-81. This included reviewing the propriety of the amount of the fine imposed. R. 1277-81. While holding that the amount of the fine was not contrary to law, the Department acknowledged that there were inadequate findings and conclusions on this point. R. 1281-82. The Department, knowing the importance of such findings for this Court to be able to properly review the administrative decisions, remanded this matter to the Commission to prepare adequate findings and conclusions to support its decision. This is no different from what this Court has done when there were inadequate, or no, factual findings. In LaSal Oil Company v. Department of Environmental Quality, 843 P.2d 1045 (Utah App. 1992), this Court was unable to perform a proper review of an administrative decision because the findings of fact were broad and conclusory. Id. at 1049. The matter was remanded, not for an entire new decision, but for "the entry of adequate findings." Id. Indeed, this Court explained that if the Executive Director had simply intended to adopt the hearing officer's findings, he could simply say so and that would be adequate. Id. at n. 3.

The Department did not seek to bolster its decision, but to make sure that the record contained an adequate explanation for this Court as to what had occurred below. No attempt was made to provide post-hoc rationalization or to bolster the record. The

Department simply did what this Court has often done, remanded an action to make an adequate record so that a proper review is possible.

IV. THE DEPARTMENT DID NOT HAVE THE BURDEN OF PROVING THE VALUE OF ANY OFFSETS CLAIMED BY PHILLIPS AGAINST THE FINE IMPOSED

Phillips does not argue that the respondents failed to present sufficient evidence to support the amount of the fine imposed. Instead Phillips argues that the respondents had the burden of proof to determine the value of the emeralds that Phillips sought to use as an offset against the fine. Brief of Petitioner at 21-24. The value of the emeralds, if any, would be an offset against the loss suffered by Phillips' victims. As such, Utah law places the burden of proof on alleged offsets on Phillips as with other affirmative defenses.

Utah's courts have held that the party that raises an affirmative defense has the burden to prove each of its elements. Vibro Trust Inc. v. Brahmin Fin., 1999 UT 13, ¶ 17 n. 8, 974 P.2d 288 ("We note that illegality is an affirmative defense; therefore, APS will bear the burden to prove each of its elements"); Messick v. PHD Trucking Serv., Inc., 615 P.2d 1276, 1277 (Utah 1980) ("Accord and satisfaction is an affirmative defense and requires the party alleging it to meet the burden of proof as to every necessary element.").


The Department correctly held that the respondents did not have the burden to calculate the potential offset that Phillips claimed. "If [Phillips] believes that

the investors have been made whole other than through a financial profit, he has the burden to prove his position, including the value of the emeralds to a reasonable certainty.” R. 1107 at 19.

CONCLUSION

For the reasons set forth supra, the Department of Commerce’s decision should be upheld on appeal.

Respectfully submitted this 4th day of February, 2016.


BRENT A. BURNETT
Assistant Attorney General
Attorney for Respondents

CERTIFICATE OF MAILING

This is to certify that I mailed, first class postage prepaid, two copies of the foregoing RESPONSE BRIEF OF RESPONDENTS to the following this 4th day of February, 2016:

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BRENT A. BURNETT

ADDENDUM “A”

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).
- (2)
 - (a) 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.
 - (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.
 - (c) The court may not require the division to post a bond in an action brought under this Subsection (2).
- (3) An order issued under Subsection (1) shall be accompanied by written findings of fact and conclusions of law.
- (4) When determining the severity of a sanction to be imposed under this section, the commission or court shall consider whether:
 - (a) the person against whom the sanction is to be imposed exercised undue influence; or
 - (b) the person against whom the sanction is imposed under this section knows or should know that an investor in the investment that is the grounds for the sanction is a vulnerable adult.

Amended by Chapter 319, 2011 General Session

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.
- (2) As to causes of action arising from violations of this chapter, the limitation of prosecutions provided in this section supersedes the limitation of actions provided in Section 76-1-302 and Title 78B, Chapter 2, Statutes of Limitations.

Amended by Chapter 3, 2008 General Session

ADDENDUM “B”

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

IN THE MATTER OF:

JACK PHILLIPS,

Respondent.

**STIPULATION ON
UNDISPUTED FACTS**

Docket No. SD-12-0001

The State of Utah, Department of Commerce, Division of Securities (Division), and Respondent Phillips (Respondent), by and through their respective undersigned counsel hereby respectfully submit this Stipulation on Undisputed Facts. For purposes of the above captioned administrative proceeding, both the Division and Respondent agree that both parties admit to the following facts:

1. Respondent Jack Phillips (Phillips) is a resident of Oregon.
2. Phillips has never been licensed to sell securities.
3. Phillips, Elliott James, and alleged investors Bill Persch, Gidgette Persch (the Persches) and Paul and Sherry Reutlinger (the Reutlingers) were involved in a multi-level marketing company known as GIT.



4. Phillips, the Persches and the Reutlingers each purchased and sold the opportunity offered by GIT and were paid commissions for selling the opportunity to others in accordance with GIT policies.
5. Phillips was enrolled as a distributor for GIT under Elliott James as his "sponsor".
6. The Persches and Reutlingers were enrolled as distributors for GIT under Phillips as their "sponsor."
7. The Persches and Reutlingers enrolled third parties as distributors for GIT below them and were the "sponsors" for the people enrolled directly below them.
8. Phillips, the Persches and the Reutlingers received periodic payments from GIT over the course of several months after their initial enrollments, but all payments from GIT stopped sometime in 2007.
9. The Persches and Reutlingers did not recover the full amount of the money they paid to GIT.
10. In late 2013 and early 2014, third party GIT principals Swainson Hawke and William Hume pled guilty to offenses relating to their operation of the GIT multi-level marketing company in the case of U.S. v. Swainson Hawke in the Western District of Kentucky. Currently the US Attorney's Office is taking Victim Impact Statements in advance of sentencing in that case. See http://www.justice.gov/usao/kyw/programs/vwa_Swainson_hawke.html
11. Elliott James was a Vice President of GIT.
12. In or about November 2006, Elliott James approached Phillips with a deal involving the purchase, importation, and sale of emeralds.
13. Among other things, James told Phillips that James could arrange for the purchase


and importation of emeralds and that the emeralds would sell for three times the value paid by Phillips within 90 days.

14. Based upon representations and promises made by Elliott James, on or about November 14, 2006 Phillips wired \$150,000 to a trust account controlled by a Texas attorney named Paul Emerson.
15. After November 14, 2006, Phillips sent additional checks to the trust account controlled by Emerson, totaling \$75,000.
16. Elliott James also made representations and promises to the Persches and Reutlingers about the emerald deal.
17. On or about January 26, 2007, Bill Persch wired \$30,000 to Marrical Music LLC in connection with the emerald deal. Marrical Music LLC is owned and controlled by James' wife, and James had signatory authority over the Marrical account.
18. On or about February 14, 2007, Bill Persch wired \$270,000 to the trust account set up by Texas attorney Paul Emerson in connection with the emerald deal.
19. Ultimately, some of the moneys paid by Phillips, the Persches, and the Reutlingers were used by Elliott James and his associates Gail Cato, Elaina Lance, and Paul Emerson, for an enterprise whereby Cato purchased emeralds in Brazil and shipped them to the U.S.
20. In late 2006 through early 2007, Cato made at least two trips to Brazil for the purpose of purchasing emeralds. During these trips, Cato purchased 31 small barrels of raw, uncut emeralds. Cato shipped the emeralds to Atlanta, GA and made them available to James or entities controlled by James.

21. The remainder of the moneys were taken and used for other purposes by Elliott James, his girlfriend Sheila Marrical, Gail Cato, Paul Emerson, and/or Elaina Lance.
22. The barrels of emeralds that were imported were stored in barrels in a warehouse leased by or on behalf of Elliott James.
23. The Persches have not received any return of cash on the emerald deal.
24. The Reutlingers paid a total of \$30,000 in the emerald deal by mailing four separate cashier's checks to James as follows: 1) a \$7,500 check dated February 27; 2) a second \$7,500 check dated February 27; 3) a \$6,000 check dated March 5, 2007; and 4) a \$9,000 check dated March 5, 2007.
25. The Reutlingers have not received emeralds or any payments on the emerald deal.

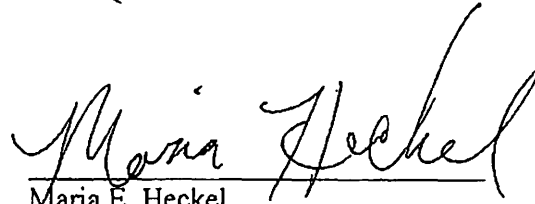
DATED this 27th day of March, 2014.

SEAN D. REYES
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Special Assistant Attorney General

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Maria E. Heckel
Mark W. Pugsley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2014, I hand delivered a true and correct copy of the foregoing Stipulation on Undisputed Facts to the following:

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Ann Skaggs, Securities Analyst
Utah Division of Securities



Maria Skedros

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Maria Skedros
Paul Amann
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ERROR -----

ADDENDUM “C”

DIVISION OF SECURITIES
KEITH WOODWELL, DIRECTOR
DEPARTMENT OF COMMERCE
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BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:

JACK PHILLIPS,
RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

CASE NO. SD-12-0001

APPEARANCES:

Mark Pugsley and Maria Heckel for Respondent.
Paul Amann and Keith Woodwell for the Division of Securities.

COMMISSION MEMBERS:

Erik Anthony Christiansen
Brent Baker
Tim Bangerter
David Russon

BY THE UTAH SECURITIES COMMISSION:

On January 3, 2012, the Utah Division of Securities (Division) brought allegations against Jack Phillips ("Respondent") through a Notice of Agency Action and Order to Show Cause. This matter was heard by four members of the Utah Securities Commission

("Commission") in a hearing held March 27, 2014 and April 21, 2014. The Commission has considered and weighed the admitted evidence according to the applicable standard of proof, that being a preponderance of the evidence, and now enters the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

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.
6. Respondent sold the GIT opportunity and was paid commissions for doing so. Respondent was extremely successfully 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.¹

¹ The Commission takes notice that FOREX trading, also known as the foreign exchange market, is a global decentralized market for the trading of currencies.

- 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 investors.
 - d. Whether the GIT investment opportunity was registered as a security or exempt from 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.

CONCLUSIONS OF LAW

1. Utah Code § 61-1-13(1)(ee)(i)(K) provides that an investment contract is a security. Utah Code § 61-1-13(1)(s)(ii)² sets forth a four-part test for determining whether an agreement under which money changes hands constitutes an investment contract. The test is as follows:

- a. An offeree furnishes initial value to an offerer.
- b. A portion of the initial value is subjected to the risks of the enterprise.
- c. The furnishing of the initial value is induced by the offerer's promises or representations that give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offeree as a result of the operation of the enterprise.
- d. The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

2. As to the GIT investment, the Commission concludes that it was an investment contract and, therefore, was a security, as follows:

² The Commission notes that Utah Code § 61-1 et seq as in effect on March 16, 2007, did not include a definition of the term "investment contract." However, the fundamental elements of the test have been in effect at all relevant times under the common law. *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946). The Utah Legislature adopted the test into statute in 2009, with the fourth prong stating that the offeree has no right to "practical or actual" control. The conjunction was changed to "and" in the 2011 Legislative Session. That linguistic change does not affect the analysis here.

- a. The Persches furnished initial value as offerees when they bought into GIT.

Where Respondent solicited the tender of this initial value, he was an offerer in the transaction.³

- b. Some or all of the value tendered by the Persches was subjected to the risks of GIT's use and management.
- c. The Persches were induced to buy into GIT by Respondent's promises and representations that they would receive a five-fold return on their investment within 18 months. A five-fold return constitutes a valuable benefit over and above the initial value tendered. In addition, while the Persches were allowed to bring additional distributors into the GIT marketing system, they were assured that it was not necessary for them to do so in order to receive the promised return on their investments. Therefore, the return was premised on the operation of GIT as an enterprise, not on the work and contribution of the Persches.
- d. The Persches did not have any duty, obligation, or opportunity to participate in or control decisions made by GIT, whether as to trading foreign currencies or otherwise. Therefore, they did not have practical or actual control over the managerial decisions of GIT.

- 3. In concluding that the GIT investment was a security, the Commission has considered Respondent's argument to the effect that multi-level marketing companies and securities are mutually exclusive. The Commission disagrees. A multi-level marketing company is a system for advertising, distributing, and selling something of value. If the offering that is advertised, distributed, and sold satisfies the statutory test for an investment contract,

³ Utah Code § 61-1-13(1)(bb)(ii) defines "offer" or "offer to sell" as including "an attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value" (emphasis added).

then it is a security, at least on the facts before the Commission in this case. It is the nature of the offering that is sold—not the manner of sale or the industry at issue—that determines whether a security is at issue. Based on the specific facts at issue, a security was involved in the sale of the GIT investment opportunity to the Persches.

4. The Commission has also considered Respondent's argument that the Persches' GIT transactions occurred more than five years prior to the date on which the order to show cause was issued in this administrative matter. The Commission has previously ruled that no statute of limitations applies.⁴ 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.
5. The Division has discretion to prosecute any case, regardless of its age. While the Division might make it a practice on an ad hoc basis to decline 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.
6. As to the emerald deal, the Commission concludes that it was an investment contract and, therefore, was a security, as follows:
 - a. The Persches and Reutlingers furnished initial value as offerees when they bought into the emerald deal. Where Respondent solicited their participation, in the transaction, he was an offerer.
 - b. Some or all of the value tendered by the Persches and Reutlingers was subjected to the risks of James's use and management, as well as to the risks of the gem market.

⁴ See the Commission's March 24, 2014 order denying Respondent's motion for summary judgment.

- c. The Persches and Reutlingers were induced to buy into the emerald deal by Respondent's promises and representations that they would receive a three-fold return on their investment within 90 days. A three-fold return constitutes a valuable benefit over and above the initial value tendered. In addition, the Persches and Reutlingers had neither the obligation nor the opportunity to participate in or direct the purchase, transport, and resale of the emeralds in order to receive the promised return on their investments. Therefore, the return was premised on the operation of the emerald deal as an enterprise, not on the work and contribution of the Persches and Reutlingers.
- d. Neither the Persches nor the Reutlingers had any duty, obligation, or opportunity to participate in or control decisions made by James and his associates in procuring emeralds for resale. Therefore, neither had practical or actual control over the managerial decisions regarding the emerald deal.
7. Utah Code § 61-1-1(2) prohibits any person engaged in the offer and sale of securities to directly or indirectly make an untrue statement as to a material fact.
8. As to the GIT transactions, Respondent falsely stated that the Persches' investments would be used for FOREX trading and would generate a five-fold return. A reasonable person would routinely consider the rate of return and the nature of the investment in determining whether to invest. Therefore, the information provided by Respondent on these issues constitutes material facts. Where Respondent's statements as to these facts were untrue, he violated Section 61-1-1(2).
9. As to the emerald deal, Respondent falsely stated that the Persches and Reutlingers would receive a three-fold return on their investment, which would remain in an escrow account

within the United States as proof of funds in the purchase of gem-quality emeralds. A reasonable person would routinely consider the rate of return, the nature of the investment, and the proposed use of invested funds in determining whether to invest. Therefore, the information provided by Respondent on these issues constitutes material facts. Where Respondent's statements as to these facts were untrue, he engaged in an additional violation of Section 61-1-1(2).

10. Utah Code Ann. § 61-1-1(2) prohibits any person engaged in the offer and sale of securities to directly or indirectly fail to disclose material information that would be necessary in order to make representations made not misleading.
11. As to the GIT transactions, Respondent failed to disclose his criminal history and the risks, nature, and track record of the offering when he assured the Persches that their money would be safe. Had the Persches known Respondent to be a convicted gambler, and had they understood the true nature of the investment and the risks involved, they would have had reason to doubt Respondent's assurances. Therefore, Respondent's omissions were material and resulted in investors being misled into believing that their money was not at risk. These circumstances constitute an additional violation of Section 61-1-1(2).
12. As to the emerald transaction, Respondent failed to disclose his criminal history and the risks, nature, and suitability of the offering when he assured the Persches and Reutlingers that their money would be safe. As to the Reutlingers' investment and the Persches' final investment, Respondent also failed to disclose that a return due to him was delinquent. Had the Persches and Reutlingers known Respondent to be a convicted gambler, had they understood the true nature of the investment and the risks involved, and had they

understood that promised returns were already delinquent, they would have had reason to doubt Respondent's assurances. Therefore, Respondent's omissions were material and resulted in investors being misled into believing that their money was not at risk. These circumstances constitute an additional violation of Section 61-1-1(2).

13. In concluding that Respondent made false statements and material omissions regarding the emerald deal, the Commission has considered Respondent's argument that he was not the maker of the statements he conveyed to investors. In making this argument, Respondent relies on the case of *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

14. The *Janus Capital* decision interprets federal law and establishes a safe haven for a person who disseminates false information to investors but does not have "authority over the content of the statement and whether and how to communicate it." *Id* at 2303. The *Janus Capital* safe haven is not applicable in this case, particularly given Respondent's lack of credibility.

15. First, the *Janus Capital* test regarding who is "the maker" of a statement has not been adopted in Utah. Utah Code § 61-1-1(2) states that it "is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to make any untrue statement of a material fact or to omit to state a material fact[.]" There is no state court decision to interpret the verb "to make," which interpretation is the focus of the *Janus Capital* case. As such, the applicable law does not distinguish the creator of a false statement from a person who repeats or passes along misinformation.

16. 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. In the *Janus*

Capital case, the problem statements were published in a prospectus filed by, and bearing the name of, the entity that controlled the offering. There is no parallel circumstance here. Respondent did not pass along to investors a description or prospectus written by and attributed to James. Instead, he personally sought out investors and made verbal representations and promises to them. Indeed, Respondent described the emerald deal as "his deal." He had complete control over the statements he made. He had complete discretion regarding to whom he made the statements. More importantly, the Commission does not find credible Respondent's argument to the effect that he couldn't have known he was sharing untrue and misleading information. At the relevant time, Respondent was a top producer for GIT. He had been with the company for some time, and he had a personal relationship with James. As such, the Commission concludes that Respondent was in a position to exercise due diligence, through which he could and should have discovered the truth about the low quality of the emeralds; the lack of a ready, willing, and able buyer; and other material facts regarding the transaction. In these circumstances, the Commission concludes that Respondent is liable for the statements he made to the Persches and the Reutlingers.

17. Utah Code § 61-1-20 provides that a person who is found to have violated Section 61-1-1 et seq may be ordered to cease and desist from further violations and may be ordered to pay a fine.
18. In assessing a fine, the Commission is authorized to consider the amount of investor losses. In this case, the Commission calculates that the Persches and Reutlingers have lost a total of \$315,000. Respondent argues that the emeralds currently in the possession of the Persches have some value and that, therefore, any fine is subject to an offset.

19. While an offset potentially might be appropriate, neither the Division nor the Commission has the burden to calculate it. The investors did not enter into the emerald deal in order to obtain emeralds. Their objective was to realize a financial profit. If Respondent believes that the investors have been made whole other than through a financial profit, he has the burden to prove his position, including the value of the emeralds to a reasonable certainty. Here, Respondent has speculated to that end, but has failed to provide admissible, credible evidence sufficient to establish a basis for offsetting the fine requested by the Division.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Utah Securities Commission orders Respondent to cease and desist from any further violations of Utah Code § 61-1 et seq. In addition, Respondent is permanently barred from associating with any broker-dealer or investment advisor licensed in Utah for life; from acting as an agent for any issuer or solicitor of investor funds in Utah for life; and from being licensed in any capacity in the securities industry in Utah for life. Finally, Respondent is ordered to pay to the Utah Division of Securities a civil penalty in the amount of \$413,750, as follows:

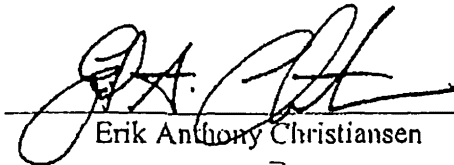
- \$315,000 in investor losses;
- \$78,750 as a fine for violations of Utah Code § 61-1-1 et seq as herein found; and
- \$25,000 in investigative costs.

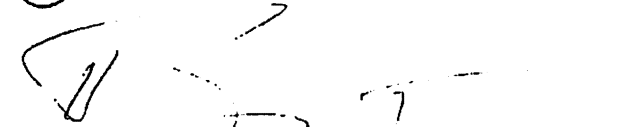
The total civil penalty is due in full with 15 days of the date of this order.

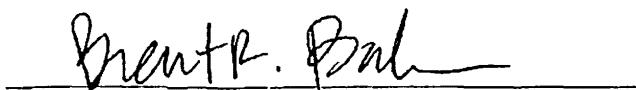
This order shall be effective on the latest of the signature dates below.


DATED this 23rd day of May, 2014.

UTAH SECURITIES COMMISSION


Erik Anthony Christiansen


Tim Bangerter


Brent Baker


David Russon

NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

Agency review of this order may be obtained by filing a request for agency review with the Executive Director of the Department of Commerce, 160 East 300 South, Box 146701, Salt Lake City, Utah 84114-6701, within thirty (30) days after the date of this order. The agency action in this case was a formal proceeding. The laws and rules governing agency review of this proceeding are found in Section 63G-4-101 et seq. of the Utah Code, and Rule 151-4 of the Utah Administrative Code.

CERTIFICATE OF SERVICE

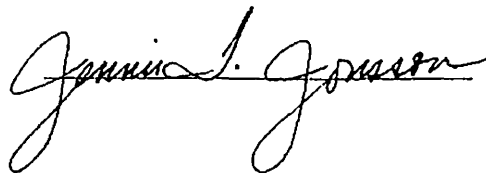
I hereby certify that on the 22nd day of May, 2014 the undersigned served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER by mailing a copy through first-class mail, postage prepaid, to:

Jack Phillips
c/o Mark Pugsley, Maria E. Heckel
Counsel for Jack Phillips
36 South State Street, Suite 1400
Salt Lake City, UT 84111

and caused a copy to be hand delivered to:

Paul Amann, Assistant Attorney General
Office of the Attorney General of Utah
Fifth Floor, Heber M. Wells Building
Salt Lake City, Utah

Keith Woodwell, Utah Division of Securities
Special Assistant Attorney General
Second Floor, Heber M. Wells Building
Salt Lake City, Utah



ADDENDUM “D”

JAN 12 2015

NEBEKER

DOCKET
CONTROLBEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAHIN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

Jack Phillips,

PETITIONER

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
and
ORDER ON REVIEW

Case No. SD-12-0001

INTRODUCTION

Jack Phillips ("Petitioner") brings this request for agency review before the Executive Director of the Department of Commerce ("Department") following a decision entered against him by the Utah Securities Commission (hereafter "Commission") on May 23, 2014.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Utah Code Annotated, Section 63G-4-301, and Utah Administrative Code, R151-4-901 *et seq.*

ISSUES REVIEWED

1. Whether Petitioner has failed to properly challenge the Commission's Findings of Fact.
2. Whether Petitioner has failed to establish that the Commission improperly interpreted or applied the law.
3. Whether Petitioner failed to establish that the fines assessed were a violation of the Eighth Amendment.

4. Whether a remand for more detailed findings and conclusions is appropriate solely on the Commission's application of Utah Admin. Code Section R164-31-1(B).

FINDINGS OF FACT

1. Petitioner is a resident of Oregon who has never been licensed to sell securities in Utah.

2. On January 3, 2012, the Utah Division of Securities ("Division") issued a Notice of Agency Action and Order to Show Cause dated December 29, 2011. The Order to Show Cause also named James Elliott as a respondent. The Division alleged that Petitioner and Elliott sold two investment opportunities to Utah citizens (the Persches and Reutlingers) in violation of the Utah Uniform Securities Act:¹ (1) a multi-level marketing opportunity called GIT, and (2) a deal involving the purchase of emeralds.

3. Elliott did not participate in the proceedings and the Division issued an Order of Default against him.

4. On March 27, 2014, the parties entered into a Stipulation on Undisputed Facts.

5. A hearing was held before the Commission on March 27, 2014 and April 21, 2014.

6. On May 23, 2014, the Commission's Findings of Fact, Conclusions of Law and Order ("Order") was entered permanently barring Petitioner from associating with any broker-dealer or investment advisor licensed in Utah, acting as an agent for any issuer or solicitor of investor funds in Utah, and being licensed in any capacity in the securities industry in Utah. The Commission also assessed a civil penalty of \$413,750.00

¹Hereafter, "Securities Act."

(\$315,000.00 of which was for investor losses; \$78,750.00 as a fine for violations of the Securities Act; and \$25,000.00 for investigative costs). The Commission concluded that the GIT investment and the emerald deal were investment contracts and therefore securities, and that Petitioner violated the Securities Act in providing false material information or omitting material information about the securities to investor.

7. Petitioner filed a timely request for agency review on June 9, 2014. The parties have since filed their memoranda.

CONCLUSIONS OF LAW

1. The standards for agency review within the Department of Commerce correspond to those established by the Utah Administrative Procedures Act, Utah Code Annotated Section 63G-4-403(4). Utah Admin. Code R151-4-905.

2. On agency review, Petitioner asks that the Order be reversed on the following grounds: (1) that the Commission exceeded its statutory authority in assessing the civil penalty against Petitioner, (2) the assessed fine is excessive and violates the Eighth Amendment of the US Constitution, (3) the Commission wrongly shifted the *burden of proof to Petitioner to prove investor loss*, (4) *the statute of limitations* prevented action taken against Petitioner, (5) it was error to impose a duty of diligence on Petitioner to investigate investments offered by others before recommending them to potential investors, and (6) Petitioner was not the maker of statements about investment opportunities.

A. The Commission's Findings of Fact Accepted as Conclusive

3. The Division asks the Executive Director to strike or disregard the Statement of Facts section in Petitioner's Memorandum in Support of Request for Agency Review. The Division points out that Petitioner's Statement of Facts is largely argument and often refers to what findings and conclusions are not found in the Commission's Order.

4. To successfully challenge a finding of fact, a party requesting agency review must show that the finding is not supported by substantial evidence when viewed in light of the whole record. Subsection 63G-4-403(4)(g). The burden remains upon the party challenging the facts to marshal all of the evidence in support of the decision and to show that despite such evidence, the decision is not supported by substantial evidence. Subsection R151-4-902(3)(a). "An appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Sweet v. Sweet*, 2006 UT App 216, ¶ 6, 138 P.3d 63. Moreover, a petitioner fails to satisfy his obligation to marshal the evidence in persistently arguing his own position without regard for the evidence supporting the Division's findings. *Heineke v. Dept of Commerce*, 810 P.2d 459, 464 (Utah Ct. App. 1991). The failure to marshal the evidence permits the Executive Director to accept findings of fact made by the Commission as conclusive. Subsection R151-4-902(3)(c); *Campbell v. Box Elder County*, 962 P.2d 806, 808 (Utah Ct. App. 1998).

5. Petitioner's Statement of Facts is indeed unusual as noted by the Division; it also appears to confuse findings of fact with conclusions of law. In response to the Division's request that the Statement of Facts be stricken, Petitioner states that he "accepts as true the findings of fact with the exception of paragraph 17," which Petitioner

believes he properly marshaled. Reply Memorandum, pp. 2-3. However, Petitioner has not met the marshaling requirement with regards to Paragraph 17 of the Commission's Findings of Fact, which states:

In soliciting the Persches and Reutlingers to invest in the emerald deal, [Petitioner] omitted to explain or disclose the following:

- a. The fact that [Petitioner] 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 [Petitioner] was licensed to sell securities or exempt from licensure.

Thus, Paragraph 17 refers to information that Petitioner failed to disclose. Petitioner apparently does not dispute that he did not disclose the information listed in Paragraph 17. Rather, Petitioner's Statement of Facts attempts to marshal the evidence in support of a conclusion that knowledge of Petitioner's criminal conviction would have been material and relevant to a decision to invest, which was not the substance of the finding in Paragraph 17.

6. Because Petitioner failed to meet the marshaling requirement in Subsection R151-4-902(3)(a) in challenging Paragraph 17, and because he states that he challenges no other finding of fact in the Order, the Executive Director accepts the Commission's Findings of Fact as conclusive. Subsection R151-4-902(3)(c); *Campbell*, at 808. It is therefore unnecessary to strike Petitioner's Statement of Facts.

B. Failure to Establish Improper Application or Interpretation of Law

7. Petitioner raises various arguments relating to the application and interpretation of the Utah Securities Act: that the statute limits fines for violations to \$10,000.00, that the Division is required to file a civil action to enforce the Commission's orders, that the Commission does not have statutory authority to make an award of restitution, and that part of the action in this case was barred by a five-year statute of limitations.

8. Under the Utah Securities Act, it is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

[M]ake an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

Utah Code Ann. §61-1-1(2). Section 61-1-20 authorizes the Division and the Commission to take an administrative or civil action for violations of the Securities Act as follows:

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:

- (1)(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) 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 the hearing, the commission may issue an order to cease and desist from engaging in any 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).

(2)(a) 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.

(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.
- (c) the court may not require the division to post a bond in an action brought under this subsection (2)

(3) An order issued under Subsection (1) shall be accompanied by written findings of fact and conclusions of law.

(4) When determining the severity of a sanction to be imposed under this section, the commission or court shall consider whether:

- (a) the person against whom the sanction is to be imposed exercised undue influence; or
- (b) the person against whom the sanction is imposed under this section knows or should know that an investor in the investment that is the grounds for the sanction is a vulnerable adult.

Section 61-1-20 (emphasis added). Willful violations of the Securities Act may also result in criminal action against the perpetrators. Section 61-1-21. In a criminal matter, in addition to ordering the individual to serve time in jail, the court may impose the penalties in Subsection 61-1-20(2)(b).²

² Where the person violating the Securities Act is a license applicant or a licensee, the Division may deny the application or the Commission may take action against the licensee for violations of the Securities Act

9. Statutory interpretation is a question of law reviewed by the Executive Director under a correctness standard. *ABCO Enters. v. Utah State Tax Comm'n*, 2009 UT 36, ¶ 7, 211 P.3d 382. "In interpreting a statute, we look to its plain language, unless it is ambiguous." *State v. Johnson*, 224 P.3d 720, ¶29, 2009 UT App 382. Where a statutory ambiguity exists, securities laws are given broad and liberal construction to give effect to the legislative purpose of preventing fraud. *Id.* (citations omitted). "Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy consideration." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶31, 2010 UT 45, citing *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994).

10. Petitioner raises various public policy considerations which need not be considered, because the plain meaning of the applicable statutes is clear. First, the Division's administrative action against Petitioner for the GIT investment opportunity is not barred by a statute of limitations. Petitioner claims that the five-year statute of limitations in Subsection 61-1-21.1 applies to administrative actions as well as civil and criminal actions. Subsection 61-1-21.1 provides that "[n]o indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation." In her Recommended Order on Respondent's Motion for Summary Judgment issued on March 24, 2014, the Administrative Law Judge ("ALJ") ruled on this issue and made a recommendation to the Commission that Subsection 61-1-21.1 did not limit the Division's administrative actions to five years. The Commission adopted the ALJ's recommendation.

pursuant to Section 61-1-6. Since Petitioner is not a licensee or an applicant for a license, Section 61-1-6 is not relevant to the analysis in this case.

11. The plain language of Subsection 61-1-21.1 imposes a five-year statute of limitations on civil and criminal actions. The ALJ and the Commission correctly interpreted this provision as inapplicable to administrative actions by the Division. The instant matter is not a lawsuit in a court of law or a criminal action. "In the absence of specific legislative authority, civil statutes of limitation are inapplicable to administrative disciplinary proceedings." *Rogers v. Div. of Real Estate of Dep't of Business Regulations*, 790 P.2d 102, 105 (Utah 1990). Had the Utah Legislature intended to establish a statute of limitations for administrative actions under the Securities Act, it would have so stated its intention in the Act. *Bourgeois v. Utah Dep't of Commerce*, 2002 UT App 5, ¶21, 41 P.3d 461.

12. Section 61-1-20 sets forth two options for the Division in taking action against an individual who has violated the Securities Act. The Division may take an administrative action against the individual by issuing an order to show cause and holding a hearing. Subsection 61-1-20(1)(a) – (d). After the hearing, the Commission may issue a cease and desist order, impose a fine, and bar or suspend the person from associating with a licensed broker-dealer or investment adviser in this state. Subsection 61-1-20(1)(e) – (g). The statute does not establish a fine limitation or cap as to administrative proceedings initiated under Subsection 61-1-20(1). In this case, the Division initiated an administrative action under Subsection 61-1-20(1) by issuing its Order to Show Cause.

13. Petitioner claims that he should not be liable under the Securities Act, because he was not the maker of any statements that were in violation of Section 61-1-1. Under Section 61-1-1(2), it is unlawful for any person to make an untrue statement of a

material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The Commission found that Petitioner made representations and failed to notify the Reutlingers and Persches of various pieces of information that a reasonable person would find material to a decision to invest.³ Commission Order, ¶¶ 8, 9, 16, 17. Petitioner relies on the *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). However, *Janus* interpreted federal securities laws, rather than the Utah Securities Act at issue in this case. Here, Subsection 61-1-1(2) applies to “any person” who makes an untrue statement or makes a material omission and does not distinguish the creator of a false statement from a person who repeats or passes along the information. Moreover, as the Commission noted, Petitioner personally sought out investors and made verbal representations and promises to them, including describing the emerald deal as “his deal”.

14. The analysis of Subsection 61-1-1(2) in *State v. Johnson*, is applicable and persuasive. Johnson was an attorney who sat in the room with a man named Schwenke who spoke to potential investors about an investment opportunity. During the meeting, Schwenke introduced Johnson as a “high powered lawyer” and a “security expert from New York,” and neither Schwenke nor the appellant notified the potential investors that appellant was the subject of disciplinary proceedings by the Utah State Bar for misappropriating client funds. 224 P.3d 720, ¶2. After the district court convicted Johnson for securities fraud, Johnson appealed to the Court of Appeals. One of his

³ *Gohler v. Wood*, 919 P.2d 561 (Utah 1996), held that Section 61-1-1(2) does not contain a subjective reliance element, that it was not necessary to establish that the individual investors relied upon the statements made, so long as a reasonable person in similar circumstances would have relied upon the statements in making the investment. *Johnson*, at ¶44. Also, evidence of actual reliance is appropriate. *Id.*

arguments on appeal was that Subsection 61-1-1(2) requires that the person who omits a material fact also be the person who made the predicate statement. The Court held that Schwenke's statements regarding Johnson's background were designed to create confidence in the transaction and gave the potential investors a false sense of security. *Id.*, ¶43. The Court further stated, "the jury could have reasonably found that predicate statements were made and that Johnson omitted to state a material fact necessary to make those statements not misleading." *Id.* According to the Court, Johnson's view would inject language not found in the statute and would allow a person to evade criminal liability by remaining silent while others make gross misstatements about the person's background, skills, experience, or other qualities. *Id.*, at ¶42, footnote 16. Under the *State v. Johnson* analysis, the Commission's conclusion that Petitioner was responsible for violations of the Securities Act was proper. Because it is concluded that the *Janus Capital* analysis is inapplicable in this case, it is not necessary to address Petitioner's argument that the Commission wrongfully imposed upon him a duty of due diligence.

15. Petitioner relies on Subsection 61-1-20(2), the option of filing a civil action, in arguing that the Commission's fine authority is limited to \$10,000.00. Under Subsection 61-1-20(2), the district court has the authority to issue an injunction, a restraining order or writ of mandamus; the court may also order restitution and impose a fine of not more than \$10,000 for each violation of the Securities Act. Subsection 61-1-20(2)(b). Petitioner would like the fine limitation in this Subsection to be applied to

administrative actions,⁴ but interpreting the statute that way would be to ignore the plain meaning of the Act, which does not include the same limitation for administrative actions under Subsection 61-1-20(1). The Securities Act plainly treats the two types of actions, administrative and civil, as separate matters with separate remedies. Moreover, the Utah Supreme Court has held that administrative matters are unique statutory proceedings and not civil actions. *Rogers v. Div. of Real Estate of Dep't of Business Regulations*, 790 P.2d 102, 105 (Utah 1990). Had the Utah Legislature intended to set limitations on fines resulting from administrative actions, it would have so stated in Subsection 61-1-20(1). With respect to criminal proceedings for willful violations of Securities Act, for example, the Legislature specifically provided that the penalties included those provided in Subsection 61-1-20(2)(b), with the fine limit of \$10,000.00 for each violation, while the Commission's authority to impose fines against respondents in a disciplinary action contains no limiting language in Subsection 61-1-6(1)(a)(iv).

16. Petitioner relies on *State v. Bushman*, 231 P.3d 833, 2010 UT App 120, arguing that the Utah Court of Appeals held that Subsection 61-1-20(1) limits the fines in administrative proceedings to \$10,000.00. In that case, an individual who had agreed to a consent order with the Division argued that criminal action taken against him would violate his constitutional rights against double jeopardy. The Court held that the criminal action did not violate double jeopardy principles, stating that fines assessed in an administrative proceeding were a civil penalty and intended for remedial purposes rather than for punishment, which is reserved for criminal actions. *Bushman*, ¶¶ 10-20. The

⁴ Interestingly, Petitioner wants to treat Subsections 61-1-20(1) and (2) the same when it comes to a limit of \$10,000.00 for each violation of the Securities Act, but then argues that they are different as to restitution – he cannot have it both ways.

Court also held that the Security Act's fine authority was not excessive in relation to its beneficial and remedial purpose. *Id.*, ¶21. In a subsequent footnote, the Court stated:

We note that the fines that the Division could impose and judicially enforce were limited to \$500 for each violation of the Act at the time of the entry of the Consent Order, *see Utah Code Ann. §61-1-20(2)(b)(vii)* (2006), and are now limited to \$10,000 per violation, *see id. §61-1-20(2)(b)(viii)* (Supp. 2009). We express no opinion as to whether a fine that is grossly disproportionate to the gravity of the underlying securities violation might give rise to some sort of as-applied double jeopardy challenge in the appropriate case; this case, however, does not present such circumstances.

Id., footnote 4. Petitioner relies on this footnote 4. It is important to note, however, that in *Bushman*, the Court considered the double jeopardy clause issue and the differences between criminal and administrative actions; the Court did not squarely address the differences between administrative and civil actions. Thus, the Court's footnote did not focus on the fine limits in an administrative action as opposed to fine limits in a civil action. If that was squarely at issue, the Court would certainly have noted the plain language of Sections 61-1-20(1) and (2), with a limit of \$10,000.00 provided only in civil actions. Finally, even if it were held that the Commission's authority to issue fines for violations of the Securities Act is limited to \$10,000.00 per violation, the Commission's Order with its fine of \$78,750.00 for four violations of the Act would meet such a limit. *See* Commission Order, p. 13. Petitioner clearly challenges the \$315,000.00 fine assessed for investor losses, which is addressed fully below.

17. Contrary to Petitioner's arguments, the Securities Act does not require the Division to first obtain an administrative order from the Commission under Subsection 61-1-20(1) and then file a civil action under Subsection 61-1-20(2) to enforce the Commission's order. The plain language in Section 61-1-20 does not make the

administrative action dependent on a follow up civil action. This is clear from the use of "may" rather than "shall" in both Subsection 61-1-20(1) and (2). "According to its ordinary construction, the term 'may' means permissive, and it should receive that interpretation unless such a construction would be obviously repugnant to the intention of the Legislature or would lead to some other inconvenience or absurdity." *M.C. v. K.H.C. (state Ex Rel M.C.)*, 940 P.2d 1229, 1235 (Utah Ct. App. 1997), citations omitted. The term "shall," is usually presumed mandatory. *Board of Educ. v. Salt Lake County*, 659 P.2d 1030, 1035 (Utah 1983). See also *Herr v. Salt Lake County*, 525 P.2d 728, 729 (Utah 1974) ("The meaning of the word shall is ordinarily that of command.").

18. As the Division has pointed out, if we interpreted Section 61-1-20 to require the Division to file a civil action each time an order in an administrative action was issued, there would be no reason to file any administrative actions before the Commission and Subsection 61-1-20(1) would be superfluous. It is our duty to avoid interpreting a statute in a manner that renders portions of the statute meaningless. *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div.*, 139 P.3d 296, ¶11, 2006 UT App 261; *Lyon v. Burton*, 5 P.3d 616, ¶19, 2000 UT 19. Any reliance on Subsection 63G-4-501(1)(a) is misplaced. That Subsection provides, "[i]n addition to other remedies provided in law, an agency may seek enforcement of any order by seeking civil enforcement in the district court." That Subsection also uses a permissive "may," and does not make it mandatory for an agency to immediately file a civil action to enforce its orders. Rather, Subsection 63G-4-501(1) provides the agency a remedy when a violator fails to comply with an administrative order of the agency.

19. Petitioner next claims that the Commission violated its statutory authority in assessing a \$315,000.00 fine for investor losses, stating that the fine in fact constitutes restitution, which the Commission does not have the authority to assess under Subsection 61-1-20(1). However, the Legislature gave the Commission the authority in Section 61-1-20(1)(f) to impose a fine, and as stated previously, there is no limit set by the Legislature for such fines in an administrative action. The Legislature also gave the Division the authority, with the concurrence of the Commission, to adopt rules to carry out the provisions of the Securities Act. Section 61-1-24(1)(a).

20. Pursuant to a rule adopted by the Division, the Commission may consider various factors in determining the amount of fines against violators of the Securities Act. Utah Admin. Code Section R164-31-1, "Guidelines for Assessment of Administrative Fines," provides:

- (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 in investigating and prosecuting the action; and
 - (h) such other matters as justice may require.

R164-31-1(B) (emphasis added). Therefore, the \$315,000.00 fine was not for restitution, but was assessed pursuant to authority granted to the Commission as part of its administrative action against someone who violated the Securities Act. Petitioner's reliance on a newspaper article supposedly quoting the Division Director is misplaced. The Division Director's reference in that article was to a whistle blower provision in the Securities Act, which allows the Commission to make an award from the Securities Investigations, Education, Licensing, and Enforcement Fund to a person who reports a violation of the Act. Section 61-1-106.

21. Petitioner argues that the Division failed to carry out its burden of proof as to losses suffered by the Persches, claiming that the Division has a duty to establish the value of the stones now in possession of the Persches for a potential offset or reduction in Petitioner's fine. Pursuant to Utah Admin. Code R151-4-709(1), the Division has the burden of proof to establish a violation of the Securities Act pursuant to its Order to Show Cause. The Division met that burden. Nothing in the applicable laws or rules requires the Division to prove any offset to the fines properly assessed by the Commission pursuant to statute. The Division and the Commission are not assessing actual damages like in a civil case and need not engage in the analysis of actual value of the stones. Given that the Division met the burden of proof to establish Petitioner's violations of the Securities Act, it was not unreasonable for the Commission to require Petitioner to establish the value of the stones. Had Petitioner presented evidence of the actual value of the stones, the Commission would have offset the fines assessed. The

Commission Order stated that while a potential offset could be appropriate, Petitioner has the burden to establish the value of those stones. Commission Order, at 13.

22. The total civil penalty of \$413,750.00 does not violate the Eighth Amendment, which states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution, Amendment VIII. Petitioner relies on the case of *United States v. Bajakajian*, 524 U.S. 321 (1998). Mr. Bajakajian attempted to transfer \$357,144.00 in cash out of the country and he failed to disclose those funds in violation of law. *Bajakajian*, at 334. The question was whether it violated the Eighth Amendment to require him to forfeit the entire amount. The U.S. Supreme Court concluded that forfeiture of the entire amount would violate the Eighth Amendment, stating the principles that the amount of the forfeiture must bear some relationship to the gravity of the offense and judgments about the appropriate punishment for an offense belong in the first instance with the legislature. *Id.*, at 334, 336.

23. The Utah Supreme Court used that *Bajakajian* analysis in *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div.* The Court held that a fine violates the Eighth Amendment only if it is "grossly disproportional to the gravity of a defendant's offense." *Brown*, 139 P.3d 296, at ¶16. The Court also stressed that the fine assessed should be compared to the maximum that could have been levied, and that the extent of the unlawful activity and amount of illegal gain should be considered in relation to the penalty and the harm caused. The Court upheld the fine of \$135,000.00 assessed by the Utah Division of Vehicle Enforcement against Brent Brown Dealerships for

selling vehicles through unlicensed sales people as not grossly disproportional to the repeated licensing violations over a period of time. *Id.*, at ¶ 20.

24. Now applying the analysis in *Brown* and *Bajakajian*, the Executive Director concludes that the \$413,750.00 fine assessed against Petitioner is not grossly disproportionate to the gravity of Petitioner's conduct and violation of law. The Utah Legislature gave the Commission the authority to take administrative action against those who violate the Securities Act and to assess fines for such violations. The Legislature did not establish a maximum fine that the Commission may impose. Petitioner's conduct in presenting the investment opportunities to the Persches and the Reutlingers in violation of Subsection 61-1-1(2) was deserving of the \$413,750.00 fine in light of the four violations of the Securities Act involving multiple investors, the investigation costs incurred by the Division, and the victims' loss of more than \$315,000.00 in amounts invested. As the Division has pointed out, *Bajakajian* and *Brown* are distinguishable. There were no victims with losses of \$315,000.00 in those cases. In *Brown*, those who purchased cars from unlicensed dealers received the value of their investment when they received their vehicles, while in *Bajakajian*, there were no victims. In addition, there was only one violation of law in *Bajakajian*.

25. Petitioner has also failed to establish that the civil penalty of \$413,750.00 was clearly unreasonable. In *Johnson-Bowles v. Division of Sec.*, 829 P.2d 101, 114 (Utah App.), cert. denied, 843 P.2d 516 (Utah 1992), the Utah Court of Appeals examined Utah Code Ann. § 61-1-6(1) and found that the Legislature granted the agency express or, at the least, implicit discretion to penalize the licenses of securities brokers for violations of the Securities Act. Due to the broad discretionary powers of the agency to

impose sanctions, the Court held that it would "not disturb the agency's decision unless it is clearly unreasonable or otherwise an abuse of that discretion." *Johnson-Bowles*, 829 P.2d at 116, *citing* Utah Code Ann. § 63-46b-16(4)(h)(i)(1989), predecessor to Subsection 63G-4-403(4)(h)(i). Accordingly, the Executive Director will not disturb the civil penalty assessed by the Commission, because as discussed in paragraph 22 above, Petitioner has failed to establish that the fine is clearly unreasonable. *Johnson-Bowles*, 829 P.2d at 116.

26. Petitioner claims that the Commission failed to consider the factors in Utah Admin. Code Subsection R164-31-1(1). Subsection R164-31-1(1) sets forth numerous factors that the Commission "shall" consider in "determining the amount of an administrative fine assessed against a person under the Utah Uniform Securities Act." A review of the Commission Order indicates that the Commission acknowledges its authority to consider investor losses, which is authority given in Subsection R164-31-1(1)(b), but the Order does not reference the rule, nor does the Order address or discuss the other factors in Subsection R164-31-1(1). An agency's findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was raised. *Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991); *Utahns for Better Dental Health-Davis, Inc. v. Davis County Comm'n*, 2005 UT App. 347, ¶ 17, 121 P.3d 39. Where a Division order fails to reveal a logical analysis of the applicable law and the facts, the appropriate remedy is a remand to the Division for further proceedings. *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1049 (Utah Ct. App. 1992); *Adams*, at p. 8.

27. Because the Commission Order does not include a discussion and analysis of the factors in Subsection R164-31-1(1) that it found relevant in assessing the total fine against Petitioner, this matter is remanded to the Commission solely for a more detailed Order that discusses the Commission's thought process and analysis with respect to the Subsection R164-31-1(1) factors.

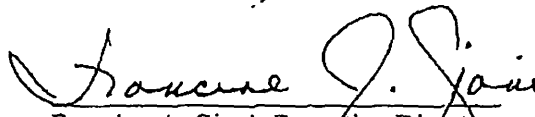
ORDER ON REVIEW

The Commission's Order is affirmed as follows. The Findings of Fact are adopted as conclusive. Petitioner has failed to establish that the Commission's interpretation or application of law was in error. The fines assessed against Petitioner do not violate the Eighth Amendment. However, a remand is appropriate for the limited purpose of obtaining a more detailed Order that discusses the Commission's thought process and analysis with respect to the Subsection R164-31-1(1) factors.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63G-4-401 and 63G-4-403, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63G-4-302.

Dated this 9th of January, 2015.


Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

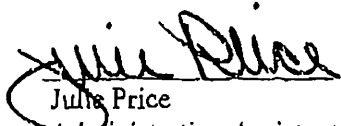
I certify that on the 9th day of January, 2015, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order on Review by first class and certified mail to:

MARK W PUGSLEY ESQ
MARIA E HECKEL
RAY QUINNEY & NEBEKER PC
36 SOUTH STATE STREET 14TH FL
SALT LAKE CITY UT 84145-0385

and caused a copy to be electronically mailed to:

Keith Woodwell, Director (kwoodwell@utah.gov)
Division of Securities
160 East 300 South
Salt Lake City, UT 84111

Tom Melton, Assistant Attorney General (tmelton@utah.gov)
Office of the Attorney General
Box 140872
Salt Lake City, UT 84114-0872


Julie Price
Administrative Assistant

ADDENDUM “E”

DIVISION OF SECURITIES
KEITH WOODWELL, DIRECTOR
DEPARTMENT OF COMMERCE
P.O. BOX 146741
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6711
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BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:

JACK PHILLIPS,
RESPONDENT

AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

CASE NO. SD-12-0001

BY THE UTAH SECURITIES COMMISSION:

Pursuant to the January 9, 2015 Order issued on agency review by the Department of Commerce in this matter, the Utah Securities Commission supplements and amends, as follows, Paragraphs 18 and 19 in the Conclusions of Law section set forth in the May 23, 2014 Order issued in this matter following hearing.

18. In assessing a fine, the Commission is charged under Utah Administrative Code § R164-

31-1(b)(1) to 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 incurred by the Division in investigating and prosecuting the action; and
- h. such other matters as justice may require.

In this case, Respondent developed very personal, trusting relationships with the Persches and Reutlingers over time. On the basis of these relationships of trust and confidence, and through repeated and persistent solicitation, Respondent convinced the Persches and Reutlingers that he was favoring them with an exclusive opportunity not otherwise available. This predatory behavior in taking advantage of persons with whom he had a close, personal relationship constitutes affinity fraud by Respondent, which is a particularly serious and repellent form of deceit and must be severely sanctioned in order for the sanction to act as a deterrent. In addition, Respondent has not cooperated with the Division, either to locate James or in any other manner. In these circumstances, the total investor losses of \$315,000 directly caused by Respondent's actions are appropriately included in the total fine amount, as are the Division's claimed investigative costs of \$25,000.

In accordance with precedent, the Commission also finds it appropriate to assess, as a penalty for violations of the chapter, a fine calculated at 25% of the total investor losses.⁴

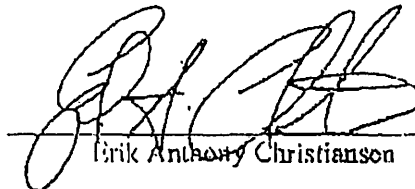
19. Respondent argues that the emeralds currently in the possession of the Persches have some unspecified value and that, therefore, any fine is subject to an offset. While an offset potentially might be appropriate, neither the Division nor the Commission has the burden to investigate and calculate a potential offset, if any. The investors did not enter into the emerald deal in order to obtain emeralds. Their objective was to realize a financial profit from an investment. If Respondent believes that the investors have been made whole other than through a financial return, Respondent has the burden to prove his position, including the value of the emeralds to a reasonable certainty, with competent and admissible evidence. Here, Respondent has speculated to that end, but has failed to provide admissible, credible evidence sufficient to establish any factual basis for offsetting the fine requested by the Division. Respondent merely speculates about potential value, but does not prove the value, if any, of the alleged emeralds.

This amended order shall be effective on the latest of the signature dates below.

⁴ There is no evidence in the record that Respondent received any meaningful financial benefit, enrichment, commission, fee or other consideration from the transactions involving the Persches and the Reutlingers. Nor is there evidence that Respondent has a history of previous violations. If such evidence were available, the circumstances might constitute additional aggravating factors justifying an additional penalty. Without such evidence, the Commission finds it appropriate to assess Respondent's fine according to established precedent for a first offense where the respondent received little to no financial benefit from the transactions at issue.

DATED this 4th day of February, 2015.

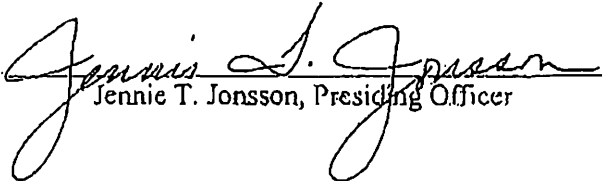
UTAH SECURITIES COMMISSION


Erik Anthony Christianson



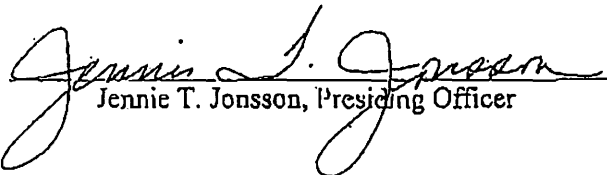
DATED this 4th day of February, 2015.

Signed by the Presiding Officer pursuant to a grant of authority from Commissioner Tim Bangerter and on Mr. Bangerter's behalf.


Jennie T. Jonsson, Presiding Officer

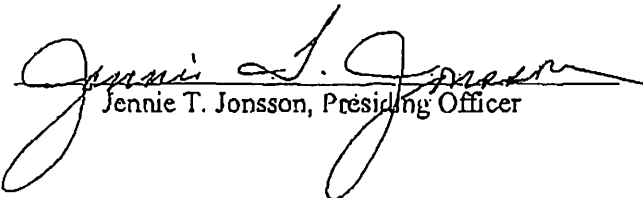
DATED this 4th day of February, 2015.

Signed by the Presiding Officer pursuant to a grant of authority from Commissioner Brent Baker and on Mr. Baker's behalf.


Jennie T. Jonsson, Presiding Officer

DATED this 4th day of February, 2015.

Signed by the Presiding Officer pursuant to a grant of authority from Commissioner David Russon and on Mr. Russon's behalf.


Jennie T. Jonsson, Presiding Officer

NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

Agency review of this order may be obtained by filing a request for agency review with the Executive Director of the Department of Commerce, 160 East 300 South, Box 146701, Salt Lake City, Utah 84114-6701, within thirty (30) days after the date of this order. The agency action in this case was a formal proceeding. The laws and rules governing agency review of this proceeding are found in Section 63G-4-101 et seq. of the Utah Code, and Rule 151-4 of the Utah Administrative Code.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of July, 2015 the undersigned served a true and correct copy of the foregoing AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER by mailing a copy through first-class mail, postage prepaid, to:

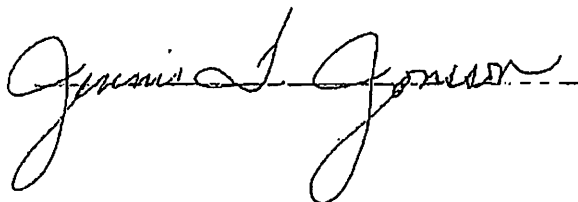
JACK PHILLIPS
C/O MARK PUGSLEY, MARIA E HECKEL
36 S STATE ST STE 1400
SALT LAKE CITY UT 84111

and caused a copy to be hand delivered to:

Thomas Melton, Assistant Attorney General
Office of the Attorney General of Utah
Fifth Floor, Heber M. Wells Building
Salt Lake City, Utah

Keith Woodwell, Utah Division of Securities
Special Assistant Attorney General
Second Floor, Heber M. Wells Building
Salt Lake City, Utah

Francine A. Giani, Executive Director
c/o Masuda Medcalf, Administrative Law Judge
Utah Department of Commerce
Second Floor, Heber M. Wells Building
Salt Lake City, Utah



ADDENDUM “F”

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

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

Jack Phillips,

PETITIONER

**SECOND FINDINGS OF FACT,
CONCLUSIONS OF LAW,
and
ORDER ON REVIEW**

Case No. SD-12-0001

INTRODUCTION

Jack Phillips ("Petitioner") brings this request for agency review before the Executive Director of the Department of Commerce ("Department") following the Amended Findings of Fact, Conclusions of Law and Order ("Amended Order") issued by the Utah Securities Commission ("Commission") on February 4, 2015.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Commission's decision is conducted pursuant to Utah Code Annotated, Section 63G-4-301, and Utah Administrative Code, R151-4-901 *et seq.*

ISSUES REVIEWED

Whether Petitioner has failed to establish any error in the Commission's Amended Order.

FINDINGS OF FACT

i. Petitioner is a resident of Oregon who has never been licensed to sell securities in Utah.

2. On May 23, 2014, the Commission's Findings of Fact, Conclusions of Law and Order ("Order") were entered. The Order permanently barred Petitioner from associating with any broker-dealer or investment advisor licensed in Utah, acting as an agent for any issuer or solicitor of investor funds in Utah, and being licensed in any capacity in the securities industry in Utah. The Commission also assessed a civil penalty of \$413,750.00 (\$315,000.00 of which was for investor losses; \$78,750.00 as a fine for violations of the Securities Act; and \$25,000.00 for investigative costs). The Commission concluded that Petitioner sold securities without a license in violation of the Utah Uniform Securities Act by selling a multi-level marketing opportunity and also selling an investment opportunity involving the purchase of emeralds. The Commission held that Petitioner further violated the Securities Act in providing false material information or omitting material information about the securities to investors.

3. Petitioner filed a request for agency review on June 9, 2014. On January 9, 2015, the Executive Director issued her Findings of Fact, Conclusions of Law and Order on Review ("Order on Review") affirming the Commission's Order. The Executive Director's Order on Review adopted the Commission's Findings of Fact as conclusive and held that the Commission had not erroneously interpreted or applied the law. Order on Review, pp. 4-14. The Executive Director also upheld the fines assessed by the Commission, concluding that the fines were within the scope of the Commission's statutory authority; that they were not grossly disproportionate to the gravity of Petitioner's conduct and violation of law, and thus, did not violate the Eighth Amendment; and that Petitioner had not established that the fine amount was clearly unreasonable. *Id.*, pp. 15-19.

4. The Order on Review rejected Petitioner's argument that the Division had the burden of proof as to losses suffered by the investors, Mr. and Mrs. Persch, and that the Division has a duty to establish the value of the emeralds now in the possession of the Persches for a potential offset or reduction in the fine assessed against Petitioner. The Order on Review stated:

¶21. Pursuant to Utah Admin. Code R151-4-709(1), the Division has the burden of proof to establish a violation of the Securities Act pursuant to its Order to Show Cause. The Division met that burden. Nothing in the applicable laws or rules requires the Division to prove any offset for the fines properly assessed by the Commission pursuant to statute. The Division and the Commission are not assessing actual damages like in a civil case and need not engage in the analysis of actual value of the stones. Given that the Division met the burden of proof to establish Petitioner's violations of the Securities Act, it was not unreasonable for the Commission to require Petitioner to establish the value of the stones. Had Petitioner presented evidence of the actual value of the stones, the Commission would have offset the fines assessed. The Commission Order stated that while a potential offset could be appropriate Petitioner has the burden to establish the value of those stones. Commission Order, at 13.

5. Finally, in discussing Petitioner's claims that the Commission failed to consider the factors in Utah Admin. Code Section R164-31-1 in determining the amount of the fine, the Order on Review stated as follows:

¶26. . . Subsection R164-31-1(1) sets forth numerous factors that the Commission "shall" consider in "determining the amount of an administrative fine assessed against a person under the Utah Uniform Securities Act." A review of the Commission Order indicates that the Commission acknowledges its authority to consider investor losses, which is authority given in Subsection R164-31-1(1)(b),¹ but the Order does not reference the rule, nor does the Order address or discuss the other factors in Subsection R164-31-1(1). An agency's findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was raised. *Adams v. Board of Review of Indus. Comm'n*, 821 P.2d 1, 4 (Utah Ct. App. 1991), *Utahns for Better Dental Health-Davis, Inc. v. Davis County Comm'n*, 2005 UT

¹ There appear to be a few typographical errors in the Order on Review with respect to the Division rule; the correct citation is Subsection R164-31-1(B)(1).

App. 347, ¶17, 121 P.3d 39. Where a Division order fails to reveal a logical analysis of the applicable law and the facts, the appropriate remedy is a remand to the Division for further proceedings. *LaSal Oil Co. v. Department of Envtl. Quality*, 843 P.2d 1045, 1049 (Utah Ct. App. 1992); *Adams*, at 8.

¶27. Because the Commission Order does not include a discussion and analysis of the factors in Subsection R164-31-1(1) that it found relevant in assessing the total fine against Petitioner, this matter is remanded to the Commission solely for a more detailed Order that discusses the Commission's thought process and analysis with respect to Subsection R164-31-1(1) factors.

Order on Review, pp. 19-20.

6. The Order on Review notified Petitioner of his right to file a petition for judicial review with the Court of Appeals within 30 days of the Order on Review.

Petitioner did not file a petition for judicial review to challenge the Executive Director's decision which affirmed the Commission's Order (including the amount of the fines assessed and the holding that the Division did not have a duty to prove the value of the emeralds for any offset of the fines assessed) and remanded the matter only for a discussion of the Commission's analysis of the factors in Subsection R164-31-1(B)(1).

7. On February 4, 2015, the Commission issued its Amended Findings of Fact, Conclusions of Law, and Order ("Amended Order"). The Amended Order amended paragraphs 18 and 19 in the Conclusions of Law section of the original Order. The changes are tracked below:

¶18. In assessing a fine, the Commission is ~~authorized to consider the amount of investor losses. In this case, the Commission calculates that the Persehes and Reuthingers have lost a total of \$715,000. Respondent argues that the emeralds currently in the possession of the Persehes have some value and that, therefore, any fine is subject to an offset charged under Utah Administrative Code § R164-31-1(b)(1) to 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 incurred by the Division in investigating and prosecuting the action; and
- h. such other matters as justice may require.

In this case, Respondent developed very personal, trusting relationships with the Persches and Reutlingers over time. On the basis of these relationships of trust and confidence, and through repeated and persistent solicitation, Respondent convinced the Persches and Reutlingers that he was favoring them with an exclusive opportunity not otherwise available. This predatory behavior in taking advantage of persons with whom he had a close, personal relationship constitutes affinity fraud by Respondent, which is a particularly serious and repellent form of deceit and must be severely sanctioned in order for the sanction to act as a deterrent. In addition, Respondent has not cooperated with the Division, either to locate James or in any other manner. In these circumstances, the total investor losses of \$315,000 directly caused by Respondent's actions are appropriately included in the total fine amount, as are the Division's claimed investigative costs of \$25,000. In accordance with precedent, the Commission also finds it appropriate to assess, as a penalty for violations of the chapter, a fine calculated at 25% of the total investor losses.⁴

⁴ There is no evidence in the record that Respondent received any meaningful financial benefit, enrichment, commission, fee or other consideration from the transactions involving the Persches and the Reutlingers. Nor is there evidence that Respondent has a history of previous violations. If such evidence were available, the circumstances might constitute additional aggravating factors justifying an additional penalty. Without such evidence, the Commission finds it appropriate to assess Respondent's fine according to established precedent for a first offense where the respondent received little to no financial benefit from the transactions at issue.

¶19. Respondent argues that the emeralds currently in the possession of the Persches have some unspecified value and that, therefore, any fine is subject to an offset. While an offset potentially might be appropriate, neither the Division nor the Commission has the burden to investigate and calculate [it] a potential offset, if any. The investors did not enter into the emerald deal in order to obtain emeralds. Their objective was to realize a financial profit from an investment. If Respondent believes that the investors have been made whole other than through a financial [profit] return, [he] Respondent has the burden to prove his position, including the value of the emeralds to a reasonable certainty, with competent and admissible evidence. Here, Respondent has speculated to that end, but has failed to provide admissible, credible evidence sufficient to establish any factual basis for offsetting the fine requested by the Division. Respondent merely speculates about potential value, but does not prove the value, if any, of the alleged emeralds.

Amended Order, pp.

8. On March 6, 2014, Petitioner filed a request for agency review of the Amended Order. The parties have submitted their respective memoranda.

CONCLUSIONS OF LAW

1. The standards for agency review within the Department of Commerce correspond to those established by the Utah Administrative Procedures Act, Utah Code Annotated Section 63G-4-403(4). Utah Admin. Code R151-4-905. The Executive Director applies the correction-of-error standard when reviewing the Commission's interpretation of general questions of law, granting no deference to the Commission's decisions. *Associated Gen. Contr. v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶18, 38 P.3d 291. Therefore, whether the Commission correctly applied the instructions given in the Order on Review is reviewed for correctness.

2. Petitioner asks that the Amended Order be reversed. He argues that the Commission wrongfully assessed the \$413,750.00 fine against him without providing the necessary analysis of the factors supporting the fine under Subsection R164-31-1(B)(1),

and it is only now with the Commission's "*post hoc* rationalizations" and analysis in the Amended Order that the Executive Director can make an accurate determination regarding the reasonableness of the fine. Petitioner's Motion and Memorandum in Support of Agency Review ("Memorandum in Support"), pp. 2-3. Petitioner relies on case law including *State v. Hansen*, 857 P.2d 978, 982 n. 4 (Utah Ct. App. 1993) for the proposition that a remand for detailed findings of fact is not intended to be a mere "bolstering" of the trial court's previous decision. Memorandum in Support, pp. 3-4. Petitioner incorporates by reference the arguments made in his prior request for agency review filed on June 9, 2014. *Id.*

3. The Executive Director has already ruled on all the issues raised by Petitioner in the Order on Review issued on January 9, 2015. The Executive Director explicitly stated that the remand was for the very narrow purpose of articulating the Commission's thought process under Subsection R164-31-1(B)(1). If Petitioner believed that the Executive Director's ruling was improper under any legal theory, his remedy was to request reconsideration or seek judicial review. By remaining silent while the Commission acted on the Executive Director's specific instructions, Petitioner waived any objection he might have made as to those instructions.

4. Petitioner argues that the Amended Order improperly shifted the burden of proof to Petitioner regarding any potential offset of the fines assessed. *Id.*, p. 3. This issue was fully addressed in the Order on Review, and the matter was remanded to the Commission solely for a written discussion of the Subsection R164-31-1(B)(1) factors considered by the Commission. The Amended Order revised ¶18 in the Conclusions of Law by reorganizing the discussion of the value of the emeralds and any offset as to fines

assessed to a newly numbered ¶19 and adding the Commission's discussion of Subsection R164-31-1(B)(1) factors to ¶18. The newly numbered ¶19 has minor changes from the original Commission Order when discussing the value of the emeralds and an offset of the fine amount. As the Order on Review remanded the matter for the limited purpose of a discussion of Subsection R164-31-1(B)(1) factors, any alterations from the original Commission Order as to the value of the emeralds and an offset of the assessed fines, beyond organizing the discussion into the new ¶19, are hereby stricken. The Commission shall therefore issue a corrected Amended Order as indicated herein.

5. The Order on Review concluded that the fines assessed by the Commission were within the scope of the Commission's statutory authority, that they were not grossly disproportionate to the gravity of the offense so as to violate the Eighth Amendment, and that Petitioner had not proven that the total fine amount was clearly unreasonable in light of the Commission's statutory grant of discretion. Order on Review, pp. 15-19. The record was clear that the Commission considered Subsection R164-31-1(B)(1) in setting the amount of the fine. The parties brought the factors to the Commission's attention on several occasions at the hearing.³ The Commission Order stated that the Commission was authorized to consider investor losses,⁴ a factor provided for in Subsection R164-31-1(B)(1). In addition, in other parts of the Commission Order, other Subsection R164-31-1(B)(1) factors such as the nature, circumstances and seriousness of the violations were mentioned as were the costs of the investigation.⁵

³ For example, in closings arguments, counsel for both parties fully discussed the factors in Section R164-31-1(B)(1). Transcript, 424:24-25, 425:1-15; 448:13-25; 449:1-6.

⁴ Commission Order, ¶18.

⁵ Commission Order, pp. 2-13.

6. The Executive Director has reviewed numerous cases from the Commission and the Division; she has knowledge of the Commission's statutory authority and is aware of the precedent with respect to establishing fines for violations of the Utah Uniform Securities Act. The Executive Director was therefore able to conduct a meaningful review in light of the Commission's stated findings, its implied findings,⁶ and the Executive Director's own knowledge. *See* Utah Code Ann. §63G-4-206(1)(b)(iv) (providing that a presiding officer may take official notice of any facts within the agency's specialized knowledge). However, where the Utah Court of Appeals would not have the same knowledge of the agency's precedent, the Executive Director required the Commission to state rather than imply its analysis of the rule factors in order to facilitate judicial review.

7. The Executive Director does not consider the Amended Order, with its discussion of the factors in Subsection R164-31-1 to be impermissible bolstering, but simply an articulation of the Commission's decision. Therefore, the Amended Order is hereby affirmed with the modification indicated herein, removal of any changes from the original Commission Order in the newly numbered Conclusion of Law ¶19 regarding the value of the emeralds.

8. As a final matter, in conducting this second agency review, the Executive Director notes an error in Conclusion of Law paragraph 16, p. 13 of the original Order on Review. The second to the last sentence of that paragraph does not make mathematical

⁶ *See* Utah Code Ann. § 63G-4-403(4)(g) (providing that relief may be granted only if a petitioner has been prejudiced by agency action based upon a determination of fact, made or *implied* by the agency.) *See also*, *Adams v. Board of Review of Industrial Comm'n*, 821 P.2d 1, 5 (Utah Ct. App. 1991) (holding that findings may be implied).

sense:

Finally, even if it were held that the Commission's authority to issue fines for violations of the Securities Act is limited to \$10,000.00 per violation, the Commission's Order with its fine of \$78,750.00 for four violations of the Act would meet such a limit.

Order on Review, p. 13. This error needs to be noted should this matter be appealed.

However, where the quoted language is dicta, it does not affect or change the conclusion reached by the Executive Director in the first part of paragraph 16 that based on a statutory interpretation, the \$10,000.00 limit in Utah Code. Ann. §61-1-20(2) for civil actions does not apply to this administrative action by the Commission.

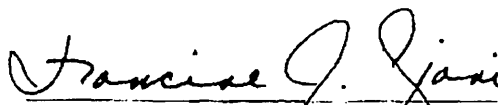
ORDER ON REVIEW

The Commission's Amended Order is affirmed with the modification that the text of the new ¶19 in the Conclusions of Law section revert to the exact language used in the original Commission Order when discussing the value of the emeralds.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63G-4-401 and 63G-4-403, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63G-4-302.

Dated this 5th of June, 2015.


Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

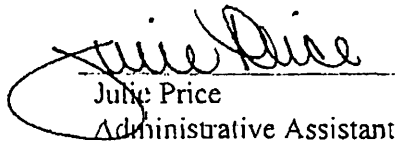
I certify that on the 5th day of June, 2015, the undersigned mailed a true and correct copy of the foregoing Second Findings of Fact, Conclusions of Law, and Order on Review by first class and certified mail to:

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