

2014

## State of Utah, Appellee, v. Lane D. Bird, Appellant.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Appellee,

v.

LANE D. BIRD,

Appellant.

Appellate Case No.: 20140434-CA

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BRIEF OF APPELLANT

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ON APPEAL TO THE UTAH COURT OF APPEALS  
FROM A JUDGMENT ENTERED BY  
THE FIFTH DISTRICT JUDICIAL COURT,  
IN AND FOR IRON COUNTY, STATE OF UTAH

**DEREK G. WILLIAMS (#14503)**

Attorney for Lane D. Bird, appellant

44 North Main Street, Suite A

Layton, UT 84041

Tel: (801) 860-9727

E-mail: [dwilliams@wasatchlegalservices.com](mailto:dwilliams@wasatchlegalservices.com)

Utah Attorney General's Office  
Attn. Criminal Appellate Division  
160 East 300 South  
P.O. Box 140811  
Salt Lake City, Utah 84114-0811

ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

FILED  
UTAH APPELLATE COURTS

DEC - 5 2014

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44 North Main Street, Suite A

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Tel: (801) 860-9727

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**IN THE UTAH COURT OF APPEALS**

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**STATE OF UTAH,**  
Plaintiff and Appellee,

v.

**LANE D. BIRD,**  
Defendant and Appellant.

Appellate Case No.: 20140434-CA

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**BRIEF OF APPELLANT**

---

**JURISDICTION**

This Court has jurisdiction pursuant to UTAH CODE ANN. §78A-4-103(2)(e), as this appeal is taken from the final *Ruling and Order on State's Request for Restitution*, entered on December 2, 2013 (the "**Restitution Order**") and the *Order on Defendant's Motion to Amend Ruling and Order on State's Request for Restitution*, entered on March 18, 2014 (the "**Post-Judgment Order**"), by the Honorable Judge Michael G. Allphin in the above-captioned matter. Further, this appeal follows a timely filed notice of appeal in accordance with UT. R. APP. P. 4.

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND  
PRESERVATION**

**ISSUE I:**     *Did the trial court err in failing to offset its court-ordered restitution amount of \$164,723.17 with the \$1M-\$1.5M of inventory given to the Markhams upon dissolution of the Company, having erroneously devalued such inventory based on the FDA ordering recall of final products produced by Markhams' new company more than two (2)*



*years later, which recall occurred due to Markham's own violations in the conducting of that business (i.e. failure to have written policies and procedures on many safety issues)?*

**STANDARD OF REVIEW:** “Generally ‘[w]e will not disturb a trial court’s order of restitution unless the “trial court exceeds the authority prescribed by law or abuses its discretion.”’” *State v. McBride*, 940 P.2d 539, 541 (Utah App 1997), *citing State v. Robinson*, 860 P.2d 979, 980 (Utah App. 1993)(citation omitted). ““However, whether or not restitution is proper in this case depends solely upon the interpretation of the governing statute, and the “trial court’s interpretation of a statute presents a question of law.”’” *Id.* at 541, *citing State v. Garcia*, 866 P.2d 5, 6 (Utah App. 1993)(*quoting Ward v. Richfield City*, 798 P.2d 757, 759 (Utah 1990). “We accord a lower court’s statutory interpretations no particular deference but assess them for correctness, as we do any other conclusions of law.” *Id.* at 541, *citing Garcia* at 6 (*quoting Salt Lake City v. Emerson*, 861 P.2d 443, 445 (Utah App. 1993)(citation omitted)).

**PRESERVATION:** This matter was preserved based upon the hearing on February 26, 2014 regarding restitution. At such hearing the issue of off-setting the amount of restitution with the inventory was raised by Bird, but was denied by the trial court as is shown by the entry of the Order requiring restitution. The post-judgment proceedings additionally dealt with this issue.

**ISSUE II:** *Was the evidence insufficient to support the trial court’s determination of complete restitution and court-ordered restitution as contained in the Ruling?*

**STANDARD OF REVIEW:** “When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court’s judgment unless it is against the clear weight

of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.” *State v. Larsen* 2000 UT App. 106, ¶10, 999 P.2d 1252.

**PRESERVATION:** Sufficiency of the evidence challenges do not require preservation. *See, State ex rel. K.F.*, 2009 UT 4, ¶61, 201 P.3d 985 (“It would be superfluous to demand that a party challenge the evidentiary support for a court’s findings shortly after the court articulates them.”). Additionally, UT. R. CIV. P. 54(b) states that, “[w]hen findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.”

### **CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS**

In accordance with UT. R. APP. P. 24(a)(11)(A), the following provisions are attached hereto verbatim as Addendum “C”:

- A. U.S. CONST. AMEND. VI.
- B. UTAH CODE ANN. §61-1-1
- C. UTAH CODE ANN. §61-1-16
- D. UTAH CODE ANN. §61-1-20
- E. UTAH CODE ANN. §61-1-21
- F. UTAH CODE ANN. §61-1-22
- G. UTAH CODE ANN. §76-3-201
- H. UTAH CODE ANN. §77-38a-102(2)
- I. UTAH CODE ANN. §77-38a-102(6)
- J. UTAH CODE ANN. § 77-38a-301
- K. UTAH CODE ANN. §77-38a-302(1)
- L. UTAH CODE ANN. §63M-7-503
- M. UTAH CODE ANN. §77-38a-401
- N. UTAH CODE ANN. §78B-5-818
- O. UTAH CODE ANN. §78B-5-820

## PROCEDURAL HISTORY AND STATEMENT OF CASE

On April 4, 2011, Bird was charged by *Criminal Information* with Securities Fraud, a second-degree felony in violation of UTAH CODE ANN. §61-1-1 and Theft, a second-degree felony in violation of UTAH CODE ANN. §76-6-404. R0001-R0002. On April 13, 2011 the *Initial Appearance* was held at which Bird waived a preliminary hearing. R0021. On April 18, 2011, the *Bind-Over Order* which bound Bird over for trial was issued. R0023. On April 25, 2011 the *Arraignment* was held at which time Bird entered a not guilty plea to both charges. R0036.

On August 28 and 29, 2012, the matter came for a bench trial. R0084. At the conclusion of the trial Bird was found guilty of Securities Fraud, a second-degree felony, while the remaining theft charge dismissed. R0087. Sentencing was held on November 26, 2012. R0114. Bird was sentenced to one (1) to fifteen (15) years in prison with such term suspended. *Id* Bird was sentenced to one hundred eighty (180) days in jail with work release. *Id*. Bird was fined \$1000 which was stayed and was also ordered to pay \$500 in attorney's fees. R0115.

On April 29, 2013, the *State's Request for Restitution* ("**Restitution Motion**") was filed. R0134. In the Restitution Motion, the State sought restitution for William and Susan Markham ("**Markhams**") in the amount of \$247,000, representing the amount that they had invested with Bird in Clarcon Labs, Inc. and Clarcon Distributing, Inc. (collectively, the "**Company**"). R0134-R0138. On June 28, 2013, Bird filed his *Defendant's Request to Deny Restitution*. R0148. Bird's request indicated that the Markhams should not be entitled to restitution because there is no actual loss that they

had suffered. *Id.* Bird indicated that the Markhams were not entitled to restitution because they had retained all assets and inventory of the Company and opened a new company, Clarcon Biological Chemistry Laboratories (“CBCL”), which they ran for over two (2) years using such assets. The assets and inventory was worth much more than the \$247,000 the Markhams invested and therefore, they did not suffer any economical loss. R0149. On October 1, 2013 a *Request to Submit for Decision* was filed by the State on its request for restitution. R0151.

On December 2, 2013 the Court entered its *Ruling and Order on State’s Request for Restitution* (the “**Ruling**”). R0153. In such Ruling the Court determined that the amount of \$82,276.83 would be off-set against the \$247,000 investment that was made by the Markhams. R0155. Such amount was the court’s calculation of the assets of the Company including, labelers, drill presses, greenhouses, processing machinery, raw ingredients, desks, computers, and office/lab equipment. *Id.* Based upon this off-set the court found that the Markhams were entitled to \$164,723.17 in pecuniary damages as a restitution order against Bird. R0156. Bird argued that the value of the product inventory within the company was worth into the millions of dollars. *Id.* The trial court ruled that, because the FDA had shut down Markhams new company two years later on violations by Markham and seized its inventory, such inventory was valueless and could not be used to off-set. *Id.* Thus, the court ordered restitution in the amount of \$164,723.17. *Id.*

On or about December 16, 2013 Bird filed his *Motion to Amend Ruling and Order on State’s Request for Restitution and Memorandum in Support* (“**Post-Judgment Motion**”). R0159. In such Motion Bird argues that there was insufficient evidence to

award pecuniary damages to Markham and that the Order doing so should be amended or at least a hearing held so that further evidence could be presented to determine appropriate restitution. R0176. On or about January 30, 2014 the State filed the *State's Response to Defendant's Motion to Amend Ruling and Order on State's Request for Restitution*. R0202. On January 30, 2014, Bird filed his *Reply on Bird's Motion to Amend Ruling and Order on State's Request for Restitution and Memorandum in Support*. R0192.

On February 26, 2014, the Post-Judgment Motion came for hearing, during which this Court indicated that the post-judgment procedure utilized was appropriate, but declined to address or apply the cost of the inventory or future profits gained from such inventory to offset the Markhams investment. R0220. After such hearing on March 4, 2014, the State mailed a copy of the proposed order to Bird's counsel. R0223. Such Order was not in conformance with the trial court's oral ruling, mistakenly indicating that the Post-Judgment Motion had been denied on the basis that (a) it lacked merit; (b) the order of restitution was not barred on statute of limitation grounds; and (c) the Post-Judgment motion was procedurally improper. R0223. The State also submitted this Order to the court for its signature at the same time.

On March 11, 2014, Bird filed his *Objection to Proposed Order on Defendant's Motion to Amend Ruling and Order on State's Request for Restitution; and Memorandum in Support* (the "**Objection**") on the basis that it did not conform with the Court's oral ruling in this matter. R0221. Unbeknownst to the parties the trial court then entered the State's proposed order on March 18, 2014. R0230. Therefore, on March 27, 2014, Bird

submitted to the State his own proposed *Order on Defendant's Motion to Amend Ruling and Order on State's Request for Restitution*. R233.

On April 15, 2014, counsel submitted Bird's Order to the Court, having waited a sufficient time for the State to submit its objection. R0247. On April 17, 2014, the Court also entered Bird's Order regarding the post-judgment proceedings. R0239-R0243. On April 23, 2014, the State filed its *Motion to Set Aside Order on Defendant's Motion to Amend Ruling and Order on State's Request for Restitution* on the basis that the State's Post-Judgment Order had been previously entered and that the State believed Bird's Order contained inaccuracies. R0246. On April 28, 2014 Bird filed his *Response in Opposition to the State's Motion to Set Aside Order, or Alternatively Bird's Motion for an Extension of Time to file his Notice of Appeal and Memorandum in Support*. R0256. Bird also filed his *Notice of Appeal* on April 28, 2014. R0267.

On May 6, 2014, the Second Judicial District Court entered its *Order Granting the State's Motion to Set Aside Order Entered on April 17, 2014*. R0279. In such Order the court also granted Bird an extension of time in which to file his *Notice of Appeal*. R0276. On May 13, 2014 the court entered the *Order Granting Defendant's Motion for Extension of Time to File Notice of Appeal*. R0291.

## **STATEMENT OF THE FACTS**

### **A. Bench Trial August 8<sup>th</sup>, 2012.**

#### **Testimony of Bill Markham.**

Bill Markham (“**Markham**”) testified that he and Bird became acquainted in 2001. R0343:3. He testified that at that time, he worked mortgage loans for Superior Lending, as did his wife as a processor-underwriter. R0343:3-4. He testified his wife did a mortgage for Bird’s house, but under Bird’s father’s name. *Id.*

Markham testified that before he went into business with Bird he had spoken to Bird about his businesses and what he did. R0343:6-7. He testified Bird approached him about getting involved with those businesses. *Id.* Markham testified he agreed to help Bird sell water filtration systems with no money necessary up front and bought one himself. R0343:8. He testified this was 2-3 years before Clarcon. *Id.* Markham testified he barely tried to sell the system; showing only his mother and sister, neither of whom purchased the system. R0343:8-10. He testified he was aware of Bird’s involvement with Couch Potato, Some Dude’s Playground and Powerslide. *Id.* Markham testified that Bird never tried to sell him a Powerslide device or spoke to him about investing or anything like that. *Id.*

He testified that Bird called him in approximately January of 2007 looking for investment money. R0343:11-13. Markham testified that Bird’s call was “out of the blue.” R0343:15. He testified that he gave Bird the first check on March 7<sup>th</sup>, 2007, and they discussed potential business opportunity in their daily conversations with one another. R0343:15-16. Markham testified that he and Omar Bonada (“**Bonada**”) first met casually while he was investing money and while Bird was showing him the facility in Roy. R0343:17. He testified that Bird introduced Markham to Bonada as someone who was investing money in the company, to which Bonada shook his hand and said it was



great to meet him. *Id.* Markham testified he met Bonada again after the investment, but did not have access to the company when he was signed as a signer (April of 2007). R0343:17-19.

He testified that Bird told him not to approach Bonada since his involvement was with sales and marketing through Bird. R0343:20. Markham testified that Bird prohibited him from speaking with Bonada . *Id.*

He testified that Bird told Markham that he bought out ClarconLab, LLC. R0343:21. Markham testified that he told the investigator, when he was being interviewed about everything, that Bird was part owner of ClarconLab and was trying to buy it out. *Id.* He testified that Bird was the owner of ClarconLabs, Inc. R0343: 22. Markham testified that, Clarcon Lab – Biological Chemistry Labs was created with Bonada in June of 2007. R0343:24. Markham testified that he never asked Bird any questions when he asked him for the \$250,000 investment because he trusted him. *Id.* He testified he has some experience in the business world. R343:27.

Markham testified that Bird never talked to him about any debt that Claron maintained. R0343:28. He testified there were no conversations about taking control of Claron from Bonada. *Id.* Markham testified that Bird told him he had invested \$500,000 into the Company, and that he had enough product on hand to cover both of their investments. R0343:28-29. Aside from the product Bird had in his office in Layton, there was no communication about how they intended to protect their interest so that Bonada did not have full control since Bonada was the only one making and distributing the product at that point. *Id.* Markham testified Bird showed him the product voluntarily.

*Id.* Markham testified he would put a retail value of \$1.5M on the product that Bird had showed him. R343:30.

He testified he was aware during his investment that there was a prior company that had been given a whole new name with Bird as part owner. R0343:31. Markham testified he did not check to see if Bird was being honest with him. R0343:32. He testified that it came as a surprise when he found out the companies were actually created in April of 2007. R0343:33. Markham testified he was not involved in the dissolving of ClarconLabs, LLC. R0343:33.

He testified that his investment was for automation to modernize all the equipment being used. R0343:34. Markham testified that he thought the money would be just for equipment. *Id.* He testified the purpose for the money was defined in their conversation. R0343:36. Markham testified that there was no written document about the money purposely being for modernizing and updating equipment. R0343:38. He testified that he used his retirement savings, 401(k), and his second mortgage along with a check from James and Patricia Macnamara, his aunt. R0343:45. Markham testified he told his aunt he would pay her back with interest and that the money was “for investment in equipment for Clarcon Labs.” *Id.* He testified he has created a company before. R0343:69. Markham testified that Clarcon Distributing, was created on April 3<sup>rd</sup>, 2007, with Judy Johnson as an incorporator and Markham as officer one and director one and that he had no knowledge of this when it occurred. *Id.*

He testified that the letter that kicked Bird out of the Company was done by an attorney that Bonada had hired and that he had not seen the letter. R343:71. Markham

testified that a sheriff had come and removed Bird but he did not know who called him. *Id.* He testified that he became partners with Bonada after Bird left and looked at what was left of all the books. R0343:72. Markham testified he did not know until a few weeks after Bird left that he had taken all his money. *Id.* He testified by the end of June of 2007, he knew what his losses were. R0343:75.

Markham testified he had no reason to work with or have Bird work for him again or solicit his help at all after Bird left the Company. R343:75-76. He testified that he sent an e-mail to Bird with an independent contractor agreement attached, with some price lists after Bird asked him if he could sell product for Markham. R0343:76. Markham testified in a verbal exchange between he and Bird, shortly after Bird left the Company, he had asked Markham if he could continue selling. R343:76-77. He testified Bird thought he had contacts he could sell the product to, make a profit on and make good on their investment. R0343:77. Markham testified that he and Bird only had a couple conversations about selling. R0343:79. He testified they sent e-mails back and forth about agreement as far as sales prices and as far as margins and commissions. *Id.* Markham testified that Bird was going to work for him as an independent contractor. *Id.* He testified that Bird went to Markham saying he “needed to make it right.” *Id.*

Markham testified that he did send an emotional e-mail to Bird airing out some of what had transpired with Clarcon, and Bird had talked about the \$60,000 transfer of money to Powerslide. R343:88. He testified that he authorized Bird to represent Clarcon in the one deal with Lowe’s and gave him parameters if he was going to work for him.

R0343:89. Markham testified that to his knowledge, Bird never sold to Lowe's for him.

*Id.*

Markham then testifies regarding an e-mail dated October 20<sup>th</sup> of 2008 in which he talks about being able to document \$89,648 of money that was moved from Clarcon to Powerslide when it had only been a \$60,000 transfer previously. R0343:93. He testified that there was something about the books that he noticed or documented to make that change. *Id.* Markham testified that most of the information was taken and removed from the Company, with many records were removed, but he was not sure by whom. R0343:94. He testified that when Bird moved out, he took that information and documentation, so Markham and the company did not have complete files. *Id.* Markham testified that it took months of sifting through paperwork, bank statements, etc., for that all to come to light. *Id.*

He testified that the attorney John Diaz and the sheriff came out and had Bird removed. *Id.* Markham testified he and Bonada were there when it happened. *Id.* He testified Bird had requested to take a desk, and things like personal belongings, and his computer. R0343:95. Markham testified Bird and Judy were the only ones with copies of the records. *Id.* He testified that he requested Bird return the computer back to the Company a month later, after looking at the books and making a determination. *Id.* Markham testified that Judy returned Bird's computer and stayed in the office a little while to gather her stuff. *Id.*

He testified that when he first looked at the computers, prior to October of 2007, he said 60,000 was the amount transferred. R0343:96. Markham testified that the number

changed to 89,000 because he started getting more documentation and bank statements. *Id.* He testified that he requested Judy Johnson's computer be returned once Bird left and took all the computers that the Company had. R0343:97. Markham testified an attempt was being made to go get bank records and see where all his money was and, after months, he only got partial records. R0343:98.

He testified that by October of 2008, he was still running the Company, but making no money. R0343:99. However, Markham testified that he formed a new company with Bonada shortly after Bird left and that company went on for a couple years before they shut it down and terminated it. R0343:110. He testified that many distributors wanted to get the product approved with FDA through a "monograph" system. R0343:111. He testified that to do this documentation was put together and submitted to the FDA. *Id.* He testified an inspector then looked at the facility, classified it differently, and wanted different things put into place with regards to the company, production, and the product itself. *Id.* He testified that to do what the FDA wanted it would cost about \$1.2-1.5 Million. *Id.* Markham testified they were given a 90-120 day time period to comply, and the FDA took some samples. *Id.* He testified there was bacteria found in some of the samples. *Id.* He testified the FDA had the power to cease all production based on the discovery of this bacteria and they did. *Id.* Markham testified that after this occurred they could not produce the product anymore but were not shut down. R0343:112. He testified they were asked to recall the product and destroy it, which they did. *Id.*

Markham testified that the books left behind after Bird left were in Quicken format and another type of ledger sheet that was maintained. R0343:116. He testified the information in the books was taken when Bird and Judy left. *Id.* Markham testified that he made a request for the information in the books to be returned, but he only got some of it when Bird returned the computer which had been in Bird's possession for several days. *Id.* Some of the information on the computer he could not access because of password protection, and some had been deleted. R0343:117. Markham testified it took months to get bank records with the assistance of bank. *Id.*

He testified regarding the email he sent to Bird which threatened that unless Bird returned \$89,648 to Markham, he would file a formal complaint or turn State's evidence. R0343:119. Markham testified that he considers his loss to be much more than \$89,648 in this particular matter. R0343:119-120. He testified that he was asking Bird for that amount because that amount was taken out to pay debt to another company, Powerslide, which has nothing to do with Clarcon. R0343:120. Markham testified that he was not successful in resolving the issue with Bird. *Id.* He testified he was involved with this Company from 2007-2009. R0343:121. Markham testifies that there was never a time where the Company's assets exceeded liabilities. *Id.*

#### **B. Hearing on Motion Regarding Restitution, February 26<sup>th</sup>, 2014.**

Bird's counsel argued that there are four (4) reasons why restitution was not appropriate in this matter. R0344:3. His counsel indicates that there needs to be a connection between the crime and the damages suffered. *Id.* First, Bird was only convicted because he was not a licensed security broker or dealer when the transaction

took place. *Id.* Second, when the dissolution of the original company and formation of the second company, CBCL, took place, CBCL acquired all assets, which included the physical equipment as well as the inventory that was there. Markham himself valued the inventory absorbed by CBCL to be at \$1-1.5 Million, thus no loss incurred from the Markhams \$247,000 investment. R0344:4. Third, around 800,000 bottles of product were sold. At wholesale cost, those profits are in the 6 million dollar range, which over-compensates for the Markhams original \$247,000 investment. R344:4. Fourth, the reason damages were occurred was because Markham's new company CBCL was shut down after the FDA came in and issued some sanctions, with which Markham and his new company CBCL failed to comply, so the FDA had the company and assets seized and a recall issued. R0344:5. Bird's counsel indicated argued that all of those things were out of Bird's control and that he had only been involved with the original company for about three (3) months. *Id.* His counsel argued that Bird's only crime was that he was not a licensed security broker when accepting Markham's investment in the Company, which fault was sufficiently attenuated from and lacking nexus with Markham's and CBCL's federal sanctions two years later. R0344:6.

The State argued that there was a jurisdictional and procedural issue stating the motion was before the court under UT. R. CIV. P. 81(e), which allows the application of civil rules when no criminal rule exists. R0344:7. However, the State indicated that there is a statute and rule for restitution in a criminal matter and therefore, Rule 81 does not apply and the court does not have jurisdiction. *Id.* The State argued that Bird's position was already litigated before the court and thus, he cannot bring them before the



court again. *Id.* The State argued this was not a licensing violation, but rather fraud since Bird made several misrepresentations and omissions in connection with the offer and sale of security. R344:8. The State argued that Bird engaged in course of conduct which operated as fraud or deceit upon another person. *Id.*

Bird's counsel referenced that victim's rights statute indicated that criminal orders of restitution become civil judgments and are enforceable under the civil rules. *Id.* The State indicated that this is accurate but that the issue here is enforceability. *Id.* The State also argues that UT. R. CRIM. P. 24 relied upon by Bird does not apply as it pertains to filing for a new trial. R0344:9.

Bird's counsel argued that there is a lack of nexus between the loss and the violation that occurred and that all of the Company assets absorbed by the Markhams should be applied as an offset, particularly because the assets covered his investment, supporting the fact that restitution is not appropriate. R0344:11.

The Court denied Bird's Post-Judgment Motion. *Id.* The Court concluded that the motion lacks merit and that Bird's conviction was correctly entered under UTAH CODE ANN. §61-1-1. *Id.* The trial court rejected Bird's arguments regarding the applicability of statute of limitations and damage calculations under UTAH CODE ANN. §61-1-22. R0344:12. The court determined that Bird's motion was an attempt to reargue the issues of whether sufficient nexus exists, or whether a credit for the product inventory is appropriate and was thus, nothing more than a procedurally-improper motion for reconsideration." *Id.* The court declined to reassess any prior ruling on the issues. *Id.*

### **C. Hearing on Orders, May 6<sup>th</sup>, 2014.**

The court indicated that after the last hearing the State was to prepare the order, which it did. R0345:3. The court indicated that while it was waiting for the time to pass to enter an order, it received an objection from Bird. *Id.* The court interlineated the order based upon Bird's objection and sent notice to both parties' counsel that the order had been entered on March 18, 2014. *Id.* Neither parties' counsel received notice that the order had been signed. *Id.* Bird then filed his own proposed order and the court, not realizing it had previously signed another order, signed it and entered it. R0345:4.

The State indicated that it did not receive a copy of the signed March 18th Order. R0345:5. It also agreed with the court's recitation of what happened with the Order. *Id.* The State received Bird's proposed order, reviewed it, did not agree with it and responded with a letter to Bird's counsel telling him they did not agree. R0345:6. The State believes the March 18, 2014, Order encompasses what the Court ordered and should stand. R0345:7.

Bird's counsel indicates that he did not receive a copy of the Order from the State until it was submitted to the Court for signature, and he reviewed it and felt it was vague so he filed an Objection to allow more time to review the audio recordings. R0345:8. Bird's counsel indicated that he got the audio on the hearing, reviewed it, and prepared a more detailed order based upon the audio recording. *Id.* Bird's attorney then sent it to the State, received the letter from the State indicating it was going to ask the court to sign its order, and when he heard nothing more after the prescribed five (5) days he filed his proposed order with the court. R0345:9. Counsel herein indicated that with the interlineation by the court, the State's Order was correct he just did not know it had been

filed. R0345:11. The Court then indicated it would vacate the second order and extend the deadline for Bird to file his Notice of Appeal. R0345:14.

## **SUMMARY OF THE ARGUMENT**

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRED IN FAILING TO OFF-SET THE RESTITUTION AMOUNT OF \$164,723.17 WITH THE \$1-\$1.5 MILLION IN INVENTORY ABSORBED BY MARKHAM, ERRONEOUSLY ATTRIBUTING ITS LACK OF VALUE TO BIRD WHEN MARKHAM'S ACTIONS OR INACTIONS HAD RENDERED IT SO.**

UTAH CODE ANN. §76-3-201(4) states as follows:

(c) In addition to any other sentence the court may impose, the court, pursuant to the provisions of Sections 63M-7-503 and 77-38a-401, shall enter:

- (i) a civil judgment for complete restitution for the full amount of expenses paid on behalf of the victim by the Utah Office for Victims of Crime; and
- (ii) an order of restitution for restitution payable to the Utah Office for Victims of Crime in the same amount unless otherwise ordered by the court pursuant to Subsection (4)(d).

(d) In determining whether to order that the restitution required under Subsection (4)(c) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and provide findings of its decision on the record.

UTAH CODE ANN. §76-3-201(4)(a) and 77-38a-302(1) both state that, “[w]hen a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution” to the victims of the crime. UTAH CODE ANN. §77-38a-102(2) states, “criminal activities” as used therein means “any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.”

Under UTAH CODE ANN. §77-38a-102(6), the term “pecuniary damages” is defined as follows:

...all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

UTAH CODE ANN. §77-38a-302(5)(c)(iv) states that, “[i]n determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and: ... (iv) other circumstances which the court determines may make restitution inappropriate.” UTAH CODE ANN. §77-38a-302(5)(c)(i) and (vi) states that, “[i]n determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b); ... and ... (vi) other circumstances which the court determines may make restitution inappropriate.” UTAH CODE ANN. §77-38a-302(5)(a) and (b) state as follows:

- (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.
- (b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:
  - (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
  - (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
- (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and the cost of necessary funeral and related services if the offense resulted in the death of a victim.

In *State v. Robinson* it was held that, "[r]estitution should be ordered only in cases where liability is clear as a matter of law and where commission of the crime clearly establishes causality of the injury or damages." *Ibid.*, 860 P.2d 979, 983 (Utah App. 1993).

As it specifically pertains to liability for damages under the Utah Uniform Securities Act, UTAH CODE ANN. §61-1-22(1)(a) and (b) state as follows:

- (a) This Subsection (1) applies to a person who
  - (i) offers or sells a security in violation of
    - (A) Subsection 61-1-3(1);
    - (B) Section 61-1-7;
    - (C) Subsection 61-1-17(2);
    - (D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used; or
    - (E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7).
- (b) A person described in Subsection (1)(a) is liable to a person selling the security to or buying the security from the person described in Subsection (1)(a). The person to whom the person described in Subsection (1)(a) is liable may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security, upon the tender of the security or for damages if the person no longer owns the security.

UTAH CODE ANN. §61-1-22(1)(c)(i)(A)(I) and (II) states that damages are calculated by "subtract[ing] from the amount that would be recoverable upon a tender under Subsection

(7)(b) the value of the security when the buyer disposed of the security;...” adding 12% per year beginning on the date the security is purchased by the buyer and ending on the date of disposition. Under subsection (7)(b) it states as follows:

A person may not sue under this section if: (i) the buyer or seller received a written offer, before suit and at a time when the buyer or seller owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and the buyer or seller failed to accept the offer within 30 days of its receipt; or (ii) the buyer or seller received such an offer before suit and at a time when the buyer or seller did not own the security, unless the buyer or seller rejected the offer in writing within 30 days of its receipt.

*Ibid.*

**A. The Modified “But For” Test Was Not Met.**

“In determining the amount of complete restitution, Utah courts employ ‘[a] modified “but for” test,’ which ‘requires (1) that the damages would not have occurred but for the conduct underlying the [defendant’s] ... conviction and (2) that the causal nexus between the [criminal] conduct and the loss ... not [be] too attenuated (either factually or temporally).’” *State v. Ruiz*, 2013 UT App 166, ¶8, 305 P.3d 223, *citing State v. Harvell*, 2009 UT App 271, ¶ 12, 220 P.3d 174 (alterations and omissions in original)(citations and internal quotation marks omitted). “Accordingly, a defendant may be ordered to pay restitution only for pecuniary loss resulting from a crime he either was convicted of or admitted responsibility for.” *Id.* at ¶ 9; *see* UTAH CODE ANN. §77-38a-302(1); *State v. Mast*, 2001 UT App 402, ¶ 16, 40 P.3d 1143. In *State v. Johnson* this Court emphasized that the restitution statutes require a “‘sufficient nexus’ between the

defendant's criminal conduct and the pecuniary damages suffered by the victim." *Ibid.*, 2009 UT App 382, ¶46, 224 P.3d 720.

In *State v. Harvell* this Court held that a causal connection was requisite in ordering restitution, reversing the trial court's restitution order absent evidence that an attempted theft by receipt of a vehicle had caused a brake system problem arising a week later in such vehicle, or a broken iPod contained within such vehicle, particularly when two other people had access to the vehicle and the iPod. *Ibid.*, 2009 UT App 271, 220 P.3d 174. Similarly, in *State v. Brown*, this Court reversed a restitution order based on failure to establish a causal nexus of his girlfriend's relocation occurring seven or eight months after the defendant had entered his girlfriend's apartment and assaulted his girlfriend's mother. *Ibid.*, 2009 UT App 285, ¶ 11, 221 P.3d 273. The State had failed to prove a causal connection between the relocation expenses and the crime. *Id.* at ¶¶ 11-13.

In *State v. Mast* a defendant pled guilty to receiving certain items of stolen property, denying involvement in the burglary, but was held responsible by the trial court for restitution on items she had not admitted to receiving. *Ibid.*, 2001 UT App 402, 40 P.3d 1143. *Ruiz* cited *Mast*'s explanation that, "the restitution 'statute requires that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution,' and that the trial court could therefore order the defendant to pay restitution only for the stolen property she admitted to receiving." *Ibid.*, citing *Mast* at ¶ 18 (citation and internal quotation marks omitted). The *Mast* court further held that even if a defendant "failed to be entirely forthcoming" regarding her



involvement in the burglary, the court was not allowed to infer her participation in another crime to which she did not plead. *Mast* at ¶18; *see State v. Galli*, 967 P.2d 930, 937-38 (Utah 1998). It found that requiring the defendant to pay for all items stolen in the burglary violated the plain language of the statute, and thus reversed.

In the instant matter, Markham invested \$247,000 into Claron Labs in approximately March, 2007, with Bird. Markham believed that his investment was to upgrade the machinery that the company already possessed. Bird was kicked out of the Company a few months later. Markham continued to produce product and do the same manufacturing under a new company, CBCL, until the product was found to be unsafe by the FDA a couple of years later. In the trial court's Ruling regarding restitution, Bird was ordered to pay Markham the amount of his investment, \$247,000 in restitution. R0155. However, such amount was off-set by \$82,276.83 based upon the assets of the Company absorbed by Markham which included labelers, drill presses, greenhouses, processing machinery, raw ingredients, desks, computers, and office/lab equipment. *Id.* The remaining amount of \$164,723.17 was ordered to be paid by Bird in restitution to Markham. R0156. However, Markham had also received inventory valued at over a million dollars by his own testimony. The trial court failed to take into consideration the product inventory of the Company as an off-set to the restitution. *Id.* The trial court ruled that because the FDA had shut down Markham's new company, CBCL, and seized its inventory, the inventory transferred to Markham two (2) years earlier by Bird was valueless and could not be used to offset restitution. *Id.* Thus, the court ordered restitution in the amount of \$164,723.17. *Id.*

Herein, Markham's new company CBCL was not shut down based on the crime for which Bird was convicted herein. *Ruiz* at ¶8, *citing Harvell* at ¶ 12. It cannot be said that "but for" Bird's lack of licensing as a securities broker—or even the "fraud" the State claims was part of this crime—that CBCL would not have been shut down due to its own failure to follow FDA requirements to continue in operation. Those failures were the result of things that were outside Bird's control, Bird having never been involved with CBCL nor any of its operations for the two (2) years it was in business. Nor can the failure of CBCL be traced to Bird's crime as charged and convicted herein.

Bird may be ordered to pay restitution "only for pecuniary loss resulting from a crime he either was convicted of or admitted responsibility for." *Ruiz* at ¶ 9; *see* UTAH CODE ANN. §77-38a-302(1); *Mast* at ¶ 16. In order for the trial court to properly devalue the inventory transferred to Markham from Bird as compensation for his investment, a "sufficient nexus" was required to be drawn between the loss of the value of the inventory by CBCL shutting down and Bird's lack of licensing and/or fraud, further requiring a showing that there were actual pecuniary damages suffered by Markham tracing back to the crime. *Johnson* at ¶46. No such evidence exists to support such a nexus.

As in *Harvell*, a causal connection was requisite in ordering restitution. In that case, no causal connection could be drawn between a brake system problem in a vehicle occurring one week after an attempted theft of such vehicle. Also, no causal connection could be drawn to the crime to order restitution for a broken iPod. At the heart of this determination was that *other people* had maintained access to the vehicle and the iPod

during that one week period. Similarly herein, Markham was the only one who maintained any connection with the machinery and inventory he absorbed from the Company as compensation for his prior investment with Bird, which are the damages in this matter. What happened afterwards to the machinery and inventory was the result of other people's access and use of such, not Bird's. A nexus cannot thus be drawn back to Bird's crime later on the other people's misuse of such machinery or inventory. It is too factually attenuated to allow for such a nexus to be drawn. *Ruiz* at ¶8, citing *Harvell* at ¶12.

In *Brown*, this Court emphasized the importance of a time frame in determining whether injury or loss is too temporally attenuated. *Ibid.* at ¶ 11. That court found that a defendant who had entered his girlfriend's apartment and assaulted his girlfriend's mother was not liable for restitution to pay for the girlfriend's relocation seven or eight months later from that apartment. *Id.* Similarly here, the two year gap between Bird having transferred the assets of the Company to Markham for compensation for his \$247,000 investment was too temporally attenuated from the closure of CBCL two years later to trace the damages from such closure to the crime Bird committed herein, particularly given that Bird had no involvement or control in CBCL whatsoever.

In *Mast* a defendant was absolved from restitution that was based on a crime other than the one in which she had admitted participation. *Ibid.*, 2001 UT App 402, 40 P.3d 1143. Although a burglary had occurred, Mast had admitted to only receiving certain items of stolen property, so she could not be held liable through restitution for all items stolen in the burglary. The Court disallowed such an inference to be drawn, citing to the

language contained in UTAH CODE ANN. §77-38a-302(1). The PSI interview with Bird indicates his acknowledgment that he “authored a Letter of Intent and Investment agreement with [Markham] representing that [Bird] owned stock to transfer to [Markham] for his contribution, and since he made a financial contribution it was determined that [Bird] had sold a security without a license.” R0101. Bird acknowledged in the PSI interview that this was considered Securities Fraud in Utah. *Id.* However, the restitution ordered by the trial court in this matter exceeds that crime by holding Bird accountable for inferences that he somehow impacted the closure of CBCL two years later although there is no evidence further crime was committed and nothing establishes such a nexus. Restitution cannot be founded upon inferences, rather liability must be clear as a matter of law and commission of the crime must clearly establish causality of the injury or damages. *Robinson* at 983.

Neither Bird’s lack of licensing as a security broker, nor his having led Markham to believe that he had stock to transfer to Markham in the Company, caused Markham to voluntarily shut down CBCL two years later on the basis that Markham did not want to invest more money into CBCL to cure production noncompliance with federal regulations. The State did not show any causal nexus with the original crime other than to argue that the crime entailed Bird perpetrating “fraud” on Markham. Calling it a “fraud” case rather than a licensing case still did not create the causal nexus that “but for” Bird’s actions Markham would have never involuntarily or voluntarily shut down CBCL two years later because he did not want to invest more money into his own company to

become FDA compliant. The modified “but for” test applied in Utah was not met and thus restitution should not have been ordered in this matter.

**B. The Markhams Were Sufficiently Compensated Before Through Absorbing All Assets of the Company and are Not Entitled to be Compensated Again.**

UTAH CODE ANN. §§76-3-201(4)(a) and 77-38a-302(1) both direct that when a defendant is convicted of any criminal offense or admits criminal conduct to a sentencing court, and such offense/conduct results in demonstrable economic injury—whether or not yet incurred—which a person could recover in a civil action arising out of the facts or events constituting the criminal offense/conduct, the court shall order that the defendant make restitution to the victims of the crime. *See also* UTAH CODE ANN. §77-38a-102(2)(defining “criminal activities”) and UTAH CODE ANN. §77-38a-102(6)(defining “pecuniary damages”).

UTAH CODE ANN. §77-38a-302(5)(c)(i) and (vi) states that, “[i]n determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b); ... and ... (vi) other circumstances which the court determines may make restitution inappropriate.” UTAH CODE ANN. §77-38a-302(5)(a) and (b) state as follows:

- (c) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.
- (d) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

- (vi) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (vii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (viii) the cost of necessary physical and occupational therapy and rehabilitation;
- (ix) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
- (x) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and
- (xi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

In *State v. Robinson* it was held that, "[r]estitution should be ordered only in cases where liability is clear as a matter of law and where commission of the crime clearly establishes causality of the injury or damages." *Ibid.*, 860 P.2d 979, 983 (Utah App. 1993).

As it specifically pertains to liability for damages under the Utah Uniform Securities Act, UTAH CODE ANN. §61-1-22(1)(a) and (b) state as follows:

- (b) This Subsection (1) applies to a person who
  - (i) offers or sells a security in violation of
    - (A) Subsection 61-1-3(1);
    - (B) Section 61-1-7;
    - (C) Subsection 61-1-17(2);
    - (D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used; or
    - (E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7).
- (b) A person described in Subsection (1)(a) is liable to a person selling the security to or buying the security from the person described in Subsection (1)(a). The person to whom the person described in Subsection (1)(a) is liable may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income

received on the security, upon the tender of the security or for damages if the person no longer owns the security.

UTAH CODE ANN. §61-1-22(1)(c)(i)(A)(I) and (II) states that damages are calculated by “subtract[ing] from the amount that would be recoverable upon a tender under Subsection (7)(b) the value of the security when the buyer disposed of the security;...” adding 12% per year beginning on the date the security is purchased by the buyer and ending on the date of disposition. Under subsection (7)(b) it states as follows:

A person may not sue under this section if: (i) the buyer or seller received a written offer, before suit and at a time when the buyer or seller owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and the buyer or seller failed to accept the offer within 30 days of its receipt; or (ii) the buyer or seller received such an offer before suit and at a time when the buyer or seller did not own the security, unless the buyer or seller rejected the offer in writing within 30 days of its receipt.

When the dissolution of the original Company Markham’s acquired all assets of the Company, which included the physical equipment as well as the inventory. These assets were then utilized by Markham to create a new business, CBCL, which did not include Bird.

Markham testified that Bird told him he had invested \$500,000 into the Company, and that he had enough product on hand to cover both of their investments but Bird did not place a specific value on it. R0343:28-29. Bird showed Markham the product voluntarily. *Id.* Markham testified he would put a retail value of \$1.5M on the product that Bird had showed him. R343:30; R0344:4.

While the trial court offset the amount of the restitution in this case by the cost of the labelers, drill presses, greenhouses, processing machinery, raw ingredients, desks,



computers, and office/lab equipment, it refused to offset the cost of the inventory ruling that, because the FDA had shut down Markhams new company two years later on violations by Markham and seized its inventory, such inventory was valueless and could not be used to off-set. R0155-156.

Bird was convicted of Securities Fraud, a second degree felony. R0114-R0115. At sentencing and in the PSI interview, Bird admitted to entering into a securities agreement with Markham without being a licensed securities broker, stating "since I authored a Letter of Intent and Investment agreement with [Markham] representing that I owned stock to transfer to [Markham] for his contribution, and since he made a financial contribution. [sic] It was determined that I had sold a security without a license." R0101.

In a civil action arising out of the facts or events constituting this criminal offense and the conduct for which Markham admitted at sentencing and in the PSI interview, Markham was entitled to recover pecuniary damages. UTAH CODE ANN. §§76-3-201(4)(a) and 77-38a-302(1). To determine this sum, the court was to consider all relevant facts. UTAH CODE ANN. §77-38a-302(5)(a) and (b). Given that the factors to be considered as listed in -302(5)(a) and (b) do not apply to securities fraud cases, the "relevant facts" of this case require reference to the Utah Uniform Securities Act to determine Bird's liability to Markham "as a matter of law" to find the required causality between the commission of Securities Fraud by Bird and Markham's alleged loss of his \$247,000 investment. *Robinson* at 983.

If this had been raised as a civil action, Markham could have sued Bird "to recover consideration paid for the security, together with interest at 12% per year from the date of

payment, costs, and reasonable attorneys fees, *less the income received on the security* upon the tender of the security or for damages if [Markham] no longer owns the security.” UTAH CODE ANN. §61-1-22(1)(b)(emphasis added). Herein, it is presumed that the security was dissolved with the Company, upon disbursement of all assets and inventory to Markham.

Damages are to be calculated by subtracting from the amount that would be recoverable—the \$247,000 investment—the value of the security when Markham disposed of it. UTAH CODE ANN. §61-1-22(1)(c)(i)(A)(I) and (II). Markham did not dispose of the security, but rather since the Company was dissolved, his investment was returned and he was paid out for such security with the labelers, drill presses, greenhouses, processing machinery, raw ingredients, desks, computers, office/lab equipment and inventory. Absent the inventory, the value of these assets was calculated by the court to be \$82,276.83. However, the trial court opted not to offset the calculation of the amount recoverable with the largest asset of the Company—the inventory—which Markham himself had testified was valued at \$1.5M. R343:30; R0344:4. This amount was substantially larger than the \$164,723.17 ordered for restitution in this matter, and would have covered not only the remaining portion of Markham’s investment but also the 12% per year required by the statute. Additionally, any income received by Markham on the security was also to be subtracted. Evidence received in this matter showed Markham sold 800,000 units of the product, which at wholesale cost would have been approximately \$6M.

Thus, at the time it was “disposed of” by dissolution of the Company, the security was valued at approximately \$1,582,276.83, all of which was given to Markham to compensate him for his \$247,000 investment. Markham used such security—converted to assets—to make approximately \$6M. Given that Bird offered Markham all of these assets in exchange for his investment, it is questionable that Markham would have maintained any grounds for a civil cause of action against Bird. UTAH CODE ANN. §61-1-22(7)(b). It could be argued in a civil action that Bird offered to refund Markham’s consideration paid, together with interest at 12% per year before the matter was brought to the trial court, and that Markham accepted it by utilizing the assets to form a new company. *Id.* Simply because his new company failed on his own omissions in following FDA regulations does not make this offer-acceptance and full compensation null. Markham’s \$247,000 investment appears to have yielded him approximately \$7,582,276.83 in assets and income.

To allow Markham the benefit of such compensation—30 times greater than his investment—and then reward him again through the order of restitution challenged herein would be to provide him excessive compensation. Even double compensation has been found to be improper under our current statutory scheme. *See, State v. Shepherd*, 1999 UT App 305, ¶32, 989 P.2d 503; *see, UTAH CODE ANN. §76-3-201(4)(a)*(“[w]hen a person is convicted of criminal activity that has resulted in pecuniary damages, ... the court shall order that the defendant make [full, partial or nominal payment for pecuniary damages to a victim]”). Thus, the Restitution Order should be reversed on the basis that

Bird has previously fully compensated any injury or loss occurring as a result of the Securities Fraud as it pertains to Markham.

**C. Alternatively, Markham Should Be Apportioned Fault for Any Loss in Value of the \$1.5M Inventory in His Actions Leading to the Violations of the FDA Regulations, the Recall, and the Closure of His New Company.**

“In determining the amount of complete restitution, Utah courts employ ‘[a] modified “but for” test,’ which ‘requires (1) that the damages would not have occurred but for the conduct underlying the [defendant’s] ... conviction and (2) that the causal nexus between the [criminal] conduct and the loss ... not [be] too attenuated (either factually or temporally).’ *State v. Ruiz*, 2013 UT App 166, ¶8, 305 P.3d 223, *citing State v. Harvell*, 2009 UT App 271, ¶ 12, 220 P.3d 174 (alterations and omissions in original)(citations and internal quotation marks omitted). In *State v. Johnson* this Court emphasized that the restitution statutes require a “‘sufficient nexus’ between the defendant’s criminal conduct and the pecuniary damages suffered by the victim.” *Ibid.*, 2009 UT App 382, ¶46, 224 P.3d 720. Given that the “but for” test requires a determination of causality, “[a] trial judge cannot decline to consider evidence that a victim’s losses were caused, not by defendant, but by the victim’s own negligence, or indeed the negligence of some other person in its determination of *complete restitution*.” *State v. Laycock*, 2009 UT 53, ¶ 9 n. 4, 214 P.3d 104 (emphasis in original).

UTAH CODE ANN. §78B-5-818(3) states that, “[n]o defendant is liable to any person seeking recovery for any amount in excess of proportion of fault attributed to that defendant under Section 78B-5-819.” UTAH CODE ANN. §78B-5-819(1) states that, “[t]he trial court may, and when requested by any party shall ... find separate special

verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78B-5-821(4) for whom there is a factual and legal basis to allocate fault.” UTAH CODE ANN. §78B-5-818(4)(a) states similarly. Furthermore, UTAH CODE ANN. §78b-5-820 states as follows:

Subject to Section 78B-5-818, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

In *Interwest Constr. v. Palmer* it states as follows:

“Fault” means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product. UTAH CODE ANN. § 78-27-37(2) (1992) (emphasis added).

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendant's whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

*Ibid.* 886 P.2d 92, 100 (Utah App 1994). In *Johnson v. Lewis* it states as follows:

‘In other words, it is such an act which, while not the sole cause of the damage, is such a part of the occurrence or event that, without it, the event would not have occurred.’ Contributory negligence, by this sentence does not depend upon the plaintiff’s breach of any duty, nor is it predicated upon any fault or blameworthy conduct. The test is stated to be whether the act or omission caused plaintiff’s damage. In effect it says, ‘if his act contributed to cause his injury or damage, then he is contributory negligent.’

*Ibid.*, 240 P.2d 498 (Utah 1952).

Herein, Markham invested \$247,000 into Claron Labs in approximately March, 2007, with Bird. Markham believed that his investment was to upgrade the machinery that the company already possessed. Bird was kicked out of the Company a few months later. Markham continued to produce product and do the same manufacturing under a new company, CBCL, until the product was found to be unsafe by the FDA a couple of years later. In the trial court's Ruling regarding restitution, Bird was ordered to pay Markham the amount of his investment, \$247,000 in restitution. R0155. However, such amount was off-set by \$82,276.83 based upon the assets of the Company absorbed by Markham which included labelers, drill presses, greenhouses, processing machinery, raw ingredients, desks, computers, and office/lab equipment. *Id.* The remaining amount of \$164,723.17 was ordered to be paid by Bird in restitution to Markham. R0156. However, Markham had also received inventory valued at over a million dollars by his own testimony. The trial court failed to taking into consideration the product inventory of the Company as an off-set to the restitution. *Id.* The trial court ruled that because the FDA had shut down Markham's new company, CBCL, and seized its inventory, the inventory transferred to Markham two (2) years earlier by Bird was valueless and could not be used to offset restitution. *Id.* Thus, the court ordered restitution in the amount of \$164,723.17. *Id.* However, the trial court had not shown how the inventory was valueless given that CBCL was not actually shut down by the FDA, but according to Markham's testimony he had voluntarily chosen to recall the product and shut down CBCL himself because he did not want to invest more money into CBCL in order to obtain FDA approval.

The noncompliance report by the FDA indicated that there was no quality control unit, control procedures for CBCL were not established, production and control records were not prepared correctly, testing of the strength of the active ingredients was inadequate prior to release to the public, employees of CBCL were not properly trained, CBCL lacked written procedures for production and process control, CBCL lacked identification of all compounding and storage containers and major equipment identifying the contents/batch number/phase of processing and there were some containers located without this identifying information, CBCL lacked a written or established stability testing program, CBCL failed to retain samples from each batch, no records were kept for the maintenance/cleaning/sanitizing/inspection of equipment, lack of written procedures for cleaning and maintenance schedules, no written procedures for related components/drug product containers/closures, no written procedures for labeling, no procedures for handling written or oral complaints, lack of identification for each lot of product to facilitate recall if necessary, no written procedures for warehousing, no written procedures for annual evaluations and no annual evaluations having been conducted. R0157-160. These violations were mainly based on CBCL's failure to have written policies and procedures with regard to the tracking and safety of the products they were disseminating to the public.

However, the trial court failed to take into consideration that the shutting down of CBCL, formed by Markham (without Bird) and ran for a couple of years thereafter, occurred by no fault of Bird. Bird was not and never had been a member of CBCL and had only worked with Markham in Claricon for a total of approximately three (3) months.

Bird was in no way responsible for the shutdown of CBCL that Markham and Bonada had formed and were running.

The determination of complete restitution herein required a finding that there existed a causal nexus between Bird's Securities Fraud and the loss of Markham's investment—which was converted to the assets of the Company upon dissolution, and then utilized in his newly formed company. *Ruiz* at ¶8. Since "cause" is at the heart of the "but for" determination, the judge did not maintain authority to decline to consider Bird's position that Markham's losses were caused by Markham's own negligence in not abiding by FDA regulations, and not by Bird. *Laycock* at ¶ 9 n. 4.

Bird was not liable to Markham for "any amount in excess of proportion of fault attributed" to him. UTAH CODE ANN. §78B-5-818(3). However, the trial court erroneously failed to apportion fault whatsoever, inevitably resulting in apportioning ALL fault to Bird even in light of Markham and possibly Bonada's evidenced negligence. UTAH CODE ANN. §§78B-5-819(1) and 78B-5-818(4)(a) mandated that the trial court proportion the fault attributable to Markham and Bird; however, it failed to do so. The Restitution Order was therefore erroneous in exceeding the maximum amount attributable to Bird. UTAH CODE ANN. §78b-5-820; *Interwest Constr.* at 100. Markham contributed to the cause of his injury or damage, rendering him contributorily negligent. *Johnson*. Thus, no restitution amount should have been ordered and the trial court committed error in not doing so. Bird was at no fault for the inventory being rendered valueless by the involvement of the FDA and it was not valueless when he gave the inventory to Markham. Therefore, the Restitution Order should be reversed.



## II. THE EVIDENCE WAS INSUFFICIENT AND DID NOT SUPPORT THE TRIAL COURT'S DETERMINATION OF COMPLETE RESTITUTION AND COURT-ORDERED RESTITUTION.

UTAH CODE ANN. §§76-3-201(4)(a) and 77-38a-302(1) both direct that a demonstrable economic injury supporting restitution must have a causal nexus with either the conviction of a criminal offense or a defendant's admission of criminal conduct to a sentencing court. *See also*, UTAH CODE ANN. §77-38a-102(2). By requiring conviction or an admission to the sentencing court, "the statute requires that responsibility for the criminal conduct be firmly established, much like a guilty plea, before the court can order restitution...." *State v. Watson*, 1999 UT App 273, ¶5, 987 P.2d 1289; *see also*, *State v. Mast*, 2001 UT App 402, ¶13, 40 P.3d 1143. In *State v. Robinson* it was held that, "[r]estitution should be ordered only in cases where liability is clear as a matter of law and where commission of the crime clearly establishes causality of the injury or damages." *Ibid.*, 860 P.2d 979, 983 (Utah App. 1993). "When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." *State v. Larsen* 2000 UT App. 106, ¶10, 999 P.2d 1252.

In *Watson*, this Court found that, "[w]ithout making inferences as the trial court did, it cannot be said that Watson admitted responsibility for the murder nor did she agree to pay restitution." *Ibid.* at ¶5. Watson had "only admitted and pleaded guilty to the obstruction of justice charge for which there were no pecuniary damages." *Id.* Because

of this, there was no firmly established admission of responsibility to support an award of restitution. *Id.*

In *State v. Mast* a defendant was held responsible by the trial court for restitution on items she had not admitted to receiving in pleading guilty to receiving stolen property, which decision was reversed by this Court. *Ibid.*, 2001 UT App 402, 40 P.3d 1143. Citing the “responsibility for the criminal conduct must be firmly established” concept, this Court found that the trial court was strictly held to charging restitution against the defendant for the stolen property she admitted to receiving, and not the entire list of items stolen in the burglary to which she had not plead. *Mast* at ¶ 18. The *Mast* court further held that even if a defendant “failed to be entirely forthcoming” regarding her involvement in the burglary, the court was not allowed to infer her participation in another crime to which she did not plead. *Mast* at ¶18; *see Galli* at 937-38. Requiring the defendant to pay for all items stolen in the burglary violated the plain language of the statute, and thus this Court reversed.

Markham testified that he formed a new company with Bonada shortly after Bird left and that the new company went on for a couple of years before they shut it down and terminated it. R0343:110. He testified that many distributors wanted to get the product approved with FDA through a “monograph” system. R0343:111. He testified that to facilitate this plan, documentation was put together and submitted to the FDA. *Id.* He testified an inspector then looked at the facility, classified it differently, and wanted different things put into place with regards to the company, production, and the product itself. *Id.* He testified that to do what the FDA wanted it would have cost about \$1.2-

1.5M. *Id.* Markham testified they were given a 90-120 day time period to comply, and the FDA took some samples. *Id.* Markham testified there was bacteria found in some of the samples. *Id.* He testified the FDA had the power to cease all production based on the discovery of this bacteria and they did. *Id.* Markham testified that after this occurred they could not produce the product anymore, but were not shut down. R0343:112. He testified they were asked to recall the product and destroy it, which they did. *Id.*

In the report issued on May 9, 2009, by the FDA (the “**FDA Report**”) to CBCL (defined therein as the “**firm**”) and dated with regard to an inspection occurring from 04/28/2009 to 05/04/2009, the following observations were made, which differ somewhat from Markham’s testimony:

- a. “There is no quality control unit.” “Specifically, Dr. Bonada stated that he claims sole responsibility for functions performed by the quality control unit and is also responsible for the manufacture of finished product. The QCU and its responsibilities are not in writing.”
- b. “Control procedures are not established which validate the performance of those manufacturing processes that may be responsible for causing variability in the characteristics of in-process material and the drug product.” “Specifically, the following validations have not been established or performed: (1) drug manufacturing process validation; (2) manufacturing equipment cleaning validation; (3) ‘Purified Water’ manufacturing process validation; (3) [sic] laboratory methods validation.”
- c. “The master production and control records for each batch size of drug product are not prepared, dated, and signed by one person with a full handwritten signature.” “Specifically, the firm does not have any written master production and control records or written procedures describing their preparation.”
- d. “Batch production and control records do not include complete information relating to the production and control of each batch.” “Specifically, .(b)(4) batch records for lots manufactured between 4/2006 and 4/30/09 were reviewed and were missing the following: (1) specific identification of each component and in-process material; (2) in process and laboratory control results; (3) inspection of the packaging and labeling area before and after use; (4) statements of actual and theoretical yields; (5) any labeling control

records including a sample of labeling used; (6) description of drug product containers; (7) any sampling performed; (8) identification of person performing the manufacturing processes; (9) any investigation made according to 21 CFR 211.192; and (10) results of examinations made in accordance with 21 CFR 211.134.”

- e. “Testing and release of drug product for distribution do not include appropriate laboratory determination of satisfactory conformance to the identity and strength of each active ingredient prior to release.” “Specifically, the firm does not test finished product to determine the identity and strength of the active ingredient, benzalkonium chloride.”
- f. “Employees are not given training in current good manufacturing practices.” “Specifically, the firm has no documentation to support the firm personnel have been trained in current good manufacturing practices for drug manufacturing.”
- g. “There are no written procedures for production and process controls designed to assure that the drug products have the identity, strength, quality, and purity they purport or are represented to possess.” “Specifically, the firm does not have any written procedures.”
- h. “All compounding and storage containers and major equipment used during the production of a batch of drug product is not properly identified at all times to indicate contents and the phase of processing of the batch.” “Specifically, there were various unidentified containers located in the production and finished goods storage rooms which were not identified as to the contents, batch number, or phase of processing. These included as identified by Dr. Bonada: (1) on the production floor there was one vertical white plastic container with approximately (b)(4) gallons & one horizontal white plastic container with approximately (b)(4) gallons of finished product. (2) in the finished goods storage there were a total of (b)(4) plastic blue drums with approximately (b)(4) gallons each of finished product.”
- i. “There is no written testing program designed to assess the stability characteristics of drug products.” “Specifically, the firm does not have a written or established stability testing program. Additionally, the firm could not supply stability data to support any expiration dating for their finished products located in the finished product storage areas of the facility; some of which were identified as being manufactured in 2007.”
- j. “A sample which is representative of each lot in each shipment of each active ingredient is not retained.” “Specifically, samples are not retained for any lots of finished products or active ingredients.”
- k. “Records are not kept for the maintenance, cleaning, sanitizing, and inspection of equipment.” “Specifically, the firm does not maintain any records pertaining to the equipment used in the manufacturing process.”
- l. “There is a lack of written procedures assigning responsibility, providing cleaning schedules, and describing in sufficient detail the methods,

- equipment and materials to be used for sanitation.” “Specifically, the firm does not have any written procedures for the maintenance of the facility.”
- m. “Written procedures are lacking which describe in sufficient detail the receipt, identification, storage, handling, sampling, testing, approval, and rejection of components, drug product containers, and closures.” “Specifically, the firm has no written procedures for related components, drug product containers, and closures.”
  - n. “Procedures designed to assure that correct labeling are used for drug products are not written.” “Specifically, there are no written procedures for the receipt, review, approval, release, and use of drug product labeling and these activities are not being performed.”
  - o. “Procedures describing the handling of written and oral complaints related to drug products are not written or followed.” “Specifically, the firm does not have an established process in place for the receipt, documentation, or investigation of complaints.”
  - p. “The distribution system is deficient in that each lot of drug product cannot be readily determined to facilitate its recall if necessary.” “Specifically, the firm has no written distribution procedures in place. Although batch numbers are recorded on the batch records and invoices, the lot numbers of the components are not documented on any manufacturing or distribution records.”
  - q. “Procedures describing the warehousing of drug products are not established.” “Specifically, the firm has no established procedure describing the warehousing of drug products.”
  - r. “Written procedures are not established for evaluations done at least annually and including provisions for a review of complaints, recalls, returned or salvaged drug products, and investigations conducted for each drug product.” “Specifically, the firm has not conducted any Annual Product Reviews for any of their manufactured products.”

R0157-160.

Bird’s PSI interview indicates that the concept of obtaining FDA approval had come about at the onset of their business relations. Bird stated as follows:

Sales were slow and we had several disagreements on claims we could make to help sell the product. Was of the opinion that we should stick to marketing the product as a liquid glove product while [Markham] and [Bonada] wanted to make claims that the product would also kill bacteria, protect against all matter [sic] of illnesses and cure and prevent diseases. I said that would require all kinds of FDA permissions and approvals and that it would be very expensive.

...

In summer 2009 approx. a story ran on KSL that Clarcon Biological was in trouble with the FDA and that they were recalling about a million dollars' worth of product that had been sold due to dangerous bacteria in their products and misleading claims. I was not surprised at all. Their product line had expanded to several different products that could cure about everything. They were ordered to halt production.

R0100-101.

The State herein established by evidence that Markham had entered into a securities agreement with Bird for \$247,000, which was found to be the loss and/or injury incurred by Markham in such crime, for which Bird was found guilty. The burden then shifted to Bird to present any offsets. Bird raised an argument and provided evidence that such damages be offset with over \$1.5M in assets absorbed by Markham in exchange for his investment, with such evidence being presented through actual testimony by Markham. The burden then shifted to the State to provide rebuttal evidence to the requested offsets. The State did not provide any evidence rebutting Bird's requested offsets. However, the court determined that the inventory was without value as an offset because the products were recalled and confiscated by the FDA two (2) years later.

The State had to establish that the inventory transferred to Markham at the time of his absorption of all assets of the Company were what caused the recall and confiscation two years later in order for them to be rendered valueless or have any kind of nexus to the crime. It presented no such evidence.

The "demonstrable economic injury" was not demonstrated by the State, who chose not to present rebuttal evidence regarding the offsets. *See*, UTAH CODE ANN. §§76-3-201(4)(a) and 77-38a-302(1); *see also*, UTAH CODE ANN. §77-38a-102(2). Nothing



was “firmly established” indicating that the assets absorbed by Markham had any direct impact on Markham’s loss occurring at the time the FDA shut down CBCL for noncompliance with federal regulations. *Watson* at ¶5. The noncompliance as contained in the FDA Report included lack of quality control, no control procedures established, no written master production/control records for each batch or batch records containing missing information, no testing of finished products prior to distribution, no employee training on manufacturing practices, no written procedures for production or process controls, lack of proper identification during the phase of processing, no written established stability testing program, nonretention of samples from each batch, lack of records for equipment upkeep/inspection and maintenance for the facility, no written procedures for handling or components, no procedures for labeling, no procedures for handling complaints, no written batch distribution information to facilitate recall, no warehousing procedures, no annual evaluations, and no Annual Product Review. The FDA Report does not indicate any connection to the original product absorbed by Markham in the dissolution of the Company. Neither Markham’s testimony nor Bird’s interview indicated any connection either. Such establishment was to be as firmly established as a guilty plea before the trial court ordered restitution. *Watson* at ¶ 5. It was not.

Bird was not liable to Markham for any further payment of restitution as a matter of law since the facts of this case did not “clearly establish causality of the injury or damages.” *Robinson* at 983. The findings that the inventory was valueless due to the FDA shutting down CBCL two years later was against the clear weight of the evidence,

and this Court should reach a definite and firm conviction that a mistake has been made in entering the Restitution Order. *Larsen* at ¶10.

The trial court would have had to infer facts in this matter to establish the nexus between the inventory at the time of the transfer to Markham and the inventory subject to recall two years later after Markham had sold 800,000 bottles of the product. Restitution cannot be inferred but must firmly establish liability as a matter of law. *Watson* at ¶ 5. With the transferred inventory having only a \$1-\$1.5M value, it is a more appropriate inference that the inventory absorbed by Markham from the Company to compensate his investment had already been entirely overturned before the FDA became involved with CBCL, and that the inventory on hand during the FDA investigation had been manufactured entirely by CBCL without any involvement from or connection with Bird.

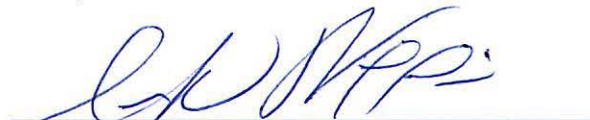
Bird was found guilty of securities fraud with regard to Markham's \$247,000 investment in the Company. He did not plead to any crime with regard to CBCL's violations of FDA regulations; however, by ordering the restitution for Markham in this case the trial court has in essence charged Bird with liability for a crime he did not commit or for which he did not admit any responsibility. This Court has regularly reversed restitution orders in these circumstances, finding a violation of the plain language of the restitution statutes. *See, Watson* and *Mast*, and *Galli*. It should do so here as well.



### CONCLUSION

WHEREFORE, based upon the foregoing, Bird respectfully request that this Court reverse his conviction and restitution order and take any such further action as this Court deems necessary.

DATED THIS 5<sup>th</sup> day of December, 2014.



Derek G. Williams  
Attorney for Lane Bird

### CERTIFICATE OF COMPLIANCE WITH Utah R. App. P. (f)(1)(C)

Counsel hereby certifies the *Brief of Appellant* complies with the type-volume limitation: 13,591 words are contained herein, in compliance with Utah R. App. P. (f)(1)(A) and was determined by the word processing system used to prepare *Brief of Appellant*.

DATED this 5<sup>th</sup> day of December, 2014.



Derek G. Williams  
Attorney for Lane Bird

### CERTIFICATE OF MAILING

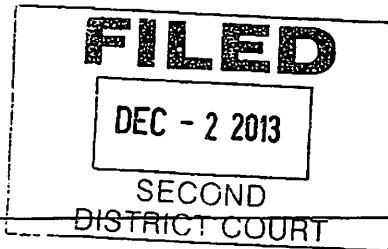
I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Brief of Appellant* and electronic copy on disc, on this 5<sup>th</sup> day of December, 2014, to the following:

Utah Attorney General's Office  
Attn. Criminal Appellate Division  
160 East 300 South  
P.O. Box 140811  
Salt Lake City, Utah 84114-0811



# Addendum ~A~

*Ruling and Order on State's Request for Restitution*, dated December 2, 2013.



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IN THE SECOND DISTRICT COURT, DAVIS COUNTY  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff,

vs.

LANE D. BIRD,

Defendant.

**RULING AND ORDER ON STATE'S  
REQUEST FOR RESTITUTION**

Case No. 111700523

Judge Michael G. Allphin

This matter is before the Court on the State's Request for Restitution. The Court has reviewed the moving and responding papers, along with their supporting documentation, and its case file. Having considered all of the arguments, determined that a hearing is unnecessary and the parties having requested that the Court make its determination without a hearing, being fully advised in the premises, and for the reasons set forth below, the Court rules as follows:

**ANALYSIS**

The State seeks an order of restitution on behalf of victims William and Susan Markham in the amount of \$247,000, representing the amount in which the Markhams invested with Defendant in Clarcon Labs, Inc. and Clarcon Distributing, Inc. The State asserts that the Markhams did not receive a return on their investment and that the requested sum accurately reflects the amount of their pecuniary damages resulting from Defendant's securities fraud. Defendant opposes the State's Request arguing that the Markham's did not suffer any actual pecuniary damages resulting from his criminal activity, as Mr. Markham ultimately absorbed all

of the companies' assets and product inventory, which have a value that far exceeds that of the Markhams' principal investment.

The Utah Code provides that “[w]hen a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime[.]” Utah Code Ann. § 77-38a-302(1). “Criminal activities” are defined as “any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.” *Id.* at § 77-38a-102(2). “Pecuniary damages” are defined as “all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant’s criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.” Utah Code Ann. § 77-38a-102(6).

Utah appellate courts interpret these statutory provisions as requiring a “sufficient nexus’ between the defendant’s criminal conduct and the pecuniary damages suffered by the victim.” *State v. Johnson*, 2009 UT App 382, ¶46, 224 P.3d 720. Utah courts have, therefore, “adopted a modified but for test to determine whether pecuniary damages actually arise out of criminal activities, which test requires a showing that (1) the damages would not have occurred but for the conduct underlying the defendant’s conviction and (2) the causal nexus between the criminal conduct and the loss is not too attenuated (either factually or temporally).” *Id.* (internal quotations and punctuation omitted). Additionally, the Utah Code requires that courts consider

all relevant facts in determining the monetary sum and other conditions for complete and court-ordered restitution. *See* Utah Code Ann. § 77-38a-302(5)(a), (b) & (c).

Here, the Court found Defendant guilty of securities fraud following a bench trial on August 28, 2012. The facts proven at trial demonstrated that Defendant made numerous untrue statements of material facts, omitted to state numerous material facts, and engaged in an act, practice, or course of business which operated as a fraud or deceit upon the Markhams. The Markhams relied on Defendant's representations and invested a principal sum of \$247,000 with Defendant in Clarcon Labs, Inc. and Clarcon Distributing, Inc., on which they did not receive a return. The Court finds that the Markhams are victims of Defendant's criminal activities and that but for Defendant's criminal conduct, the Markhams would not have suffered pecuniary damages from their investment, which damages have a sufficient causal nexus in fact and time with Defendant's securities fraud. The Court, therefore, concludes that it is appropriate to order that Defendant make restitution to the Markhams in the amount of their pecuniary losses.

In determining the amount of the Markhams' pecuniary losses, there is no dispute that the amount of the Markhams' principal investment with Defendant was \$247,000, or that the Markhams did not receive a return on this investment. Nevertheless, Defendant has presented undisputed evidence that Mr. Markham absorbed all of the assets of Clarcon Labs, Inc. and Clarcon Distributing, Inc. when forming a new entity, Clarcon Biological Chemistry Laboratory, Inc. Defendant also presented undisputed evidence that itemized and estimated the value of these assets, including: \$10,631 for labelers; \$1,006.24 for drill presses; \$639.59 for a greenhouse; \$30,000 for processing machinery (i.e. tanks, mixers, bottlers, etc.); \$15,000 for raw ingredients; and \$25,000 for desks, computers and office/lab equipment. These assets have a total estimated value of \$82,276.83. As the State has not presented any contrary evidence as to Mr. Markham's

retention of these assets or as to their value, the Court shall credit \$82,276.83 against the amount of the Markhams' principal investment for purposes of determining the amount of the Markhams' pecuniary damages. *C.f. Johnson*, 2009 UT App 382, ¶48 (holding that trial court erred by failing to consider potential credits for sums received by the victim subsequent to the defendant's criminal activities against the victim's investment losses).

Defendant seeks further credit against the amount of the Markhams' principal investment for the value of Clarcon Labs, Inc. and Clarcon Distributing, Inc.'s product inventory, which he estimates as having a value into the millions of dollars. However, the evidence demonstrates that the Federal Drug Administration found the products to be unsafe, which resulted in a products recall and the product inventory being seized by the United States Marshall's Office. The Court finds that the products recall and the seizure of the product inventory render the product inventory valueless. The Court shall, therefore, attribute no credit against the amount of the Markhams' principal investment for the value of Clarcon Labs, Inc. and Clarcon Distributing, Inc.'s product inventory for purposes of determining the amount of the Markhams' pecuniary damages.

Accordingly, the Court finds that the Markhams' suffered \$164,723.17 in pecuniary damages (\$247,000 – \$82,276.83) as a result of Defendant's criminal activities, which the Court concludes is the amount of Defendant's complete restitution in this matter. *See* Utah Code Ann. § 77-38a-302(a) ("Complete restitution' means restitution necessary to compensate a victim for all losses caused by the defendant."). The Court further concludes that \$164,723.17 is also the amount of Defendant's court-ordered restitution in this matter, as Defendant has failed to submit a financial affidavit, as required under Utah Code Ann. § 77-38a-204, and neither party

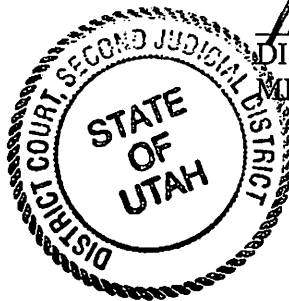
has presented any evidence or argument relating to the other enumerated factors of Utah Code Ann. § 77-38a-302(5)(c) for determining court-ordered restitution.

### ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Defendant's complete and court-ordered restitution in this matter is \$164,723.17, the payment of which shall be incorporated into the conditions of Defendant's probation.

This Ruling and Order shall constitute the Court's order on the State's Request for Restitution; no separate order need be prepared or submitted by the parties.

Dated: 12-2-13



  
DISTRICT COURT JUDGE  
MICHAEL G. ALLPHIN



**MAILING CERTIFICATE**

I certify that I sent a true and correct copy of the foregoing **RULING AND ORDER ON  
STATE'S REQUEST FOR RESTITUTION**, postage pre-paid, to the following on this date:

12/2/13.

Ché Arguello  
5272 South College Drive, #200  
Murray, Utah 84123

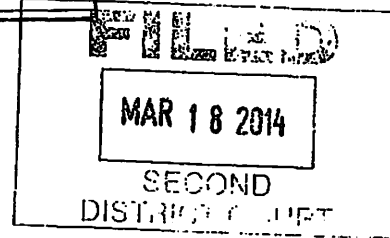
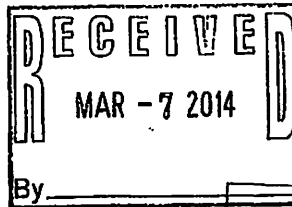
Richard M. Gallegos  
863 East 25<sup>th</sup> Street  
Ogden, Utah 84401

RM P. M.

# Addendum ~B~

*Order on Defendant's Motion to Amend Ruling and Order on State's Request for  
Restitution, entered on March 18, 2014.*

CHÉ ARGUELLO, #12412  
Assistant Attorney General  
SEAN D. REYES, #7969  
Utah Attorney General  
5272 South College Drive, #200  
Murray, Utah 84123  
Telephone: (801) 281-1221  
Facsimile: (801) 281-1224  
Attorneys for Plaintiff



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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR  
DAVIS COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	ORDER ON DEFENDANT'S MOTION
	:	TO AMEND RULING AND ORDER ON
Plaintiff,	:	STATE'S REQUEST FOR
	:	RESTITUTION
vs.	:	
LANE D. BIRD,	:	Case No. 111700523
Defendant.	:	Judge Michael G. Allphin

---

On December 2, 2013, the Court entered a Ruling and Order on the State's Request for Restitution. The Court ordered, *inter alia*, "court-ordered restitution" and "complete restitution" on behalf of victims William and Susan Markham in the amount of \$164,723.17. Payment of said restitution was incorporated into the conditions of defendant's previously ordered probation. On or about December 16, 2013, the defendant filed a Motion to Amend Ruling and Order on State's Request for Restitution. On or about January 22, 2014, the State filed its response to defendant's motion. The defendant filed a reply to the State's response on or about January 29, 2014. A hearing was held on the defendant's motion on February 26, 2014. The Court, having reviewed the

pleadings and having heard oral argument by the parties, ruled from the bench on February 26, 2014, denying the defendant's motion. The Court now enters the following written Order consistent with its February 26, 2014 ruling.

**ORDER**

WHEREFORE, the Court hereby ORDERS:

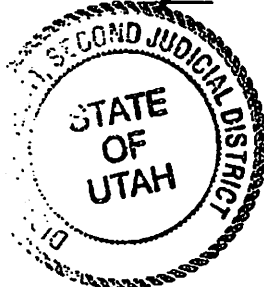
1. The defendant's Motion to Amend Ruling and Order on State's Request for Restitution is denied. The motion is denied on the following grounds:

- a) The motion lacks merit;
- b) The order of restitution is not barred on statute of limitation grounds; and

c) The defendant's motion is procedurally improper.

*To the extent that it seeks reconsideration of issues previously ruled on.*  
2. As previously ordered, the defendant's "court-ordered restitution" and "complete restitution" is \$164,723.17, the payment of which shall be incorporated into the conditions of defendant's probation. *Ze*

DATED this *18* day of March, 2014



SO ORDERED BY THE COURT:

*Michael G. Allphin*  
Michael G. Allphin  
Second District Judge

APPROVED AS TO FORM:

\_\_\_\_\_  
Derek G. Williams, Esq.  
Attorney for defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of March,  
2014, I caused a true and correct copy of the foregoing order to  
be served by the method(s) indicated below, upon the following:

Derek G. Williams  
44 North Main Street, Suite A  
Layton, UT 84041

*Derek G. Williams*

X U.S. Mail, postage prepaid  
     Overnight Express Mail  
     Via Facsimile (#         )  
     Hand-Delivered  
X Via E-Mail

# Addendum ~C~

*Controlling Constitutional and Statutory Provisions*

## **CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **A. U.S. CONST. AMEND. VI states as follows:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### **B. UTAH CODE ANN. §61-1-1 states as follows:**

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to: (1) employ any device, scheme, or artifice to defraud; (2) make any 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; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

### **C. UTAH CODE ANN. §61-1-16 states as follows:**

It is unlawful for any person to make or cause to be made, in any document filed with the division or in any proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

### **D. UTAH CODE ANN. §61-1-20 states as follows:**

(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).

E. UTAH CODE ANN. §61-1-21 states as follows:

(1) A person is guilty of a third degree felony who willfully violates: (a) a provision of this chapter except Sections 61-1-1 and 61-1-16; (b) an order issued under this chapter; or (c) Section 61-1-16 knowing the statement made is false or misleading in a material respect. (2) Subject to the other provisions of this section, a person who willfully violates Section 61-1-1: (a) is guilty of a third degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000; or (b) is guilty of a second degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more. (3) A person who willfully violates Section 61-1-1 is guilty of a second degree felony if: (a) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000; and (b) in connection with that violation, the violator knowingly accepted any money representing: (i) equity in a person's primary residence; (ii) a withdrawal from an individual retirement account; (iii) a withdrawal from a qualified retirement plan as defined in the Internal Revenue Code; (iv) an investment by a person over whom the violator exercises undue influence; or (v) an investment by a person that the violator knows is a vulnerable adult. (4) A person who willfully violates Section 61-1-1 is guilty of a second degree felony punishable by imprisonment for an indeterminate term of not less than three years or more than 15 years if: (a) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more; and (b) in connection with that violation, the violator knowingly accepted any money representing: (i) equity in a person's primary residence; (iii) a withdrawal from a qualified retirement plan as defined in the Internal Revenue Code; (iv) an investment by a person over whom the violator exercises undue influence; or (v) an investment by a person that the violator knows is a vulnerable adult. (5) It is an affirmative defense under this section against a claim that the person violated an order issued under this chapter for the person to prove that the person had no knowledge of the order. (6) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose a penalty or remedy provided for in Subsection 61-1-20(2)(b).



F. UTAH CODE ANN. §61-1-22 states as follows:

(1) (a) This Subsection (1) applies to a person who: (i) offers or sells a security in violation of: (A) Subsection 61-1-3(1); (B) Section 61-1-7; (C) Subsection 61-1-17(2); (D) a rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used; or (E) a condition imposed under Subsection 61-1-10(4) or 61-1-11(7); or (ii) offers, sells, or purchases a security in violation of Subsection 61-1-1(2). (b) A person described in Subsection (1)(a) is liable to a person selling the security to or buying the security from the person described in Subsection (1)(a). The person to whom the person described in Subsection (1)(a) is liable may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security, upon the tender of the security or for damages if the person no longer owns the security. (c) Damages are an amount calculated as follows: (i) subtract from the amount that would be recoverable upon a tender under Subsection (7)(b) the value of the security when the buyer disposed of the security; and (ii) add to the amount calculated under Subsection (1)(c)(i) interest at: (A) 12% per year: (I) beginning the day on which the security is purchased by the buyer; and (II) ending on the date of disposition; and (B) after the period described in Subsection (1)(c)(ii)(A), 12% per year on the amount lost at disposition.

G. UTAH CODE ANN. §76-3-201 states as follows:

(4) (a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. (b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act. (c) In addition to any other sentence the court may impose, the court, pursuant to the provisions of Sections 63M-7-503 and 77-38a-401, shall enter: (i) a civil judgment for complete restitution for the full amount of expenses paid on behalf of the victim by the Utah Office for Victims of Crime; and (ii) an order of restitution for restitution payable to the Utah Office for Victims of Crime in the same amount unless otherwise ordered by the court pursuant to Subsection (4)(d). (d) In determining whether to order that the restitution required under Subsection (4)(c) be reduced or that the defendant be

exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (vi) and provide findings of its decision on the record.

H. UTAH CODE ANN. §77-38a-102(2), states “ ‘[c]riminal activities’ means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.”

I. UTAH CODE ANN. §77-38a-102(6) states as follows:

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

J. UTAH CODE ANN. § 77-38a-301, states “[i]n a criminal action, the court may require a convicted defendant to make restitution.”

K. UTAH CODE ANN. §77-38a-302(1) states as follows:

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5). (2) In determining restitution, the court shall determine complete restitution and court-ordered restitution. (a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant. (b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing. (c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record. (4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue. (5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. (b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including: (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense; (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; (iii) the cost of necessary physical and occupational therapy and rehabilitation; (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim. (c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider: (i) the factors listed in Subsections (5)(a) and (b); (ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204; (iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant; (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; (v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and (vi) other circumstances that the court determines may make restitution inappropriate. (d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing. (ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

L. UTAH CODE ANN. §63M-7-503 states as follows:

(1) A reparations award may not supplant restitution as established under Title 77, Chapter 38a, Crime Victims Restitution Act, or as established by any other provisions. (2) The court may not reduce an order of restitution based on a reparations award. (3) If, due to reparation payments to a victim, the Utah Office for Victims of Crime is assigned under Section 63M-7-519 a claim for the victim's judgment for restitution or a portion of the restitution, the office may file with the sentencing court a notice of the assignment. The notice of assignment shall be signed by the victim and a reparations officer and shall contain an affidavit detailing the specific amounts of pecuniary damages paid on behalf of the victim. A copy of the notice of assignment and affidavit shall be mailed by certified mail to the defendant at his last known address 20 days prior to sentencing, entry of any judgment or order of restitution, or modification of any existing judgment or order of restitution. Any objection by the defendant to the imposition or amount of restitution shall be made at the time of sentencing or in writing within 20 days of the receipt of notice, to be filed with the court and a copy mailed to the office. Upon the filing of the objection, the court shall allow the defendant a full hearing on the issue as provided by Subsection 77-38a-302(4). (4) If no objection is made or filed by the defendant, then upon conviction and sentencing, the court shall enter a judgment for complete restitution pursuant to the provisions of Subsections 76-3-201(4)(c) and (d) and identify the office as the assignee of the assigned portion of the judgment and order of restitution. (5) If the notice of assignment is filed after sentencing but during the term of probation or parole, the court or Board of Pardons shall modify any existing civil judgment and order of restitution to include expenses paid by the office on behalf of the victim and identify the office as the assignee of the assigned portion of the judgment and order of restitution. If no judgment or order of restitution has been entered, the court shall enter a judgment for complete restitution and court ordered restitution pursuant to the provisions of Sections 77-38a-302 and 77-38a-401.

M. UTAH CODE ANN. §77-38a-401 states as follows:

(1) Upon the court determining that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Section 77-38a-302 on the civil judgment docket and provide notice of the order to the parties. (2) The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. In addition, the department may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure. (3) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover collection and reasonable attorney fees. (4) Notwithstanding Subsection 77-18-6(1)(b)(v) and Sections 78B-2-311 and 78B-5-202, a judgment ordering restitution when entered on the civil judgment docket shall have the same affect and is subject to the same rules as a judgment in a civil action and expires only upon payment in full, which includes applicable interest, collection fees, and attorney fees. Interest shall accrue on the amount ordered from the time of sentencing, including prejudgment interest. This Subsection (4) applies to all restitution judgments not paid in full on or before May 12, 2009. (5) The department shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

N. UTAH CODE ANN. §78B-5-818 states as follows:

(1) The fault of a person seeking recovery may not alone bar recovery by that person. (2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78B-5-819(2). (3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78B-5-819. (4)(a) The fact finder may, and when requested by a party shall, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78B-5-821(4) for whom there is a factual and legal basis to allocate fault. In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony. (b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person

seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

O. UTAH CODE ANN. §78B-5-820 states as follows:

(1) Subject to Section 78B-5-818, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. (2) A defendant is not entitled to contribution from any other person. (3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting from the allocation of fault under Section 78B-5-818.

# Addendum ~D~

*Bench-Trial Partial Transcript Testimony of Bill Markham Cross, Redirect, and Recross.  
R343:28-30, dated August 28, 2012.*



1 reason we've got to create these two companies is so Omar  
2 doesn't have all the control. Do you recall any conversations  
3 like that?

4 A. He didn't talk to me about any debt from the LLC.

5 Q. He didn't talk to you about any debt?

6 A. From the LLC, no.

7 Q. Okay. Were there conversations about taking the  
8 control from Omar?

9 A. Um.

10 Q. That's why you needed to create Labs and  
11 Distribution?

12 A. Taking control from Omar? No. He's -- his \$500,000  
13 deposit he said he put in the -- they put in the company would  
14 pay for the debt.

15 Q. He told you he put a \$500,000 deposit?

16 A. Invested \$500,000 to the company.

17 Q. Okay. And so there was no communication about how  
18 you were going to basically protect yours and Lane's interest  
19 so that Omar didn't have full control, since Omar was the only  
20 guy that made the product and distributed it at this point?

21 A. Aside from the stock that he had in his office in  
22 Layton.

23 Q. Okay.

24 MR. ARGUELLO: Stock, (inaudible) ask stock?

25 THE WITNESS: Of the product. Of the skin care



1 product he had.

2 Q. (By Mr. Gallegos) And that's -- when you say  
3 "stock," you're talking about product?

4 A. I'm talking about product, yes.

5 Q. Okay. So, and at some point there's a conversation  
6 where Lane represents to you, when you ask, you know -- I guess  
7 you're asking some questions, I can't tell. But I'm -- you're  
8 asking questions about the company and how it's going to work  
9 and all that, right?

10 A. Yes.

11 Q. Okay. And at some point he tells you, I got 500,000  
12 worth of product. That's how we're going to protect our butts,  
13 basically. Right?

14 That's how I'm going to protect your money, that's  
15 how I'm going to protect my interest, so we don't do all this  
16 stuff for Omar.

17 A. He didn't put a dollar figure on it. But he said he  
18 had enough money -- enough of the product to cover the  
19 investment and himself in case he had to.

20 Q. Okay. So then your next question is, Well, can you  
21 show me the product? Did you say that?

22 A. No. He showed me voluntarily.

23 Q. You didn't ask to see the -- oh. He just took  
24 you --

25 A. Yeah.

1 Q. -- to see the product?

2 A. We were over in the office. He said, "Let me show  
3 you."

4 Q. And knowing what you know now and seeing all the  
5 product, what value would you have put on what he showed you?

6 MR. ARGUELLO: Objection, relevance.

7 MR. GALLEGOS: I think it goes to the representation  
8 that was made, Judge.

9 THE COURT: Overruled. Go ahead.

10 THE WITNESS: Rephrase the question.

11 Q. (By Mr. Gallegos) When -- after -- knowing what you  
12 know about the company, and the bottles and all that and  
13 everything that he showed you as far as the product that he had  
14 secured, what value would, would you put on that,  
15 approximately? Ball park figure of what you --

16 A. At -- now, or at that time?

17 Q. At that time.

18 A. At that time, based upon his price that he told me  
19 it was per bottle, couple million.

20 Q. Couple million?

21 A. Million and a half.

22 Q. So even more -- well, is that retail value or would  
23 that be what it --

24 A. Retail.

25 Q. Okay. So it was even more than the 500,000?