

2016

**State of Utah, Plaintiff/ Appellee, v. Laned. Bird, Defendant/
Appellant.**

Utah Court of Appeals

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Case No. 20140434-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

LANE D. BIRD,
Defendant/Appellant.

Brief of Appellee

Appeal from an order of restitution entered following a conviction for securities fraud, a second degree felony, in the Second Judicial District, Davis County, the Honorable Michael G. Allphin presiding

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Case No. 20140434-CA

IN THE
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STATE OF UTAH,
Plaintiff/Appellee,

v.

LANE D. BIRD,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from an order of restitution entered following a conviction for securities fraud, a second degree felony. This Court has jurisdiction under Utah Code section 78A-4-103(2)(e).

INTRODUCTION

Defendant Lane D. Bird was convicted of securities fraud for, in connection with the sale or offer of a security, willfully making numerous false statements, omitting numerous material facts, and engaging in an act, practice, or course of business that operated as a fraud on his victims. His victims, Bill and Susan Markham, were Defendant's next-door neighbors. The Markhams invested \$247,000 in a hand-lotion company Defendant was promoting. Defendant did not disclose his prior bankruptcies, tax liens, and

other civil judgments, nor did he disclose the financial disarray that the hand-lotion venture was in. Defendant told them that he had invested half a million of his own money in the venture, but he had not. Defendant also told them that the money would be used to update and automate the production equipment. But while some of the victims' money was used for that purpose, most was not.

In exchange for the investment, Bill Markham was promised stock and a position with the company. The original founder of the company ousted Defendant after just a few months, but Bill stayed on for another two years, working with the founder in a futile attempt to make the venture profitable. Mired in debt and lacking in sales, the company never made a profit. Bill shut the company down after the Food & Drug Administration (FDA) seized and destroyed the company's product inventory because it contained harmful bacteria.

The trial court sentenced Defendant to prison but suspended the prison term and ordered Defendant to pay \$164,723.17 in restitution. In calculating restitution, the trial court subtracted \$82,276.83 from the victims' initial investment of \$247,000 to account for the value of fixed assets that Bill had assumed control of after Defendant was no longer involved in the venture. But the trial court declined to adjust the figure to account for the

product inventory that Defendant had relinquished to Bill, explaining that the product inventory was worthless because the FDA confiscated it.

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion when it refused to offset the amount of restitution to account for product inventory from which the victims never received any benefit?

Standard of Review. While the trial court's interpretation of the relevant restitution statutes is reviewed for correctness, its application of those statutes in ordering restitution is reviewed for abuse of discretion. *See State v. Ludlow*, 2015 UT App 146, ¶ 5, 353 P.3d 179; *State v. Garcia*, 866 P.2d 5, 6 (Utah Ct. App. 1993). "A trial court will be deemed to have abused its discretion only if no reasonable [person] would take the view adopted by the trial court." *Ludlow*, 2015 UT App 146, ¶ 5 (internal quotation marks omitted) (alteration in original).

2. Is the evidence sufficient to support the trial court's conclusion that Defendant caused the victims' loss?

Standard of Review. Review is for clear error. *State v. Walker*, 743 P.2d 191, 192-93 (Utah 1987).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are reproduced in Addendum A:

- Utah Code Ann. §61-1-1 (West 2012)
- Utah Code Ann. §61-1-3 (West 2012)
- Utah Code Ann. §61-1-21 (West 2012)
- Utah Code Ann. §61-1-22 (West 2012)
- Utah Code Ann. §76-3-201 (West 2015)
- Utah Code Ann. §77-38a-102 (West Supp. 2015)
- Utah Code Ann. §77-38a-301 (West 2004)
- Utah Code Ann. §77-38a-302 (West Supp. 2015).

STATEMENT OF THE CASE

This case involves Defendant's challenge to the amount of restitution he was ordered to pay his victims. Defendant was charged with theft and securities fraud. R1-2. He was tried before the court and acquitted of theft but convicted of securities fraud. R121-22. As part of Defendant's sentence, the court ordered him to pay \$164,723.17 in restitution. R121-22; *157; 231.¹

A. Summary of facts.²

By January 2007, Bill and Susan had lived next door to Defendant for about six years. R346:21. They enjoyed a "very friendly relationship," going to dinner together occasionally, interacting through church, and talking about each other's jobs when they crossed paths. R346:21-23. Based

¹ After page 178 in the record, the numbering mistakenly reverts to 149. To avoid confusion, any citation to the second occurrence of pages 149-78 will be preceded by an asterisk.

² Because Defendant does not challenge the sufficiency of the evidence supporting the verdict, the facts are presented in a manner consistent with that verdict. Conflicting evidence is addressed only to the extent necessary to understand the issues on appeal.

on these interactions and Bill's observation of Defendant's lifestyle, Bill viewed Defendant as a successful entrepreneur. R346:23-26. Bill and Susan trusted Defendant. R346:111; 137.

Around January or February 2007, Defendant approached Bill about investing in a venture Defendant was involved in. R346:26-27. The venture involved producing and distributing a hand lotion that, when dried, formed a barrier to protect hands from acid, dirt, and grease. R346:26-27, 40-41. A man named Omar Bonada had developed the lotion and was trying to produce and distribute it and had brought in Defendant to help with distribution and sales. R346:32; 347:369, 390-91. Defendant told Bill that the venture had been experiencing "exponential growth," and that they were looking for \$250,000 in capital to update and automate the "antiquated" production equipment so they could keep pace with demand. R346:26-27, 30, 61-62.

Defendant and Omar entered an agreement where Omar's company, ClarconLab, LLC, was dissolved and two new companies were formed: one to handle production—Clarcon Labs, Inc.—and another to handle distribution and marketing—Clarcon Distributing Inc. R346:85; 347:390-91. Defendant told Bill that he was part owner of Clarcon Labs and full owner of Clarcon Distributing. R343:21-22; 346:34. Defendant showed Bill a

prospectus he had developed, projecting over \$15.4 million in profits for the first year; a copy of several invoices, showing sales that had been made by Omar's company over the past few months; and some checks, ostensibly indicating payment on some of the invoices. R343:62-63; 346:48, 50; SE1, 2.

Defendant also told Bill that it was a "solid" investment. R346:45. In fact, he told Bill and Susan that he believed the product would be so successful that he had put everything he had into the venture, investing \$500,000 of his own money by taking out a second mortgage on his house and borrowing from his father. R343:28; 346:44-45, 125-26. Defendant also gave Bill a tour of the factory, introduced him to Omar, and later showed Bill a stockpile of inventory that Omar had given Defendant as "security" for any investments that Defendant brought in. R343:17; 346:41-43.

Bill and Susan agreed to invest with the understanding that their money would be used for updating and automating the production equipment. R343:34; 346:61-62, 73, 97, 122, 124. To come up with the money, Bill and Susan took out a second mortgage on their home, Susan liquidated her retirement account, and Bill borrowed \$50,000 from his aunt. R343:45; 346:52-53, 74-76. In six separate payments between March 7, 2007, and May 16, 2007, Bill and Susan gave a total of \$247,000 to Clarcon Labs and Clarcon Distributing. SE6.

After most of that amount had been invested, Defendant and Bill signed an agreement on April 11, 2007, memorializing the arrangement. SE5. In exchange for the investment, Bill would become the Executive Vice President of Clarcon Distributing and would oversee marketing and sales. R346:64; SE5. He would receive a salary once the company became profitable, plus a commission on subordinates' sales. R346:64; 347:432; SE5. He would be given a 5% share of stock in Clarcon Labs and a 25% share of stock in Clarcon Distributing. R346:109-10; SE5. Bill would also become Chief Operating Officer and Vice President of Clarcon Labs, but with no significant role in that company. R346:73; SE5. Defendant represented that he presently owned stock in the two companies and had the right to assign it. SE5.

In fact, the companies had never issued any stock because, as Defendant later acknowledged, there was no value in the companies at that point. R343:103; R347:458, 482. Defendant had registered the companies just days before Bill signed the agreement, even listing Bill as an officer of Clarcon Distributing without his knowledge. R343:21, 32; 346:85-86; SE14, 15.

Over several formal and informal pre-investment conversations with the Markhams, Defendant never told them about his two prior

bankruptcies. R346:109, 131; SE41, 42. Nor did he tell them about several civil judgments and tax liens against him. R346:109, 131; SE23-33, 35. Regarding the Clarcon venture, Defendant never gave the Markhams any audited financial statements or other documents that showed the venture's assets and liabilities. R343:39; 346:49, 127. Defendant never discussed any of ClarconLab's debts, nor did he tell the Markhams that ClarconLab was borrowing money from other companies in which Defendant was a principal to meet operating expenses and pay salaries. R343:27-28; 346:99, 106. Defendant later characterized the financial and managerial state of ClarconLab—and, indeed, everything about the venture—as “a mess” and said that he had intended to use the investment “to help Omar out of a . . . bad situation.” R347:382, 434-38, 462. But Defendant did not convey that to the Markhams. R346:45, 122, 128, 150; 347:434.

Defendant used Bill and Susan's money to buy some new production equipment, but he spent much of it to cover salaries and bills and to repay over \$68,000 that Defendant had borrowed from another one of his ventures, Powerslide Tools, Inc. R343:93; 346:129, 190, 196; SE9. In fact, for nearly the first two months of each company's existence, the operating accounts for both Clarcon Labs and Clarcon Distributing consisted almost solely of the funds Defendant received from the Markhams. R346:177-87;

SE7 at 1-4 (Clarcon Distributing check register listing \$127.50 in deposits from sources other than the Markhams between March 8, 2007, and May 1, 2007, compared with \$170,300 in deposits from the Markhams); SE8 at 1-10 (Clarcon Labs check register listing \$970.66 in deposits from sources other than the Markhams between March 27, 2007, and June 4, 2007, compared with \$127,000 in deposits from the Markhams). Defendant thus used the Markhams' money to cover all operating expenses during that time period and beyond. R346:128, 177-87; SE7 at 1-4; SE8 at 1-8. *see also* R346:197-98 (describing first-in, first-out rule of forensic accounting, whereby expenses are not attributed to new deposits until preexisting funds—here, the Markhams' investment—are exhausted).

Bill began working part time at Clarcon Distributing in April 2007. R346:88-89. He started to review the books for Clarcon Lab and Clarcon Distributing. R346:94-95. In May 2007, about a week after he had given his last check to Defendant, Bill noticed large payments to Powerslide and asked Defendant about it. R346:89-90, 92-95. Defendant explained that he was part owner of Powerslide and had used Powerslide to pay some of the operating expenses for the Clarcon venture and, given his ownership interest in each company, Defendant said "he had the right to pass the monies back and forth as he saw fit." R346:99, 105-06, 148-49.

Bill also noticed that while Clarcon Labs was updating some equipment, it was not doing so as quickly as he had wanted. R346:89–90. Although Defendant had told Bill not to talk to Omar about finances or other business matters—Omar and Defendant supposedly had an agreement that Defendant would be the point of contact for all investors—Bill approached Omar sometime in late May about his concerns. R346:89, 99–103. In the course of that conversation, Bill mentioned Defendant’s personal investment of half a million dollars in the company, and Omar became angry. R346:100. The two confronted Defendant, and Defendant acknowledged that he had not put any money into the company, but reasoned that he had put that much into the company “in the form of his time and efforts.” R346:102–03.

On June 1, 2007, Omar ousted Defendant from Clarcon Labs. R346:103–04; DE11. Defendant initially tried to continue working with Clarcon Distributing—based out of his personal office—but the relationship with Bill had soured and Defendant soon relinquished any control over Clarcon Distributing. R343:97; 347:422, 424, 471. In July 2007, Bill and Susan met with Defendant at his office. Defendant admitted that he had lied about investing his own money in the venture, apologized, and said that he had done it because he thought the Markhams would not invest if

they did not think he had “some skin in the game.” 346:106–07, 130, 158. Defendant gave Bill the inventory he had been holding in his office as security, which was valued at \$500,000 retail. R346:125, 156; 347:346, 379, 426.³

Defendant dissolved Clarcon Distributing; Omar dissolved Clarcon Labs; and on June 8, 2007, Bill and Omar formed Clarcon Biological Chemistry Laboratory, Inc. SE14, 15, 16. For the next two years, the two tried to salvage the company but were never able to produce and market the product like they had hoped. R343:61, 114; 347:107. Bill began looking at all the records from the various companies—some of which he had not seen before Defendant left, R343:74–75, 94–98—and realized that the financial condition of the venture as of June 2007 was “[p]retty bad”: “Lot of debt. Lot of overhead. Virtually nothing in sales.” R346:78, 107. As one salesman described it, other than a few small transactions, most sales were “preliminary.” R347:353. And that financial picture did not improve over

³ Bill estimated the retail value of the inventory when it was first shown to him as \$1.5–\$2 million, based on the prices Defendant had quoted him when Bill was considering whether to invest. R343:29–30. But everyone else, including Defendant, valued the inventory at \$500,000. R346:125, 156 (Susan); 347:346 (a salesman); 347:379 (Defendant).

the next two years. Many promising distributors had simply signed letters of interest that never materialized into actual sales. R343:89, 110, 121-22.

In 2009, Bill and Omar began the process for FDA approval in an effort to convince reluctant distributors to purchase the product. R343:111. The FDA conducted site inspections in April and May 2009 and informed the company of several necessary procedural safeguards. R156-60; 343:111. But when the FDA tested the lotion, it found harmful bacteria in it and in June 2009 ordered the company to recall and destroy the product. R153-55; 343:111-12. Unsatisfied with the company's efforts to do so, the FDA had U.S. Marshals seize the remaining inventory on July 31, 2009. R153-55; 343:112-13. Bill and Omar then dissolved the company. 343:110-11; SE16.

At no point did any of the four Clarcon companies make a profit—either before Bill invested, while he worked with Defendant, or after Defendant left. R343:99-100, 121; 346:107; 347:382, 417, 432, 467-68, 476, 482. What sales they did have were never enough to cover operating expense and payments on debt. R343:99-100, 121; 346:107; 347:417, 431-32. Other than one check for \$1,129.67, Bill never received any salary or commissions while Defendant was involved in the venture. R346:78; SE8 at 7. “Sales apparently were not there, and there [were] no commissions to be paid.” R346:78. Hoping to make their initial \$247,000 investment bear fruit, Bill

and Susan put an additional \$193,000 into the venture after Defendant left, bringing their total cash investment to \$440,000. R346:108. Bill worked 60 to 80 hours per week in the mortgage industry to pay bills and to “subsidize” the Clarcon venture. R346:108. By 2012, the Markhams were on the verge of having to sell their house because they could not make payments on the second mortgage. R346:108, 137–38. As Bill described the situation, “It’s like being 18 years old all over again and having to start over financially.” R346:108–09.

B. Summary of proceedings.

The State charged Defendant with one count of theft and one count of securities fraud, both second degree felonies. R1–2. A bench trial was held August 28 and 29, 2012. R84–87.

The Markhams testified for the State in a manner consistent with the facts discussed above. The State also presented testimony from an investigator with the Utah Division of Securities and an expert on securities law. R346:18, 114, 164; 347:235, 240. Defendant called his sister—who had worked at Clarcon Distributing as a bookkeeper while Defendant was involved with the company—and a salesman who had also worked with Clarcon Distributing during that time. R347:294–95, 331, 333–34. Defendant also took the stand and disputed almost every aspect of the Markhams’

testimony. *See, e.g.*, R347:386–87, 392, 410, 413, 425–26, 469, 471. Defendant did not, however, dispute that the Clarcon venture was “a mess,” mired in debt, and unprofitable. 347:382, 417, 432, 434–38, 476, 482.

The court acquitted Defendant of the theft charge but found him guilty of securities fraud. R87. It sentenced him to one to fifteen years in prison and fined him \$10,000, but suspended the sentence and fine and placed him on probation and ordered him to serve 180 days in jail. R121–22. The Markhams had submitted a letter, asking the court not to send Defendant to prison but to order him to pay restitution. R118. The court scheduled a restitution hearing for a later date. R122.

The State filed a restitution request for \$247,000—the amount of the Markhams’ initial investment in the venture. R134–35. The State argued that the Markhams had relied on Defendant’s statements in making the investment, were never given stock in the company as promised, were never repaid the \$247,000, and never received any return on their investment. R135–36. In support, the State referred to the trial testimony and attached copies of the checks the Markhams had used to pay Defendant. R135, 139–45.

Defendant objected to the State’s request. R148–50. He argued that the Markhams had “not suffered an actual loss in this case.” R148.

Defendant asserted that because Bill became involved in the company and Defendant had turned over assets and inventory worth between \$1 million and \$1.5 million, the Markhams had not actually lost anything. R149. Defendant relied on the trial record, a number of attachments identifying the inventory he had returned to Bill, and the FDA's report following its site inspection. R149-50, 152-78.

The parties waived their right to a hearing on restitution, and the trial court decided the issue based on the record before it, which included the case file. R*153. The trial court concluded that the Markhams did not receive any return on their \$247,000 investment. R*155. It found that the only thing of value the Markhams received in exchange for their investment was \$82,276.83 worth of fixed assets Bill had retained when he assumed control of the Clarcon venture.⁴ R*155. The court thus offset the \$247,000 loss by \$82,276.83. R*155. But the court declined to further offset the loss based on the value of the product inventory because the government had seized it. R*156. Finally, the court concluded that Defendant's conduct was the but-for cause of the Markhams' loss, and that the loss had "a sufficient causal nexus in fact and time with Defendant's securities fraud." R*155.

⁴ The fixed assets included labelers, drill presses, processing machinery, raw ingredients, a greenhouse, a desk, computers, office equipment, and lab equipment. R*155.

The court thus ordered complete and court-ordered restitution of \$164,723.17. R*156. Defendant filed a motion to reconsider, which was denied, and he timely appealed the underlying restitution order. R267, 285.

SUMMARY OF ARGUMENT

Issue I. In challenging the restitution order, Defendant argues that the Markhams did not actually suffer any loss because Defendant gave Bill product inventory that exceeded the value of the Markhams' investment. Defendant argues that the restitution order thus should have been offset by the value of that inventory, resulting in no restitution. Defendant also argues that he did not cause the Markhams' loss because he was convicted only of selling securities without a license, which could not be the but-for cause of the Markhams' loss. Furthermore, Defendant argues that any causal nexus is too attenuated because the Markhams' loss occurred in 2009, as a result of Bill's failure to follow FDA regulations—long after Defendant was no longer involved in the venture.

The inventory the Markhams received did not reduce the losses they incurred because the inventory was not sufficiently valuable to cover the venture's operating expenses and debt. The Markhams received no profit from their investment; indeed, they did not even recover the principal they invested.

Moreover, the record clearly establishes that Defendant was charged with, convicted of, and sentenced for securities fraud, not selling securities without a license. And Defendant's many fraudulent statements, omissions, and other actions are the but-for cause of the Markhams' loss; without Defendant's fraudulent actions, the Markhams would not have invested their money in a failed venture.

Furthermore, the causal nexus between Defendant's fraudulent actions and the Markhams' loss is not attenuated either factually or temporally. Attenuation occurs when the loss is attributable to some intervening cause that is not reasonably foreseeable. But the Markhams' loss occurred in 2007—a direct result of Defendant's fraudulent actions—when they invested their money in a failed venture. Bill's efforts over the next two years were nothing more than a futile attempt to salvage that investment. And the FDA's seizure of the property and Bill's dissolution of the company merely marked the end of that futile two-year attempt to recoup his lost investment. In any event, given the financial disarray of the venture, the ultimate failure of the venture was reasonably foreseeable at the time of Defendant's fraud.

Issue II. Defendant argues that the evidence is insufficient to support the trial court's conclusion that he caused the Markhams' loss. But the

evidence demonstrates that any sales were insufficient to generate a profit given the venture's debts and operating expenses. The undisputed evidence at trial was that no Clarcon entity ever made a profit. The evidence thus supports the trial court's finding that Defendant caused the Markhams' loss when he convinced them to invest in a failed venture by willfully misstating and omitting material facts.

ARGUMENT

Defendant challenges only the restitution order entered against him. He does not challenge the sufficiency of the evidence supporting his conviction or any other aspect of his conviction or sentence. And his challenge to the restitution order is based only on whether the Markhams suffered any loss, whether Defendant is responsible for any loss they did suffer, and whether the evidence is sufficient to support the trial court's conclusion that the security the Markhams received for their investment was worthless.

The record is clear that the Markhams suffered a loss of well over \$164,000—the amount Defendant was ordered to pay. Defendant—and not Bill, the FDA, or anyone else—caused that loss. The security the Markhams received for their investment was Bill's equity position in the venture. And the evidence is sufficient to support the conclusion that that security was

worthless, not just when the FDA confiscated the company's inventory, but—accounting for the company's liabilities—when Defendant gave the inventory to Bill.

I.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT CREDITED DEFENDANT FOR THE VALUE OF FIXED ASSETS THE VICTIMS ACQUIRED, BUT REFUSED TO CREDIT HIM FOR PRODUCT INVENTORY FROM WHICH THE VICTIMS RECEIVED NO BENEFIT.

Defendant argues that restitution is inappropriate for three reasons:

(1) the Markhams did not suffer any loss because Defendant gave them product inventory that exceeded the value of their investment; (2) Defendant was convicted only of, or has accepted responsibility only for, selling a security without a license, and that conduct was not the but-for cause of any loss suffered by the Markhams; and (3) because Defendant was not involved in the Clarcon venture when the FDA seized the inventory, any loss was too attenuated from Defendant's actions.

Defendant's arguments are foreclosed by the record. First, the inventory was insufficient to cover the value of the Markhams' investment because the company was mired in debt, lacking in sales, and peddling an unsafe product that the FDA eventually confiscated. Second, Defendant was convicted of securities fraud for engaging in an act, practice, or course

of business that operated as a fraud or deceit upon the Markhams, and for making numerous material misstatements and omissions to induce the Markhams to invest. That fraudulent activity was the but-for cause of the Markhams putting their money into a failed investment and not receiving any benefit in return. Third, the Markhams' loss is not too attenuated from Defendant's conduct because the Clarcon venture was a failed venture from the beginning. Aside from a single thousand-dollar check, the Markhams never recouped any of their principal despite Bill's prolonged efforts to salvage the investment. That Bill was ultimately unsuccessful at doing so does not break the causal chain.

Restitution serves compensatory, deterrent, and rehabilitative purposes. *State v. Laycock*, 2009 UT 53, ¶18, 214 P.3d 104. Chief among those purposes is "making crime victims whole for the harms they suffer because of a defendant's criminal conduct." *State v. Wadsworth*, 2015 UT App 138, ¶13, 351 P.3d 826 (internal quotation marks omitted), *cert. granted*, 363 P.3d 523. Thus, "[t]he appropriate measure of the loss or damage to a victim is fact-sensitive and will vary based on the facts of a particular case." *State v. Corbitt*, 2003 UT App 417, ¶15, 82 P.3d 211. Trial courts are therefore "granted flexibility in determining damages in order to 'fashion an equitable award to the victim.'" *Wadsworth*, 2015 UT App 138, ¶13 (quoting

Corbitt, 2003 UT App 417, ¶14); *see also Henderson v. For-Shor Co.*, 757 P.2d 465, 469 (Utah Ct. App. 1988) (“[R]ules relating to the measure of damages are flexible, and can be modified in the interest of fairness.” (internal quotation marks omitted)).

The trial court properly exercised that flexibility when it decided to credit Defendant for fixed assets turned over to Bill, but declined to credit Defendant for inventory that was insufficient to cover Bill’s liabilities and ultimately deemed worthless.

A. The victims suffered a loss of over \$164,000, even accounting for the value of the inventory Defendant returned.

Defendant argues that as a matter of law, any property returned to the Markhams must be used to offset the amount of their loss. Aplt. Br. at 28–32. Defendant thus argues that the Markhams were compensated when Defendant gave Bill the product inventory Defendant had been holding as security. Aplt. Br. at 23, 25. In other words, Defendant challenges whether the Markhams in fact suffered any loss.

The State agrees that the value of any loss should be offset by the value of any income the Markhams received from their investment. But the record supports the conclusion that, aside from a single thousand-dollar check, the Markhams received nothing for their investment because the

company's liabilities always exceeded its assets, the company had trouble selling its products, what sales it did have were never sufficient to cover expenses, and the inventory was ultimately seized.

The Crime Victims Restitution Act authorizes a sentencing court to impose restitution "[w]hen a defendant is convicted of criminal activity that has resulted in pecuniary damages." Utah Code Ann. §77-38a-301 (West 2004); *id.* §77-38a-302(1) (West Supp. 2015).⁵ The statute defines "pecuniary damages" as "all demonstrable economic injury, . . . which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities." *Id.* §77-38a-102(6) (West Supp. 2015). The relevant civil-action analog to securities fraud involving material representations and omissions is a civil action under section 61-1-22 of the Utah Code. *See id.* §61-1-22(1) (West 2012) (authorizing a civil action to recover for violations of section 61-1-1(2)).

Section 61-1-22 provides two bases for calculating damages. The first applies when the victim returns the security he or she purchased. The statute allows the victim to recover the consideration paid for the security,

⁵ Defendant cites the current version of the Utah Code for all statutory citations in his opening brief and does not argue that any amendment affects the outcome of this case. The State likewise cites the current version of the Utah Code for all statutory citations.

“less the amount of income received on the security.” *Id.* §61-1-22(1)(b). The second allows the victim to recover “damages” if the victim no longer owns the security. *Id.* Such damages are calculated by subtracting from the value of the consideration “the amount of income received on the security” and “the value of the security when the buyer disposed of the security.” *Id.* §61-1-22(1)(b), (c)(i).⁶

As Defendant acknowledges, the second approach applies here because Bill no longer owns the security. *Aplt. Br.* at 30–31. But Defendant’s application of the statute is inconsistent with the facts of this case. In exchange for his investment, Bill received partial ownership of

⁶ Although the provision addressing how to calculate damages cross-references “Subsection (7)(b),” that cross-reference is most likely a typographical error and was intended to be “Subsection (1)(b).” *See* Utah Code Ann. §61-1-22(1)(c). Although section 61-1-22 contains a subsection 7(b), the cross-reference to subsection 7(b) is illogical and, if applied, absurd. The statute says to “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.” *Id.* Subsection 7(b) refers to situations—patently inapplicable here—where recovery is prohibited, and says nothing of a tender. *Id.* §61-1-22(7)(b). Thus, if read literally, damages would be calculated by subtracting from \$0—that is, from the amount recoverable under subsection (7)(b)—the value of the security when it was disposed of. In other words, the victim would be required to pay the fraudster. The better reading of the statute is to read the “tender” reference as referring to the victim’s return of the security discussed in subsection (1)(b). *See State v. Jeffs*, 2010 UT 49, ¶31, 243 P.3d 1250 (“We read statutory provisions literally, unless such a reading would result in an unreasonable or inoperable result.” (internal quotation marks omitted)).

Clarcon Labs and Clarcon Distributing and at least the promise of stock, if not the actual thing. It is that security – and not the inventory – that is to be valued when considering the Markhams' loss. See §61-1-22(1). And the evidence from trial is undisputed: The Markhams did not recover the principal they invested and they received no profits from that investment, either before Clarcon Lab and Clarcon Distributing were dissolved or during the two years following that dissolution. R343:99-100, 121; 346:78, 107; 347:382, 432, 467-68, 476, 482. Aside from a single check for \$1,129.67, Bill never received any salary or commission from the venture. R346:78; 347:432; SE8 at 7. Even factoring in the \$500,000 worth of inventory Defendant returned to the venture, the Markhams did not receive any income from it because sales were at best anemic and because expenses far exceeded any sales revenue. R343:99-100, 121; 346:107; 347:353, 476. Thus, at most, \$1,129.67 in "income received on the security" could be subtracted from the \$247,000 consideration the Markhams paid for that security, yielding a net loss of \$245,870.33. See *id.* §61-1-22(1)(b).

But the damages are not reduced any further by subtracting "the value of the security when the buyer disposed of the security." *Id.* §61-1-22(1)(c)(i). Bill disposed of the security – his position in Clarcon Labs and Clarcon Distributing – when the two companies were dissolved. But even

accounting for the \$82,276.83 worth of fixed assets and \$500,000 worth of inventory, the Markhams' security was worthless when the companies were dissolved because the companies' liabilities far outweighed any of the assets. R343:107; 347:476, 482. In light of the venture's abysmal financial state, the trial court would have been well within its discretion to order restitution of at least \$245,870.33, and not to offset the Markhams' damages by the face value of the company's fixed assets.⁷

The calculus does not improve for Defendant if disposal of the security is measured from late 2009 when Bill finally gave up on the venture. *Cf. Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶57, 201 P.3d 966, *holding modified on other grounds by Cent. Utah Water Conservancy Dist. v. King*, 2013 UT 13, ¶57, 297 P.3d 619 (concluding in a common law fraudulent inducement suit that "the employee is entitled to recover the difference between the compensation provided by the employer whom the employee was induced to leave and the compensation that follows"). The Markhams still had not made any income on their investment, R343:99–100, 108–09, 121; 346:78, 107, and the inventory was rendered worthless when

⁷ The trial court's restitution award is also conservative in light of section 61-1-22's explicit authorization of 12% annual interest as recoverable damages and treble damages for intentional or reckless securities offenses. *See* Utah Code Ann. §61-1-22(1)(c)(ii), (2)(a). The single thousand-dollar check Bill received did not even cover one month's interest.

the FDA seized it, R153-55; 343:112-13. Thus, over the two-year period that Bill headed the venture, there was no income and no value in the security to subtract from the consideration paid by the Markhams in 2007.

Furthermore, the trial court would have been within its broad discretion to order even more restitution than it did for yet another reason. Section 61-1-22 states that the civil remedy it provides is “in addition to any other rights or remedies that may exist at law or in equity.” Utah Code Ann. §61-1-22(10)(a).⁸ Under a common law suit for fraudulent inducement, the Markhams could have recovered far more than the consideration paid for the worthless security. Utah follows the benefit-of-the-bargain rule. *E.g., Lamb v. Bangart*, 525 P.2d 602, 609 (Utah 1974). Under that rule, “in an action for fraud and deceit the measure of damages is the difference between the actual value of what the party received and the value thereof if it had been as represented.” *Id.* In other words, damages are not limited to the consideration paid for the security or other out-of-pocket expenses. *Id.* See generally 37 Am. Jur. 2d Fraud and Deceit §376

⁸ A civil action under section 61-1-22 is also limited to violations of section 61-1-1(2) (fraudulent statements and omissions) and other statutes not relevant here. Utah Code Ann. §61-1-22(1)(a). It does not cover violations of section 61-1-1(3) (fraudulent or deceitful acts, practices, or courses of business). *Id.* Defendant was charged with both variants of securities fraud, and the trial court concluded that the evidence supported each variant. R2, *155.

(defining the benefit-of-the-bargain rule as “a punitive measure which compels a party guilty of fraud to make good his or her representations”). Here, Defendant falsely told Bill that Clarcon Distributing was a “solid” investment with projected profits of over \$15.4 million in the first year. R346:45; SE1. Bill was promised a 25% stake in the company, which would translate to over \$3.8 million in projected profits. SE5. Given the common law rule, the State’s requested restitution and the trial court’s order were quite conservative.

In sum, regardless of what timeframe is used to measure the Markhams’ loss, the inventory did not compensate them for their investment in light of the complete evidentiary picture. The Markhams thus lost at least \$164,000 of their investment due to Defendant’s fraudulent actions, and the trial court was well within its discretion to order restitution in that amount.

B. Defendant was convicted of securities fraud—not transacting business as an unlicensed broker-dealer or agent—and those fraudulent actions were the but-for cause of the victims’ loss.

Defendant argues that his actions are not the but-for cause of the Markhams’ loss because he was convicted of—or at least accepted responsibility only for—selling securities without a license. Aplt. Br. at 24, 26, 30.

Contrary to Defendant's repeated assertions, Defendant was charged with, convicted of, and sentenced for securities fraud under section 61-1-1 of the Utah Code, not selling a security without a license or transacting business as an unlicensed broker-dealer or agent in violation of section 61-1-3. R1-2, 121; R347:530. And Defendant's fraudulent actions are the direct cause of the Markhams parting with their money and joining a failed venture.

As noted, the Crime Victims Restitution Act authorizes restitution "[w]hen a defendant is convicted of criminal activity that has resulted in pecuniary damages." Utah Code Ann. §77-38a-301. As the statute suggests, there must be a causal nexus between the defendant's criminal activity and the pecuniary damages suffered by the victim. This Court has defined the requisite causal nexus using a modified but-for test: "A modified 'but for' test requires 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).'" *State v. Brown*, 2009 UT App 285, ¶11, 221 P.3d 273 (alterations and omissions in original) (quoting *State v. McBride*, 940 P.2d 539, 544 (Utah Ct. App. 1997)).

But before causation can be determined, the court must first determine what “criminal activity” is at issue. *See* Utah Code Ann. §77-38a-301. The statute defines criminal activity as “any offense of which the defendant is convicted.” *Id.* §77-38a-102(2). Criminal activity also includes “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.* Here, Defendant was convicted of securities fraud under section 61-1-1, not engaging in unlicensed transactions under section 61-1-3.

Section 61-1-3 makes it unlawful for anyone to transact business “as a broker-dealer or agent unless the person is licensed” to do so. Utah Code Ann. §61-1-3(1) (West 2012); *see also id.* §61-1-13(1)(c)(i) (defining “broker-dealer” in part as “a person engaged in the business of effecting transactions in securities for the account of others or for the person’s own account”). Section 61-1-1 makes it unlawful for anyone—licensed or not—“in connection with the offer, sale, or purchase of any security” to either directly or indirectly (1) “employ any device, scheme, or artifice to defraud”; (2) make “any untrue statement of a material fact” or omit to make any statement of material fact that would render the statement 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.” *Id.* §61-1-1. Securities fraud under section 61-1-1 may be a second degree felony depending on the value of the security or the circumstances of the victim, but engaging in securities transactions without a license is punishable only as a third degree felony. *Id.* §61-1-21(1), (2) (West 2012).

The criminal information filed in this case referred to the second and third variants of securities fraud under section 61-1-1, and it charged Defendant with a second degree felony. R1-2. The testimony and argument presented by both parties at trial extensively covered the issue of whether Defendant willfully misrepresented or omitted material facts when he pitched the investment to the Markhams. *See, e.g.*, R347:491–507 (prosecutor’s closing argument); R347:507–24 (defendant’s closing argument). And the few times Defendant’s lack of a license came up at trial was always to emphasize that Defendant *never told the Markhams* that he was unlicensed to sell securities. R346:109, 130–31. When the trial court announced its verdict, it specifically mentioned misrepresentations and omissions and stated that Defendant was guilty of securities fraud, not selling securities without a license. R347:530. Accordingly, the trial court sentenced Defendant for second degree felony securities fraud. R121. The trial court reiterated that fact in its restitution order when it stated, “The

facts proven at trial demonstrated that Defendant made numerous untrue statements of material fact, 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.” R*155. And the trial court rejected Defendant’s argument, made in a motion to reconsider the restitution order, that it had incorrectly entered a conviction under section 61-1-1 rather than 61-1-3. R344:11.

Defendant cites no record support for his assertion that he was convicted and sentenced for transacting business as an unlicensed broker-dealer or agent. Aplt. Br. at 24, 26, 30. And he acknowledges that the trial court specifically rejected this argument below. Aplt. Br. at 16; R344:11. The only evidence Defendant points to in the record is his statement to the investigator who prepared the presentence report, where Defendant accepted responsibility only for selling a security without a license.⁹ R101.

But Defendant’s refusal to accept responsibility *for the crime for which he was convicted* is irrelevant to the question of what losses his criminal

⁹ Defendant also asserts on appeal that he made similar statements at the sentencing hearing. Aplt. Br. at 30. But Defendant did not provide a transcript of the sentencing hearing on appeal and thus cannot rely on what was said there to support his claim. See Utah R. App. P. 11(e)(2); *State v. Nielsen*, 2011 UT App 211, ¶4, 257 P.3d 1103 (per curiam) (“An appellant has the burden to provide an adequate record for review.”).

activity caused. As noted, the law authorizes the sentencing court to impose restitution resulting from criminal conduct for which a defendant admits responsibility, even if the defendant was not convicted based on that conduct. See Utah Code Ann. §76-3-201(1)(b), (4)(a) (West 2015); *id.* §77-38a-102(2); *id.* §77-38a-302(1), (5)(a). But restitution is not limited to what a defendant is willing to pay. The court may also impose restitution for any loss caused by a crime for which a defendant was actually convicted. See *id.* §§76-3-201(1)(b), (4)(a); 77-38a-102(2); 77-38a-302(1), (5)(a); *State v. Poulsen*, 2012 UT App 292, ¶10, 288 P.3d 601; *State v. Bickley*, 2002 UT App 342, ¶¶8–9, 60 P.3d 582. To hold otherwise would create a strong incentive for defendants to deny responsibility for the crimes for which they have been convicted in an attempt to limit restitution.

In most cases, the criminal conviction itself satisfies the requirement that “liability is clear as a matter of law” before entering an order for restitution. *State v. Robinson*, 860 P.2d 979, 983 (Utah Ct. App. 1993). The defendant’s refusal to admit responsibility for criminal activity only becomes an issue when the trial court attempts to order restitution for losses not caused by the crime for which the defendant was convicted or pleaded guilty. See, e.g., *State v. Larsen*, 2009 UT App 293, ¶9, 221 P.3d 277 (holding that trial court may not infer criminal liability for actions not covered by

defendant's guilty plea); *State v. Watson*, 1999 UT App 273, ¶5, 987 P.2d 1289 (same). That is not the case here.

Because Defendant was convicted of securities fraud, the causal link between Defendant's criminal activity and the Markhams' loss must focus on Defendant's fraudulent actions, misrepresentations, and omissions, not his licensing status. But for Defendant's fraud, the Markhams would not have parted with their money and invested in a failed venture. Bill and Susan both testified that Defendant's false statement that he had invested \$500,000 of his own money was important to their decision to invest. R346:45, 125-26. Susan was leery of investing in a new company that needed investors' money to function. R346:125-26. The financial records submitted at trial demonstrate that Clarcon Labs and Clarcon Distributing were dependent on the Markhams' investment to meet day-to-day operating expenses and to pay off debts—not simply to update antiquated production equipment. SE7, 8. Had the Markhams known that, they would not have invested. Defendant's fraudulent statements and omissions were thus the but-for cause of the Markhams losing their investment.

C. The victims' loss did not become too attenuated from Defendant's fraudulent actions simply because Defendant was not involved in the venture when it was finally terminated.

In addition to but-for causation, restitution requires that the victims' loss not be factually or temporally too attenuated from the Defendant's criminal actions. *Brown*, 2009 UT App 285, ¶11. Defendant argues that the State cannot meet the second part of the causation test because the Markhams lost the value of their investment in 2009 when the FDA seized the inventory from Bill's company.¹⁰ Defendant asserts that event was too attenuated from Defendant's fraudulent actions both factually and temporally. *Aplt. Br.* at 24–26. Defendant also argues that the trial court “decline[d] to consider [his] position that Markham's losses were caused by Markham's own negligence in not abiding by FDA regulations.” *Aplt. Br.* at 37. *See State v. Laycock*, 2009 UT 53, ¶27 n.4 (noting that in determining amount of restitution, the trial court “cannot decline to consider evidence that a victim's losses were caused” by someone other than defendant).

The trial court considered Defendant's arguments and the evidence he presented in support. R*153. That the trial court viewed the evidence

¹⁰ Defendant actually frames his argument in terms of the FDA shutting down Bill's company. But Bill was adamant at trial that the FDA did not shut down the company, nor did it force Bill and Omar to do so. R343:110–12. They may have been left with little choice given the circumstances, but it was still their choice to make.

differently than Defendant does not mean the trial court declined to consider it. In light of the record evidence, the trial court's conclusion was reasonable. Indeed, when the full evidentiary picture is viewed, the causal nexus is clear and strong. The Markhams lost the value of their investment because they invested in a debt-ridden company that had trouble generating sales, and they were induced to invest by Defendant's material misrepresentations and omissions. The FDA's seizure of the unsafe product merely marked the end to Bill's prolonged and futile attempt to salvage something from what had been a failed investment from the beginning. In other words, the loss had already occurred by the time Defendant separated from the venture. Any intervening events Defendant identifies do not undermine the causal nexus.

Even if Bill's control of the company and the FDA's seizure of the product were relevant, those intervening events do not undermine the causal nexus because they were foreseeable. In the context of restitution, this Court has held that an intervening force does not make a victim's loss too attenuated from the defendant's actions as long as the intervening force is reasonably foreseeable. *State v. McBride*, 940 P.2d 539, 543-45 (Utah Ct. App. 1997). In *McBride*, for example, the defendant was caught joyriding, the police were unable to locate the owner of the car because they

mistranscribed the vehicle's information, and the car was impounded and eventually sold. *Id.* at 540–41. Defendant was ordered to pay restitution for the car, but he argued on appeal that the police's negligent conduct was an intervening cause that broke the causal nexus between his criminal conduct and the victim's loss. *Id.* at 541. This Court rejected the argument, concluding that the causal nexus was not broken because "the negligence of the police in transcribing the vehicle identification number was [not] so unforeseeable as to supersede the fault" of the defendant in causing the loss. *Id.* at 544.

1. The causal chain is not factually too attenuated.

Defendant argues that the causal chain is factually too attenuated because the Markhams' loss was a result of "production noncompliance with federal regulations." *Aplt. Br.* at 26. In other words, he argues that the Markhams lost the value of their investment not because of Defendant's fraudulent misrepresentations and omissions, but because the FDA seized the inventory as a result of Bill's actions at a time when Defendant was not involved in the venture. *Aplt. Br.* at 24. The inventory, he claims, was not valueless when he gave it to Bill. *Aplt. Br.* at 37.

But the Markhams' loss of their security occurred in 2007 when they invested in a company laden with debt and unable to sell enough product to

cover basic operating expenses. Neither Omar's original company, Defendant's distribution company, nor Bill's subsequent company ever made a profit. R343:99-100, 121; 346:107; 347:382, 417, 432, 476, 482. Each company had significant debt, and although some sales apparently took place, most fell through. R343:89, 110, 121-22; 346:78; 347:353, 476. And Defendant was aware of the financial state of the Clarcon venture when he separated from it. R347:382, 417, 432, 434-38, 476, 482. Thus, the Markhams' loss of the complete value of their investment would have been reasonably foreseeable to Defendant and anyone else in that situation. Cf. *State v. Johnson*, 2009 UT App 382, ¶¶45-48, 224 P.3d 720 (concluding that value of a loan co-defendant took out using victims' investment as collateral "flow[ed] from the fraudulent securities transaction and [was] properly charged against" defendant, but remanding to determine whether to credit defendant for payments victims received on their investment).

The inventory Defendant returned to Bill did not change the company's financial situation. With a retail value of \$500,000, the inventory was not "valueless" on its face. But its value was not sufficient to offset the debts that Bill had also assumed in exchange for his investment, particularly in light of lackluster product sales and high operating expenses. The

seizure of the product in 2009 simply put an end to Bill's persistent and futile efforts to salvage the investment.

Significantly, the reason that the FDA seized the product was not because of Bill's noncompliance with federal regulations. Rather, it did so because the product that Defendant got the Markhams to invest in was unsafe. R343:110-12. That fact is clear from the exhibits Defendant presented to the trial court in opposition to the State's restitution request. The FDA inspection report listed several procedural violations, ranging from a lack of quality controls to poor record keeping. R157-60. The report was issued at the beginning of May 2009. R160. The FDA did not seized the inventory then or take any other adverse action against Bill's company. It was not until June 2009 that the FDA ordered the company to cease production of the contaminated product, recall it, and destroy it. R153-55; 343:110-12. Then on July 31, 2009, the FDA seized the company's product because it was not satisfied with the company's recall and destruction efforts. R153-55; 343:110-12. The seizure was based not on regulatory noncompliance. It was based on the presence of harmful bacteria in the product. R153-55; 343:110-12. Though Bill's company had apparently added other product lines, it was producing the same product in 2009 as it was when Defendant convinced Bill to invest in Clarcon in 2007. R26-27,

155. Defendant has not shown that Omar ever changed the formula or that the product that was unsafe in 2009 was somehow safe in 2007.

The Markhams' loss is thus not factually attenuated from Defendant's fraudulent actions. The loss occurred in 2007, and the FDA's seizure of the product merely put an end to the Markhams' attempts to recover from that loss. Given Defendant's intimate knowledge of the abysmal financial state of the Clarcon venture, it was reasonably foreseeable that the Markhams would not recoup their investment.¹¹

¹¹ Defendant also presents what he terms an alternative argument, asserting that if the inventory he returned to Bill is deemed worthless, fault for its loss in value should be apportioned to Bill. Aplt. Br. at 33-37. Although Defendant relies on comparative negligence statutes and cases to support his argument, the argument is really a restatement of his claim that the causal nexus is too attenuated because Bill is responsible for the loss.

To the extent Defendant intends to present an independent argument based on comparative negligence, that argument is unpreserved and should not be addressed. R148-*49, *159-77. See *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal."). The argument is also foreclosed by precedent. In the appropriate case, "comparative negligence *may* be relevant in determining restitution." *Laycock*, 2009 UT 53, ¶27 (emphasis added). But as its name suggests, comparative negligence applies only to negligence actions. See *State v. McBride*, 940 P.2d 539, 545 (Utah Ct. App. 1997). Securities fraud explicitly requires a mental state of willfulness. Utah Code Ann. §§61-1-1; 61-1-21; *State v. Moore*, 2015 UT App 112, ¶10, 349 P.3d 797 (reiterating that securities fraud requires a mental state of willfulness; recklessness does not suffice).

2. The causal chain is not temporally too attenuated.

Defendant also argues that the causal chain is temporally too attenuated because Bill's company was dissolved two years after Defendant was last involved in the venture. Apl't. Br. at 25. For support, Defendant points to *State v. Brown*, where this Court held that relocation expenses incurred seven to eight months after a burglary and assault were temporally too attenuated from the crimes to justify restitution. Apl't. Br. at 25. *See Brown*, 2009 UT App 285, ¶¶1, 11.

Again, the Markhams' loss of their investment was reasonably foreseeable, even if it took two years for Bill to give up his efforts to salvage that investment. Defendant's argument about temporal attenuation would have more force if the venture had been profitable up until the FDA seized the inventory. But it was not. As discussed, the undisputed evidence is that Clarcon—in all its iterations—never made a profit. R343:99–100, 121; 346:107; 347:382, 417, 432, 467–68, 476, 482. When Defendant left the venture, Bill had the fixed assets of the company and the product inventory. But he also had its debts. And selling the product to cover those debts and any operating expenses apparently was not as easy as Defendant had led Bill to believe it would be. R343:89, 107, 110, 121–22; 346:78; 347:353. Given the venture's financial history, of which Defendant was well aware, the loss

of the Markhams' investment was reasonably foreseeable no matter how long Bill worked to salvage it.

Defendant convinced Bill and Susan to part with \$247,000 based on material misrepresentations and omissions. Aside from a single thousand-dollar check, the Markhams never recouped any of their money because it was a bad investment from the very beginning. That did not change when Bill took over control of the company and Defendant gave Bill the inventory he had been keeping as security.

* * *

In sum, the Markhams' loss is clear, as is the causal nexus between it and Defendant's fraudulent actions. The causal nexus did not become attenuated because of what happened after Defendant left the picture. The security the Markhams received—Bill's position in the company—was valueless from the time he received it in 2007 to the time he abandoned it in 2009. Given the debts, the high operating costs, the lackluster sales, and the ultimate seizure of the product, the inventory Defendant gave Bill did not affect the value of the Markhams' security. The trial court thus acted within its broad discretion when it ordered Defendant to pay \$164,723.17 in restitution.

II

The evidence is sufficient to support the trial court's conclusion that Defendant caused the victims' loss.

Finally, Defendant argues that the evidence is insufficient to support the trial court's conclusion that he caused the Markhams' loss. Aplt. Br. at 43-45. Defendant acknowledges that the State presented evidence that he caused the Markhams' loss of their initial \$247,000 investment. Aplt. Br. at 43. But he argues that once he responded with evidence that an offset was appropriate, the State was required to rebut that evidence. Aplt. Br. at 43. He thus argues that the trial court's causation ruling was clearly erroneous because the State presented no evidence of a connection between the product inventory and the dissolution of Bill's company due to regulatory noncompliance. Aplt. Br. at 43-45.

Regardless of whether the burden-shifting scheme Defendant describes is accurate, Defendant has not demonstrated that an offset was appropriate. As shown above, the relevant inquiry is whether the record contains evidence of the causal nexus between *Defendant's fraudulent actions* and the Markhams' loss of their \$247,000 investment—not between the inventory and the FDA's actions. The product inventory is relevant only to the extent that it had value sufficient to compensate the Markhams for at least some portion of their investment. As should be clear from the

discussion above, the record contains evidence sufficient to support the conclusion that the inventory was not sufficiently valuable to compensate the Markhams, either when Defendant gave it to Bill or when Bill ultimately gave up his effort to salvage his investment two years later. R343:89, 99-100, 107, 110, 121-22; 346:78, 107; 347:353, 382, 417, 432, 467-68, 476, 482. The evidence necessary to rebut Defendant's claim of an offset was already in the record, having been admitted at trial. Furthermore, the evidence of each Clarcon entity's financial disarray was undisputed at trial.

Defendant asserts in passing that Bill's company had \$6 million in sales after Defendant left the company. Aplt. Br. at 31; R168-69. But even if that is correct, it does not account for the undisputed trial testimony that each iteration of Clarcon was beset with debt and high operating costs and could *never* generate enough sales to make a profit. R343:89, 99-100, 110, 121-22; 346:78, 107; 347:353, 382, 417, 432, 476, 482. Saddled with the venture's liabilities, Bill worked for two years to salvage his investment but ultimately failed. R343:110-11, 114. The trial court's conclusion that Defendant caused the Markhams' loss is not clearly erroneous, particularly when viewed in light of record evidence that no matter how much inventory was actually sold, it never resulted in any recovery of the Markhams' investment.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on April 6, 2016.

SEAN D. REYES
Utah Attorney General



WILLIAM M. HAINS
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 9,693 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



WILLIAM M. HAINS
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on April 8, 2016, two copies of the Brief of Appellee were

☒ mailed ☐ hand-delivered to:

Derek G. Williams
44 North Main Street, Suite A
Layton, UT 84041
Telephone: (801) 860-9727

Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Lee Nakamura

Addenda

Addendum A

Utah Code Annotated § 61-1-1. Fraud unlawful

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.

Utah Code Annotation § 61-1-3. Licensing of broker - dealers, agents, investment advisers, and investment adviser representatives

(1) It is unlawful for a person to transact business in this state as a broker-dealer or agent unless the person is licensed under this chapter.

(2)(a) It is unlawful for a broker-dealer or issuer to employ or engage an agent unless the agent is licensed. The license of an agent is not effective during any period when the agent is not associated with:

- (i) a particular broker-dealer licensed under this chapter; or
- (ii) a particular issuer.

(b) When an agent begins or terminates an association with a broker-dealer or issuer, or begins or terminates activities as an agent, the agent and the broker-dealer or issuer shall promptly notify the division.

(c) An agent who terminates an association with a broker-dealer or issuer is considered to be unlicensed until the day on which the division:

- (i) approves the agent's association with a different broker-dealer or issuer; and
- (ii) notifies the agent of the division's approval of the association.

(d)(i) It is unlawful for a broker-dealer or an issuer engaged, directly or indirectly, in offering, offering to purchase, purchasing, or selling a security in this state, to employ or associate with an individual to engage in an activity related to a securities transaction in this state if:

- (A)(I) the license of the individual is suspended or revoked; or
- (II) the individual is barred from employment or association with a broker-dealer, an issuer, or a state or federal covered investment adviser; and

(B) the suspension, revocation, or bar described in Subsection (2)(d)(i)(A) is by an order:

- (I) under this chapter;
- (II) of the Securities and Exchange Commission;
- (III) of a self-regulatory organization; or
- (IV) of a securities administrator of a state other than Utah.

(ii) A broker-dealer or issuer does not violate this Subsection (2)(d) if the broker-dealer or issuer did not know and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar.

(iii) An order under this chapter may modify or waive, in whole or in part, the application of Subsection (2)(d)(i) to a broker-dealer or issuer.

(3) It is unlawful for a person to transact business in this state as an investment adviser or as an investment adviser representative unless:

(a) the person is licensed under this chapter;

(b) the person's only clients in this state are:

(i) one or more of the following whether acting for itself or as a trustee with investment control:

(A) an investment company as defined in the Investment Company Act of 1940¹;

(B) another investment adviser;

(C) a federal covered adviser;

(D) a broker-dealer;

(E) a depository institution;

(F) a trust company;

(G) an insurance company;

(H) an employee benefit plan with assets of not less than \$1,000,000; or

(I) a governmental agency or instrumentality; or

(ii) other institutional investors as are designated by rule or order of the director; or

(c) the person:

(i) is licensed in another state as an investment adviser or an investment adviser representative;

(ii) has no place of business in this state; and

(iii) during the preceding 12-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

(4)(a) It is unlawful for:

(i) a person required to be licensed as an investment adviser under this chapter to employ an investment adviser representative unless the investment adviser representative is licensed under this chapter, except that the license of an investment adviser representative is not effective during any period when the person is not employed by an investment adviser licensed under this chapter;

(ii) a federal covered adviser to employ, supervise, or associate with an investment adviser representative having a place of business located in this state, unless the investment adviser representative is:

(A) licensed under this chapter; or

(B) exempt from licensing; or

(iii) an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to providing investment advice

in this state if:

- (A)(I) the license of the individual is suspended or revoked; or
 - (II) the individual is barred from employment or association with a state or federal covered investment adviser, broker-dealer, or issuer; and
 - (B) the suspension, revocation, or bar is by an order:
 - (I) under this chapter;
 - (II) of the Securities and Exchange Commission;
 - (III) a self-regulatory organization; or
 - (IV) a securities administrator of a state other than Utah.
 - (b)(i) An investment adviser does not violate Subsection (4)(a)(iii) if the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar.
 - (ii) An order under this chapter may waive, in whole or in part, the application of Subsection (4)(a)(iii) to an investment adviser.
 - (c) When an investment adviser representative required to be licensed under this chapter begins or terminates employment with an investment adviser, the investment adviser shall promptly notify the division.
 - (d) An investment adviser representative who terminates association with an investment adviser is considered unlicensed until the day on which the division:
 - (i) approves the investment adviser representative's association with a different investment adviser; and
 - (ii) notifies the investment adviser representative of the division's approval of the association.
- (5) Except with respect to an investment adviser whose only clients are those described under Subsections (3)(b) or (3)(c)(iii), it is unlawful for a federal covered adviser to conduct advisory business in this state unless the person complies with Section 61-1-4.

Utah Code Annotated § 61-1-21. Penalties for violations

- (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 Code¹;
 - (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;
- (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.

(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).

**Utah Code Annotated § 61-1-22. Sales and purchases in violation --Remedies--
Limitation of actions**

(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.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney fees, less any amounts, all as specified in Subsection (1) upon a showing that:

(a) the violation was reckless or intentional; or

(b) the violation was of Subsection 61-1-1(2), was negligent, and it is

demonstrated by clear and convincing evidence that the violation involved an investment by a person over whom the violator exercised undue influence.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4)(a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that the nonseller or nonpurchaser did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(b) There is contribution as in cases of contract among the several persons so liable.

(5) A tender specified in this section may be made at any time before entry of judgment.

(6) A cause of action under this section survives the death of a person who might have been a plaintiff or defendant.

(7)(a) An action may not be maintained to enforce liability under this section unless brought before the earlier of:

(i) the expiration of five years after the act or transaction constituting the violation; or

(ii) the expiration of two years after the discovery by the plaintiff of the facts constituting the violation.

(b) 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.

(8) A person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order issued under this chapter, or who has acquired a purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may not base a suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order issued under this chapter is void.

(10)(a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity.

(b) This chapter does not create a cause of action not specified in this section or Subsection 61-1-4(6).

Utah Code Annotated § 76-3-201. Definitions--Sentences or combination of sentences allowed--Civil penalties

(1) As used in this section:

(a) "Conviction" includes a:

- (i) judgment of guilt; and
- (ii) plea of guilty.

(b) "Criminal 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.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e)(i) "Victim" means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include a codefendant or accomplice.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal or disqualification from public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) on or after April 27, 1992, to life in prison without parole; or
- (f) to death.

(3)(a) This chapter does not deprive a court of authority conferred by law to:

- (i) forfeit property;
- (ii) dissolve a corporation;

- (iii) suspend or cancel a license;
 - (iv) permit removal of a person from office;
 - (v) cite for contempt; or
 - (vi) impose any other civil penalty.
- (b) A civil penalty may be included in a sentence.

(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.

(5)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court, the defendant shall pay restitution of governmental transportation expenses if the defendant was:

- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
- (ii) charged with a felony or a class A, B, or C misdemeanor; and
- (iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

- (i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or
- (ii) the defendant was not transported pursuant to a court order.

(c)(i) Restitution of governmental transportation expenses under Subsection

- (5)(a)(i) shall be calculated according to the following schedule:
- (A) \$100 for up to 100 miles a defendant is transported;
 - (B) \$200 for 100 up to 200 miles a defendant is transported; and
 - (C) \$350 for 200 miles or more a defendant is transported.
- (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.
- (d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.
- (6)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall pay restitution to the county for the cost of incarceration and costs of medical care provided to the defendant while in the county correctional facility before and after sentencing if:
- (i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and
 - (ii)(A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or
 - (B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.
- (b)(i) The costs of incarceration under Subsection (6)(a) are the amount determined by the county correctional facility, but may not exceed the daily inmate incarceration costs and medical and transportation costs for the county correctional facility.
- (ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) 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 shall enter the reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

Utah Coe Annotated §77-38a-102. Definitions

As used in this chapter:

(1) "Conviction" includes a:

- (a) judgment of guilt;
- (b) a plea of guilty; or
- (c) a plea of no contest.

(2) "Criminal 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.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(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.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(9) "Plea in abeyance" means an order by a court, upon motion of the

prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(10) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)(a) "Reward" means a sum of money:

- (i) offered to the public for information leading to the arrest and conviction of an offender; and

- (ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)(a) "Victim" means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

Utah Code Annotated § 77-38a-301. Restitution – Convicted defendant may be required to pay

In a criminal action, the court may require a convicted defendant to make restitution.

Laws 2001, c. 137, § 7, eff. April 30, 2001.

LIBRARY REFERENCES

Sentencing and Punishment § 2100.

Westlaw Key Number Search: 350Hk2100.

C.J.S. Criminal Law §§ 1771 to 1786.

UNITED STATES SUPREME COURT

Restitution,

In general,

Probation, revocation for failure of indigent defendant to pay fine and restitution, equal protection, see *Bearden v. Georgia*, U.S.Ga.1983, 103 S.Ct. 2064, 461 U.S. 660, 76 L.Ed.2d 221, on remand 167 Ga.App. 334, 308 S.E.2d 63.

Amount of restitution,

Restitution calculation, losses caused by offense of conviction, unauthorized use of credit card, see *Hughey v. U.S.*, U.S.Tex.1990, 110 S.Ct. 1979, 495 U.S. 411, 109 L.Ed.2d 408, on remand 907 F.2d 39.

Restitution as condition of probation,

Bankruptcy, dischargeability of restitution obligations imposed as conditions of probation, see *Pennsylvania Dept. of Public Welfare v. Davenport*, U.S.Pa.1990, 110 S.Ct. 2126, 495 U.S. 552, 109 L.Ed.2d 588.

Bankruptcy, restitution obligation discharge, condition of probation, see *Kelly v. Robinson*, U.S.Conn.1986, 107 S.Ct. 353, 479 U.S. 36, 93 L.Ed.2d 216.

Consideration of alternatives to incarceration before revocation, see *Black v. Romano*, U.S.Mo.1985, 105 S.Ct. 2254, 471 U.S. 606, 85 L.Ed.2d 636, rehearing denied 105 S.Ct. 3548, 473 U.S. 921, 87 L.Ed.2d 671.

Failure of indigent defendant to pay fine and restitution, equal protection, see

Bearden v. Georgia, U.S.Ga.1983, 103 S.Ct. 2064, 461 U.S. 660, 76 L.Ed.2d 221, on remand 167 Ga.App. 334, 308 S.E.2d 63.

Resentencing, drug possession, see U.S. v. Granderson, U.S.Ga.1994, 114 S.Ct. 1259, 511 U.S. 39, 127 L.Ed.2d 611.

Current through the end of the 2004 4th Spec. Sess.

Utah Code Annotated §77-38a-302. Restitution criteria

(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.

Addendum B

ORIGINAL

FILED
JUN 18 2015
SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT - FARMINGTON
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,	)	Case No. 111700523
)	
Plaintiff,	)	Judge Michael G. Allphin
)	
vs.)	
)	
LANE D. BIRD,)	
	)	Bench Trial
Defendant.	)	Day 1 of 2

REPORTER'S TRANSCRIPT OF PREVIOUSLY-RECORDED
PROCEEDINGS

DATE RECORDED: August 28, 2012
TRANSCRIBED BY: Kelly L. Barber-Wilburn, CSR, RPR

FILED
UTAH APPELLATE COURTS

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20140434-CA

1 physically gave you or delivered the check?

2 A. Judy.

3 Q. Who's Judy?

4 A. She is the -- Lane Bird's sister, and accountant to
5 the company.

6 Q. Is that Judy Johnson?

7 A. Yes, it is.

8 Q. Okay. Other than the \$1,100 check that you
9 received, did you ever receive any salary payment at all?

10 A. No.

11 Q. The paragraph mentions commissions. Did you ever
12 make any commissions?

13 A. No.

14 Q. Why not?

15 A. Never got a check. Sales apparently were not there,
16 and there was no commissions to be paid.

17 Q. Talks about a corporate profit sharing plan. And
18 again, I'm still focussing on paragraph 6. Did you believe,
19 again, you were going to be part of some profit sharing plan
20 that would give you portions of the profits of this company, or
21 these companies?

22 A. Yes.

23 Q. Flipping over the page to paragraph 7. This
24 mentions your involvement in Clarcon Labs. You have been
25 appointed COO -- that's chief operating officer; is that

1 out of personal funds.

2 Q. So ultimately what happens with the company after
3 Mr. Bird is dismissed? You already indicated to this Court
4 that you've got \$247,000 invested in this company. Did you try
5 and make the company work after the Defendant was dismissed?

6 A. Yes.

7 Q. You did that by forming this new company with
8 Mr. Bonada?

9 A. Yes.

10 Q. What, what ultimately happens to the company, sir?

11 A. It closes.

12 Q. Were you ever able to produce and market this
13 product like you had hoped?

14 A. No.

15 Q. Company ever make a profit?

16 A. No.

17 Q. How long did you continue to try and get this
18 company up and working?

19 A. For a couple years.

20 Q. When you formed this partnership with Mr. Bonada and
21 you began to be involved in the company to that extent, can you
22 describe the financial condition of the company at the time?

23 A. Pretty bad, when I finally got into the records.
24 Lot of debt. Lot of overhead. Virtually nothing in sales.
25 Agreements had been changed between distributors.

1 Q. At some point there were some issues with the FDA,
2 correct?

3 A. Yes.

4 Q. They see some of your product at some point,
5 correct?

6 A. Yes.

7 Q. Now, including your \$247,000 investment that you
8 made when the Defendant was still involved in the company, how
9 much money have you and your wife lost as a result of your
10 involvement with Clarcon over the years you tried to get it
11 running? How much money, including the \$247,000, have you put
12 into this venture?

13 A. In full, about 440,000.

14 Q. Can you briefly explain to this Court how this has
15 impacted your life?

16 A. Aside from the obvious of financial indebtedness.
17 And working in excess of 60, 70, 80 hours a week in the
18 mortgage industry to try to pay the bills, and also to
19 subsidize Clarcon Labs (inaudible) the company. We --
20 obviously our house, we've been trying to salvage.

21 Been trying to work with the mortgage company to try
22 to work with us on the second mortgage, which they don't want
23 to do. And the house is going up for a short sale. And of
24 course we have no retirement. We have no other funds. It's
25 like being 18 years old all over again and having to start over

1 financially.

2 Q. Four hundred and forty thousand dollars you put in
3 is gone?

4 A. Gone.

5 Q. Prior to your investment what, if anything, did the
6 Defendant discuss with you about being licensed or not licensed
7 to sell securities in the State of Utah?

8 A. No discussion.

9 Q. Did the Defendant ever discuss with you in any way
10 the nature and extent of his civil litigation history? Did he
11 discuss with you the fact that he had prior civil judgments
12 against him?

13 A. No.

14 Q. Did he ever discuss with you the fact that he had
15 prior tax liens against him?

16 A. No.

17 Q. Did he ever mention to you, prior to your
18 investment, that he had applied for and received two separate
19 bankruptcy discharges?

20 A. No.

21 Q. With respect to your investment, again, you were
22 offered stock, correct?

23 A. Yes.

24 Q. Did you believe you were purchasing stock?

25 A. Yes.

ORIGINAL

FILED

AUG - 4 2014

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT - FARMINGTON
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,	)	Case No. 111700523
)	
Plaintiff,	)	Judge Michael G. Allphin
)	
vs.)	
)	
LANE D. BIRD,	)	Bench Trial-Partial Transcript
	)	Testimony of William Markham
Defendant.)	Cross, Redirect, and Recross

REPORTER'S TRANSCRIPT OF PREVIOUSLY-RECORDED
PROCEEDINGS

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TRANSCRIBED BY: Kelly L. Barber-Wilburn, CSR, RPR

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UTAH APPELLATE COURTS

AUG 7 2014

20140434-CA

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1 or the 89, and what the difference is with 247. Did you ever
2 say, Hey, you know, I want that money too, you stole it from
3 me?

4 A. No.

5 Q. Okay. That was never brought up? Do you have any
6 emails where you ever communicate with him saying, you know,
7 You, you took that money from me?

8 A. Which money? The 89,648, or --

9 Q. Yeah.

10 A. -- the total amount?

11 Q. The -- not the 89,648 or the 60,000. The total
12 amount. The difference.

13 A. That I would have asked for it back?

14 Q. Yeah.

15 A. No.

16 Q. Okay. And in October of 2008 you're still running
17 the company, correct?

18 A. Yes.

19 Q. Okay. And still making money?

20 A. No.

21 Q. You're not making any money?

22 A. (Moves head from side to side.)

23 Q. Okay. The company was --

24 MR. ARGUELLO: Again --

25 THE COURT: Yes.

1 MR. ARGUELLO: -- I'd just like to ask the witness
2 for an answer.

3 THE COURT: Please.

4 MR. ARGUELLO: You shook your head. I'd just ask
5 for a verbal answer.

6 THE WITNESS: No.

7 THE COURT: Thank you.

8 THE WITNESS: Well, definition of making money.
9 After expenses and everything else, no.

10 Q. (By Mr. Gallegos) No, I'm not asking any question.
11 Okay. Then you were asked about his civil
12 litigation history, that he never did close that -- disclosed
13 that to you. Did you ever ask him about any of that?

14 A. You said I asked about his civil?

15 Q. You were asked previously, by Mr. Arguello, about
16 you were -- that Lane Bird never disclosed to you the civil
17 litigation history that he had?

18 A. Correct.

19 Q. Did you ever ask him?

20 A. No.

21 Q. And are you aware that, that, you know, judgments
22 and, and court records are generally public knowledge?

23 A. No.

24 Q. You're not aware of that?

25 A. (Moves head from side to side.)

1 A. (Inaudible.)

2 Q. -- a stock, isn't when you invest in a stock you're
3 trying to get something of value?

4 A. You're buying in on the ownership.

5 Q. Okay.

6 A. Equity position.

7 Q. Of ownership?

8 A. Uh-huh.

9 Q. Which has value, right? Isn't that the whole reason
10 you're doing it, is to gain value and make some money?

11 A. Yes.

12 Q. Okay. And, and at the time you entered into this
13 agreement was there any value to, to that document that you had
14 signed?

15 A. Yes. In my mind, yes.

16 Q. And what was that?

17 A. If I could (inaudible) the exhibits?

18 Q. Please do.

19 A. Okay. Referring to State Exhibits No. 1, month one,
20 one hundred forty-six million -- a hundred forty-six thousand
21 five hundred thousand [sic.] Month two, 156,340. Month three,
22 166,672. All the way thorough to year one. And end of year
23 one, \$15,426,256.40.

24 Q. That's what you were relying on?

25 A. And --

1 regards to some of the people, and I provided some information.

2 Q. All I asked is if this is a letter that you
3 addressed to Lane.

4 A. Yes.

5 Q. Okay. And it's dated December 6th, 2007?

6 A. Yes.

7 Q. And, and you created that, correct? I mean.

8 A. Yes.

9 Q. All right.

10 (Pause.)

11 MR. ARGUELLO: No objection, Judge. If he wants to
12 move it into evidence, I don't care.

13 THE COURT: You're offering it?

14 MR. GALLEGOS: Yes, your Honor.

15 THE COURT: I'll receive it. Thank you.

16 Q. (By Mr. Gallegos) So all that, and that's Defense
17 No. 22. But let me just ask you, in this letter essentially --
18 this is December 6th of 2007. And you've got, according to
19 this letter, all kinds of agreements with cruise lines, the
20 government of Mexico, tomato growers in Mexico, EMEX, and of
21 course the distributors.

22 You also indicate that you've been approached by
23 Costco, and maybe lay out some other things indicating
24 essentially what your company is doing. Right?

25 A. Some advertising and some things that we --

1 direction we wanted to go, yes.

2 Q. Okay. And so, so your business was moving forward?

3 A. It was moving forward. This is in reference to the
4 distributors, not specifically with Clarcon Biological Labs,
5 that did not have the contracts (inaudible) the distributors
6 represented the company (inaudible) agreements. They were in
7 the process of (inaudible) agreements. Had agreements. That
8 does not necessarily mean they had volume sales.

9 Q. Okay. But this -- these were at least some lines
10 you had in the water?

11 A. It would be like letter of intents, yes.

12 Q. Okay.

13 A. Interest, yes.

14 Q. And then, and then just finally, you indicated that
15 you formed a new company with Omar Bonada essentially after
16 Lane left the company. Correct?

17 A. Yes.

18 Q. And that went on for a couple years. And then you
19 said that the company -- you guys closed the company down?

20 A. Yes.

21 Q. How exactly was the -- did you guys just close it
22 and terminate it?

23 A. Yes.

24 Q. Okay. You weren't ordered to terminate your
25 company?

1 A. No, we were not.

2 Q. Okay. Did something occur that affected your
3 company?

4 A. Yes. We -- many of the distributors wanted to get
5 the product approved with FDA through what's called a
6 "monograph" system. And so such documentation and stuff were
7 put together and submitted to FDA.

8 And the FDA, when you get your monograph approval,
9 then they send out an inspector to look at the facility. And
10 while looking at the facility they, um, were not necessarily
11 happy with the way that Omar was putting together the product
12 and wanted it done a little differently.

13 They classified it differently. Wanted some
14 different things put into place with regards to the company,
15 with regards to the production, and the product itself. Which
16 would have been about, you know, 1.2, 1.5 million dollars to
17 do.

18 They gave us a time period to be compliant. And we
19 said possibly with 90 to 120 days. And then they did take some
20 samples. And they found some of the samples contaminated with
21 some pro -- with some bacteria. It was random. Some had no
22 contamination whatsoever. Some had some. Some had lots. Some
23 had little. So there was variation throughout the whole thing.

24 And then FDA came back in -- or FDA came back in and
25 said that they had the power to cease all production if just

1 one product had any kind of contamination. At which point they
2 did. They -- so we had to stop producing the product. They
3 did not close us down though.

4 Q. Okay. Didn't they seize a lot of product?

5 A. The product was -- they asked for us to voluntarily
6 recall the product and destroy the product. And which we did.

7 Q. Well, let me ask you this. Were U.S. marshals sent
8 out to seize certain things?

9 A. That was done after the fact. The director of the
10 FDA in Salt Lake, she said that she wanted all the product
11 destroyed a certain way, a certain process, which would cost a
12 lot of money.

13 I said that we're going to need probably till the
14 end of August in order to come up with the money. Because at
15 that point not being able to sell, not being able to produce,
16 not being able to function as a company till that was taken
17 care of, we had to find some money. So we were looking for
18 money to, to get that taken care of. Get started again.

19 She got antsy. And she got a little excited.

20 And --

21 MR. GALLEGOS: Judge, I'm going to object, Judge, to
22 his characterizations of --

23 Q. (By Mr. Gallegos) Let me, let me just ask --

24 THE COURT: So state -- ask specific questions. And
25 then don't, don't give us a narrative, sir. Just answer the

1 questions.

2 Q. (By Mr. Gallegos) The Department of Health and
3 Human Services, through the FDA, the Federal Food and Drug,
4 Drug Administration, essentially -- didn't they issue an order
5 to seize all the product and, and shut down the operation?

6 A. Not to shut down the operation.

7 Q. Not to -- so you were still allowed to produce that
8 and sell it?

9 A. (Inaudible.)

10 MR. ARGUELLO: I'm going to object to relevance.
11 Again, the focus of this trial is whether or not there were
12 certain misrepresentations or omissions made to this witness by
13 the Defendant. What happened in 2008 or 2009 with the FDA is
14 irrelevant to the issues we have to decide.

15 I've let it go for a while, but I don't see the
16 relevance of this questioning.

17 MR. GALLEGOS: Judge, it goes to the credibility. I
18 mean, in order for the Court to make a finding, you have to
19 believe Mr. Markham. And I think it's going the way he
20 characterizes things.

21 And the fact that he says his company closed, and
22 now the way he's dancing around this, I think it certainly goes
23 to the credibility that the Court needs to, to make a
24 determination in the way he characterizes statements.

25 THE COURT: I, I think we've allowed probably about

1 as much as I'm willing to allow. I think I know where you were
2 going. I think you've got whatever it is you need to get in.
3 The company was shut down, even though Mr. Markham doesn't
4 characterize it that, basically shut down because the FDA
5 stopped production. So.

6 MR. GALLEGOS: Okay.

7 THE COURT: The company can still go forward, but if
8 it had no product to make and distribute, then.

9 MR. GALLEGOS: So I --

10 THE COURT: So we're done.

11 MR. GALLEGOS: I think 22 I -- 22 is entered,
12 correct?

13 MR. ARGUELLO: Yes, 22 is in evidence. That was a
14 letter written by the Defendant to Mr. Bird. Twenty-two is in
15 evidence with no objection, Judge.

16 MR. GALLEGOS: Then I don't have anything further.

17 THE COURT: Mr. Arguello.

18 MR. ARGUELLO: Briefly, Judge.

19 THE COURT: Please.

20 REDIRECT EXAMINATION

21 BY MR. ARGUELLO:

22 Q. After Lane leaves the company under the
23 circumstances that you described you tried for a couple of
24 years to get this company running, correct?

25 A. Yes.

1 questions that relate to what happened to the company long
2 after Lane is gone. Representations about whether the company
3 was or wasn't making money. Was or wasn't successful. Did you
4 try to make this business work, sir?

5 A. Yes.

6 Q. In the -- well, first of all, how long were you
7 involved in this company? You obviously began in 2007. When
8 does the company actually shut down? When do you close its
9 doors?

10 A. 2009.

11 Q. 2009? During that two-plus years of involvement was
12 there any a -- was there ever a single month or quarter where
13 this company made an actual profit where your assets exceeded
14 your liabilities, ever?

15 A. No. Never.

16 Q. You were asked a variety of questions about
17 documents that are in evidence about agreements, and letters of
18 intent, and all this (inaudible) going somewhere. In those
19 emails were you attempting to show that the company was making
20 a profit?

21 A. No.

22 Q. Were you trying to make a profit?

23 A. Yes.

24 Q. Were any of those, any of those purported agreements
25 or agreements, letters of intent, did they ever ultimately get

1 consummated in actual voluminous sales of the product? Were
2 you ever able to sell the product?

3 A. No.

4 Q. And again, just one final question on just the
5 issues that you were cross-examined on. There was some
6 discussion about a refinancing of the Defendant's home at some
7 point in 2005. I think refinancing of the Defendant's home was
8 how the defense characterized it. But do you remember those
9 questions, sir?

10 A. Yes.

11 Q. Were you involved in any way, shape, or form with
12 that refinancing?

13 A. With Lane Bird, no.

14 Q. And with your knowledge (inaudible), who was? Who
15 was involved in that issue with the Defendant's home?

16 A. As far as -- well, his, his dad and my wife.

17 Q. Okay. And again, in the course of your work would
18 it be a violation of her fiduciary duty to share information
19 with you about confidential things she would or could be
20 learning about the Defendant's background; is she allowed to
21 share that with you just because you're her husband?

22 A. No.

23 Q. The information that you know about that particular
24 transaction, is that information that simply just came to you
25 in general form by your wife?

Addendum C

ORIGINAL

FILED

JUN 29 2015

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT - FARMINGTON
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,	)	Case No. 111700523
)	
Plaintiff,)	Judge Michael G. Allphin
)	
vs.)	
)	
LANE D. BIRD,)	
)	Bench Trial
Defendant.)	Day 2 of 2

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DATE RECORDED: August 29, 2012

TRANSCRIBED BY: Kelly L. Barber-Wilburn, CSR, RPR

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UTAH APPELLATE COURTS

NOV 10 2015

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20140434-CA

1 over at their home for family dinners and things like that.

2 Q. When you say you met them because they were Lane's
3 neighbor, fair to say that you knew Lane first, and then
4 through your association with Lane you met the Markhams?

5 A. Yes.

6 Q. Things at Clarcon got up and running, I think you
7 said once the capital came in, correct?

8 A. We had, we had still done business before that. And
9 had done sales, prospecting, marketing, and trying to get
10 things up and going. But it expedited, and grew, and expanded
11 once the capital came in.

12 Q. You were a salesman for Clarcon, correct?

13 A. Yes.

14 Q. You mentioned that during the month of -- at least
15 the limited time period you were there that, again, once the
16 capital came in, things were moving. I think your testimony on
17 direct was that production increased while you were there after
18 the capital came in. Correct?

19 A. Uh-huh (affirmative.)

20 Q. Who were you selling to? You specifically. Who did
21 you sell to?

22 A. So it was preliminary. And I went to trade show.
23 And I worked with organizations like Blitz USA, Save Mart.

24 Q. How much product did Blitz USA purchase?

25 A. We were not able to close the deal prior to their

1 disagreement.

2 Q. So the answer to my question is zero. Correct?

3 A. Not to those organizations. I had sold a case to
4 SYSCO. Some representatives of SYSCO. And --

5 Q. A case. How much is a case?

6 A. Probably about 48 bottles or so.

7 Q. Forty-eight bottles. How much is 48 bottles of this
8 lotion worth?

9 A. It wasn't much.

10 Q. Other than SYSCO, who else did you consummate a sale
11 with?

12 A. Hmm. I'd have to go back and check my records, but
13 I'm pretty certain there were a couple small ma-and-pa shops
14 that we closed a couple of cases with.

15 Q. SYSCO and a couple of small mom-and-pop situations?

16 A. Uh-huh (affirmative.)

17 Q. Okay. Just going to show you what's in evidence --
18 these are documents that are in evidence. I know you haven't
19 been present for the trial, but I just want to show you some
20 documents. State's Exhibit 3, 4, and 5.

21 Just take a look at those documents. And take
22 whatever time you need. When you're done flipping through
23 those, just look up.

24 (Pause.)

25 MR. ARGUELLO: And with your permission I'm going to

Addendum D

ORIGINAL

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JUN 29 2015

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT - FARMINGTON
DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,	)	Case No. 111700523
)	
Plaintiff,)	Judge Michael G. Allphin
)	
vs.)	
)	
LANE D. BIRD,)	
)	Bench Trial
Defendant.)	Day 2 of 2

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20140434-CA

1 Q. What is it?

2 A. This is a monthly cash flow projection that was done
3 up by Bill after he had, had reviewed -- he'd gone through all
4 the records and books. What we were trying to do, he was
5 trying to figure out exactly what we had, what the, what the
6 numbers were, what they needed to be, in order to make
7 decisions on what we need to do to turn it around so we could
8 become profitable.

9 Q. So I guess what I'm asking you, is this a
10 spreadsheet that was given to you, or did you prepare it?

11 A. Bill prepared this.

12 Q. Bill prepared that spreadsheet?

13 A. Yes.

14 Q. And that was based upon what; do you know?

15 A. That was based upon his review of the records.

16 Q. Of what records?

17 A. That were there at Clarcon. The invoices. All the
18 records that were available.

19 Q. So did it -- was it -- that had been provided to him
20 by -- I mean by you and him, or by -- I mean, who was it --

21 A. Everybody.

22 Q. The records were provided by who?

23 A. By me, by Omar, by what was in their old files from
24 ClarconLabs, LLC, to determine the, the costs, and what they
25 had out, and everything that they did. He put it together and

1 And so he did. He spent hours going over all the ledgers and
2 everything.

3 Our main thing -- the main reason that he started to
4 do that, and that we -- he needed to do that is we, we started
5 analyzing all the old ClarconLabs, LLC, invoices and what they
6 were selling product for. Well, we started -- when we got
7 there, you know, we started, Okay, how much are they
8 actually -- is it costing them to make a bottle of product?

9 And as Bill was figuring out all those costs, how
10 much money we actually had in a bottle, he figured out that the
11 old company, Omar's old company, was actually selling product
12 most of the time for less money than it was costing them to
13 produce. The dollars were big, but there was no profit --

14 Q. Okay.

15 A. -- because they, they didn't know how to work that
16 out. And that's the main reason that he did that, was so we
17 knew where to put our prices.

18 Q. Okay. And as far as, there was some testimony about
19 whether there was one account or two accounts. How many
20 accounts -- bank accounts were there?

21 A. Two.

22 Q. Two? And did he have access to those?

23 A. He had access to the Clarcon Labs and Clarcon
24 Distributing. Always -- we were going to do it, we just didn't
25 do it.

1 A. Everybody except me, and probably --

2 Q. Do you know if Omar took a paycheck?

3 A. Omar did. Always had a paycheck.

4 Q. And what about Bill?

5 A. Once. He would always -- he was always -- it was
6 always known that he would get a paycheck as soon as we could
7 afford to give him a paycheck, yes.

8 Q. Okay. And what was his paycheck going to be; do you
9 know?

10 A. Eight thousand dollars a month.

11 Q. Okay. And you never got a paycheck?

12 A. Never.

13 Q. All right.

14 MR. GALLEGOS: I don't think I have anything
15 further, your Honor.

16 THE COURT: We're going to take a break.

17 MR. ARGUELLO: Thank you. I was going to say, I
18 need to run to the restroom.

19 THE COURT: We'll take 15 minutes.

20 MR. ARGUELLO: Thank you, Judge.

21 THE COURT: Come back at five after.

22 (A recess was taken.)

23 THE COURT: Go ahead.

24 MR. ARGUELLO: Thank you, Judge. With the Court's
25 permission.

1 evidence that's in evidence, none of the bank records --
2 summaries of the bank records here in evidence reflect any of
3 these sales, correct?

4 A. No, because we don't have any of the bank records,
5 records from ClarconLabs, LLC.

6 Q. So what we have is essentially we have to rely on
7 your testimony, correct?

8 A. Sure.

9 Q. You were shown projections that I think are in
10 evidence as State's Exhibit 1, correct?

11 A. Yes.

12 Q. And that's exactly what those are, right?

13 A. Yes.

14 Q. Projections, correct?

15 A. Projections, yes.

16 Q. Who created those projections?

17 A. I created these projections.

18 Q. Based on what?

19 A. Projections provided me by the three individuals at
20 ClarconLabs, LLC.

21 Q. So that is what the company hoped to be producing,
22 correct?

23 A. Yes. It's what they had purchase orders to produce.

24 Q. Okay. Fair to say that the company never met
25 anywhere near those projections, correct?

1 A. I would say that that is fair.

2 Q. Okay. Did you ever see any audited financial
3 statements for any of the Clarcon businesses, sir?

4 A. No, sir.

5 Q. Was a financial audit ever done of the business, to
6 your knowledge?

7 A. Not that I'm aware of, no.

8 Q. You never saw anything, got anything, or passed
9 along anything to Mr. Markham that was an audited
10 representation of the company's current assets versus
11 liabilities, correct?

12 A. No, sir.

13 Q. Flip to the second page of State's Exhibit No. 1.
14 That document, again, is something that you gave to Bill
15 Markham, correct? As evidence, again, that there were
16 projected sales, correct?

17 A. I believe so, yes.

18 Q. And again, you got that from Omar, correct?

19 A. Yes.

20 Q. And I think you testified on direct examination you
21 had no idea about Mexican markets, correct?

22 A. Correct.

23 Q. You had no idea whether or not those projections
24 were legitimate or not legitimate, correct?

25 A. Correct.

1 going to bring in those comments, Judge, in context. Because
2 you were only told about two of his comments and there's a
3 paragraph down below that clarifies it.

4 THE COURT: I don't have anything in evidence. If
5 you want to have him review it to refresh his recollection --

6 MR. GALLEGOS: Well --

7 THE COURT: -- and ask him some specific questions,
8 I'll allow you to do that.

9 MR. GALLEGOS: Well, that's what I was going to ask
10 him. I don't want him to read it.

11 THE COURT: Although I don't know that it's --
12 that's appropriate either, because it's not his work product.

13 MR. ARGUELLO: Correct. And he has not said that he
14 doesn't remember saying something at this point.

15 MR. GALLEGOS: Okay. Well, let me, let me just ask
16 him. Let me --

17 Q. (By Mr. Gallegos) Do you recall when you were being
18 asked about the -- by the investigator about the company being
19 a mess financially?

20 A. Yes.

21 Q. And your response was:

22 "They were a mess financially. They
23 were a mess procedurally. Their
24 manufacturing was, I would call it
25 archaic at best."

1 And then do you recall explaining or qualifying that
2 statement?

3 A. Well, I just think that they could use a lot of
4 help. And there's a long way you could -- there was a, there
5 was a long way you could go with that if you modernized and
6 brought things up to par with how you should run a business.

7 Q. Do you recall telling him:

8 "You know, at the time, I mean, they
9 made it sound like it was, you know, 5 or
10 20 thousand dollars."

11 When you were asked by Investigator Nielsen: "Like,
12 how far behind are they in debt? Your response was:

13 "But later on down the line when we're
14 in there I learned that it was
15 significantly more than that. And I
16 couldn't tell you what the exact numbers
17 were, but it was significantly more than
18 had been represented."

19 MR. ARGUELLO: I'm going to object to form.

20 MR. GALLEGOS: Well, I'm going to --

21 Q. (By Mr. Gallegos) Do you remem --

22 MR. GALLEGOS: I guess, Judge, he --

23 THE COURT: How -- what -- I --

24 MR. GALLEGOS: I can ask him if he recalls saying
25 that because he was asked specifically about comments he made

1 about the company. And, I mean, you know, as these transcripts
2 are --

3 THE COURT: Let me, let me just indicate to you, I'm
4 going to let it in. But based on what I've heard you say, it
5 sounds to me like it's going to be more damaging to your client
6 than it is -- I'd consider what you want to put in and what you
7 don't.

8 I'm going to allow you to put whatever you, you want
9 in as it relates to this specific instance, but.

10 MR. GALLEGOS: Okay.

11 Q. (By Mr. Gallegos) Well, I just, I mean, was that
12 your -- did you explain to the investigator that once you got
13 into the company and figured everything out, they're -- they
14 were a lot worse off than what you had envisioned?

15 A. Yeah. And that's what I addressed in my testimony.
16 The fact that we figured out when you took cost per bottle,
17 that they were actually selling a lot but not making any money.
18 And that's what I was referring to.

19 Q. Okay. And you're, you're discussing this with the
20 investigator June of 2010. So this is after you've got the
21 benefit of hindsight and seen everything that occurred?

22 A. Yes.

23 Q. Okay. And, and then you were asked about the, the
24 exhibit... (inaudible) find it easier.

25 There's Defense Exhibit 1, the -- and it's this one

1 A. No. Just the agreement for -- when you say "actual
2 stock," we had not -- the certificates had not been ordered.

3 Q. Okay. And was there --

4 A. Had not been.

5 Q. Was there even any, I mean, was there a value in any
6 company at that point?

7 A. No, there was not.

8 Q. Okay. This was an agreement that you guys, provided
9 this thing got off the ground, would be able to do down the
10 road?

11 A. Yes.

12 Q. Okay. And, uh.

13 MR. GALLEGOS: Judge, I think that's all the
14 questions I have.

15 THE COURT: Anything else?

16 I have a question that I'm very interested in. Sir,
17 turn to State's Exhibit 9. It's the Powerslide Tools check
18 register?

19 THE WITNESS: Okay.

20 THE COURT: Can you see there on February 20th there
21 was a check to ClarconLabs for \$25,000?

22 THE WITNESS: Yes.

23 THE COURT: And also on February 22nd there was a
24 check or a transfer, I'm not sure what it was exactly, but a
25 transfer to Clarcon for \$10,000; is that correct?

1 security, correct?

2 A. Yes.

3 Q. Okay. You had business proposals that were given to
4 you by Omar, Defendant's Exhibit 3, correct?

5 A. Yes.

6 Q. You were shown, by Omar, proof of prior sales of the
7 product, correct?

8 A. Yes.

9 Q. You had projections that were given to you, correct?

10 A. Yes.

11 Q. You were shown checks -- I think it's
12 Defendant's 19, I think. You were shown multiple checks that
13 represented sales -- or purchases of the product, correct, by
14 different vendors?

15 A. Yes.

16 Q. So it's your testimony that when you get involved in
17 Clarcon the company is a thriving company?

18 A. I wouldn't say "thriving." It looked like it was
19 doing darn good.

20 Q. Doing darn good. The company was doing darn good.
21 Making sales. Looked like it was making a profit, making
22 money, correct?

23 A. Yes.

24 Q. And that's your testimony?

25 A. Yes.

1 Q. Sure about that?

2 A. Yes.

3 Q. You remember back on June 22nd of 2010 you went and
4 had a meeting with the investigator in this case, Jeffrey
5 Nielsen. Do you remember that?

6 A. Yes, I do.

7 Q. And you sat down, and he asked you a bunch of
8 questions and you answered a bunch of questions, correct?

9 A. Yes.

10 Q. Went through everything that you could possibly
11 remember about what occurred with this Clarcon venture that you
12 had embarked on, correct?

13 A. Yeah. We were, we were scratching the surface of an
14 old, old bad memory.

15 Q. You told the investigator, sir, did you not, that
16 the company was a mess?

17 A. Management.

18 Q. Management. Just management?

19 A. Yeah. They didn't know what they were doing.

20 Q. They didn't know what they were doing?

21 A. They didn't, they didn't know how to, how to do
22 things what I would consider properly and in step for the
23 business to be in a potential that they could be. It was, it
24 was a mess. Accounting-wise it was a mess.

25 Q. So accounting-wise it was a mess as well, correct?

1 A. Yeah.

2 Q. Management-wise it was a mess, correct?

3 A. Yes.

4 Q. Accounting-wise it was a mess, correct?

5 A. Yes.

6 Q. Financially it was a mess, wasn't it?

7 A. Didn't look like it on paper, but.

8 Q. Okay. Well, let me ask you. Sir, isn't it true you
9 told -- well, withdrawn.

10 Do you remember being asked the following questions
11 by Investigator Nielsen and giving the following answers:

12 "Question: What kind of things were a
13 mess?

14 "Answer: Everything.

15 "Question: When you say 'everything'?

16 "Answer: They were a mess financially.
17 They were a mess procedurally. Their
18 manufacturing was, I would call it
19 archaic at best."

20 Do you remember hearing those questions and giving
21 those answers?

22 A. Yes.

23 MR. GALLEGOS: Judge, can I just ask, he's reading,
24 what page he was referring to?

25 MR. ARGUELLO: Yes. I will say, Judge, this was

1 provided to the Court and Counsel prior to trial. This was a
2 transcript of the interview. I was reading from page 6 of the
3 transcript.

4 THE COURT: Thank you.

5 SPEAKER UNKNOWN: Those -- Che? Those pages are off
6 a little bit from what these copies show.

7 MR. ARGUELLO: And the printout I have may -- the
8 pages may be a little off. If you're unable to find it when I
9 refer to this, please let me know, and I'll try to find it for
10 you.

11 THE COURT: That's fine. I'm not sure that it's
12 necessary at this particular point for me to do that, but --

13 MR. ARGUELLO: Correct.

14 THE COURT: -- I will find it.

15 SPEAKER UNKNOWN: Che.

16 MR. ARGUELLO: One sec.

17 (Pause.)

18 Q. (By Mr. Arguello) And in fact the company -- and
19 when I say "the company," at the time you get involved the
20 company is ClarconLabs, LLC, correct?

21 A. Yes.

22 Q. So the company, isn't it in fact true, was a
23 complete mess?

24 A. It was not living up to what it could be done if it
25 was operated correctly.

1 Q. My question is a "yes" or "no" question, sir.
2 You've heard -- we've heard your testimony. We've discussed
3 some things you said to the investigator. Yes or no, the
4 company was a complete mess?

5 A. In my opinion, it was a mess.

6 Q. You were going to be the company's savior, correct?

7 A. I wouldn't characterize myself as a "savior," no.

8 Q. Going back to that June 22nd, 2002, interview with
9 Mr. Nielsen. Do you recall being asked the following question
10 and giving the following answer:

11 "Question: Okay. Were you offered
12 some sort of role inside the company, or
13 did they ask you just to work for them?

14 "Answer: They wanted me, they wanted
15 me to do everything for them. They
16 wanted me to come in and just be their
17 savior and take care of them and
18 whatever.

19 "And I tried again over the, you know,
20 I don't know, maybe a week or two, you
21 know. I looked into some things and, you
22 know, checked out their stuff, you know.
23 They, they wanted me to come in to be a
24 partner. Do everything.

25 "And I said, 'Well, I managed to become