Public

Case No. 20170436-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DAVID BRUCE BUTTARS,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for four counts of securities fraud, second and third degree felonies, and one count of pattern of unlawful activity, a second degree felony, in the Third Judicial District, Salt Lake County, the Honorable Vernice Trease presiding

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INTRODUCTION

David Buttars challenges his convictions for securities fraud and engaging in a pattern of unlawful activity based on his fraudulent misstatements and omissions to investors, and his other fraudulent business practices, including lying to investors about how investment funds would be spent and about his prior failed efforts to develop and market the same technology.

First, Buttars claims that the bank records used to show misuse of investor funds should have been suppressed. This argument fails because the records were obtained through a valid subpoena lawfully issued by a district court under the Subpoena Powers Act.

Second, he argues the bank records were inadmissible hearsay. The majority of the records were admissible under the business records exception. Those that were not were admissible under the residual exception because they had equivalent circumstantial guarantees of trustworthiness.

Third, Buttars claims his counsel was ineffective for not objecting to the summaries of bank records, for proposing a jury instruction defining willfully, and for not objecting to statements made during trial about "material omissions" in the securities fraud context. Buttars has not proven deficient performance or prejudice. Competent counsel could have reasonably viewed the summaries, the jury instruction, and the statements as consistent with Utah law, or that any errors were so minor as to not merit consideration. And any error was so insignificant that counsel's performance, if deficient, was not reasonably likely to have changed the outcome in light of the totality of the evidence.

Fourth, he argues that some expert testimony was inadmissible. The expert testimony was proper because it was similar to that approved of in other cases and because the opinions offered were not tied to Utah law. In addition, any error was not prejudicial.

Finally, Buttars cumulative error claim fails because there were no errors to accumulate.

STATEMENT OF THE ISSUES

1. Did the trial court properly deny the motion to suppress the bank records obtained by a subpoena lawfully issued under the Subpoena Powers Act?

Standard of Review. A trial court's decision to grant or deny a motion to suppress is a mixed question of law and fact. The underlying factual findings are reviewed for clear error while legal conclusions are reviewed for correctness, including the application of the law to the facts. *State v. Fuller*, 2014 UT 29, ¶17, 332 P.3d 937.

2. Did the trial court properly rule that the bank records were admissible hearsay?

Standard of Review. When reviewing hearsay rulings, legal questions are reviewed "for correctness, factual questions for clear error, and the final ruling on admissibility for abuse of discretion." *State v. McNeil*, 2013 UT App 134, ¶14, 302 P.3d 844.

3. Has Buttars proven both elements of his claim that counsel was ineffective because he (1) did not object to the admission of the summaries of bank records under rule 1006, Utah Rules of Evidence; (2) proposed an allegedly erroneous definition of "willfully;" and (3) did not object to

statements made by an expert, the prosecutor, and the jury instructions about making material omissions in the securities fraud context?

Standard of Review. Ineffective assistance of counsel claims raised for the first time on appeal present questions of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

4. Has Buttars shown an abuse of discretion by the trial court's admission of expert testimony that offered no opinion about whether Buttars violated Utah law?

Standard of Review. A trial court's "wide discretion in determining the admissibility of expert testimony" is reviewed for abuse of discretion. *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993).

5. Has Buttars established cumulative error?

Standard of Review. Under the cumulative error doctrine, this Court applies the standard of review applicable to each underlying claim of error and reverses only if the cumulative effect of several errors undermines confidence in a fair trial. *McNeil*, 2013 UT App 134, ¶16.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Ellipse Technology and MovieBlitz

Defendant David Buttars joined Vince Romney in a start-up company called Ellipse Technology. R4855–56,4860. The purpose of Ellipse was to create a product for renting digital movies from a kiosk by downloading them onto a "modified flash drive" or "key" that could be taken home for viewing. R4856,5025; State'sTr.Ex.1 & 2.

Buttars was an engineer and had worked with Romney previously on another start-up. R4854–55. Romney recruited Buttars to develop the technology for the kiosk and "key." R4855–56,4910. Buttars and Romney ran Ellipse "50/50," with Buttars as CEO and Romney as president and CIO. R4859,4895,4910,4940,4954. Others were brought in to assist with software research and development, R4908–09,4939, fundraising, R4910–11,4954,5027–28, or other corporate duties, R4860–61. For about two years, Buttars and Romney received a salary from Ellipse that came from individual investor funds. R4863,4865.

Buttars' main responsibilities were overseeing financing and fundraising, establishing relationships with investors, and managing bank accounts, as well as developing the technology. R4859–60,4910,5027–28,5033.

But really, as CEO, "[h]e was over everything." R4954. Buttars "made [it] very clear from the start" that he "was in charge," and the others viewed him as "the top decision maker." R5028–29.

After Ellipse had raised between $600,000 and $750,000, Ellipse's attorneys told the company to stop raising money from individual investors and to instead seek out large institutional investors. R4864–65,4931,5039. But when a large institutional investor made an offer in the millions of dollars for a large ownership stake in Ellipse, Buttars exercised his authority and turned it down even though the others, including Romney, wanted to accept it. R4865–66,4920–21.

Buttars later brought his friend Mark LaCount into Ellipse as a board member and executive because LaCount "claimed to have access to large amounts of institutional funding overseas." R4868–69,4923–24,4940,5030. That funding never materialized. R4869–70.

With the lack of institutional investors, Ellipse was "running out of funds." R4870,4929–30,4935. Romney and the others learned that Buttars was misusing Ellipse's funds to pay for LaCount's mortgage, among other things, R4871,4924–30, and that Buttars was soliciting individual investors again, against the advice of counsel. R4870–71.

Romney and the other original members filed a lawsuit against Buttars "to get control of the company." R4935–36. Buttars resigned as CEO but refused to relinquish control of Ellipse—he retained his shares and his voting rights—claiming that it was "his technology" and that Ellipse could not go forward without him. R5070. A dispute about ownership of the patents between Buttars and Romney also arose, encumbering the patents. R4901–02. "Ellipse ultimately just dissolved" sometime in 2009. R4877–78. On May 1, 2009, Ellipse's bank account was closed after the last $145.47 was transferred to Buttars' personal account. State'sTr.Ex.26 at 7.

As Ellipse dissolved, Buttars and LaCount formed "MovieBlitz" to continue raising money from investors to develop the same technology. R4965,5090–91; State'sTr.Ex.8 & 37. Between the two companies, Buttars raised over $815,000 from investors between January 2007 and April 2010. R5209; State'sTr.Ex.32.

Material Misstatements to Investors and Use of Funds

One of Buttars' key roles in both Ellipse and MovieBlitz was to speak with potential investors. R4859–60. Through those efforts, Rebecca Gerritsen invested $15,000 in Ellipse—$10,000 initially and $5,000 two years later, R5074–76, State'sTr.Ex.3. And he secured investments for MovieBlitz from Janet Hinman ($2,000), R5090–92, State'sTr.Ex.5–6; Orjan Gustafsson ($9,000

in two separate payments), R5118–23,5126–27, State'sTr.Ex.9–12; and Gary Miller ($10,000), R5148–51, State'sTr.Ex.16–19. Each of these investments were made after Buttars made material misstatements and omissions, including about how their investment funds would be used.

Gerritsen made her second investment in March 2009, during the period that Ellipse was facing financial difficulties. R5075–76; *see* R4868–70, 4929–30. Buttars told her that he "needed just a little bit more money," and that the payment "would be used for the technology" and "to get it to market more quickly." R5075–78. Buttars did not tell her that the funds could be used for any other purpose. R5078–79. Within six weeks, Gerritsen's $5,000 investment, along with another investor's $10,000 investment, was gone. State'sTr.Ex.27; R5188–91. Over $9,000 went to Buttars' ex-wife, purportedly for legal fees incurred several months earlier for patent work. State'sTr.Ex.27; Def'sTr.Ex.24. Over $3,000 was paid to a private investigator, for which Ellipse had no need. State'sTr.Ex.27; R4867–77. The majority of the remaining funds were spent on personal expenses, such as groceries, gas, phone and satellite tv bills, insurance, and housecleaning, including over $1,700 that was transferred to Buttars' personal account before it was spent. State'sTr.Ex.27; R4917–18,5456–57.

Two months later, Hinman and Gustafsson invested in MovieBlitz after Buttars told them about the technology—with pictures and diagrams of the key and kiosk—and about the patents he had obtained. R5090–91,5118–19; State'sTr.Ex.8. He presented the idea in "fabulous terms," with a "positive" tone that made it seem "too good to be true." R5096–97,5119,5125. Buttars, however, did not tell them that Ellipse attempted to market this same product but failed. R5111,5120. Hinman and Gustafsson were told that their investment funds would be used to produce the key and kiosk and to incorporate in Nevada. R5098,5133. No other uses for the funds, including for personal expenses, were discussed. R5098–99,5113,5133–34.

The first $1,500 of Hinman's investment was deposited into a brand new MovieBlitz account. State'sTr.Ex.31. Five-hundred dollars was transferred to LaCount's personal account, $400 was withdrawn in cash, and $215 was transferred to Buttars' personal account where it was commingled with his personal funds. State'sTr.Ex.31. The remaining $500 from Hinman, along with the first $2,000 from Gustafsson, were deposited directly into Buttars' personal account. State'sTr.Ex.29. While $859 was spent on "Incorp Services," possibly to incorporate MovieBlitz in Nevada, the remaining funds were spent on groceries, gas, restaurants, clothing, a talent agency, and other

personal expenses. State'sTr.Ex.29 & 31. In less than a month, Hinman's and Gustafsson's combined $4,000 was gone. *Id.*; R5191–97,5201–04.

Gustafsson later invested an additional $7,000 that was deposited into the MovieBlitz account. R5125–26; State'sTr.Ex.30. Over the next three weeks, $200 was withdrawn, $800 was spent at Fresh Market grocery store, and $5,500 was transferred to Buttars' personal account, where the money was spent on a variety of expenses unrelated to producing the product as Gustafsson was told it would be: $2,200 to pay another investor, $2,100 for a debt settlement, $334 for child support payments, a $300 withdrawal, and hundreds of dollars on utilities, groceries, gas, clothing, and restaurants, as well as multiple bank charges for insufficient funds. State'sTr.Ex.30; R5197–5201. Just three weeks after Gustafsson's $7,000 investment, MovieBlitz's account balance was $293.80 and Buttars' personal account balance was *negative* $1,628.04. State'sTr.Ex.30; R5198–99.

Finally, Buttars spoke with Miller in January 2010 about MovieBlitz. R5148–49. Like the others, Miller was told about the company's product and that his investment would only be used "to develop the key and the kiosks." R5149,5155. And like the others, Buttars did not tell Miller about Ellipse or about MovieBlitz's financial difficulties. R5149,5154–55,5162. Buttars also did not explain that the patents were encumbered. R5155.

Miller invested $10,000, which was deposited into MovieBlitz's account. State'sTr.Ex.28. Over the next month, $3,000 was transferred to LaCount and $5,900 was transferred to Buttars' personal account. State'sTr.Ex.28. Buttars' personal account began with a balance of *negative* $1,742.79 (after having spent all of Gustafsson's investment on personal expenses), and the only funds added were Miller's funds from the MovieBlitz account. State'sTr.Ex.28 & 30. The funds were used for debt settlement ($2,100), groceries, gas, bail bonds, child support, restaurants, iTunes music, etc., and ended with a balance of $107.38 after one month. State'sTr.Ex.28.

Each of these investors supplied funding at a time when the Ellipse or MovieBlitz accounts were at or close to zero, and the funds from each was spent within weeks, bringing the balances close to zero once again. *See* State'sTr.Ex.26–31. But none of the investors were told that the companies were undercapitalized. R5113,5134,5228. Miller received a payment of $6,500 a few months after he invested, but these investors saw no other returns. R5079,5102,5133,5152; State'sTr.Ex.26 at 12.

B. Summary of proceedings and disposition of the court.

Buttars was charged with four counts of securities fraud and four counts of theft—one of each for each of the four investors discussed above—and one count of engaging in a pattern of unlawful activity. R534–39.

Subpoenas for Bank Records

Before filing the Information, the State obtained three investigative subpoenas for bank records for the accounts of Buttars, Ellipse, MovieBlitz, and LaCount from Frontier Bank ("Frontier") and JP Morgan Chase Bank ("Chase"). R2945,2949; *see* R797–99,818–20,834–36 (Addendum B). For each subpoena, Agent Nesbitt prepared a good cause statement that he emailed to a paralegal at the Salt Lake County District Attorney's Office, and the paralegal prepared the subpoenas. R2943. Agent Nesbit prepared no paperwork other than the good cause statement. R2944. Agent Nesbitt picked up the subpoenas, took them to the court where they were signed by a magistrate, and served them on the banks. R2943–44,2947.

The first Frontier subpoena sought "all account records" for Ellipse and Buttars from January 1, 2007 to April 1, 2011. R797–99. The records were produced in two distributions, each with its own custodial certification. R803–04,2947–48. Agent Nesbit later subpoenaed Frontier for "all account records" for MovieBlitz and LaCount from June 1, 2008 to December 31, 2010. R834–36. These records were produced via a secure email. R2947–48,2993; *see* Def.'sEvid.Hr'gEx.P. However, this batch was not produced with a custodial certificate. *See* R1153,5503.

Agent Nesbitt also subpoenaed records from Chase seeking "all account records" for Ellipse and Buttars from January 1, 2007 to April 1, 2011. R818–20. Those records were produced with a custodial certification. Def.'sEvid.Hr'gEx.S.

Buttars' Motion to Suppress Bank Records

Buttars filed a motion to suppress the bank records, arguing that the records were obtained in violation of the United States and Utah constitutions. R766–67. Specifically, Buttars claimed that the subpoenas used to obtain the bank records were unlawful because they cited an inapplicable state statute requiring the banks not to disclose the existence of the subpoenas to "any person," thereby denying Buttars the opportunity to learn of the subpoenas and attempt to quash them. R768–784.

The trial court denied the motion. First, it ruled that under the Subpoena Powers Act, the State was not required to give notice of the subpoenas to Buttars. Second, it ruled that the reference to the inapplicable state statute did not render the subpoenas unlawful, particularly where Buttars did not challenge the good cause statement or allege that the subpoenas were not reasonably related to the criminal investigation. Finally, the court ruled that even if the subpoenas were unconstitutional, the good

faith exception would preclude suppression. R1085–90 (written findings of fact and conclusions of law) (Addendum C); *see also* 3098–3104 (oral ruling).

State's Motion to Admit Summaries of Bank Records

The State moved for a pretrial ruling on the admissibility of summaries of the bank records prepared by the State's financial expert John Curtis, a forensic accountant and certified fraud examiner. R734–36,862–65; *see* State'sTr.Ex.26–32 (Addendum D). Following two rounds of briefing and oral argument, and two findings of fact and conclusions of law, the trial court ruled that the bank records and the summaries were admissible. R1148–54 (first written findings of fact and conclusions of law), 1216–23 (second) (Addendum E); *see also* 3180–3201 (first oral ruling), 3274–88 (second).

First, the trial court ruled that the bank records were "voluminous," making rule 1006, Utah Rules of Evidence, applicable for admitting the summaries, so long as the bank records themselves were admissible. R1151; *see also* R2999 (Buttars did not challenge the summaries under rule 1006).

Second, the trial court ruled that the bank records were authentic under rule 901(b)(1) and (4), Utah Rules of Evidence, based on the certifications for most of the records, the testimony of Agent Nesbit who subpoenaed and personally received and reviewed the bank records, and the testimony of Curtis, who reviewed the records and concluded that they were complete and

authentic records. R1151–52; *see* R3002–07,3014–15 ("in every way they did appear to be the authentic documents").

Finally, the court ruled that although the bank records were hearsay, they were admissible under an exception. R1152–53,1219–23. The court ruled that not all of the records were admissible under rule 803(6), Utah Rules of Evidence, because some did not come with a records custodian certificate. R1153. However, the court ruled that they were admissible under evidence rule 807 because they had equivalent circumstantial guarantees of trustworthiness. R1219–23. And because the bank records were admissible evidence, the summaries of those records were also admissible. R1223,3287.

Expert Testimony

The prosecution called two expert witnesses: Brian Lloyd, a securities expert, R4822–24, and John Curtis, a certified public accountant and certified fraud examiner with experience investigating financial fraud, and who reviewed and prepared summaries of the bank records, R5168–70,5172–75.

The prosecutor asked Lloyd, "Based on your experience in the securities industry, could you give some examples of what material statements may entail?" R4827. Defense counsel objected, arguing that it was improper to define material misstatement and that "the examples are going to be too closely related to this case." R4827. The court ruled that it would be

inappropriate "to give examples that would include what was mentioned in this case," but it allowed Lloyd to define material misstatement. R4830. Soon thereafter, the court called a sidebar and changed its ruling. Based on the court's reading of the case law, it believed that an expert could give a "list of examples" of material facts "so long as it's not explicitly tied to, or the words used, explicitly mirrors the allegations made in this case." R4835–37.

Lloyd was again asked about "examples, in the securities industry, [of] what material information might include, just generally?" R4838. Lloyd responded with some general examples, including "information about the business," its assets, management, financial information, and risks. R4838–39. Lloyd also defined "material" as "information that a reasonable investor would consider important in making a decision whether to purchase or to sell a security," R4830, and "information that's important to an investor making a decision," R4838.

The prosecutor asked Curtis whether there are "certain characteristics that you look for in analyzing a business or an individual to determine fraud, or theft, or deceit?" R5211. Defense counsel objected, essentially on the same basis as it objected to Lloyd's testimony that the "characteristics" would "track closely with this case." R5211. The prosecutor explained that he intended to ask Curtis (1) about general characteristics of fraud that he looks

for as an accountant; and (2) whether he saw any of those characteristics in this case. The prosecutor explained, however, that he would refrain from asking for an opinion about whether Buttars violated the law. R5217–23.

The court ruled that it would "allow the testimony" as proffered "so long as the questioning and the answers do not touch on…the ultimate question under Utah law, or under the statutes…as to what is fraudulent, what is securities fraud….The witness can testify about his understanding, what is the accepted standard and characteristics in the industry." R5223–24. The trial court also ruled that the testimony of both Lloyd and Curtis would be helpful to the jury because they described aspects of the securities industry that are beyond the understanding of an ordinary juror. R5224–26.

Curtis proceeded to give examples of general characteristics that he looks for in his practice when analyzing possible fraud, including misrepresentations, disregard of corporate formalities, dependency on investor money, misuse of funds, and undercapitalization. R5227–28. He also testified that he had seen some of those characteristics in this case. R5228.

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The jury convicted Buttars on all four securities fraud charges and the pattern of unlawful activity charges but acquitted on the four theft charges. R1432–33. Buttars timely appealed. R2587.

SUMMARY OF ARGUMENT

I. The trial court did not err when it denied Buttars' motion to suppress the bank records. The records were obtained by valid investigative subpoenas, issued under the Subpoena Powers Act and approved by a district court. The technical error did not make the subpoenas unlawful or the search unreasonable. And even if it did, suppression would not be appropriate because the officer reasonably relied on the district court's approval of the subpoenas and the Act authorizing the search and seizure of Buttars' bank records.

The trial court also did not abuse is discretion when it ruled that the bank records were admissible hearsay. Most of the records qualified for the business records exception, rule 803(6), and those that did not were admissible under rule 807 because they contained equivalent circumstantial guarantees of trustworthiness.

II. Buttars claims his counsel was ineffective for three reasons: (1) for not objecting to the summaries of bank records under Utah Rules of Evidence 1006 because they purportedly included information not contained in the bank records; (2) for proposing a jury instruction defining "willfully;" and (3) for not objecting to statements made by an expert, the prosecution, and the

jury instructions about making material omissions in the securities fraud context. Each claim fails.

First, it was objectively reasonable for counsel not to object to minor details in the summaries of bank records that accurately summarized the records, that were not inconsistent with evidence rule 1006 or case law, and that were obvious to the jury. Buttars has not proven prejudiced because the summaries were accurate, and the challenged information did not change the evidentiary picture.

Second, counsel acted reasonably when he proposed a jury instruction that contained language approved by this Court. And there was no prejudice for including this court-approved language, especially because it was not material to this case.

Third, counsel performed competently when he did not object to statements made by an expert, the prosecutor, and the jury instructions that used an abbreviated "material omissions" in lieu of the cumbersome statutory language about omissions "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Counsel could reasonably conclude that it was clear from other statements made during trial and the jury instructions as a whole that the few references to the abbreviated "material omissions" did not

supplant the legal standard for securities fraud. Buttars was not prejudiced because there is no reasonable probability that the jury would have ignored the clear jury instructions on the standard for omissions based on what was clearly convenient short-hand language.

III. The trial court did not abuse its discretion when it admitted expert testimony that offered general definitions and conclusions consistent with evidence rule 704 and binding case law. The experts did not tie their opinions to Utah law or opine that Buttars was guilty of securities fraud. And any error was not prejudicial because the jury instructions clearly set forth the proper legal standards and informed the jury to weigh expert testimony the same as any other witness.

IV. Having failed to establish any error, Buttars' cumulative error claim necessarily fails.

ARGUMENT

I.

The Trial Court Correctly Ruled That the Bank Records Used to Show Buttars' Fraudulent Activity Were Admissible.

Buttars' securities fraud spanned several years and multiple bank accounts through which he transferred, commingled, and improperly spent investor funds. The trial court admitted into evidence seven summaries of bank records pursuant to rule 1006, Utah Rules of Evidence. State'sTr.Ex. 26–32. Buttars argues that the summaries should have been excluded because the underlying bank records were inadmissible for two reasons.

First, he claims that the trial court should have suppressed the bank records because they were purportedly obtained in violation of the United States and Utah constitutions. Aplt.Br.18–31. Second, he argues that the bank records were inadmissible hearsay. Aplt.Br.31–42. The trial court correctly rejected both of these arguments.

A. The search and seizure of the bank records did not violate Buttars' state or federal constitutional rights.

The State obtained the bank records of Buttars, Ellipse, and MovieBlitz through three subpoenas issued under the Subpoena Powers Act.[1] *See* R797–

[1] The full name of the Act is "Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity." Utah Code Ann. 77-22-1 et. seq. (West 2018). The State will refer to it as the "Subpoena Powers Act" or the "Act."

99, 818–20, 834–36. Buttars argues that the seizure of his bank records by subpoena violated his rights under both the United States and Utah Constitutions. Aplt.Br.18–25. Both the state and federal constitutional provisions guard "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *accord* Utah Const. art. I, §14. But neither was violated with the seizure of the bank records.

1. The Fourth Amendment does not protect bank records.

The Fourth Amendment claim is a non-starter. Although Buttars cites the Fourth Amendment he does not cite to any case law supporting his claim that the seizure of his bank records by subpoena violated his Fourth Amendment rights. Indeed, he cannot. The United States Supreme Court has foreclosed the issue by holding that the Fourth Amendment does not protect bank records. *United States v. Miller*, 425 U.S. 435, 442–45 (1976). Much like the defendant in *Miller*, Buttars has "no protectable Fourth Amendment interest in the subpoenaed documents." *Id.* at 437.

2. The search and seizure of the bank records did not violate article I, section 14 of the Utah Constitution.

Buttars' state constitutional challenge also fails. Article I, section 14 of the Utah Constitution "reads nearly verbatim" with and has almost always been interpreted identically to the Fourth Amendment. *State v. Thompson*, 810 P.2d 415, 416–17 (Utah 1991). One of the rare circumstances in which it has

been interpreted differently is with respect to bank records. Unlike the Fourth Amendment, the Utah Supreme Court has interpreted article I, section 14 to extend the "right of privacy" to "bank records," at least "under the facts of [one] case." *Id.* at 418.

In *Thompson*, the attorney general issued subpoenas "under the Subpoena Powers Act to defendants' bankers, accountants, business associates, and several corporations." *Id.* at 416. In a related case, one of the corporations challenged the validity of the subpoenas and the court held that the Act was unconstitutionally applied. *Id.* at 416, 418; *see In re Criminal Investigation*, 754 P.2d 633, 658–59 (Utah 1988). The *Thompson* defendants argued that the trial court erroneously denied their motion to suppress the bank records obtained by those same subpoenas. *Thompson*, 810 P.2d at 415–16. The court held that because the subpoenas had been issued in an unconstitutional manner, they were unlawful, and the evidence obtained against the *Thompson* defendants should have been suppressed. *Id.* at 418–19; *see Schroeder v. Utah Attorney General's Office*, 2015 UT 77, ¶23, 358 P.3d 1075.

The Utah Supreme Court later emphasized that the *Thompson* "opinion explicitly restricts the holding to 'the facts of [that] case.'" *Schroeder*, 2015 UT 77, ¶24 (quoting *Thompson*, 810 P.2d at 418). And the facts of that case

included the seizure of bank records by subpoenas issued without judicial oversight—a critical fact that does not exist in this case.

The supreme court in *Schroeder* explained that the *Thompson* decision "stands for the unremarkable proposition that there is no violation of article I, section 14 when the state obtains bank records through a reasonable search and seizure." *Id.* "A state intrusion is not unreasonable…when the state acts under a valid…subpoena." *Id.* ¶22. Thus, "whatever 'right of privacy' individuals may have in their bank records, the Utah Constitution permits the state to intrude upon it 'pursuant to a subpoena' that is 'lawfully issued' to a bank." *Id.* ¶24 (quoting *Thompson*, 810 P.2d at 418).

The search and seizure of Buttars' bank records was not unreasonable because the records were obtained through valid, lawful investigatory subpoenas approved by the district court under the Subpoena Powers Act.

Investigatory subpoenas are "not subject to the same probable cause requirements as a search warrant." *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007). Rather, to be constitutionally "reasonable" they need only be "'sufficiently limited in scope, relevant in purpose, and specific in directive.'" *Id.* at 916 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)).

The Subpoena Powers Act is consistent with these "minimal requirements" of reasonableness. *Id.* at 917. The Act permits a prosecutor to

"conduct a criminal investigation" "upon application and approval of the district court and for good cause shown." Utah Code Ann. §77-22-2(2)(a) (West 2018). After judicial approval, a prosecutor may "subpoena witnesses" and "require the production" of anything that "may be relevant to the investigation." *Id.* §77-22-2(3)(a). The prosecutor must "apply to the district court for each subpoena" and "show that the requested information is reasonably related to the criminal investigation authorized by the court." *Id.* §77-22-2(3)(b).

The three subpoenas here were properly issued according to these requirements—the district court approved the investigation upon a showing of good cause, the prosecutor applied to the district court for each subpoena, and the district court authorized each one. R1088–89. Buttars does not argue otherwise. The subpoenas were therefore "valid," making the "intrusion" of Buttars' bank records "not unreasonable." *Schroeder*, 2015 UT 77, ¶22.

Buttars, however, claims the subpoenas were unlawful because he was not given notice. Aplt.Br.19–25. The Act does not require that notice be given to a target of the investigation or that he be given the opportunity to challenge it before the subpoenaed party complies. And Buttars has not pointed to any case law that has interpreted the Act to impose such a requirement, let alone

that a failure to do so makes the subpoena "unlawful" or the seizure "unreasonable" and mandates suppression of the evidence obtained.

Critically, Buttars has never challenged the good cause basis for the investigation, or the bank records' relevance to that investigation—the only factors that could make the subpoena unlawful or the seizure unreasonable. Because the subpoenas complied with the requirements of the Act, including judicial approval, they were not unlawful.

Buttars erroneously relies on cases interpreting a prior version of the Act, and procedures for obtaining subpoenas under rule 45, Utah Rules of Civil Procedure. Neither argument has merit.

First, Buttars relies on *Thompson* and *In re Criminal Investigation*, which were decided under a prior version of the Act. Neither of these cases held that the Act requires notice to targets of investigations. Indeed, Buttars concedes that the validity of the subpoenas in these cases hinged on how they affected "*the subpoenaed party's* ability to mount a meaningful pre-compliance challenge." Aplt.Br.21 (emphasis added); *see In re Criminal Investigation*, 754 P.2d at 656 ("subpoenaed person must have a meaningful opportunity to challenge the lawfulness of a subpoena").

Moreover, the critical problem with the Act under which those subpoenas were issued is that the Act did not require judicial oversight.

Moreover, each subpoena falsely represented that it had in fact been authorized by court order. *See In re Criminal Investigation*, 754 P.2d at 658–59. In response, the legislature enacted "a significant overhauling of the Act" to incorporate "the substantive and procedural safeguards read into the Act in *In re Criminal Investigation*." *Gutierrez v. Medley*, 972 P.2d 913, 916 (Utah 1998). The amendments specifically addressed the court's concern about the lack of judicial oversight—the Act now requires court approval of each subpoena before it is issued to ensure that the "requested information is reasonably related to the criminal investigation authorized by the court." Utah Code Ann. §77-22-2(3)(b). Much like a magistrate's approval of a warrant, the district court's approval of the subpoena ensures that the seizure comports with procedural safeguards of the Act. This pre-issuance authorization satisfies the "minimal" reasonableness requirements for investigatory subpoenas. *See Becker*, 494 F.3d at 916–17.

Consistent with the amendments, the subpoenas in this case were individually authorized by the district court after the court determined that the evidence sought was reasonably related to the previously approved investigation. R1088–89. The subpoenas were valid.

Buttars next relies on the notice requirement for subpoenas under rule 45, Utah Rules of Civil Procedure. But rule 45 does not govern here; the Subpoena Powers Act does.

The Subpoena Powers Act "can be used by the State only prior to the filing of formal criminal charges." *Gutierrez*, 972 P.2d at 917. After charges are filed, the state must obtain subpoenas through rule 14, Utah Rules of Criminal Procedure, which incorporates some of the procedures from civil rule 45, including "the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the" criminal rules. Utah R. Crim. P. 14(c). This includes civil rule 45's requirement that notice be given to opposing parties "before serving the subpoena." Utah R. Civ. P. 45(b)(3); *see State v. Gonzales*, 2005 UT 72, ¶41, 125 P.3d 878 (holding that rule 45's notice requirement "applies to criminal matters where privileged information is at stake"); Utah R. Crim. P. 14 adv. comm. note ("subsection (c) clarifies the applicability of Rule 45…as addressed in *State v. Gonzales*.").

Because the subpoenas here were issued before charges were filed and in compliance with the Subpoena Powers Act, neither criminal rule 14 nor civil rule 45 and its notice provision apply. The lack of notice, therefore, does not make the subpoenas unlawful or the seizure of the bank records

unreasonable when they complied with the terms of the Subpoena Powers Act, including obtaining a district court's approval.

Buttars argues that under rule 45 case law, the lack of notice is constitutionally significant. But unlike subpoenas issued under the Subpoena Powers Act, which require judicial approval of the overall investigation and of each subpoena, rule 45 subpoenas are issued by a party without any judicial oversight. Utah R. Civ. P. 45(a)(2) ("An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court"). That procedural difference is meaningful. It was the lack of judicial approval under the prior version of the Act that concerned the court. *See In re Criminal Investigation*, 754 P.2d at 658–59. And that concern was remedied in a subsequent amendment. The judicial approval works to protect Buttars from an unreasonable search and seizure of his bank records, much like a court-approved warrant. *See Becker*, 494 F.3d at 916–17.

Rule 45 also contains procedures for challenging a subpoena, but only for specific reasons. Utah R. Civ. P. 45(e)(3). Similar procedures are not present in the Subpoena Powers Act. This too is a significant difference that Buttars does not attempt to analyze. And Buttars has not identified any of the listed reasons in rule 45 as a basis for challenging the subpoenas.

Finally, Buttars argues that the lack of notice was exacerbated because the subpoenas "erroneously included [a] secrecy provision" that prevented the banks from notifying Buttars of the subpoenas. Aplt.Br.23–25.

The trial court found that each subpoena "contained references to an irrelevant section of the Utah Criminal Code" that prohibited the banks "from disclosing the subpoenas to any third party." R1086. The trial court ruled that although this "was an error," it "did not make the subpoenas unlawful or unreasonable" because the state complied with the Act by obtaining court approval for the investigation and for each subpoena. R1086,1088–89.

The trial court noted that even without the erroneous language, "there is no evidence that [Buttars] would have known about the subpoenas." R1089. Buttars posits that Frontier would have been subject to California law that prohibits banks from disclosing financial records without notice to the customer whose records are sought. Aplt.Br.24. But this was a subpoena issued under Utah law and served on a bank in Utah. Buttars offers no explanation as to why California law would govern in this scenario.

Moreover, the Act has its own secrecy provision, but it does not act as a notice provision. The Act permits a prosecutor to apply for the district court to order the subpoena and the substance of the evidence obtained to be kept secret. Utah Code Ann. §77-22-2(6)(a). It authorizes secrecy upon "showing a

reasonable likelihood that publicly releasing information about the identity of a witness or the substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm to a person or otherwise impede the investigation." *Id.* §77-22-2(6)(a)(i). The purpose of the secrecy provision is not to prevent notice to interested parties who would otherwise have notice; as explained, the Act does not require notice to anyone but the subpoenaed party. Rather, as the trial court concluded, the purpose of the secrecy provision is "to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution," but it does not create a right to pre-compliance notice or pre-compliance challenges. R1089.

In sum, the subpoenas were issued in compliance with the Subpoena Powers Act—they were approved by the district court after concluding that they were "reasonably related to the criminal investigation authorized by the court." *See* Utah Code Ann. §77-22-2(3)(b). The Act requires nothing more for the subpoenas to be valid and lawful. Obtaining Buttars' bank records was not unreasonable and did not violate the Utah Constitution because "the state act[ed] under a valid…subpoena" "that [was] 'lawfully issued' to a bank." *Schroeder*, 2015 UT 77, ¶¶22, 24 (quoting *Thompson*, 810 P.2d at 418).

3. Even if the subpoenas were unlawful, suppression would not be appropriate.

Even assuming arguendo that the subpoenas violated the Utah Constitution, suppression is not merited. The State acknowledges that the Utah Supreme Court has held that "'exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.'" *Thompson*, 810 P.2d at 419 (quoting *State v. Larocco*, 794 P.2d 460, 472 (Utah 1990)). However, the State disputes the validity of those holdings and maintains that they should be overturned.[2] And even if exclusion is a remedy under the Utah Constitution, the good faith exception should apply.

a. The Utah Constitution does not require an exclusionary remedy for violations of article I, section 14.

Utah courts will not hesitate to overturn prior precedent that is "erroneous," "no longer sound," or that lacked meaningful analysis. *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). (cleaned up). Such is the case in *Thompson*, and in the *Larocco* plurality opinion upon which it relied.

In adopting a state exclusionary rule, *Thompson* did not assess the text or history of article I, section 14, and failed to acknowledge, much less

[2] The State also acknowledges that this Court is bound to follow Utah Supreme Court precedent but makes this argument for purposes of preservation.

explain, why it was departing from long-standing precedent rejecting a state exclusionary rule.

In *State v. Aime*, 220 P. 704, 706–08 (1923)—an opinion issued just twenty-seven years after the Utah Constitution's adoption in 1896—the Utah Supreme Court held that excluding evidence for an article I, section 14 violation by police is neither constitutionally required, nor appropriate as a remedy in a criminal trial. The court later reaffirmed *Aime*, holding "that evidence, even though illegally obtained, is admissible." *State v. Fair*, 353 P.2d 615, 615 (1960).

Thompson failed to cite *Aime* and *Fair* altogether. And it was bereft of analysis. Instead, it quoted the *Larocco* plurality opinion as if it were binding precedent, completely overlooking that (1) the *Larocco* opinion garnered the support of only two justices, (2) the *Aime* holding had been undisturbed for almost 70 years, and (3) excluding evidence had never been recognized as a remedy for a violation of the nearly 100-year-old state constitution.

Larocco's reasoning fares no better. While the *Larocco* plurality acknowledged this Court's rejection of a state exclusionary rule in both *Aime* and *Fair*, it did not discuss, let alone examine, *Aime's* underlying rationale for rejecting a state exclusionary rule. *Larocco*, 794 P.2d at 471. Nor did it discuss article I, section 14's text or history.

Thompson's and *Larocco's* "lack of acknowledgement of authority and its weak analytical underpinnings" beg for reconsideration. *Menzies*, 889 P.2d at 400. When interpreting the Utah Constitution, this Court begins with "the text's plain meaning," informed with "historical evidence of the framers' intent." *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶10, 140 P.3d 1235.

Nowhere in the text of article I, section 14 does it require the exclusion of evidence. This point was made in *Aime* after detailing the reasoning of courts from four sister states that had rejected a state exclusionary rule. *Aime*, 220 P. at 706–07. And it is supported by evidence of the framer's intent. At or near the time of the framing, a person subjected to an unlawful search or seizure was entitled to a "claim for the restoration of [his] property, and for the punishment of the trespasser or the announcement that the citizen may defend against such intrusion." *Id.* at 707 (cleaned up). Thus, "the redress of grievances for invasion of constitutional rights" did not lie in the exclusion of evidence at the defendant's criminal trial but rested with "the usual and adequate provisions of the civil and criminal law." *Id.* (cleaned up).

In sum, neither the text of the Utah Constitution nor the historical evidence relevant to the framers' understanding of the constitutional text supports an exclusionary remedy for violations of article I, section 14.

b. Assuming the applicability of the exclusionary rule for violations of the State constitution, this Court should recognize and apply a good-faith exception to preclude suppression.

Even if suppression is the appropriate remedy for an illegal search and seizure under the Utah Constitution, and assuming the Court finds that obtaining the bank records by subpoena was unlawful, suppression is improper under the good-faith exception, as the trial court ruled. R1089–90.

The Utah Supreme Court has yet to decide whether there is a good-faith exception to the exclusionary rule under article I, section 14 of the Utah Constitution. *See Thompson*, 810, P.2d 419–20. But there is a federal good-faith exception where there is no unlawful police conduct to deter. *United States v. Leon*, 468 U.S. 897, 920–21 (1984). The Supreme Court has recognized situations relevant here where exclusion is not appropriate because there was no misconduct on the part of police.

First, *Leon* established that "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," suppression is inappropriate even if the warrant is later invalidated. *Id.* This is because "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause" and "to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.* at 921. Moreover, "an officer cannot be expected to question

the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* Exclusion of evidence under such circumstances is undeserved because it penalizes "the officer for the magistrate's error, rather than his own," which "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.*; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 989–90 (1984) (exclusionary rule does not apply when officer relies in good faith on magistrate's approval of form of warrant that contained technical error); *State v. Dominguez*, 2011 UT 11, ¶¶18–20, 248 P.3d 473 (no exclusion where "[e]verything [officer] did was authorized by the rules" governing obtaining warrants but magistrate committed technical violation).

Second, the Supreme Court extended the good-faith exception to when an officer acts "in objectively reasonable reliance on a statute" that authorizes a warrantless administrative search even if the statute is later held to be unconstitutional, again, because the officer bears no fault in relying on the legislature's enactment of an invalid statute. *Illinois v. Krull*, 480 U.S. 340, 342, 349–50 (1987).

Although the bank records here were obtained by subpoena rather than a warrant, this case demonstrates an intersection of both of these good-faith situations. The only error in the subpoenas that Buttars identifies is the

reference to the irrelevant statute prohibiting the bank from disclosing the subpoena to other. But that language was inserted by a paralegal and the form of the subpoenas were approved by the district court. Agent Nesbit reasonably relied both on the district court's approval of the subpoena and "his judgment that the form" of it was "technically sufficient," *Leon*, 468 U.S. at 921. He also reasonably relied on the statutory authority to obtain the bank records without a warrant by following the procedures outlined in the Subpoena Powers Act. *See Krull*, 480 U.S. at 349–50.

Buttars does not challenge the trial court's finding of good-faith reliance by Agent Nesbit. He merely argues that the exception should not apply based on his mistaken reliance on *Thompson* and *State v. Yount,* 2008 UT App 102, ¶11, 182 P.3d 405. Aplt.Br.25–27. Once again, Buttars fails to consider the significant differences between those cases and the present one.

The *Thompson* court determined that the good-faith exception to the exclusionary rule, if it exists under the Utah Constitution, did not apply in that case because there was no "objectively reasonable reliance" on a magistrate's approval of the subpoenas. *Thompson*, 810 P.2d at 419–20. Rather, the subpoenas were approved by the attorney general consistent with the Subpoena Powers Act at the time. *Id.* As explained above, the Act has since changed, requiring judicial approval of every subpoena, which was obtained

in this case. Thus, the rationale for rejecting a good-faith exception in *Thompson* does not exist here.

Yount is similarly inapplicable because those subpoenas were issued under civil rule 45, not the Subpoena Powers Act. 2008 UT App 102, ¶11. And as explained, rule 45 also requires no judicial oversight upon which one could reasonably rely.

***

In sum, the bank records were obtained by a valid, lawful subpoena properly issued under the Subpoena Powers Act. If invalid, suppression is not warranted. The trial court correctly denied the motion to suppress. This Court should affirm.

B. The bank records were admissible under exceptions to the rule against hearsay.

Buttars argues that the summaries of bank records were inadmissible because the underlying bank records were inadmissible hearsay. Aplt.Br.31–40. The trial court admitted the bank records under evidence rule 807 because the records "were lawfully obtained through subpoena," they had "been properly authenticated," and they satisfied "each of the four prongs of the residual hearsay exception." R1216–23.

There is no dispute that the bank records are hearsay—an out-of-court statement offered for the truth of the matter asserted. Utah R. Evid. 801(c).

But hearsay statements are admissible if they meet one of the many exceptions that establish the reliability of the statements. *Id.* at 802. The bank records were properly admitted because they met one or more exceptions.

1. The majority of the bank records were admissible under Utah Rules of Evidence 803(6).

The trial court initially ruled that the bank records were not admissible under the traditional hearsay exception for bank records—rule 803(6), Utah Rules of Evidence—because some of the records were received without the necessary custodial certificates. R1153. But the majority of the records were properly certified and should have been ruled admissible under that exception.

Under rule 803(6), records of regularly conducted activity, like bank or other business records, are admissible hearsay. Utah R. Evid. 803(6). To qualify for this exception, the proponent of the records must show that they were "made at or near the time by—or from information transmitted by—someone with knowledge" and that they were "kept in the course of a regularly conducted activity" and as part of "a regular practice of that activity." *Id.* These conditions must be established by either "the testimony of the custodian or another qualified witness," or by "a certification" consistent with evidence rule 902(11) or (12). *Id.* Finally, "neither the source of

information nor the method or circumstances of preparation indicate a lack of trustworthiness." *Id.*

The majority of the bank records should have been deemed admissible under this exception. The bank records were obtained through three subpoenas. R2944–55,2962. Agent Nesbitt received the bank records, reviewed them, summarized them in his police report, and believed they were complete. R2947–49,2967.

The first was served on Frontier and requested records for Ellipse and Buttars. R797–99. Frontier produced a batch of records with a custodial declaration that met each of the requirements of rule 803(6). R803. Agent Nesbitt sent Frontier a letter noting that some records were missing. R838,2950,2995. Frontier then produced a second batch of records, again with a proper custodial declaration. R804. Agent Nesbitt also received duplicate productions in the mail. R2947–48.

The second subpoena was served on Chase requesting records for Ellipse and Buttars. R818–20. Chase produced the relevant records with a custodial declaration. Def.'sEvid.Hr'gEx.S; *see* R1221.

The third subpoena was served on Frontier, requesting records for MovieBlitz and Mark LaCount. R834–36. Frontier produced the records by secure email but without a custodial declaration. Def.'sEvid.Hr'gEx.P.

Buttars challenged the admissibility of only the Frontier records under rule 803(6) because there were only two custodial certificates for the three batches of records obtained, but he did not challenge the Chase records because they came with proper certification. *See* R910–23; *see* R1221. Thus, the admissibility of the Chase records is not at issue. Moreover, the first two batches of Frontier records came with proper certification and should have been deemed admissible under rule 803(6). *See* R1221 ("the State does have certificates for some of the Frontier bank records").

Thus, the trial court should have ruled that all the records for Ellipse and Buttars from both banks were admissible because they met the requirements of rule 803(6). And this Court can affirm on any ground apparent in the record. *Baily v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158.

Only the last batch of records from Frontier, records for the accounts of MovieBlitz and Mark LaCount, lacked custodial certification and failed to qualify under the business records exception. But these records were properly admitted under Utah Rules of Evidence 807.

2. The bank records were also admissible under Utah Rules of Evidence 807.

All the bank records were admissible under rule 807, Utah Rules of Evidence, as the trial court ruled. R1216–23. The purpose of rule 807, or the "residual exception," is to provide for the admissibility of hearsay that "does

not fit into a recognized exception" but "its admission is justified by the inherent reliability of the statement and the need for its admission." *State v. Nelson*, 777 P.2d 479, 482 (Utah 1989).

Under rule 807, a hearsay statement not otherwise admissible under another hearsay exception is admissible if four conditions are satisfied:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of [the rules of evidence] and the interests of justice.

Utah R. Evid. 807(a). In addition, the opposing party must be given "reasonable notice of the intent to offer the statement and its particulars." *Id.* at 807(b).

Courts routinely use the residual exception to admit bank records that lack custodial certifications or otherwise fail under the business records exception. *See, e.g.*, *United States v. Turner*, 718 F.3d 226, 233–35 (3rd Cir. 2013) (no error admitting uncertified bank records that trial court found to be authentic and trustworthy); *United States v. Wilson*, 249 F.3d 366, 374–76 & n.5 (5th Cir. 2001) (no error admitting bank records under rule 807 even though they were incomplete, contained clerical errors, and had an "indirect chain of

custody;" such issues go to weight of evidence, not admissibility), *abrogated on other grounds by Whitfield v. United States*, 543 U.S. 209 (2005); *United States v. Nivica*, 887 F.2d 1110, 1127 (1st Cir. 1989) (bank records admissible under residual exception after failing under rule 803(6)); *Karme v. Comm'r*, 673 F.2d 1062, 1064–65 (9th Cir. 1982) (same).[3] Like these courts, the trial court appropriately admitted the records here after finding that the bank records met each of rule 807's requirements.

First, the records have "equivalent circumstantial guarantees of trustworthiness." Utah R. Evid. 807(a)(1). The trial court recognized that all of the Chase records and some of the Frontier records came with custodial certificates that establish the trustworthiness and reliability of the records. R1221. Even the records that lacked a custodial certification were provided by Frontier in response to a subpoena and sent through a secure email. The records were obtained through a known, reliable source—they came directly from the banks. There has never been any evidence to suggest that the records are anything other than "what the proponent claims" they are—actual bank

[3] Buttars cites only a single unpublished extra-jurisdictional decision to the contrary. *See* Aplt.Br.36. Even that case is distinguishable because there "no effort whatever was made to authenticate the document or to prove the foundation requirements for its admissibility as a business record." *Clifton v. Gusto Records, Inc.*, 852 F.2d 1287 (6th Cir. 1988).

records created and maintained by a federally regulated bank. *See* Utah R. Evid. 901(a). The trial court correctly ruled that the bank records were authentic. R1151–52,1220–22.

Ruling that the records are authentic provides guarantees of trustworthiness equivalent to a custodial certification, because the purpose of the certificates is solely to establish the authenticity of the records. *See* Utah R. Evid. 902(11). And Buttars does not challenge the trial court's ruling that the records are authentic. Because the records are authentic, they are inherently reliable and trustworthy. *See Turner*, 718 F.3d at 234 (bank records found to be trustworthy for the same reasons the records were found to be authentic); *United States v. Pelullo*, 964 F.2d 193, 202 (3rd Cir. 1992) ("bank documents…provide circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business").

Buttars argues that a hearsay statement that fails under a specific exception can never be admissible under rule 807 because its trustworthiness is not "equivalent" to the specific exception if failed to meet. Aplt.Br.37. But that is contrary to the purpose of the rule. Evidence admitted under rule 807 by definition failed under every other exception because rule 807 is only available when the evidence "does not fit into a recognized exception."

Nelson, 777 P.2d at 482; *see United States v. Clarke*, 2 F.3d 81, 83–84 (4th Cir. 1993) ("this circuit and others have admitted evidence under the residual exception when that evidence was inadmissible under one of the specified exceptions"); *United States v. Furst*, 886 F.2d 558, 573 (3rd Cir. 1989) (holding that residual exception "is not limited in availability as to types of evidence not addressed in the other exceptions," but "is also available when the proponent fails to meet the standards set forth in the other exceptions").

Just because a statement may not have met the technical requirements of a specific exception does not mean that it is not equivalently trustworthy for some other reason. That is the whole point of rule 807—to provide for admissibility of reliable, trustworthy hearsay when a specific exception does not work. Buttars' interpretation of the rule would contravene its purpose of focusing on the trustworthiness and reliability of the evidence and instead turn the question into whether evidence was "close enough" to another exception that the residual exception does not apply, regardless of the statement's trustworthiness. As noted above, courts routinely admit bank records under rule 807 even if they are inadmissible under rule 803(6) because they lack the proper certification.

State v. Clopten does not support Buttars' argument to the contrary. Clopten argued that prior statements of another person were admissible

under rule 804(b)(3) and rule 807. *Clopten*, 2015 UT 82, ¶¶16–18, 23, 362 P.3d 1216. After rejecting the admission of the statements under rule 804(b)(3), the court also rejected them under rule 807. *Id.* ¶22, 24. The court held that rule 807 did not apply because Clopten had "not shown that the statements have 'equivalent circumstantial guarantees of trustworthiness' that are different from other recognized exceptions to the hearsay rule." *Id.* ¶24. The reference to "different" guarantees of trustworthiness does not imply that a statement that is close to meeting a specific exception but fails cannot be admissible under rule 807. Indeed, the court considered the admissibility of the statement under rule 807 even after rejecting it under rule 804(b)(3). The court was merely saying that to be admissible under rule 807, the statement must be trustworthy even though it "does not fit into a recognized exception." *Nelson*, 777 P.2d at 482. In other words, if a statement qualifies as trustworthy under a particular exception, the court need not look for a "different" reason to admit it under rule 807.

Buttars, citing *Clopten*, also argues that the trial court improperly relied on "extrinsic evidence" to support admission under rule 807 when it credited the testimony of Agent Nesbit and John Curtis. Aplt.Br.37. Clopten argued that a witness' hearsay statement exonerating Clopten of murder were trustworthy because it was corroborated in part by the descriptions of the

killer by other witnesses. *Clopten*, 2015 UT 82, ¶25. But the court held that trustworthiness cannot be determined by other evidence "unrelated to the hearsay statements," such as the testimony of others that are consistent with the hearsay. *Id.* Rather, trustworthiness under rule 807 is typically satisfied by evidence about the hearsay statement itself—"the circumstances in which the hearsay statement was made or the content of the statement itself to determine whether the declarant would be unlikely to lie." *Id.*

The bank records, however, are unlike the oral statements in *Clopten* that were made by a person who could lie. And the evidence relied on to establish their trustworthiness is also much different. The trial court did not look to unrelated evidence; it correctly relied on intrinsic evidence about the bank records themselves—testimony about the circumstances under which the records were obtained and of their content, as well as the custodial certificates about how they were made—which show that the records are "unlikely to lie." *See id.* The trial court did not err in relying on this evidence related to the bank records to support a finding of trustworthiness.

Second, the records were offered as evidence of a material fact. Utah R. Evid. 807(a)(2). Buttars does not challenge this element. Aplt.Br.33. Nor could he, as the bank records were material to the State's case that Buttars committed securities fraud. *See* R1222.

Third, the bank records were "more probative on the point for which [they were] offered than any other evidence that the proponent [could] obtain through reasonable efforts." Utah R. Evid. 807(a)(3). Buttars argues that bank records with custodial certification would be more probative than bank records without it. But the custodial certificates are not the evidence. The bank records are the evidence. And there was no more probative evidence to establish Buttars' use of investor funds. As the trial court stated, "There is no other evidence that can be presented or obtained through other reasonable means or efforts to show what happened to investor funds, which is a vital question in this case." R1222; *see also Nivica*, 887 F.2d at 1127 (bank records "status as the best—indeed, the only—available proof of…financial activity…was irrefragable").

Fourth, the trial court correctly determined that admitting the bank records would serve the purposes of the rules of evidence and the interests of justice. R1222–23; *see* Utah R. Evid. 807(a)(4). Buttars challenges this prong by returning to his claim that the records were untrustworthy without the custodial certificates. This prong, however, is different than trustworthiness. It is about whether admitting evidence that is trustworthy but does not meet a specific hearsay exception is consistent with the purpose of the rules of evidence and the interests of justice.

The bank records were deemed authentic and trustworthy. R1220–22. The trial court said, "A jury trial is a search for truth." R1222. And the rules of evidence are to be construed "to the end of ascertaining the truth and securing a just determination." Utah R. Evid. 102. Thus, the trial court correctly ruled that "[t]he purposes of the rules and the interests of justice [are] met when trustworthy, relevant information and evidence is admitted to assist the jury in the search for the truth." R1223; *accord* R2581 ("Omitting the bank records when they have been shown to be authentic and legally obtained would frustrate the fact-finding purpose of the trial by keeping relevant and trustworthy evidence away from the jury.") There was no error in that assessment.

Finally, the prosecution gave Buttars "reasonable notice of the intent to offer the statement and its particulars" so that he had "a fair opportunity to meet it." Utah R. Evid. 807(b). This includes "notice that a proponent intends to rely on the residual exception as a basis for admitting hearsay." *State v. Webster*, 2001 UT App 238, ¶¶21–22, 32 P.3d 976. The prosecution gave the requisite notice. Although the prosecution originally argued that the bank records were admissible under evidence rules 803(6) and 703, the prosecution also argued for its admissibility under rule 807. R1143–44. Buttars availed himself of the opportunity to challenge admission under rule 807 in written

form, R1168–70, and at oral argument, R3240–42. For that reason, the trial court correctly ruled that Buttars "had a fair opportunity to respond to the State's argument for admission under" rule 807. R1220.

Buttars argues notice was insufficient because it was not given until after the evidentiary hearing. Aplt.Br.34. The rule requires reasonable notice "before the trial or hearing" at which the statements will be offered as evidence. Utah R. Evid. 807(b). The issue was raised and argued several months before trial "where it is anticipated that the evidence will be given," R3280, and Buttars had "further opportunities" to challenge the evidence "at trial," giving Buttars "a substantial amount of time to prepare to meet the evidence at trial," R1220.

Moreover, Buttars does not proffer what additional information could have been obtained to challenge the trustworthiness of the bank records if he were given even more advanced notice. The notice was "reasonable," given "before the trial," and provided Buttars a "fair opportunity" to challenge the admissibility of the records. The trial court did not err when it ruled that notice was proper.

In sum, admission of the bank records was "justified by the inherent reliability of the statement and the need for its admission." *Nelson*, 777 P.2d

at 482. The trial court did not abuse its discretion when it ruled that they were admissible under rule 807.

3. Buttars cannot show prejudice because if the trial court had ruled that the records were not admissible under rule 807, the prosecution would have called a witness to testify as required by rule 803(6).

Proof of prejudice requires a showing of a reasonable likelihood that the admission of the evidence altered the verdict. *State v. Ellis*, 2018 UT 2, ¶41, 417 P.3d 86. "Prejudice analysis is counterfactual." *Id.* ¶42. It requires a court to consider "an alternative universe" without the error. *Id.* If the court concludes "that the result would have been the same absent the error, no prejudice has occurred." *State v. Ring*, 2018 UT 19, ¶36, 424 P.3d 845.

Here, the prosecution sought to admit the bank records under evidence rule 703, or alternatively, rule 807. Under either rule, the prosecution did not need custodial certificates. The trial court ruled that the records were admissible under rule 807 several months before trial. But had the trial court ruled they were not admissible under rule 807, the prosecution would have had several months to make other arrangements for the records' admissibility. In this "alternate universe" the prosecution could have either gone back to the bank to obtain custodial certifications or called a witness to testify and establish the requirements of rule 803(6). There is nothing in the record to suggest that this could not have been accomplished had the trial

court required it. *See State v. McNeil*, 2016 UT 3, ¶¶31–42, 365 P.3d 699 (holding erroneous admission of phone records was not prejudicial where prosecution had alternative method for admitting phone records that was "unnecessary" to raise because "the first one it tried…succeeded").

Thus, even if the trial court erred in admitting the records under rule 807, Buttars has not proven that a contrary ruling would have resulted in the exclusion of the bank records. The result at trial would have been the same absent any error because the bank records, and by extension the summaries, would have been admitted through alternative means.

II.

Buttars Has Failed to Meet the Difficult Burden of Proving That His Counsel Was Ineffective.

Buttars asserts three claims of ineffective assistance of counsel. First, he contends that counsel was ineffective for not objecting to the summaries of bank records because they purportedly violated rule 1006, Utah Rules of Evidence. Aplt.Br.42–49. Second, he argues that his counsel was ineffective for proposing an allegedly erroneous definition of "willfully" that was included in the jury instructions. Aplt.Br.49–60. Third, he argues that counsel was ineffective for not objecting to expert testimony, the prosecutor's closing argument, and a jury instruction that each allegedly misstated the law about making material omissions in the securities fraud context. Aplt.Br.60–66.

Buttars has not succeeded in meeting his heavy burden of proving ineffective assistance of counsel for any of his three claims.

To make the requisite showing of constitutional ineffectiveness, Buttars must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687–88, 697 (1984). This standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). And surmounting it "is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (cleaned up).

For the deficient performance element, *Strickland*'s guiding principle is reasonableness. *Strickland*, 466 U.S. at 687 ("[T]he proper standard for attorney performance is that of reasonably effective assistance."). So long as counsel acts reasonably, Buttars has received the sort of assistance that the Sixth Amendment guarantees.

The analysis examines reasonableness "considering all the circumstances." *Strickland*, 466 U.S. at 688. It is "difficult" to prove ineffectiveness "when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111; *see also Kimmelman*, 477 U.S. at 386 (holding that "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order" to decide

deficient performance element, and chiding the lower courts for "inadvisabl[y]" failing to do so).

Review of counsel's performance "must be highly deferential." *Strickland*, 466 U.S. at 689. This begins with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Such latitude is necessary because "[e]ven the best criminal defense attorneys would not" necessarily "defend a particular client in the same way," meaning that there are "countless ways to provide effective assistance in any given case." *Id.* Review must also "eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time," rather than second-guessing counsel's performance after it has proven unsuccessful. *Id.*

Reasonableness of counsel's performance does not turn on a binary consideration of whether counsel's actions were strategic, *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000), or whether a forgone objection may have succeeded, *see Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (counsel is not required "to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success"); *accord Ross v. State*, 2012 UT 93, ¶45, 293 P.3d 345 ("[A]ppellate counsel's failure to raise an obvious, meritorious claim does not automatically render his assistance ineffective."). Even a legal miscalculation

does not prove deficient performance. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). There is "no expectation that competent counsel will be a flawless strategist or tactician." *Richter*, 562 U.S. at 110.

The point of the *Strickland* analysis is to ensure a fair trial, not to "grade counsel's performance," *Strickland*, 466 U.S. at 697, or to weigh the relative merits of alternative strategies, *State v. Lucero*, 2014 UT 15, ¶¶41-43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. The dispositive inquiry is simply whether counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *see Bullock v. Carver*, 29 F.3d 1036, 1045–51 (10th Cir. 2002).

In short, Buttars cannot prove deficient performance unless he proves that "no competent attorney" would have proceeded as his counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see Richter*, 562 U.S. at 105, 110 (the Sixth Amendment requires "only a reasonably competent attorney" and defendant must prove that counsel's performance "amounted to incompetence").

On the prejudice element, Buttars must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, 466 U.S. at 694. This requires much more than merely showing that the errors "had some conceivable effect on the outcome" of the case. *Id.* at 693. And the "likelihood of a different result must be substantial." *Richter*, 562 U.S. at 112.

Proving both deficient performance and prejudice requires actual proof—neither can be "a speculative matter but must be a demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (cleaned up). "It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel" rendered "reasonable professional assistance." *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (cleaned up). Thus, any record gaps are construed in favor of finding both that counsel performed adequately, and that the defendant suffered no prejudice. *State v. Litherland*, 2000 UT 76, ¶17, 12 P.3d 92.

A. Counsel was not ineffective when he did not object to the accurate summaries of bank records.

Buttars contends that his counsel was ineffective because he did not object to the admissibility of the summaries of bank records under rule 1006, Utah Rules of Evidence. He contends they were erroneous because they were compiled in reliance on extraneous information, they summarized information that does not qualify as "writings, recordings, or photographs,"

and they include conclusions and inferences. Aplt.Br.42–49. Buttars has not proven deficient performance or prejudice.

Rule 1006 permits a party to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Utah R. Evid. 1006. This is an exception to the so-called "best evidence rule," which typically requires the "original writing, recording, or photograph…to prove its content." *Id.* at 1002; *see Sunridge Dev. Corp. v. RB & G Eng'g, Inc.*, 2013 UT App 146, ¶19, 305 P.3d 171. To be admissible, "the proponent of a summary must provide a competent witness to establish the necessary foundation for the summary and the underlying records." *Sunridge*, 2013 UT App 146, ¶20.

The bank summaries were prepared by the prosecutor's expert John Curtis. He testified that he received bank records and other case files "to analyze the transactions related to some of the allegations in the case, and form opinions." R3005–06. Curtis prepared seven "fair and accurate summar[ies] of all those bank records." R3009–10. Defense counsel did not perform deficiently when he did not object to the admission of the summaries under rule 1006.[4]

[4] Defense counsel did more than not object. She explicitly stated, "we're not arguing that summaries are inappropriate under 1006." R2999.

First, Buttars claims that counsel should have objected because the summaries were compiled "based on sources extraneous to the bank record data." Aplt.Br.43–44. Reasonable counsel could have believed otherwise.

Curtis testified that he occasionally needed to find out who a payee was when the bank records were not clear, or otherwise needed background information to understand the flow of money through the accounts, and that he added this missing information in the summaries in brackets. R3015,3730,5183,6118,6125. For example, the bank record had a payment to "US PTO" that Cutis discovered was to the US Patent Trademark Office and stated as much in the summary. R6125; *see* State'sTr.Ex.26 at 2. In other instances, a payee was listed only as an address and Curtis would find out what business was located at that address and include it in the summary. R3015; *see, e.g.,* State'sTr.Ex.26 at 4–5 ("[The Home Depot]" and "[GNC]"). Curtis also noted transfers from business to personal accounts or identified investor money with brackets. *See* State'sTr.Ex.26 at 7.

This information that Buttars claims his counsel was incompetent for not objecting to did nothing more than "prove the content" of the records by explaining the transactions. Utah R. Evid. 1006. Buttars does not allege that this information is inaccurate. Nor is there anything in the record to suggest that it was. And Curtis was careful to explain his methods to the jury. Buttars

cites no authority to show that this type of accurate information, when missing from bank records, violates rule 1006. Nor has Buttars explained why all reasonably competent counsel would have objected to this accurate information about the transactions in the bank records that was not in dispute and that was presented in a non-misleading way. Certainly, a reasonable attorney could have believed that an objection was futile. *See Ring*, 2018 UT 19, ¶43 (holding counsel not ineffective because "trial counsel could have reasonably believed that an objection was futile"). And a competent attorney could also decide not to make an objection, even if potentially meritorious, because he was focused on other possibly stronger challenges, *see Mirzayance*, 556 U.S. at 123; *Ross*, 2012 UT 93, ¶45, especially if an objection would be unlikely to materially affect the outcome, *see* discussion of prejudice, *infra*.

Second, Buttars similarly argues that the compilation of "questionable payments" identified on the summary cover sheets were made based on Curtis' review of the facts of the case, which is beyond the underlying records themselves. Aplt.Br.44. But these payments were all included in the bank records. Compiling them merely constituted a "calculation" to prove the content of the records. Utah R. Evid. 1006. Buttars does not contend that the calculations are inaccurate. A competent attorney could reasonably decide not to object to these calculations.

Third, Buttars argues that counsel should have objected because the summaries included "State-drawn" conclusions that some payments were "questionable" and that Buttars "commingled" funds. Aplt.Br.44. These conclusions were discussed in Curtis' testimony. R5179–81,5259. Curtis explained, and the bank records themselves show, that investor money was transferred between business and personal accounts, and that the money was often spent on items that he deemed "questionable" business expenses. But Curtis was clear to testify that expenses he labeled as "questionable" could be legitimate. R5179–80. He also labeled some expenses as "potential legitimate payments," thereby giving Buttars favorable evidence as well. A reasonable attorney could refrain from objecting to these conclusions that came in through Curtis' testimony as well.

In fact, defense counsel used the categorization to Buttars' advantage throughout the trial to challenge Curtis' testimony by showing that Curtis did not know what the allegedly "questionable" payments were for, but that they could be for legitimate business expenses. In his opening statement, defense counsel highlighted the fact that the summaries merely said "questionable payments" but "[n]ot illegitimate, not illicit" payments. And that "the reason that this says 'questionable' is that Mr. Curtis will not necessarily know what the business purpose was behind these purchases."

R4816–17. During cross-examination, defense counsel got Curtis to admit repeatedly that he did not know what the money was spent on and the payments could be legitimate business expenses, R5232–58, which counsel emphasized during closing arguments, R5620–21,5627–31,5637. Choosing not to object was a reasonable way to highlight Curtis' ignorance of the actual use of funds and attack the State's case. *See State v. Bedell*, 2014 UT 1, ¶¶23–25, 322 P.3d 697.

Buttars was also not prejudiced. First, as stated, Buttars does not argue, let alone cite any record evidence showing, that anything in the summaries is inaccurate. Had counsel objected to the bracketed information it is not reasonably likely that the trial court would have removed it. And even if it were removed, Curtis could have and did provide testimony explaining the same information. It is not reasonably likely that even if the trial court removed this information from the summaries that it would have changed the outcome.

Second, including inferences such as "commingling" and "questionable" in the summaries was not reasonably likely to change the result. Again, the evidence came in through Curtis' testimony. Removing the words from the summaries would not have changed the evidentiary picture. And Curtis admitted that payments he labeled as "questionable" could have

been legitimate. Labeling them as questionable only served to highlight for the jury which expenses were at issue but left it to the jury to decide whether Buttars' actions amounted to securities fraud. That is the purpose of rule 1006, to make complex and voluminous records easier to understand. Moreover, such inferences were obvious ones that a reasonable jury would make on its own—using investor money on groceries, gas stations, and house cleaning is certainly "questionable." Labeling them as such was not prejudicial.

Courts have found similar inferences contained in rule 1006 summaries to be harmless. In *United States v. Spalding*, 894 F.3d 173, 185–86 (5th Cir. 2018), a forensic accountant included in his summaries of bank records "inferences and opinions about the underlying records" that money was used for "personal expenses." The court first stated that it had "upheld the admission of similar summary exhibits." *Id.* at 186 (citing cases). But it did not decide whether there was error, because it held "any error was harmless" where "the exhibit does not suggest any conclusions unsupported by the evidence, the district court properly instructs the jury, and the defendant conducts a full cross-examination of the charts' author." *Id.* (cleaned up).

Here, the inferences were amply supported by the evidence—both the records themselves and Curtis' testimony—showing how the money was transferred between business and personal accounts and where the money

was spent. And they were only opinions, which included Curtis' concessions that the use of funds could have been legitimate. The jury was instructed that it did "not have to accept an expert's opinion" and could give it "whatever weight you think it deserves." R1391. Finally, Curtis was thoroughly cross-examined about the summaries.

In sum, reasonable counsel could have elected not to object to the summaries of bank records and doing so did not prejudice Buttars.

B. Counsel was not ineffective for proposing a jury instruction that was supported by existing case law.

Buttars argues that his counsel was deficient for proposing jury instruction 42 stating that knowledge of the falsity of material misstatements or omissions "can be inferred if the defendant consciously avoided the existence of a fact or facts," and that Buttars "must have acted with the conscious objective or desire to ignore a material fact or facts." Aplt.Br.52; *see* R1413. Buttars acknowledges that this Court approved this language in *State v. Moore*, 2015 UT App 112, ¶17, 349 P.3d 797. Aplt.Br.55. That alone defeats his ineffectiveness claim.

When reviewing an allegation of ineffective assistance of counsel, a reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" and "from counsel's perspective." *Strickland*, 466 U.S. at 689–90.

This includes assessing counsel's conduct "on the basis of the law in effect at the time of trial." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993). Buttars cannot prove that counsel was objectively unreasonable for relying on binding precedent. Nor can he show prejudice for including language approved by this Court.

Moore challenged jury instructions defining "willfully" in his securities fraud case, arguing that it omitted language approved of by the Utah Supreme Court in *State v. Larsen*, 865 P.2d 1355 (Utah 1993). *Moore*, 2015 UT App 112, ¶16. The Court in *Moore* stated that "*Larsen* requires that Moore's fraud convictions rest on facts indicating, for example, that he 'made willful misstatements or omissions of a material fact' by having 'consciously avoided the existence of a fact or facts' or, in other words, that Moore 'acted with a conscious objective or desire to ignore a material fact or facts." *Id.* ¶17 (quoting *State v. Chapman*, 2014 UT App 255, ¶11, 338 P.3d 230). Thus, the language Buttars challenges was approved of in *Moore* based on the supreme court's holding in *Larsen*. Moreover, it is the same language used in a jury instruction in *Chapman* that was not challenged. *Chapman*, 2014 UT App 255,

¶11. Thus, reasonable counsel could read *Larsen*, *Moore*, and *Chapman* and be satisfied that this language was correct.[5]

Buttars argues that the language in *Moore* is "non-binding dicta." Even if it were, he has not shown that it was objectively unreasonable to rely on this Court's approval of specific language, even if it were dicta. Buttars also argues that if the language is not dicta, that the Court should overrule it. The Court need not reach this issue. The question here is whether counsel was

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[5] Buttars suggests that if *Moore* "precludes a showing of deficient performance," the Court could reach the issue "under the exceptional circumstances doctrine." Aplt.Br.57–58. This argument is inadequately briefed and fails to meet his burden of persuasion.

The exceptional circumstances doctrine is reserved for "the most unusual circumstances" where a "rare procedural anomaly" prevents or excuses preserving the issue. *State v. Johnson*, 2017 UT 76, ¶29, 416 P.3d 443 (cleaned up). Buttars barely analyzes this doctrine in two paragraphs. And he fails to show how counsel's reliance on existing law qualifies as the type of "rare procedural anomaly" that the exceptional circumstances exception is intended to reach, especially where the court can review the issue under his claim of ineffective assistance of counsel. *See Johnson*, 2017 UT 76, ¶¶29–38 (exceptional circumstances "is not a catch-all category that may be used to do the work of other exceptions" to preservation).

In addition, Buttars misquotes exceptional circumstances case law to suggest that if "the settled interpretation of law colored the failure to have raised an issue," it could create exceptional circumstances. Aplt.Br.57–58 (quoting *State v. Irwin*, 924 P.2d 5, 8 (Utah Ct. App. 1996)). But this Court in *Irwin* said that "a *change* in the law or the settled interpretation of law" could create exceptional circumstances. *Irwin*, 924 P.2d at 8 (emphasis added). Buttars has not identified any change in the law that prevented preservation. He merely disputes this Court's statements about the law.

ineffective for relying on language from this Court's opinion at the time. Overruling that language now would not change the analysis.

Counsel was also not deficient because jury instructions "must be read together as a whole," *State v. Lambdin*, 2017 UT 46, ¶50, 424 P.3d 117, and reasonable counsel could have decided that Instruction 42, when read with the other instructions defining willfully, correctly informed the jury about the mental state. Three separate instructions, including Instruction 42, explained that a person acts "willfully" if he has the "conscious objective or desire to engage in the conduct or cause the result." R1412–13,1424. Buttars does not challenge this definition as it correctly states the law. *See* Utah Code Ann. §76-2-103(1).

Instruction 42 does not contradict that general definition. But it added three important clarifications that the other instructions did not. First, it emphasized that a person "acts willfully if he acts purposefully and not because of mistake or accident." *See Larsen*, 865 P.2d at 1358 n.3 ("To act willfully in this context means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently."). Second, it explained willfulness in a securities fraud context, stressing that a person must have "knowledge" about the falsity of a misstatement, the omitted facts, and the materiality of them. *See State v. Martinez*, 2000 UT App 320, ¶12 n.5,

14 P.3d 114 (intentional mental states "require actual knowledge"). Third, it tied the knowledge back to willfulness by stating that Buttars could not be convicted "if he was merely negligent, careless or foolish," rather, his knowledge could be inferred only by willful conduct—"a conscious objective or desire to ignore a material fact or facts." *See Moore*, 2015 UT App 112, ¶17. Reasonable counsel could include this instruction with the others as part of the totality of the instructions on willfulness because it provides further guidance to help the jury understand the mental state.

Buttars argues that this instruction amounted to an instruction of "willful blindness" that the *Moore* Court rejected. But the instruction in *Moore* was problematic because it imposed an affirmative duty to know and imposed criminal liability for an individual who "recklessly state[s] facts about matters of which he is ignorant." *Id.* ¶¶9–10. The instruction here includes neither of those issues. Instead, it tracks the language approved of in *Moore*, which was intended to eliminate liability for "good faith oversight" or the "failure to discover and disclose a material fact." *See id.* ¶17 (cleaned up). Again, counsel cannot be found to be ineffective where case law at the time supports his course of conduct.

Buttars also has not shown that he was prejudiced. The instruction was consistent with binding case law. And even if there were some error, it was

not material to this case. The jury was not tasked with deciding whether Buttars consciously avoided or ignored material facts. The jury was presented with evidence that Buttars—the CEO of Ellipse and MovieBlitz who managed the companies' finances, and who was "over everything," R4859–60, 4910,4954,5028–29,5033—made untrue statements and had actual knowledge of material facts that he did not tell investors in order to make what he did tell them not misleading. This included telling them about MovieBlitz's investment opportunity without telling them the same investment opportunity under a different name had failed; telling them about MovieBlitz's patented technology without telling them that Ellipse had a claim on those patents; telling them that their money would be used to develop the technology and bring it to market, without telling them that the money would be used for groceries, mortgage payments, house cleaning, private investigators, and other personal expenses, or that the companies were undercapitalized. Omitting these material facts made the facts he did tell them misleading and constituted securities fraud.

In addition, the jury had significant evidence that Buttars willfully engaged in an act, practice or course of business which operated or would operate as a fraud or deceit upon any person. Utah Code Ann. §61-1-1(3). Buttars engaged in an extensive practice over several years of selling

securities under the guise of developing a product and then immediately spending the money on personal expenses. And he continued that practice even after the first company failed because it ran out of money. No reasonable jury would believe that this conduct, which is unaffected by the alleged error, did not constitute securities fraud.

Buttars has failed to show either element of ineffective assistance of counsel for proposing Instruction 42.

C. Counsel was not ineffective for not objecting to expert testimony, argument, and jury instruction about material omissions.

Buttars claims that his counsel was ineffective for not objecting to expert testimony by Brian Lloyd and prosecutorial argument that allegedly misstated the law about making omissions of material facts. Aplt.Br.60–66. Buttars asserts that counsel preserved a similar argument with a general objection to Instruction 47, but that if the issue is unpreserved, counsel was ineffective for not making a proper objection. Aplt.Br.63–64. The challenge to Instruction 47 is unpreserved and Buttars has not proved ineffective assistance of counsel.

1. Counsel's general objection to Instruction 47 did not preserve this specific issue.

Instruction 47 states that a defendant's "honest belief that an event would occur in the future" or "good faith effort to bring about the future

event" does not permit him "to make a willful misrepresentation or omission of material fact." R1419. Buttars argues that Instruction 47 erroneously instructs the jury that he has an affirmative duty not to omit material facts. He claims that his counsel's objection to Instruction 47 preserved this issue. Aplt.Br.62–63. It did not. Counsel made only a general objection to Instruction 47, which is insufficient to preserve the specific issue he raises on appeal.

"As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346. To preserve a claim for appellate review, "[t]he issue must be raised to a level of consciousness that allows the trial court an adequate opportunity to address it." *State v. Worwood*, 2007 UT 47, ¶16, 164 P.3d 397 (cleaned up). A defendant must therefore make "a timely and *specific* objection…to preserve an issue for appeal." *State v. Low*, 2008 UT 58, ¶17, 192 P.3d 867 (cleaned up).

Counsel and the court went over the jury instructions in chambers, off the record. R5573. When given the opportunity to make objections on the record, defense counsel objected to Instruction 47 but did not give a reason. R5574–76. Buttars concedes that counsel did not "lodge a specific objection on the record." Aplt.Br.64.

In addition, the State's argument in favor of the instruction does not indicate that the objection was related to the portion of the instruction about material omissions. *See* R5575. Nor did the trial court's ruling. R5575–76. Without a specific objection upon which the trial court could make a specific ruling, this issue is unpreserved.

2. Counsel's performance was neither deficient nor prejudicial.

Buttars identifies three instances where he alleges that the law regarding material omissions was misstated during trial without objection from counsel. He identifies selective portions of the testimony of securities expert Brian Lloyd; a single line from the prosecutor's closing argument; and a phrase in Instruction 47. Each of these, he claims, misstated the law regarding Buttar's obligation not to make material omissions in connection with the sale of securities by "suggest[ing] that the law imposed an affirmative duty to disclose material information—even in the absence of a prior misleading statement." Aplt.Br.61. Buttars fails to show either deficient performance or prejudice.

Buttars was charged with violating the Utah Uniform Securities Act, which makes it unlawful to (1) "make any untrue statement of a material fact" or (2) "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" in the sale of securities. Utah Code Ann. §61-1-1(2).

Buttars appears to take issue with the fact that every time Lloyd, the prosecutor, or the instructions spoke about omissions they did not say "necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." But a reasonable attorney could decide not to object every time a person or an instruction used an abbreviated "material misstatements and omissions," or stating that a seller may not "omit material information." Even the case law routinely uses simplified short-hand to refer to the statute's disclosure obligations. *See, e.g.*, *Fibro Tr., Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶14, 974 P.2d 288 ("[A] person violates section 61–1–1(2) only if that person willfully misstates or omits material facts."); *Larsen*, 865 P.2d at 1358 ("The plain language" requires a finding that defendant "acted 'willfully' in misstating or omitting material facts."); *id.* at 1358 n.3 ("willful" in securities fraud context "implies a willingness to commit the act, which, in this case, is the misstatement or omission of a material fact"); *id.* at 1361 ("[T]he statute prohibit[s] material omissions or misstatements."); *Chapman*, 2014 UT App 255, ¶13 (discussing evidence of defendant's "several willful material misstatements or omissions of material fact").

The reasonableness of counsel's decision not to object is solidified here, where the jury instructions and the record as a whole made clear that there is no affirmative duty to disclose all material facts, rather, any omitted information must be necessary to make the statements that were made not misleading.

First, six separate jury instructions, including four securities fraud elements instructions, informed the jury that omissions must be "necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." R1403,1405,1407,1409 (elements instructions), 1416 (defining "fraud"), 1418 (referring to charges/elements).

Second, Lloyd repeatedly stated that the omissions must be about information "necessary" to make other statements not misleading, even though he occasionally used a short-hand version. For example, he stated, "fraud is considered when you have a misstatement of material information, or the omission of material information necessary to address a misstatement or a deceit." R4827; *see also* R4826–27 (a seller may not "omit information that's necessary in order to understand material fact."); R4832 (sellers are "not to omit information that is necessary to correct a misstatement"). When asked specifically whether a seller is "required to disclose all material information," he did not agree with that interpretation. Rather, Lloyd responded that a

seller cannot "omit to provide material information that's necessary to correct a misstatement." R4831. Thus, Lloyd repeatedly focused omissions on whether they were necessary in light of other misleading statements.

Third, the prosecutor, after discussing disclosure obligations, referred the jury to the law "contained in the jury instructions," which, again set out the proper standard regarding omissions. R5611.

Reasonable counsel could be satisfied that these statements were adequate even if they did not perfectly quote the statute, especially "in light of all of the circumstances," *Strickland*, 466 U.S. at 690.

Instruction 47 used similar short-hand language to that used in case law identified above. R1419. Moreover, its purpose was not to define the elements of the crime, but to explain that a person may not hide behind an honest belief or good faith efforts to excuse the making of material misstatements or omissions. Buttars argues that such belief could be a defense, making this instruction erroneous. Aplt.Br. 62–63. It is not, at least when the jury finds the Buttars made willful misrepresentations or omissions. "Because a finding of scienter is not a prerequisite to criminal liability under section 61–1–1(2), the trial court properly refused to instruct the jury that good faith is a complete defense to criminal liability." *Larsen*, 865 P.2d at 1360 n.8. Competent counsel could reasonably conclude that there was no reason

to object to Instruction 47's use of the common abbreviation "material misstatements or omissions."

Buttars has also not proven prejudice. As explained above, the jury was correctly instructed on the elements of securities fraud, which required a finding that any omissions must have been of "a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." R1403,1405,1407,1409,1416,1418; *see* Utah Code Ann. §61-1-1(2). The jury was further instructed that the judge would "instruct [them] on the law." R1377. Using the short-hand "material misstatements or omissions" did not change what that jury had to find in order to convict. It is not reasonably likely that the jury would have misunderstood that the references to "material misstatements or omissions" was anything other than an abbreviated way to speak clearly about the real standard spelled out clearly and repeatedly in the instructions.

In addition, the evidence revolved around specific material facts that were not said to investors but were necessary to make the statements Buttars did make, not misleading. The evidence focused on several of these types of omissions. For example, Buttars told investors (1) that MovieBlitz was a startup company developing a new movie-renting technology; (2) that MovieBlitz had patents for this new technology; (3) that investor money

would be used to develop the technology; and (4) that the company was in great shape. However, in order to make these statements not misleading, Buttars needed to also tell them, but did not, (1) that MovieBlitz was the second such startup company, the first of which failed to develop the technology after several years despite hundreds of thousands of investor dollars; (2) that the patents were encumbered because the prior company also had a claim on them; (3) that investor money would be used for things other than developing the technology, including paying off old debt (personal and business), groceries, house cleaning, and other personal expenses; and (4) that the first business had failed and that both businesses did not have sufficient capital to operate. By omitting to state these material facts, the statements Buttars did make were misleading.

Moreover, the case was not built merely on omissions. Even if the jury thought it could convict based on a duty to disclose, despite there being no instruction to that effect, it is not reasonably likely that the jury did not also find Buttars guilty for the several untrue statements he made. This included statements about the use of funds to develop the technology. Other than incorporating MovieBlitz in Nevada, the majority of investor funds were spent on things that cannot be reasonably construed as developing the technology. Just "one [untrue] statement [of material fact] is alone sufficient

to satisfy the elements of the statute." *State v Schwenke*, 2009 UT App 345, ¶15, 222 P.3d 768. And as the trial court found, "[t]he jury heard testimony and saw evidence that the defendant willfully made *numerous* untrue statements and omissions of material facts." R2579 (emphasis added).

Buttars suggests that without the alleged misstatements on the law the jury could have acquitted for three reasons, none of which are availing. First, Buttars argues that the jury could have concluded that he believed all that he said. There is no basis in the evidence to conclude that Buttars believed everything he said. As CEO and the person in charge of financials, Buttars knew the financial affairs of the companies, he knew how he was spending investor funds, he knew about the patents dispute, and he knew that Ellipse failed. He lied about or omitted to tell investors these material facts.

Second, Buttars claims a jury could believe he was unaware of misleading predicate statements made by others. But the evidence was not about what other people did or did not tell investors. It was about what Buttars did or did not tell investors. And, as the trial court found, there was a "vast amount of evidence of untrue material statements and omissions made by *defendant*." R2579–80 (emphasis added).

Third, Buttars claims that the jury could believe that he did not misuse funds because they could have been used for business expenses. But the

investors were not told that their investment would simply be placed into a business account to be used for any business purpose. They were specifically told that it would be used to develop the technology and bring it to market. And even if some of the funds could be viewed as being spent on appropriate business expenses, there is no way all of them could be. A reasonable investor would want to know whether his $10,000 investment—which he was told would go directly to developing the technology—was actually being used on dining at restaurants, groceries, gas, a house cleaner, a private investigator, child support, or past debts—none of which is going to develop the product or increase the likelihood of the investment paying off.

Finally, any error would not have created a reasonable likelihood that the jury would not have also convicted under subpart three of the securities fraud statute for "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." Utah Code Ann. §61-1-1(3). Buttars' course of business over several years of obtaining investor money for developing a new technology but using those funds on personal expenses is a fraud or deceit upon those investors. Buttars does not show that any error in counsel's performance would have affected the jury's decision to convict under this prong of the statute.

III.

The Trial Court Did Not Abuse Its Discretion When It Admitted Expert Testimony.

Buttars challenges the trial court's admission of expert testimony from Brian Lloyd and John Curtis. Aplt.Br.66–75. A trial court has "wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *Larsen*, 865 P.2d at 1361. An appellate court "will not reverse unless the decision exceeds the limits of reasonability." *Id.* The trial court here did not abuse its discretion when it admitted both testimonies.

Rules 702 and 704, Utah Rules of Evidence, govern the admissibility of expert testimony. Rule 702 provides that an expert "may testify in the form of an opinion or otherwise" if the expert's specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702(a). Rule 704 provides that an "opinion is not objectionable just because it embraces an ultimate issue." *Id.* at 704(a).

Under these rules, expert "opinions that tell the jury what result to reach or give legal conclusions [are] impermissible." *State v. Davis*, 2007 UT App 13, ¶15, 155 P.3d 909 (cleaned up). This is because such testimony "tend[s] to blur the separate and distinct responsibilities of the judge, jury, and witness." *Id.* (cleaned up). Moreover, "there is a danger that a juror may

turn to the [witness's legal conclusion] rather than the judge for guidance on the applicable law." *Id.* (cleaned up).

At the same time, however, experts may properly testify as to the reach of legal terms if it "aid[s] the jury in resolving the factual disputes" at hand. *Larsen*, 865 P.2d at 1361 n.11. For example, "expert testimony may be appropriate in securities fraud cases because the technical nature of securities is not within the knowledge of the average layman or a subject within the common experience and would help the jury understand the issues before them." *Id.* at 1361 (cleaned up). Indeed, such expert testimony can be particularly helpful when experts, "because of particular knowledge[,] are competent to reach an intelligent conclusion and inexperienced persons are likely to prove incapable of forming a correct judgment without skilled assistance." *Patey v. Lainhart*, 1999 UT 31, ¶22, 977 P.2d 1193.

Consequently, "[n]o 'bright line' separates permissible ultimate issue testimony under rule 704 and impermissible 'overbroad legal responses' a witness may give during questioning." *Davis*, 2007 UT App 13, ¶16. Thus, a "semantic characterization of [an expert's] testimony as a legal conclusion does not, without more, move the testimony outside the scope of" rule 704. *Larsen*, 865 P.2d at 1362.

Utah courts have found expert testimony improper only when the expert expressly opines on whether the defendant's conduct violated the law. *See Davis*, 2007 UT App 13, ¶¶14-17 (expert testimony that defendant "possessed" firearm under the "statute" improper); *State v. Stringham*, 957 P.2d 602, 607 (Utah App. 1998) (expert's opinion that hypothetical conduct that was identical to defendant's alleged crime was "illegal" was reversible error); *State v. Tenney*, 913 P.2d 750, 756 (Utah App. 1996) (error when experts "tie[d] their opinions to the requirements of Utah law"); *Cf. Larsen*, 865 P.2d at 1361–63 & n.10 (testimony was proper because expert "did not…testify that Larsen was guilty" or "that, as a matter of law, the facts satisfied the legal standard of materiality").

Here, the trial court did not abuse its discretion in allowing the testimony of Lloyd and Curtis under rule 704 because neither opined as to whether Buttars' conduct violated Utah law or met the legal standard for securities fraud.

A. Lloyd's testimony was properly admitted.

Buttars claims that Lloyd improperly defined "material" and provided "examples of material information [that] mirrored the State's allegations." Aplt.Br.68–70. Lloyd twice defined "material" in the securities context: (1) "information that a reasonable investor would consider important in making

a decision whether to purchase or to sell a security," R4830; and (2) "information that's important to an investor making a decision," R4838. And he gave general examples of material information "in the securities industry," including information about the business, its assets, management, financial information, and risks. R4838–39. The trial court did not abuse its discretion by allowing this testimony.

In *Larsen*, the supreme court found no error in an expert opining "that some of the material that Larson had omitted from the securities documents could have been important or significant to an investor," where the expert did not "testify that Larsen was guilty" or "that, as a matter of law, the facts satisfied the legal standard of materiality." *Larsen*, 865 P.2d at 1361 & n.10. The court held that "Rule 704 permits [an expert] to express an opinion regarding the ultimate resolution of that disputed issue"—whether misstated or omitted facts are material. *Id.* at 1363.

Similarly, in *State v. Harry*, 873 P.2d 1149, 1153-55 & n.9 (Utah App. 1994), this Court upheld the admission of "expert testimony concerning the materiality of certain misrepresentations and omissions Harry allegedly made or failed to make." The *Harry* court also held that the expert's testimony "that selling away is illegal" was not improper where the "expert did not testify that Harry actually sold away." *Id.*

Lloyd did even less than the experts in *Larsen* and *Harry*. Those experts explicitly opined that the defendants misrepresented or omitted material information, but Lloyd merely gave examples of material information without drawing the conclusion that Buttars had misstated or omitted such information. And even if he had, he would have done no more than what was allowed in *Larsen* and *Harry*. Lloyd "did not testify…that [Buttars] was guilty," or that "as a matter of law, the facts satisfied the legal standard of materiality." *Larsen*, 865 P.2d at 1361 & n.10. He was asked and he answered questions about examples of material information in the context of the "securities industry," R4838–39, not "under Utah law" or "under the Act," *see Tenney*, 913 P.2d at 756.

Lloyd's testimony was very similar to that approved of in *Chapman*, 2014 UT App 255, ¶21. The expert did not state what information was "required" to be disclosed, but rather, gave "'some examples' of information that he believed is important" to consider when purchasing a security. *Id.* That is precisely what Lloyd did.

Lloyd's testimony stayed within the bounds of rule 704 as approved by both this Court and the Utah Supreme Court. The trial court did not abuse its discretion in admitting his testimony.[6]

B. Curtis' testimony was properly admitted.

Buttars challenges Curtis' testimony where he offered examples of "characteristics of fraud." Aplt.Br.70–72. The trial court did not abuse its discretion in admitting this testimony because, like Lloyd, Curtis also refrained from offering an opinion about the requirements of Utah law or the securities statutes.

The bulk of Curtis' testimony was about his review and summary of the bank records. At the end of his direct examination Curtis testified of "general" "characteristics" that he looks for in his "practice" when analyzing possible fraud, including misrepresentations, disregard of corporate formalities, dependency on investor money, misuse of funds, and

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[6] Buttars' passing argument that the trial court did not consider helpfulness under rule 702 is unpreserved and inadequately briefed. Aplt.Br.69–70. Lloyd was the first witness on day one of trial, but Buttars did not raise a helpfulness objection until during the last witness on day two. The untimeliness of the objection failed to preserve this claim. *See Low*, 2008 UT 58, ¶17 (an objection must be "timely" to preserve an issue for appeal). Moreover, the trial court ruled that Lloyd's testimony would be helpful, consistent with case law. R5225–26. Buttars does not even acknowledge the trial court's ruling let alone show it was erroneous in his meager one-paragraph argument.

undercapitalization. R5227–28. He also testified that he had seen some of those characteristics in this case. R5228.

The trial court allowed the testimony "so long as the questioning and the answers do not touch on…the ultimate question under Utah law, or under the statutes…as to what is fraudulent, what is securities fraud." R5224. Curtis' testimony followed those limitations. While Curtis did speak about "fraud," it was "based on generally accepted accounting practices…and principles," not on Utah law. R5228. His testimony did not include the impermissible conclusory testimony that Buttars was guilty of the crimes charged. He did not mention the legal standard or discuss Utah statutes. Nor did he testify that Buttars was responsible for any of the characteristics or that Buttars acted willfully. His testimony was properly admitted, pursuant to the trial court's discretion.[7]

C. Buttars was not prejudiced by any error in admitting the expert testimony.

Even when an expert's testimony exceeds permissible limits, the defendant must show that he was prejudiced by it. *See Tenney*, 913 P.2d at

[7] Buttars briefly claims that the trial court did not sufficiently analyze the testimony's helpfulness under rule 702 or its prejudicial effect under rule 403. Aplt.Br.72–73. Buttars did not make a rule 403 objection below and thus failed to preserve that issue. Moreover, Buttars' single paragraph, which fails to analyze the trial court's ruling on helpfulness, is inadequately briefed.

756; Utah R. Crim. P. 30(a). Such testimony is not prejudicial if it "matche[s] the [law] set forth in the jury instruction[s]." *State v. LaCount*, 732 N.W.2d 29, 35-36 (Wis. Ct. App. 2007); *accord People v. Prendergast*, 87 P.3d 175, 183 (Colo. Ct. App. 2003); *People v. Lurie*, 673 N.Y.S.2d 60, 63 (App. Div. 1998). Nor is it prejudicial if the trial court "correctly admonishe[s] the jury as to the relative roles of expert testimony and opinion evidence," "instruct[s] the jury to accord no unusual deference to an expert's opinions," and gives "careful instructions regarding the legal definition[s] and requirements of the term[s]…as used in the [governing] statute." *Larsen*, 865 P.2d at 1363.

The admission of Lloyd's and Curtis' testimony was not prejudicial for these reasons. Lloyd's definition of material was similar to the definition included in the jury instructions. *Compare* R4830 ("information that a reasonable investor would consider important in making a decision whether to purchase or to sell a security") *with* R1416 ("A 'Material fact' is something which a buyer of ordinary intelligence and prudence would think to be of importance in determining whether to buy a security.") Buttars does not contend that Lloyd misstated the law. Thus, there can be no harm if the jury followed Lloyd's definition of materiality that was consistent with the jury instructions. *See Chapman*, 2014 UT App 255, ¶¶38–39 (Pearce, J., concurring in part and concurring in the result in part).

The jury was also instructed to weigh the opinion of an expert and judge its "overall credibility." But that it did "not have to accept an expert's opinion," that it could "accept it all, reject it all, or accept part and reject part," and that it should "[g]ive it whatever weight you think it deserves." R1391. And the jury was instructed about legal definitions and required elements under the law. R1403–11,1416–17,1425–26.

Courts assume that jurors "were conscientious in performing their duty, and that they followed the instructions of the court." *State v. Hodges*, 517 P.2d 1322, 1324 (Utah 1974); *accord State v. Lee*, 2014 UT App 107, ¶25, 318 P.3d 1164. And based on these correct instructions, it is not reasonably likely that absent the experts' testimony, the jury would have reached a different result. Whatever error may have occurred, "[t]he jury was charged with making the ultimate determination of whether the statements made or facts omitted…were factually material" and whether Buttars willfully committed securities fraud. *Larsen*, 865 P.2d at 1362. Buttars has failed to show he was prejudiced by any error.

IV.

Buttars Has Not Proven Any Errors and Therefore Has Not Proven Cumulative Error.

Buttars argues that if no single error is independently sufficient to warrant reversal, he can prevail under the doctrine of cumulative error. Aplt.Br.75–76. Because there are no errors to accumulate, this claim fails.

Under the doctrine of cumulative error, courts "will reverse only if the cumulative effect of the several errors undermines the confidence…that a fair trial was had," even if no error was sufficiently prejudicial alone. *State v. Gonzales*, 2005 UT 72, ¶74, 125 P.3d 878. (quotation simplified). If, however, "the claims are found on appeal to not constitute error, or the errors are found to be so minor as to result in no harm, the doctrine will not be applied." *Id.*; *accord State v. Martinez-Castellanos*, 2018 UT 46, ¶42, 428 P.3d 1038. Finally, "a single accumulable error cannot warrant reversal under the cumulative error doctrine." *Martinez-Castellanos*, 2018 UT 46, ¶48.

As described above, Buttars has failed to establish any error, let alone several errors. Accordingly, the doctrine of cumulative error does not apply.

CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Buttars' convictions.

Respectfully submitted on June 10, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 18,964 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Jeffrey D. Mann
JEFFREY D. MANN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on June 10, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

Utah Code Annotated § 61-1-1 (West 2018) 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 Annotated § 61-1-21 (West 2018) 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 Code[1];
(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) When amounts of property, money, or other things are unlawfully obtained or sought to be obtained under a series of acts or continuing course of business, whether from the same or several sources, the amounts may be aggregated in determining the level of offense.

(6) 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.

(7) 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 § 76-2-103 (West 2018) Definitions

A person engages in conduct:
(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Utah Code Annotated § 77-22-2 (West 2018) Investigations--Right to subpoena witnesses and require production of evidence--Contents of subpoena--Rights of witnesses--Interrogation before closed court--Disclosure of information

(1) As used in this section, "prosecutor" means the attorney general, county attorney, district attorney, or municipal attorney.
(2)(a) In any matter involving the investigation of a crime or malfeasance in office, or any criminal conspiracy or activity, the prosecutor may, upon application and approval of the district court and for good cause shown, conduct a criminal investigation.
(b) The application and statement of good cause shall state whether or not any other investigative order related to the investigation at issue has been filed in another court.
(3)(a) Subject to the conditions established in Subsection (3)(b), the prosecutor may:
(i) subpoena witnesses;
(ii) compel their attendance and testimony under oath to be recorded by a suitable electronic recording device or to be given before any certified court reporter; and
(iii) require the production of books, papers, documents, recordings, and any other items that constitute evidence or may be relevant to the investigation.
(b) The prosecutor shall:
(i) apply to the district court for each subpoena; and
(ii) show that the requested information is reasonably related to the criminal investigation authorized by the court.
(4)(a) The prosecutor shall state in each subpoena:
(i) the time and place of the examination;
(ii) that the subpoena is issued in aid of a criminal investigation; and
(iii) the right of the person subpoenaed to have counsel present.
(b) The examination may be conducted anywhere within the jurisdiction of the prosecutor issuing the subpoena.
(c) The subpoena need not disclose the names of possible defendants.
(d) Witness fees and expenses shall be paid as in a civil action.
(5)(a) At the beginning of each compelled interrogation, the prosecutor shall personally inform each witness:
(i) of the general subject matter of the investigation;
(ii) of the privilege to, at any time during the proceeding, refuse to answer any question or produce any evidence of a communicative nature that may result in

self-incrimination;
(iii) that any information provided may be used against the witness in a subsequent criminal proceeding; and
(iv) of the right to have counsel present.
(b) If the prosecutor has substantial evidence that the subpoenaed witness has committed a crime that is under investigation, the prosecutor shall:
(i) inform the witness in person before interrogation of that witness's target status; and
(ii) inform the witness of the nature of the charges under consideration against the witness.
(6)(a)(i) The prosecutor may make written application to any district court showing a reasonable likelihood that publicly releasing information about the identity of a witness or the substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm to a person or otherwise impede the investigation.
(ii) Upon a finding of reasonable likelihood, the court may order the:
(A) interrogation of a witness be held in secret;
(B) occurrence of the interrogation and other subpoenaing of evidence, the identity of the person subpoenaed, and the substance of the evidence obtained be kept secret; and
(C) record of testimony and other subpoenaed evidence be kept secret unless the court for good cause otherwise orders.
(b) After application, the court may by order exclude from any investigative hearing or proceeding any persons except:
(i) the attorneys representing the state and members of their staffs;
(ii) persons who, in the judgment of the attorneys representing the state, are reasonably necessary to assist in the investigative process;
(iii) the court reporter or operator of the electronic recording device; and
(iv) the attorney for the witness.
(c) This chapter does not prevent attorneys representing the state or members of their staff from disclosing information obtained pursuant to this chapter for the purpose of furthering any official governmental investigation.
(d)(i) If a secrecy order has been granted by the court regarding the interrogation or disclosure of evidence by a witness under this subsection, and if the court finds a further restriction on the witness is appropriate, the court may order the witness not to disclose the substance of the witness's testimony or evidence given by the witness to others.
(ii) Any order to not disclose made under this subsection shall be served with the subpoena.
(iii) In an appropriate circumstance the court may order that the witness not

disclose the existence of the investigation to others.
(iv) Any order under this Subsection (6)(d) must be based upon a finding by the court that one or more of the following risks exist:
(A) disclosure by the witness would cause destruction of evidence;
(B) disclosure by the witness would taint the evidence provided by other witnesses;
(C) disclosure by the witness to a target of the investigation would result in flight or other conduct to avoid prosecution;
(D) disclosure by the witness would damage a person's reputation; or
(E) disclosure by the witness would cause a threat of harm to any person.
(e)(i) If the court imposes an order under Subsection (6)(d) authorizing an instruction to a witness not to disclose the substance of testimony or evidence provided and the prosecuting agency proves by a preponderance of the evidence that a witness has violated that order, the court may hold the witness in contempt.
(ii) An order of secrecy imposed on a witness under this Subsection (6)(e) may not infringe on the attorney-client relationship between the witness and the witness's attorney or on any other legally recognized privileged relationship.
(7)(a)(i) The prosecutor may submit to any district court a separate written request that the application, statement of good cause, and the court's order authorizing the investigation be kept secret.
(ii) The request for secrecy is a public record under Title 63G, Chapter 2, Government Records Access and Management Act, but need not contain any information that would compromise any of the interest listed in Subsection (7)(c).
(b) With the court's permission, the prosecutor may submit to the court, in camera, any additional information to support the request for secrecy if necessary to avoid compromising the interests listed in Subsection (7)(c).
(c) The court shall consider all information in the application and order authorizing the investigation and any information received in camera and shall order that all information be placed in the public file except information that, if disclosed, would pose:
(i) a substantial risk of harm to a person's safety;
(ii) a clearly unwarranted invasion of or harm to a person's reputation or privacy; or
(iii) a serious impediment to the investigation.
(d) Before granting an order keeping secret documents and other information received under this section, the court shall narrow the secrecy order as much as reasonably possible in order to preserve the openness of court records while protecting the interests listed in Subsection (7)(c).

Utah R. Evid. 702. Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony
(1) are reliable,
(2) are based upon sufficient facts or data, and
(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Utah R. Evid. Rule 803 Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum,

report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organization. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar

facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but

may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Utah R. Evid. 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
(1) the statement has equivalent circumstantial guarantees of trustworthiness;
(2) it is offered as evidence of a material fact;
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
(4) admitting it will best serve the purposes of these rules and the interests of justice.
(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Utah R. Evid. 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by court rule or statute of this state.

Utah R. Evid. 1006. Summaries to prove content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Addendum B

LOHRA L. MILLER
District Attorney for Salt Lake County
JARED W. RASBAND, 12633
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

IN THE MATTER OF A	)	SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION	)	CS NO. 11-91

THE STATE OF UTAH TO: ***CUSTODIAN OF RECORDS***
FRONTIER COMMUNITY BANK
7525 SOUTH UNION PARK AVENUE
MIDVALE, UT 84047
PHONE: (801) 562-2272

You are hereby commanded to set aside all business and excuses and appear at the Office of the District Attorney for Salt Lake County, 111 East Broadway, Suite 400, Salt Lake City, Utah, at the hour of 10:00 AM on the 3rd day of May 2011, to give testimony in aid of a criminal investigation. You are entitled to be represented by legal counsel at the time of this examination.

You are also commanded to bring with you copies of any and all account records belonging to Ellipse Technology, Inc., and/or David Buttars, SSN [redacted], for the period of January 1, 2007, through and including April 1, 2011, to include but not limited to:

- signature cards
- monthly bank statements
- deposit tickets
- credit and debit memos

- bank checks (Cashier's Checks, Travelers Checks, Money Orders, etc,)
- applications for credit
- CTRs and CMIRs
- Real estate or Chattle Mortgages
- Account holder information
- Account numbers
- Customer correspondence
- Withdrawals
- Transfers, to include wire transfers

Your affiant is seeking only copies of any and all forms of identification used to open accounts, applications to open the accounts, signature cards, monthly bank statements showing deposits, withdrawals, and incoming and outgoing wire transfers at this time; however, if other information is deemed necessary, your affiant will request further documents.

YOU ARE FURTHER ADVISED that pursuant to §77-22a-1(4), Utah Code Annotated, 1953, as amended, you are not to disclose to any person the existence or service of the subpoena, the information being sought, or the existence of an investigation, as it could impede this ongoing criminal investigation.

PLEASE FORWARD THE REQUESTED DOCUMENTS TO AGENT SCOTT NESBITT, STATE BUREAU OF INVESTIGATION, 5500 WEST AMELIA EARHART DRIVE, BLDG. 100, SALT LAKE CITY, UTAH 84116.

If you are specifically notified by the agent serving this subpoena that delivery or making available the requested documents is all that is requested, it shall not be necessary for you to appear at the time and place designated above. However, such documents should be delivered or made available by you prior to that date and time to excuse you from the duty to appear.

Failure to respond to this Subpoena may result in the District Attorney's Office for Salt Lake County seeking an Order of Contempt from the District Court.

Given under my hand this 21 day of April 2011.

Clerk of the Court

Deputy Court Clerk

Approved the issuance of this subpoena:

JUDGE

SIM GILL
District Attorney for Salt Lake County
BLAKE A. NAKAMURA, 6288
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

IN THE MATTER OF A	)	SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION	)	CS NO. 11-91

THE STATE OF UTAH TO: ***CUSTODIAN OF RECORDS***
JP MORGAN CHASE BANK, N.A.
C/O CT CORPORATION SYSTEM
136 EAST SOUTH TEMPLE, SUITE 2100
SALT LAKE CITY, UTAH 84111
PHONE: (801) 531-7090

You are hereby commanded to set aside all business and excuses and appear at the Office of the District Attorney for Salt Lake County, 111 East Broadway, Suite 400, Salt Lake City, Utah, at the hour of 10:00 AM on the 23rd day of March 2012, to give testimony in aid of a criminal investigation. You are entitled to be represented by legal counsel at the time of this examination. You are also commanded to bring with you copies of any and all account records belonging to Ellipse Technology, Inc., and/or David Buttars, SSN [redacted] for the period of January 1, 2007, through and including April 1, 2011, to include but not limited to:

- signature cards
- monthly bank statements
- deposit tickets

- credit and debit memos
- bank checks (Cashier's Checks, Travelers Checks, Money Orders, etc,)
- applications for credit
- CTRs and CMIRs
- Real estate or Chattle Mortgages
- Account holder information
- Account numbers
- Customer correspondence
- Withdrawals
- Transfers, to include wire transfers

Your affiant is seeking only copies of any and all forms of identification used to open accounts, applications to open the accounts, signature cards, monthly bank statements showing deposits, withdrawals, and incoming and outgoing wire transfers at this time; however, if other information is deemed necessary, your affiant will request further documents.

YOU ARE FURTHER ADVISED that pursuant to §77-22a-1(4), Utah Code Annotated, 1953, as amended, you are not to disclose to any person the existence or service of the subpoena, the information being sought, or the existence of an investigation, as it could impede this ongoing criminal investigation.

PLEASE FORWARD THE REQUESTED DOCUMENTS TO AGENT SCOTT NESBITT, STATE BUREAU OF INVESTIGATION, 5500 WEST AMELIA EARHART DRIVE, BLDG. 100, SALT LAKE CITY, UTAH 84116.

. If you are specifically notified by the agent serving this subpoena that delivery or making available the requested documents is all that is requested, it shall not be necessary for you to

appear at the time and place designated above. However, such documents should be delivered or made available by you prior to that date and time to excuse you from the duty to appear.

Failure to respond to this Subpoena may result in the District Attorney's Office for Salt Lake County seeking an Order of Contempt from the District Court.

Given under my hand this 5th day of March 2012.

Clerk of the Court

Deputy Court Clerk

Approved the issuance of this subpoena.

JUDGE

SIM GILL
District Attorney for Salt Lake County
BLAKE A. NAKAMURA, 6288
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

IN THE MATTER OF A	)	SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION	)	CS NO. 11-91

THE STATE OF UTAH TO: ***CUSTODIAN OF RECORDS***
FRONTIER COMMUNITY BANK
1630 SHORT LINE
PARK CITY, UTAH 84098

You are hereby commanded to set aside all business and excuses and appear at the Office of the District Attorney for Salt Lake County, 111 East Broadway, Suite 400, Salt Lake City, Utah, at the hour of 10:00 AM on the 13th day of July 2012, to give testimony in aid of a criminal investigation. You are entitled to be represented by legal counsel at the time of this examination.

You are also commanded to bring with copies of any and all account records belonging to Movieblitz North America, and/or Mark La Count, SSN #[redacted], to include accounts [redacted], [redacted], and [redacted], to include but not limited to applications to open the accounts, copies of signature cards, copies of forms of identification used to open the accounts, account holder(s) names, monthly account statements, copies of deposited items, copies of

withdrawals, and copies of documentation for incoming and outgoing wire transfers for the period of June 1, 2008, through and including December 31, 2010.

YOU ARE FURTHER ADVISED that pursuant to §77-22a-1(4), Utah Code Annotated, 1953, as amended, you are not to disclose to any person the existence or service of the subpoena, the information being sought, or the existence of an investigation, as it could impede this ongoing criminal investigation.

PLEASE FORWARD THE REQUESTED DOCUMENTS TO AGENT SCOTT NESBITT, STATE BUREAU OF INVESTIGATION, 5500 WEST AMELIA EARHART DRIVE, BLDG. 100, SALT LAKE CITY, UTAH 84116.

If you are specifically notified by the agent serving this subpoena that delivery or making available the requested documents is all that is requested, it shall not be necessary for you to appear at the time and place designated above. However, such documents should be delivered or made available by you prior to that date and time to excuse you from the duty to appear.

Failure to respond to this Subpoena may result in the District Attorney's Office for Salt Lake County seeking an Order of Contempt from the District Court.

Given under my hand this 20 day of August 2012.

Clerk of the Court

Deputy Court Clerk

Approved the issuance of this subpoena:

JUDGE

AFFIDAVIT OF RETURN FOR

INVESTIGATIVE SUBPOENAS

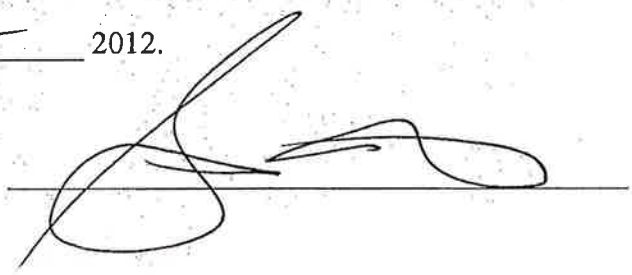
STATE OF UTAH)
:ss.
County of Salt Lake)

I hereby certify that on the 20th day of August 2012, at Salt Lake City, in Salt Lake County, State of Utah, I served the within Subpoena upon the following within named witness, to wit: Hilary Horrocks

Custodian Of Records, Frontier Community Bank, Subpoena Compliance Department

by showing the original to said witness personally and informing said witness of its contents.

DATED this 20th day of August 2012.



Addendum C

The Order of the Court is stated below:
Dated: December 28, 2015 07:35:37 PM /s/ Vernice Trease District Court Judge

JACOB S. TAYLOR, Bar No. 10840
Assistant Attorney General
MICHAEL D. PALUMBO, Bar No. 13325
Assistant Attorney General
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mpalumbo@utah.gov

Attorneys for the State of Utah

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. **DAVID BRUCE BUTTARS,** Defendant.	**FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS** Case No. 131901512 Judge: Vernice Trease

INTRODUCTION

On September 7, 2015, Defendant David Bruce Buttars filed a motion to suppress bank records the State obtained from JP Morgan Chase Bank and Frontier Bank through investigative subpoenas issued under the Subpoena Powers for Aid in Criminal Investigation and Grant of Immunity Act ("Subpoena Powers Act"), Utah Code Ann. Section 77-22-1. The Court held an evidentiary hearing on Defendant's motion to suppress and other motions on September 14, 2015. The State filed an opposition to Defendant's motion to suppress on October 13, 2015.

Defendants filed a reply on November 13, 2015.

On December 3, 2015 the Court heard oral arguments on the Defendant's motion. Assistant Attorneys General Jacob Taylor and Michael Palumbo appeared on behalf of the State. Cara Tangaro and Robert Cummings appeared on behalf of the Defendant. Defendant was present at the hearing. The District Court, having reviewed the written materials filed by the parties and hearing oral arguments, ruled from the bench on December 3, 2015 denying the Defendant's motion. The Court now enters the following written Findings of Fact, Conclusions of Law, and Order denying Defendant's motion consistent with its December 3, 2015 ruling.

FINDINGS OF FACT

The following factual findings are undisputed and based on filings by the parties, exhibits, and testimony obtained during the September 14, 2015 evidentiary hearing in this matter.

The Defendant's September 7, 2015 motion to suppress concerned investigative subpoenas issued by the State between April 2011 and August 2012 under the Subpoena Powers Act during an investigation of Defendant for securities fraud and other crimes. The subpoenas sought bank records from Frontier Bank and JP Morgan Chase Bank.

The subpoenas contained references to an irrelevant section of the Utah Criminal Code, Utah Code Ann. Section 77-22a. Specifically, the subpoenas told the recipients of the subpoenas (JP Morgan Chase Bank and Frontier Bank) that under Utah Code Ann. Section 77-22a, they were prohibited from disclosing the subpoenas to any third party. The inclusion of this language was an error.

Prior to issuing the investigative subpoenas, the State filed a Statement of Good Cause with the Third District Court and obtained an Order authorizing the investigation under the

Subpoena Powers Act from a magistrate. A magistrate reviewed and signed the Statement of Good Cause.

A magistrate reviewed each subpoena before it was issued. The magistrate's review was for the purpose of determining whether the subpoenas were reasonably related to the criminal investigation authorized by the court, as required under Utah Code Ann. Section 77-22-2(3)(b)(ii). The Defendant does not challenge the good cause basis for the criminal investigation or that the subpoenas were reasonably related to the criminal investigation.

The State did not seek or obtain a secrecy order from the Court to keep the investigation or materials obtained through the subpoenas secret.

After serving the subpoenas on JP Morgan Chase Bank and Frontier Bank, the State obtained bank records of the Defendant.

The State did not notify Defendant when it sought an order authorizing a criminal investigation, nor did the State notify Defendant when it issued subpoenas to the Defendant's banks.

The bank records obtained by the state through the investigative subpoenas were used in an investigation that led to criminal charges against Defendant.

CONCLUSIONS OF LAW

The questions presented by Defendant's motion are: (1) Whether the subpoenas issued by the State were unlawful due to the erroneous reference to Utah Code Ann. Section77-22a or because the State did not give notice to the Defendant when the subpoenas were issued; (2) if the subpoenas were unlawful, would the good faith exception apply; (3) and finally, if the subpoenas were unlawful, whether exclusion would be the appropriate remedy.

Although individuals in Utah have an expectation of privacy right in bank records, the State may nevertheless search and seize bank records through a lawful subpoena under the Subpoena Powers Act.

A. The State is Not Required to Give Notice to a Suspect in a Criminal Investigation When the State Issues Subpoenas to Banks for a Suspect's Bank Records

The Subpoena Powers Act does not require the State to provide notice to the subject of a criminal investigation when the State initiates an investigation or issues subpoenas under the Subpoena Powers Act. Neither *State v. Yount*, 2008 UT App 102, 182 P.3d 405 (2008), nor *State v. Thompson*, 810 P.2d 415 (Utah 1991), creates a notice requirement for subpoenas issued under the Subpoena Powers Act. Furthermore, the Subpoena Powers Act, itself, does not contain a requirement that the State provide notice to the subject of records when the State issues an investigative subpoena. The notice requirements in the Subpoena Powers Act pertain only to the party to whom the subpoena is issued—in this case, the banks.

State v. Thompson was a case decided under the pre-1989 version of the Subpoena Powers Act and the changes in the Act appear to be a direct response to the issues in *Thompson* and *In the Matter of Criminal Investigation*, 754 P.2d 633 (1988). In those cases, the issues centered on whether a defendant had a right to privacy in bank records, and whether the state should seek judicial approval to obtain bank records because of defendant's expectation of privacy.

B. The Erroneous Reference to Utah Code Ann. Section 77-22a Did Not Render the Subpoenas Unlawful

The inclusion of the secrecy language from Utah Code Ann Section 77-22a in the

subpoenas did not make the subpoenas unlawful or unreasonable under the Fourth Amendment or Article I, Section 14 of the Utah Constitution. The state met all the requirements of obtaining a lawful subpoena by having the subpoenas reviewed and signed by a magistrate who also determined that the subpoenas were reasonably related to a criminal investigation based on good cause.

The secrecy provision of the Subpoena Powers Act exists to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution. The fact that the 77-22a language was included in the subpoenas does not render the subpoenas unlawful. Whether a secrecy order is properly granted is not a basis for attacking the validity of the underlying subpoena. This is particularly true in the present case where the Defendant has not attacked the good cause statement or that the subpoenas were reasonably related to the criminal investigation. The purpose of the secrecy order is not to create a right for the defendant to move to suppress the evidence.

Even if the secrecy provision was not included in the subpoena, there is no evidence that the defendant would have known about the subpoenas or that he would have successfully moved to quash them.

C. Even if the Subpoenas Were Found to be Unlawful, the Good Faith Exception Would Apply

The reasoning applied by the Utah Supreme Court in *State v. Dominguez*, 248 P.3d 473 (2011), is compelling in the present case. Failing to meet perfectly the procedural requirements

of the subpoena powers act, or in this case, including the language from 77-22a, does not automatically implicate the Defendant's constitutional rights. The Court has determined that including the 77-22a language did not render the subpoenas unlawful. But, even if it did, the good faith exception to the exclusionary rule would apply to this case. The state and federal cases that have applied to the good faith exception are on par with the present case. Specifically, the cases dealing with search warrants are instructive.

The ruling in *State v. Thompson,* is based on different facts, and was decided under the pre-1989 Subpoena Powers Act. Under the Act in effect at the time of *Thompson*, the State had the unilateral authority to issue subpoenas without judicial oversight. *Thompson* is distinguishable from the present case due to the fact that the State obtained judicial review of the investigative subpoenas and reasonably relied on the Court's approval of the subpoenas.

ORDER

WHEREFORE, consistent with the District Court's December 3, 2015 ruling from the bench, the District Court hereby ORDERS that Defendant's Motion to Suppress is DENIED.

SIGNATURE CONTAINED ON TOP OF FIRST PAGE

Addendum D
REDACTED

Addendum E

The Order of the Court is stated below:
Dated: April 08, 2016 09:33:10 AM
/s/ Vernice Trease
District Court Judge

SUBMITTED BY
CARA M. TANGARO (9197)
TANGARO LAW, P.C.
35 West Broadway, Suite 203
Salt Lake City, Utah 84101
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E: robert@thesaltlakelawyers.com
Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, -v- DAVID BRUCE BUTTARS, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STATE'S MOTION FOR ADMISSION OF EVIDENCE** Case No.: 131901512 Judge: Vernice Trease

Plaintiff, the state of Utah (the "State") filed a Motion for Admission of Evidence (the "Motion") on August 28, 2015. The Court held an evidentiary hearing regarding the Motion, along with Defendant David Bruce Buttars' ("Mr. Buttars") Motion to Suppress, on September 14, 2015. Pursuant to the Court's scheduling order entered on the record on September 14, 2015 (docket, 9/24/2015, Hr'ing Trans, at 96-97), the State filed a Supplemental Brief in Support of Motion for Admission of Evidence on October 13, 2015. Mr. Buttars filed his Opposition to the State's Motion on November 13, 2015. Finally, on November 27, 2015, the State filed its reply in further support of

the Motion. Further more the Court incorporates by reference the ruling issued on the record on this motion.

Having considered the briefs and arguments of counsel, the Court hereby DENIES the Motion without prejudice. The State may resubmit the motion and raise Rule 703 second prong and other hearsay issues. As explained below, while the Court finds that the State met its burden of proving the authenticity of the bank records at issue, the bank records are still nonetheless hearsay evidence. And the State has not met its burden of providing sufficient evidence to establish foundation for a hearsay exception to apply. Because the parties did not brief the second prong of Utah R. Evid. 703 (i.e., the probative value of disclosing the bank records to the jury substantially outweighs their prejudicial effect), the Court denies the State's Motion at this time.

BACKGROUND

The State moves for an order of the Court admitting evidence in advance of trial pursuant to Utah R. Evid. 104. Specifically, the State seeks admission of summaries of bank records at issue in this case. In its supplemental brief in support of the Motion, the State argues that the summaries are admissible pursuant to Utah R. Evid. 703, 803(6), and 1006. Mr. Buttars makes two arguments as to why the summaries are not admissible. First, Mr. Buttars argues that the summaries are not admissible based upon his arguments raised in his Motion to Suppress Evidence. (Docket, 9/7/2015.) The Court denied Mr. Buttars' Motion to Suppress. (Docket, 1/12/2016.) Therefore, the Court rejects Mr. Buttars' first argument based upon the reasons stated in the order denying Mr. Buttars' Motion to Suppress. (*Id.*)

Second, Mr. Buttars argues that the summaries are inadmissible because the underlying bank records upon which the State bases its summaries are inadmissible. Specifically, Mr. Buttars argues that the bank records have insufficient foundation and lack authenticity. The Court will address each of these arguments in turn.

FINDINGS OF FACT

1. The State has seven (7) summaries prepared based upon various bank records collected pursuant to subpoenas issued in this case. (Docket, 9/14/2015, State's Exhs. 1 through 7.)
2. The State's accounting expert, John Curtis, prepared the summaries based upon the bank records obtained from JP Morgan Chase and Frontier Bank.
3. John Curtis has been a forensic accountant for 17 years.
4. Based upon the submissions by the parties, Mr. Curtis appears to be qualified to opine as a forensic accountant.
5. Mr. Curtis received and reviewed the bank records.
6. Regarding the Frontier Bank records, it appears that the Agent Nesbit collected the records in person, via U.S. Mail, and also via E-Mail.
7. There are, however, only two custodian certifications provided by Frontier Bank with some of the records.
8. Mr. Curtis testified during the September 14, 2015 evidentiary hearing that it did not appear that any of the bank records were missing.
9. Likewise, Mr. Curtis testified that he received and reviewed the verifications provided by Frontier Bank with the bank records.
10. There are two records custodian certificates from Frontier Bank.
11. Agent Nesbit testified that he received records from Frontier Bank on three or four occasions.
12. The bank records are voluminous in nature.

CONCLUSIONS OF LAW

The State bears the burden of proving admissibility. At play in the State's Motion are Utah R. Evid. 703, 803, 901, and 1006. Each are discussed below.

I. **Utah R. Evid. 1006**

Utah R. Evid. 1006 provides, in pertinent part, "[t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." This is an exception to the best evidence rule, Utah R. Evid. 1002. As noted above, the moving party, the State here, bears the burden of "establish[ing] a foundation that the underlying materials on which [the summaries] are based are admissible evidence." *Trolley v. Square Assocs. v. Nielson*, 886 P.2d 61, 67 (Utah Ct. App. 1994).

Here, the voluminous requirement of Utah R. Evid. 1006 is satisfied. Rule 1006, however, cannot be used as a cover for inadmissible evidence. Therefore, in order to make the summaries admissible, the State must: 1) there must be competent evidence to establish authenticity; and 2) provide testimony to establish the foundation for the underlying bank records.

I. **Authenticity**

Pursuant to Utah R. Evid. 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Utah R. Evid. 901(a). The rule provides a non-exhaustive list of examples through which the proponent of evidence can satisfy the requirement. Relevant here are subsection (1) and (4). Subsection (1) states: "Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be." Utah R. Evid. 901(b)(1). Subsection (4) states: "Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Utah R. Evid. 901(b)(4).

These two subsections are met here. To the first subsection, Agent Nesbit is a "witness with knowledge." At the September 14, 2015 evidentiary hearing, Agent Nesbit testified that he either

personally picked up the bank records from Frontier Bank or otherwise received them via U.S. Mail or E-Mail from Frontier Bank. To the fourth subsection, Mr. Curtis, the State's forensic accountant, testified that the bank records appeared to be complete. Therefore, the State has met its burden of authentication as required by Utah R. Evid. 901.

I. **Expert's Reliance on Inadmissible Evidence**

The State contends that the bank records are admissible based upon Utah R. Evid. 703 and 901. Utah R. Evid. 703 provides, in pertinent part, that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." In other words, once the expert is qualified, that expert can rely upon inadmissible evidence. But the rule continues: "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Utah R. Evid. 703.

Regardless if the bank records are ultimately admissible on their own, the Court finds that Mr. Curtis can rely upon the bank records as part of his expert opinion. Mr. Curtis appears to be qualified to testify as a forensic accountant. He has practiced as a forensic accountant for 17 years, and otherwise appears to be competent to testify in that field. Because Mr. Curtis appears to be qualified to opine as a forensic accountant, Mr. Curtis can rely upon the bank records to form his opinion.

I. **Admissibility of Bank Records**

Utah R. Evid. 802 states that "[h]earsay is not admissible except as provided by law or by these rules." While the Court finds that the State has provided sufficient evidence to authenticate the

bank records and that Mr. Curtis can rely upon the bank records pursuant to Utah R. Evid. 703, the hearsay consideration is different than authentication and Rule 703. And the Court finds that the entries on the bank records are hearsay.

The State contends that Utah R. Evid. 803(6) applies here as an exception to the hearsay rule. That rule states that "[a] record of an act, event, condition, opinion, or diagnosis [is admissible] if" certain conditions are met. Utah R. Evid. 803(6). In order to meet this requirement, the State must show: "(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; … [and] (E) neither the source of information nor the method or circumstances of preparation indicate of lack of trustworthiness." Utah R. Evid. 803(6)(A)-(E). The rule provides, however, that (A) through (C) can be "shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification[.]" Utah R. Evid. 803(6)(D).

In short, the State needs to provide foundation in support of the bank records to establish an indicia of reliability. The State has not been able to establish the necessary foundation. The record reflects that there are two records custodian certificates from Frontier Bank, and the State has conceded that there are no other records custodian certificates. Agent Nesbit testified, however, that he received records from Frontier Bank on three or four occasions. Therefore, the State has not met its burden under Utah R. Evid. 803(6) and 902(11)-(12). The bank records contain inadmissible hearsay, and are therefore inadmissible on their own.

Rule 703, however, has an additional component. In order to have inadmissible evidence upon which an expert relies disclosed to the jury, the proponent of the evidence must establish that

the "probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." The parties have not briefed this issue. Therefore, the Court cannot at this point decide the issue of admissibility under the second prong of Rule 703.

IT IS SO ORDERED.

[Court's Signature Appears at the Top of the First Page of this Order]

STIPULATED AS TO FORM BY:

This is not stipulated as to form by the State, as discussed in the concurrently filed Notice of Lodging

UTAH ATTORNEY GENERAL

JAKE TAYLOR
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Electronically signed with permission

THE SALT LAKE LAWYERS

/s/ Robert B. Cummings

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CERTIFICATE OF SERVICE

The Order of the Court is stated below:
Dated: June 14, 2016 11:43:52 AM
/s/ Vernice Trease
District Court Judge

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. **DAVID BRUCE BUTTARS,** Defendant.	**FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER GRANTING STATE'S MOTION FOR ADMISSION OF EVIDENCE** Case No. 131901512 Judge: Vernice Trease

INTRODUCTION

After considering the State's Motion for the Admission of Evidence, as well as all briefs, evidence, and arguments by the parties, the Court GRANTS the State's motion to admit bank record summaries at trial.

FINDINGS OF FACT

On August 28, 2015, the State moved this Court to rule on the admissibility of bank record summaries prior to trial. The State argued, among other things that the summaries are

admissible under Utah R. of Evid. 1006 because they distill voluminous bank records that cannot be conveniently examined in court. Further, the State argued that the underlying bank records upon which the summaries are based are admissible under Utah R. of Evid. 703, or alternatively under Utah R. of Evid. 803(6).

An evidentiary hearing was held on September 14, 2015 during which John Curtis, the State's forensic accounting expert, and Special Agent Scott Nesbitt testified. During that hearing, Agent Nesbitt testified that beginning in 2011 he sought and obtained investigative subpoenas through the Salt Lake County District Attorney's Office. Agent Nesbitt described the process he followed for obtaining the subpoenas, and further testified that he obtained responsive bank records on several occasions from Frontier Bank and JP Morgan Chase. Agent Nesbitt testified that he scanned and made copies of these records and provided them to the Attorney General's Office and the Division of Securities. Agent Nesbitt testified that the records he obtained from Frontier Bank and JP Morgan Chase appeared to be complete. In total, Agent Nesbitt obtained records for six Frontier Bank accounts, and four JP Morgan Chase bank accounts. In addition Agent Nesbitt obtained certificates of authenticity from Frontier Bank and JP Morgan Chase Bank.

Also during the September 14, 2015 hearing, John Curtis testified that he received copies of the bank records from the Attorney General's Office. Mr. Curtis reviewed all of the bank records, which consisted of approximately 500-700 pages. Mr. Curtis determined that the bank records appeared to be complete. Mr. Curtis testified that some check images were missing from the records. However, Mr. Curtis testified, this is not uncommon. Mr. Curtis did not send out his own subpoenas, but he verified and analyzed the records he reviewed. Based on Mr. Curtis's

review, it appeared to him that the bank records were what they purported to be. Based on Mr. Curtis's review of the bank records, he formed an opinion as to whether the transactions at issue in this case had characteristics of fraud.

This Court heard oral argument on the State's motion for the admission of evidence, and other motions, on December 3, 2015.

On February 22, 2016 this Court denied the State's motion without prejudice. The Court issued written Findings of Fact and Conclusions of Law on April 8, 2016. The Court denied the State's motion to admit evidence pursuant to Utah R. of Evid. 703 because, while the State established the first prong of Utah R. of Evid. 703 (i.e. bank records are the type of evidence a forensic accounting expert would typically rely upon), the State did not address the second prong of Rule 703 (i.e. the evidence is more probative to helping the jury evaluate the expert opinion). The Court also held that the State met its burden of proving authenticity of the bank records. The Court invited further briefing on the issue of admissibility of the bank records and/or summaries to address the second prong of Rule 703 and other hearsay issues.

On March 16, 2016 the State submitted its Second Supplemental Brief in support of its motion to admit evidence. In that brief, the State addressed the second prong of Utah R. of Evid. 703. The State also made an alternative argument under the residual hearsay exception, Utah R. of Evid. 807. Defendant filed an opposition, and the State filed a reply. Oral argument was held on May 10, 2016.

On May 23, 2016 the Court issued an oral ruling on the State's second supplemental brief, and GRANTED the State's motion for admission of evidence. The Court incorporated by reference its prior Findings of Fact, Conclusions of Law, and Order from February 22, 2016.

CONCLUSIONS OF LAW

Evidence admitted under Utah R. of Evid. 703 can be used only for the purpose of assisting the jury in evaluating an expert's opinion. Evidence admitted under Utah R. of Evid. 807 can be used for its substance. The Court finds that the bank records and bank summaries are admissible under the residual hearsay exception, Utah R. of Evid. Rule 807. Because the bank records and summaries are admissible for their substance under Rule 807, the Court does not address whether the records or summaries are also admissible under Rule 703.

I. The Bank Records Are Admissible Under Utah R. of Evid. 807

Utah R. of Evid. 807 allows hearsay statements to be admitted even if the statement is not specifically covered by a hearsay exception Utah R. of Evid. 803 or 804, as long as the statement satisfies four prongs:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

Additionally, in order for a statement to be admitted under Utah R. of Evid. 807, the proponent of the evidence must provide the opposing party "reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."

The bank records that the State seeks to introduce were lawfully obtained through subpoena (*See* Order, December 28, 2015). Additionally, the bank records have been properly authenticated. (*See* Order, April 8, 2016, at 5). Taking all facts and arguments into

consideration, this Court finds that the bank records from Frontier and JP Morgan Chase satisfy each of the four prongs of the residual hearsay exception, Utah R. of Evid. 807.

a. The Notice Requirement Has Been Met

On August 28, 2015 the State provided notice to this Court and the defendant that it intends to introduce summaries of bank records at trial. The defendant has been on notice of the State's intent to introduce the bank records and/or summaries for many months.

The State initially sought to introduce the bank records and summaries under Rule 703. However, on March 16, 2016 the State argued for admission of the bank records or summaries under Utah R. of Evid. 807 in its second supplemental brief. Defendant has had an opportunity to respond to this argument in his opposition, filed on April 11, 2016. At that time, a jury trial was not set. It was not until May 10, 2016 that the Court set a four day jury trial for September 2016. The jury trial is several months away. The defendant has had a fair opportunity to respond to the State's argument for admission under Utah R. of Evid. 807. Additionally, the defendant has had an opportunity to cross examine John Curtis and Agent Nesbitt regarding the records. Defendant will have further opportunities to do so at trial. The defendant has a substantial amount of time to prepare to meet the evidence at trial. Therefore the Court finds that the State has satisfied the notice requirement of Utah R. of Evid. 807.

b. The Bank Statements Have Equivalent Circumstantial Guarantees of Trustworthiness

The question under the first prong of Rule 807 is whether the bank records have equivalent circumstantial guarantees of trustworthiness, similar to other exceptions under the hearsay rules such as business records, family records, certain public records, and so forth. In this case, the bank records have equivalent circumstantial guarantees of trustworthiness. There is

both intrinsic and extrinsic evidence to support the trustworthiness of the records. Therefore, the first factor of Utah R. of Evid. 807 weighs in favor of admission of the bank records.

First, although the State cannot produce authentication certificates for all bank records the State obtained from Frontier Bank, the State does have certificates for some of the Frontier bank records.[1] These certificates state the things required by Utah R. of Evid. 803(6) to establish trustworthiness for records of regularly conducted activity. For example, the certificates state that that the records were kept in the usual course of business, and that the entries in the bank records were generally prepared contemporaneously with the events described. In other words, the certificates generally describe the authenticity of records maintained by that bank, and speak to the reliability of the bank records. All Frontier bank records were provided to the State by the same personnel and in the same manner in response to lawful subpoenas.

Further, the bank records have been authenticated under Rule 902 through the testimony of Agent Nesbitt and John Curtis. Agent Nesbitt testified about how he obtained the records through an investigative subpoena. Mr. Curtis is a forensic accountant with 17 years of experience and a CPA. In light of testimony presented about his qualifications, education, and experience, the Court has found that he is an expert qualified to testify and give an opinion on bank records, fraudulent activities related to finances, including investigating and analyzing records of companies, banks, and individuals alleged to have engaged in fraud. Mr. Curtis testified that he received and reviewed the bank records from Frontier and JP Morgan Chase. He also testified that he reviewed these accounts and all the information related to these accounts. It did not appear to Mr. Curtis that any records were missing from the bank records, aside from one

1 JP Morgan Chase provided certificates of authentication that appear to meet the requirements of Rule 803(6).

or two missing check images. But, this is fairly common, and not a big issue in determining the accuracy and so forth of the records. Mr. Curtis also testified that there were approximately 500-700 pages of the records. He reviewed the records to determine if they were what they purported to be and if he could rely on the records to render his opinion. He testified that in every way, the bank records appeared to be authentic documents.

The Court finds that the bank records have equivalent circumstantial guarantees of trustworthiness, and so meet the first prong of Utah R. of Evid. 807.

c. The bank records are evidence of a material fact

It is uncontroverted that bank records and/or summaries are crucial to this case. The bank records/summaries are evidence of a material fact. This factor weighs in favor of admission.

d. The bank records are more probative than any other evidence to show how investor funds were used

The third factor of Utah R. of Evid. 807 weighs in favor of admission. The bank records, and/or summaries, are more probative of whether a fraud or theft occurred because they show what happened to the investment money of victims. There is no other evidence that can be presented or obtained through other reasonable means or efforts to show what happened to investor funds, which is a vital question in this case.

e. Admitting the bank records will serve the best interests of justice.

A jury trial is a search for truth. The evidence contained in the bank records and summaries can assist in that search. Whether the bank records and summaries benefit the state or the defendant is not the determining factor. The testimony given by Mr. Curtis and Agent Nesbitt

is that these records contain information about the money alleged to be invested and how it was used. The bank records come in regardless of whether the records show the money was used appropriately or inappropriately. The purposes of the rules and interest of justice is met when trustworthy, relevant information and evidence is admitted to assist the jury in the search for the truth.

ORDER

The bank records satisfy all four prongs of Utah R. of Evid. 807. The State has also provided notice to the defendant as required under that rule. Therefore, the bank records are admissible for their substance. Because the bank records are admissible, this Court finds the summaries of bank records are admissible under Rule 1006

WHEREFORE, the Court hereby GRANTS the State's Motion for Admission of Evidence.

COURT'S SIGNATURE CONTAINED ON TOP OF FIRST PAGE

Addendum F

misstatements of material facts, not to omit information that's necessary in order to understand material fact.

Q. And based on your experience in the securities industry, could you explain how fraud is defined in the securities industry?

A. Generally, it's -- fraud is considered when you have a misstatement of material information, or the omission of material information necessary to address a misstatement, or a deceit.

Q. And you mentioned the phrase 'material statements'. Based on your experience in the securities industry, could you give some examples of what material statements may entail?

A. That's -- it's information --

MR. CUMMINGS: Objection, Your Honor.

THE COURT: Approach.

(Whereupon a sidebar was held as follows).

MR. CUMMINGS: This is the situation, I believe that the Chapman court addressed two things, one is defining what is a material misstatement, the second thing is providing examples. My concern is that the examples are going to be too closely related to this case, and at least one judge in -- was it Chapman, or --

THE COURT: Moore.

MR. PALUMBO: I think you're thinking of Moore.

MR. CUMMINGS: Moore, thank you.

MR. PALUMBO: (Inaudible).

MR. CUMMINGS: But it was too prejudicial to give the examples of the statements. The second thing I would submit is that in this case, all these statements or alleged statements and alleged omissions are squarely within a reasonable jury's mindset. It's not needed. We don't need expert testimony to say that -- whether a jury will -- a reasonable investor in a jury's mind will say what about credit card debt needs to know about the prior (inaudible) stuff along those lines. It's not complex.

MR. PALUMBO: And Your Honor, I have a copy of the Moore decision if you would like it for your reference, but I believe the issue in Moore is that there was a discussion of material misstatements, and how the security expert defined them. The issue was that the expert in that case was opining on what the law said rather than what the industry dictates. And so, when I ask, based on your experience in the industry, I'm not asking the expert to tell me what the law is. I'm asking him to tell me what his experience in the industry when he forms his opinion.

MR. CUMMINGS: The distinction with that is the (inaudible) would still be able to make a conclusion that's in the jury's providence. And again, these aren't

complex issues.

MR. PALUMBO: I'm simply asking also for an example of what the material misstatement might be. I'm not asking the expert to talk about what's going on in this case, and to tell the jury that what's happening in this case is a material distinction.

THE COURT: If the wit -- if the witness says something that is -- was a material omission in this case, do you see that as a problem?

MR. PALUMBO: Pardon me?

THE COURT: If the witness says -- gives an example of a material omitment -- a material omission, and it's something that was done in this case, do you see the problem with that?

MR. PALUMBO: No, because I think he could provide a number of examples, as long as the examples don't exactly track the facts of this case, and he's not --

MS. TANGARO: And that's what she's asking.

THE COURT: That's what I'm saying.

MR. PALUMBO: But I'm saying, if those are the only examples he provides, rather than providing a -- you know, an inclusive list of various types of examples in other cases that would be material --

THE COURT: Do you anticipate that the witness will give examples that are included in this case?

MR. PALUMBO: Yes. Yeah. But not exclusively.

THE COURT: Mm-hmm.

MS. TANGARO: I don't think that's --

MR. CUMMINGS: That's the concern.

MS. TANGARO: I think that's objectionable (inaudible).

THE COURT: Okay. I'm going -- I'm going to sustain the objection for now, but you can ask the witness to define what the definition is of material statements, and so forth, but I don't think it would be appropriate for him to give examples that would include what was mentioned in this case because then he would be saying, you know, that's a material omission (inaudible).

MR. PALUMBO: Sure.

THE COURT: Okay.

MR. PALUMBO: Thank you.

(End of sidebar).

Q. (BY MR. PALUMBO) Mr. Lloyd, based on your experience in the industry, could you give a working definition of material misstatement?

A. Well, it would be a misstatement of information that a reasonable investor would consider important in making a decision whether to purchase or to sell a security.

Q. In the context of the securities industry,

are you familiar with the term, 'willful'?

A. Yes.

Q. And in the securities industry, what does that term mean?

A. It's generally understood to mean an intentional -- in the case, for example, of statements, an intentional statement.

Q. And based on your experience in the industry, is a seller required to disclose all material information?

A. A seller is -- the industry expectation is that a seller will not misrepresent any material information or omit to provide material information that's necessary to correct a misstatement.

Q. With respect to a purchaser of a security, in the securities industry, does a purchaser of a security have any obligations?

A. None, other than a contract they may enter into.

Q. On the part of a purchaser of a security, is there any legal obligation in the securities industry for a purchaser to engage in any kind of due diligence or investigation?

A. No, there's no obligation on the part of the purchaser.

A. Yes.

Q. And what is that?

A. A warrant generally represents the right to acquire another security. And so, a warrant might be the right at some point in the future to purchase shares of stock. And the warrant is a contract that's executed that gives a party the right to purchase shares in this -- you know, in -- an example I'm using, to purchase shares of stock at some point in the future.

Q. And I'd like to maybe take a step back and ask you, in the securities industry, if there are multiple sellers of a security, do -- what are the obligations of each of the sellers?

A. Each of the sellers would have the same obligations as the other -- the obligations we've discussed previously.

MR. PALUMBO: Your Honor, if I could have a moment?

THE COURT: Yes. Could I ask counsel to approach one more time?

(Whereupon a sidebar was held as follows).

THE COURT: So you guys know this case has been around and I just read a new case and Judge Davis did not find any problem with a witness - with this witness generally stating examples, so long as it wasn't something that explicitly mirrored (inaudible) used

occurred in this case. I understand that there was some comment about a concurrence by a judge hearsay from one of the other judges, but the state of the law doesn't seem to say that any stating of examples is is exclusively precluded. I think it's so long as it doesn't explicitly -- I mean, it could mention these things as an example, as long as the witness is -- is not saying, well, in this case, this conduct would be -- and that's what paragraph two says --

MR. PALUMBO: That is my understanding of the law, too, Your Honor.

THE COURT: -- in Moore, right? So, the witness in Moore gave a definition of material, and then gave a list of examples. And the opinion was that the list of examples was general enough that it was okay -- that an expert witness can give that opinion, so long as it's not explicitly tied to, or the words used, explicitly mirrors the allegation made in this case. You don't anticipate, if you were to ask the witness, that he would just list these things and then talk about how the allegations in this case --

MR. PALUMBO: I don't anticipate that, Your Honor.

THE COURT: Okay.

MS. TANGARO: Well, have you discussed it with him?

MR. PALUMBO: Yes.

MS. TANGARO: Okay.

MR. CUMMINGS: One -- I would still like my objection. Candidly, Moore is one judge.

THE COURT: Okay.

MR. CUMMINGS: So it's not a majority (inaudible).

THE COURT: Sure, sure. And it's the Court of Appeals.

MR. CUMMINGS: It's the Court of Appeals, too, so there's --

THE COURT:Supreme Court could still say something--

MR. CUMMINGS: It's still an open issue.

THE COURT: Mm-hmm.

MR. CUMMINGS: I do think there's issues of law here.

THE COURT: Sure.

MR. CUMMINGS: Specifically giving examples. And it's -- and again, with this case, different (inaudible) this case, the issues that we're discussing are squarely within the layman's understanding of what it is (inaudible). We're not talking complex issues, we're talking (inaudible).

THE COURT: Okay.

MR. CUMMINGS: So...

THE COURT: Okay. So, I'll allow it, as long as you're within the parameters of State v. Moore.

MR. PALUMBO: Okay.

THE COURT: Okay?

MR. PALUMBO: Thank you.

(End of sidebar).

MR. PALUMBO: And, Your Honor, if I could just have a moment?

THE COURT: Yes. Sure.

Q. (BY MR. PALUMBO) Mr. Lloyd, just a few more questions. Based on your understanding of the securities industry, a few moments ago we discussed the issue of material information. Could you give some examples, in the securities industry, what material information might include, just generally?

A. Yes. It depends on the individual entity, but material information would be again information that's important to an investor making a decision. It could include information about the business, the underlying assets of the business, if those assets are fixed assets that you can touch and feel, or are they technology assets where you have to understand the nature of the particular technology. It would include information about the management, who is it that's running this enterprise, what's their background, what's their experience, have they ever been involved in criminal or other inappropriate activity, have they ever

been sanctioned by regulators.

It can involve looking at the financial information about the enterprise in order to determine whether the financial assets are sufficient to conduct the operations, and what the -- what the financial statements look like. It could include risks, what are the risks of the business, where could this business have problems in the future, and what's the type of information that an investor would want to -- would want to know about potential risks? Those are a few examples.

Q. Thank you. And a few moments ago, you described various types of securities. Does a security have to fall into only one category?

A. No, you could have instruments which satisfy multiple categories.

MR. PALUMBO: Thank you.

And Your Honor, if I could just have one more moment?

THE COURT: Yes.

MR. PALUMBO: Thank you, Mr. Lloyd. Those are all the questions I have.

THE COURT: Okay. Cross examination?

MR. CUMMINGS: Thank you, Your Honor.

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Q. So, in your experience, are there certain characteristics that you look for? And I -- you may have talked about some of these, but are there certain characteristics that you look for in analyzing a business or an individual to determine fraud, or theft, or deceit?

MR. CUMMINGS: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon a sidebar was held as follows).

MR. CUMMINGS: This is going to be the same, Your Honor. Same issue as Mr. Lloyd. Whether the characteristics track closely to this case, and especially after he laid out all the evidence, and then he asked what characteristics, he's going to go over what the characteristics were as to what the evidence just said. I think that's highly prejudicial, and also for the jury.

MR. TAYLOR: He's giving his opinion as to what characteristics of financial fraud are. I mean, that's -- as an expert, he's qualified to do that.

THE COURT: Go ahead.

MR. CUMMINGS: I was going to say, if you go back to the Moore case, though, what concerned at least one judge on the Court of Appeals there, was that the characteristics track too closely to the case.

THE COURT: Is that the concurrent opinion?

MR. CUMMINGS: Well, it was the -- it was the opinion of the Court that wasn't joined by the two other judges.

THE COURT: Okay. So --

MR. CUMMINGS: So --

THE COURT: Yeah.

MR. TAYLOR: And I'm not asking him to talk -- I'm asking him in general right now.

THE COURT: Mm-hmm.

MR. TAYLOR: And if I recall --

THE COURT: Yeah. The case law says you can ask generally, but you can't tie it specifically to the case. It's part of why I changed my mind on the objection to the material omission because it seemed to me that the case law says that you can't tie it to the case, you can't say that, pursuant to Utah law, these are the things --

MR. TAYLOR: Right.

THE COURT: But a witness can testify generally -- an expert witness can testify generally as to things he looks for, or, you know, things of that nature, as long as it's not tied to this case. So, if you're going to ask generally what characteristics somebody looks for in the -- in the industry, and so forth, I think that was the testimony that the Court of Appeals -- and I can't

remember if it's the Davis case, or Judge Greeley had said was okay. But you cannot say, based on my review in this case, here is what I saw.

MR. CUMMINGS: And that's where that question was going. Because he said, you sat through all the testimony, you've heard all the evidence, we just reviewed all the bank records. Generally, what do you look for?

THE COURT: Mm-hmm.

MR. CUMMINGS: It's tied directly to the case.

MR. TAYLOR: I can rephrase that question. I can say, based on your experience, in your profession in general, what are -- what are characteristics of financial fraud?

THE COURT: Okay. Well, you need to make sure that the witness does not say, "well, in this case here's what I saw.".

MR. TAYLOR: Yeah.

THE COURT: He can testify generally in the industry the things that are looked for, or that somebody looks for in his position, when he's analyzing, you know, in general cases. He can testify about that. But he can't say," well, in this case, here's what I saw."

MR. CUMMINGS: I would still like to lodge an objection that, at this juncture in the direct

examination, there's no way to have this untethered from the case, after he's laid out all the evidence --

THE COURT: Well, he can --

MR. CUMMINGS: -- gone through all the exhibits, so...

THE COURT: -- he can testify about things that were red flags to him.

MR. CUMMINGS: Sure.

THE COURT: That's what he's testified to --

MR. CUMMINGS: Sure. And he -- and he has.

THE COURT: --thus far.

MR. CUMMINGS: But now on a summation saying, what do you look for in fraud, I -- I, just at this point, I would like to lodge the objection.

THE COURT: Okay.

MR. CUMMINGS: You can, of course, overrule it, but --

THE COURT: So -- so, your objection is sustained as to anything -- if the intent was to get him to go through this case and say, what's fraudulent in this case.

MR. TAYLOR: Well, he can opine as to whether there are characteristics of financial fraud in this case. I mean, he's allowed to do that under Rule 704. His testimony -- expert testimony that embraces the ultimate

issue.

THE COURT: So, this is the part of the law that I think is sometimes confusing to lawyers, and I don't profess to be the person that knows this, but as a general proposition, a witness -- and I think Moore and Chapman say that an expert witness, in certain circumstances, can give their opinion about the ultimate issue in a case. But there are some situations where they can't.

And if I'm going to err on the side of not creating an issue for appeal, it would be, you get where you want to go by having the witness testify about what characteristics of fraud that he looks for generally, rather than having him say, you know, here's what I saw was fraud in this case.

MR. TAYLOR: Well, it -- in that case, Your Honor, what I'll do is I'll ask him, in general, based on his practice and his knowledge of --

THE COURT: Right.

MR. TAYLOR: -- of forensic accounting --

THE COURT: Mm-hmm.

MR. TAYLOR: -- what are some characteristics of financial fraud? And then I guess the Court's -- under the Court's ruling, I'm -- I'm just -- I'll have to leave it at that.

THE COURT: Well, and then you can argue it. You can argue it to the jury. Right? But I -- is there any case law that identifies what -- that says a witness -- an expert witness in this situation can say, well, here's the fraudulent things that I saw in this case?

MR. TAYLOR: If I could have a second, Your Honor?

THE COURT: Okay.

(Inaudible conversation).

MR. TAYLOR: Judge, our understanding of case law is that this is territory we can get into, and I would cite the Larsen decision from 1993. Now, that was a case where a securities expert testified, and I believe the Utah Supreme Court held that the securities expert could opine as to whether the -- the alleged material -- omissions were material -- would be material or important to the average investor.

And in addition to that, the Chapman case, we believe, is actually supportive of us, and if the -- I don't mean to ask for a recess, but if the Court wanted to review that, I believe that there's a part of that decision --

THE COURT: There is.

MR. TAYLOR: Well, I believe that there's a part of that decision which says that --

THE COURT: Yeah, and that's why I say, to talk --

let's give the jury a recess and we can talk about this--

MR. TAYLOR: Okay.

THE COURT: -- at length. Okay?

MR. TAYLOR: Okay.

(End of sidebar).

THE COURT: Members of the jury, we're going to take about a five or 10-minute recess. Please do not talk about the case. We just need the time to put some things on the record.

Raine?

(Whereupon the jury left the courtroom).

THE COURT: Please be seated. All members of the jury have now left the courtroom.

The discussion regarding the question asked of Mr. Curtis is -- at sidebar is on the record, and I asked the jury to step outside so that we can talk about this more thoroughly rather than on the record. The state has identified State V. Larsen and State v. Chapman. And let me read this part of Chapman which, again, is what I had indicated to the parties at sidebar.

There are certain things that, under State v. Chapman, an expert witness can testify about. And in fact, State v. Chapman says, quote, an expert witness may testify in the form of an opinion, and can opine on an ultimate issue at trial, so long as that testimony is

otherwise admissible under the rules of evidence.

And then it -- well, and the next -- and then it cites Rule 704. And then it goes on and says, 'an opinion is not objectionable just because it embraces an ultimate issue. An expert witness exceeds the scope of permissible testimony when the witness's legal conclusions blur the separate and distinct responsibilities of the judge, jury, and witness, or there is a danger that the juror may turn to the witness's legal conclusion rather than judge for guidance on the applicable law.'

So, and I'll read the next sentence, because I think it demonstrates why we are struggling with this issue.

The case says, 'no bright line separates permissible ultimate issue testimony under Rule 704, and impermissible overbroad legal responses a witness may give during questioning, and the trial court has wide discretion in determining the admissibility of expert testimony.'

So, as I indicated to counsel at sidebar, there is no complete exclusion of an expert witness from testifying or giving an opinion, or opining on the -- on an ultimate issue at trial. And that's what the case law says. The -- but there are cases, there are situations

where I think the -- the expert witness can overstep their bounds and takes away the determination from the jury as to the ultimate issue at hand. And if that's the case, or when that is the case, the trial court should not allow the witness to give their opinion about certain things. If it appears that that is going to take away from the jury, or the finder of fact, their responsibility of making the ultimate determinations in this case.

Okay. So, the objection has been made by Mr. Cummings. Let me hear, Mr. Taylor, what your position is, and exactly what question, and what you are seeking from the witness, and then I'll hear from Mr. Cummings and make a ruling.

MR. TAYLOR: First, the question that I'm asking Mr. Curtis is, in his experience, if there are certain characteristics that he looks for in analyzing a business or an individual to determine fraud, deceit, or theft. And I could rephrase that to make it clear that I'm asking based on his experience, his knowledge, and -- as a forensic accountant, to explain what those characteristics are. I believe he would give off a list of certain characteristics. For example, business activity is dependant on outside investor money -- investor money not used for its stated purpose, business

enterprise lacks profits sufficient to provide the promised returns to investors, high rates of return relative to the promoted investment risk, business experiences -- that the business experiences increasing insolvency, and preferential treatment to certain investors, disregard to corporate formalities. Those are characteristics of financial fraud that he would outline or list.

And then I would ask him, after reviewing the financial records associated with this case, and listening to the testimony at trial -- and perhaps I should've asked this later -- but based on generally accepted accounting practices, do you see any of these characteristics present in this case? And I would ask him to identify any such characteristics that he -- that he has observed in this case. And I would ask him if he had an opinion as to whether the defendants engaged in the course of business which operated as a fraud, deceit, or theft.

I would ask him, what is your opinion? And I believe that he would testify that he does see what appear to be the characteristics of financial fraud, and he would outline which ones he sees.

THE COURT: Okay.

Mr. Cummings.

MR. CUMMINGS: I think the witness has already testified to most of that. He's used the term red flag multiple times. He's said that certain charges are troubling. And so, he's given an expert opinion as to what the summaries elicit, what the charges -- what he believes the charges reflect.

And in Moore, I think this is important, as the Court has said, an expert witness can tie their opinion -- can't tie their opinion to law -- to the law -- to Utah law, but can embrace an ultimate conclusion, but at the end of this paragraph 22, the court says, 'other jurisdictions have determined that expert witness testimony that encompasses an ultimate issue is generally admissible when it alludes to an inference that the trier of facts should make, or uses a term that has both a lay factual meaning and a legal meaning, and it's clear that the witness is using only the factual term.

And in here, the -- it's the legal meaning of fraud. This is indicia of accounting fraud, this is indicia of an enterprise running in a fraudulent manner. I believe that the accounting expert, Mr. Curtis, has laid out all the information, and the jury needs to draw that final inference of whether it constitutes legal fraud.

THE COURT: Okay.

MR. TAYLOR: And --

MR. CUMMINGS: And I would also say it's prejudicial under 403 considering the sequencing of the questions and where we're at in questioning.

THE COURT: Okay.

MR. TAYLOR: If I may, Your Honor?

THE COURT: Sure.

MR. TAYLOR: My recollection of the Moore opinion is that the witness cannot tie his opinion to the requirements of law. In Moore, we're talking about securities fraud, and, of course, there's a lot of gray area when it comes to what the law is -- Utah law, and what the securities statutes say.

Here, we're not talking about the law. We're talking about generally accepted accounting principles. So, there's that distinction.

And also, again, I'm not asking him to -- to say, this is fraud, it's just that these are characteristics of fraud which I see, and that's the distinction there.

And finally, the Chapman decision, in Chapman, the court recognized that where the expert does not specifically testify that the defendant was guilty, or that as a matter of law the facts satisfied the legal standard, I believe the court upheld the expert testimony that was rendered in that case, which was from a

securities expert, I believe.

THE COURT: Okay.

MR. TAYLOR: So, there are those distinctions.

THE COURT: Anything further?

MR. CUMMINGS: I did, and I just totally lost my train of thought. Hold on, one moment.

I don't think my -- I would have an objection if Mr. Curtis testified that certain accounting practices here, as evidenced by the banking records, violated GAAP, or the Generally Accepted Accounting Principles. But it's the -- it's the connection of, do these bank records show fraud? Are these -- you know, what you have reviewed here, is this a fraudulent scheme? And to me, there's an important difference between those two -- between those two lines of questioning.

THE COURT: Okay. Anything further?

So, I'm going to allow the testimony to go through as long as there is no mention of, under Utah law, or under the laws of the State of Utah, or federal law, and so forth. The witness has already testified that he -- I mean, there -- I'm assuming -- and I think I'm correct -- that there are investigations in the industry looking for fraud, or fraudulent conduct, that may not necessarily rise to the level of a criminal offense, that there -- you know, that they may be different. So, so long as the

questioning is tied to the witness's experience as a fraud investigator, his experience in the industry, what the industry looks like, what the industry looks for, and so forth, I -- the testimony can come in. Particularly because testimony related to, what are characteristics of fraud, are not things that are within the kin or the understanding normally of a layperson, it's information that normally would come from an expert, defining what the industry believes are things that are looked for, characteristics, and so forth.

It's part of the reason that I changed my mind and allowed the testimony regarding what the industry considers is material information and so forth during the testimony of Mr. Lloyd. So again, I think so long as the questioning and the answers do not touch on, you know, the ultimate question under Utah law, or under the statutes and so forth, as to what is fraudulent, what is securities fraud, and so forth. The witness can testify about his understanding, what is the accepted standard and characteristics in the industry, and so forth.

Any clarification needed?

Any objection if -- well, Mr. Curtis is here on the witness stand, and I think he's heard the Court's ruling, but I -- as I've indicated in the past, if counsel believe that they are going into an area that might cause

an issue, unless there's an objection, I would be fine if leading questions are used.

Mr. Cummings?

MR. CUMMINGS: I would just like to put on the record that, as with Mr. Lloyd, the initial round of questions with Mr. Lloyd, I don't believe that it's helpful to the trier of fact. And I understand the Court's ruling, we'd just like the record clear that part of our objection is also on that aspect.

THE COURT: Yeah. And I looked at the Chapman case, I think Chapman and Moore -- or one or the other, and the Court of Appeals in one or both of those cases determined that when the witness -- and I think it was Mr. Lloyd, actually, testified -- he testified generally enough, or sufficiently general, did not say that under the laws of the State of Utah this was the case, and my recollection of the question asked by Mr. Palumbo was, according to the industry, or in the industry, yada, yada, yada.

And the case law seemed to me to say that there's not an absolute prohibition against an expert testifying about what a material omission, or what material information is. It depends on the case. And I think in this case, the -- the conduct and the things -- the subscription agreements, things of that nature, are

things that I don't think the ordinary citizen, ordinary juror, would understand unless they have some specialized knowledge. And so, it was necessary for Mr. Lloyd to give that information during his testimony. Okay.

Shall we bring the jury in? Raine?

While Raine is doing that, let me also indicate the following -- in case I forget, will one of you remind me? All the jurors have to leave their copies of the exhibit here. They cannot take them home. But I don't want to forget that. In other words, I don't want somebody taking it home and looking at it tonight. They can look at them here and review them, and then when they're done, they leave everything, and they go home, and come back, and so forth. I think that's the way it should be done, because we don't let them take any exhibits home.

(Whereupon the jury entered the courtroom).

THE COURT: All members of the jury are now in the courtroom, all counsel are present, and the defendant is present.

Mr. Taylor?

MR. TAYLOR: Thank you.

THE COURT: And Mr. Curtis resumes the witness stand, he's previously been sworn in.

Q. (BY MR. TAYLOR) Mr. Curtis, a couple more questions. I can't remember where we left off, so let me

ask you this. You indicated that you have particular experience investigating and analyzing records of companies or individuals alleged to have engaged in fraud, deceit, or theft? Is that correct?

A. Yes. That's right.

Q. In your experience, and based on your practice, are there certain characteristics that you look for in analyzing a business or an individual to determine fraud, deceit, or theft?

A. Yes.

Q. Can you briefly explain what those characteristics are in general?

A. Generally, yeah. As it relates to investment fraud, there would be things like misrepresentations, financial -- that could be financial statement misrepresentations, or misrepresentations of how the money's being used, or failure to disclose material information, or that could be omissions.

So, if the party has knowledge of material information and does not disclose that to investors, that's important. Disregard for corporate formalities. That's where corporations -- business and personal could be commingled and confused, that could be part of that, or disregarded in that way. A business being dependent on investor money. Investor money not being used for the

stated purpose that's stated to investors, it's used for other purposes or unauthorized purposes. Those are -- those are some of the main characteristics we look at.

Q. Maybe you touched on this, but what about the business enterprise lacking profits sufficient to provide the promised returns to investors?

A. Yes. And also, you know, sometimes businesses are insolvent, that means their liabilities exceed their assets, or they become further insolvent as they continue to operate, or operate with very small capital, or undercapitalized.

Q. Thank you. After reviewing the financial records associated with this case, and after listening to the testimony of this trial, based on generally accepted accounting practices, do you -- and principles, do you see any of these characteristics present in this case?

A. Yes.

Q. And which ones, in your opinion?

A. Right. I see characteristics of misrepresentations and omissions, of investor money not being used for the stated purpose, of inadequate capitalization or lack of capital to operate the business. Those are the main ones that come to mind. And dependence on investor money, obviously.

Q. Are those all characteristics that you see?

Addendum G

INSTRUCTION NO. 20

FACT VS. EXPERT WITNESS:

There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that he/she can see, hear, touch , taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. An expert can testify about facts, and they can give their opinions in their area of expertise.

In weighing the opinion of an expert, you may look at their qualifications, the reasoning process the expert used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses including any expert witness. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

INSTRUCTION NO. 32

DAVID BUTTARS is charged in Count One of the Second Amended Criminal Information with committing SECURITIES FRAUD commencing on or about March 2009. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Commencing on or about March 2009, in the State of Utah, David Buttars, directly or indirectly;
2. To Rebecca Gerritsen;
3. In connection with the offer or sale of a security;
4. A. Willfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; OR

   B. Willfully engaged in an act, practice or course of business which operated or would operate as a fraud or deceit upon any person;
5. At the time, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000.00.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 34

DAVID BUTTARS is charged in Count Three of the Second Amended Criminal Information with committing SECURITIES FRAUD commencing on or about January 2010. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Commencing on or about January 2010, in the State of Utah, David Buttars, directly or indirectly;
2. To Orjan Gustafsson;
3. In connection with the offer or sale of a security;
4. A. Willfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; OR

   B. Willfully engaged in an act, practice or course of business which operated or would operate as a fraud or deceit upon any person;
5. At the time, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000.00.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 36

DAVID BUTTARS is charged in Count Five of the Second Amended Criminal Information with committing SECURITIES FRAUD commencing on or about May 2009. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Commencing on or about May 2009, in the State of Utah, David Buttars, directly or indirectly;
2. To Janet Hinman;
3. In connection with the offer or sale of a security;
4. A. Willfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; OR

   B. Willfully engaged in an act, practice or course of business which operated or would operate as a fraud or deceit upon any person.
5. At the time, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000.00.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 38

DAVID BUTTARS is charged in Count Seven of the Second Amended Criminal Information with committing SECURITIES FRAUD commencing on or about summer 2009. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. Commencing on or about summer 2009, in the State of Utah, David Buttars, directly or indirectly;
2. To Gary A. Miller;
3. In connection with the offer or sale of a security;
4. A. Willfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; OR

   B. Willfully engaged in an act, practice or course of business which operated or would operate as a fraud or deceit upon any person;
5. At the time, the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000.00 or more.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 41

The State of Utah must prove that the defendant, DAVID BUTTARS, acted willfully in committing the offenses set forth in Counts 1, 3, 5 and 7.

A defendant acts willfully if it was his conscious objective or desire to engage in the conduct or cause the result--not that it was the defendant's conscious desire or objective to violate the law, nor that the defendant knew that he was committing fraud in the sale of the security.

Instruction No. 42

WILLFULLY

To act willfully it must be a person's conscious objective or desire to engage in certain conduct or cause a certain result. A person acts willfully if he acts purposefully and not because of mistake or accident. In the context of willful misstatements or omissions of material facts, willfully implies knowledge of the falsity of the misstatements and knowledge of the omitted facts and knowledge of the materiality of the misstatement(s). That knowledge can be inferred if the defendant consciously avoided the existence of a fact or facts; however, the defendant cannot be convicted if he was merely negligent, careless or foolish. He must have acted with a conscious objective or desire to ignore a material fact or facts.

INSTRUCTION NO. 45

You are instructed that under the laws of the State of Utah, the following words have the following meanings:

1. "Sell" or "sale" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

2. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

3. A "Material fact" is something which a buyer of ordinary intelligence and prudence would think to be of importance in determining whether to buy a security.

4. "Buy" or "purchase" means every contract for purchase of, contract to buy, or acquisition of a security or interest in a security for value.

5. "Agent" is any individual who represents an issuer in causing or attempting to cause purchases or sales of securities. "Agent" does not include an individual who represents an issuer but who receives no commission or other remuneration, directly or indirectly, for causing or attempting to cause purchases or sales of securities in this state, and who causes transactions in exempt securities.

6. "Issuer" is any person or entity who issues or proposes to issue any security or has outstanding a security that it has issued.

7. "Fraud" is defined as 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, engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

8. "Security" includes any note, stock, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, investment contract, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; and any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing, or, in general, any interest or instrument commonly known as a "security."

9. You are instructed that "course of business" means to engage in business activity.

INSTRUCTION NO. 46

One of the allegations against defendant, DAVID BUTTARS, in each of the charges addressed in Counts 1, 3, 5 and 7, is that he, directly or indirectly, made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Under this allegation, it is not necessary for the State to prove that the individual investors believed the statements to be true, nor that they relied upon the statements in their decision making process, so long as the statements made were such that a reasonable person in similar circumstances would have relied upon the statements in making an investment decision.

INSTRUCTION NO. 47

You are instructed that opinions concerning what will happen in the future are not statements of fact. Even if the Defendant(s) had an honest belief that an event would occur in the future or made a good faith effort to bring about the future event, he is still not permitted to make a willful misrepresentation or omission of a material fact.

Therefore, to the extent that there exists any such belief that the plan will succeed, that belief does not constitute a defense to the crimes alleged in this case if you find that the Defendant has engaged in willful material misstatements or omissions.

INSTRUCTION NO. 52

You are instructed that the following words have the following meanings:

Count 9, Pattern of Unlawful Activity, includes the terms "intentionally", "knowingly" and "willfully". Each of these terms has a specific definition under the law, as follows:

A person engages in conduct "Intentionally" or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct "Knowingly" or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The definition for willfully is contained in Instructions No. 41 and 42.