STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

In the Matter of: DARYL W. SUTTON dba THE BLON PROJECT, LLC, an Individual, Respondent.	DCBS Case No. S-23-0001 OAH Case No. 2023-ABC-05939 FINAL ORDER REINSTATING CIVIL PENALTIES

HISTORY OF THE CASE

On January 12, 2023, the Department of Consumer and Business Services, Division of Financial Regulation ("Department"), issued a Proposed Order Reinstating Civil Penalties to Darryl W. Sutton dba The Blon Project, LLC. On January 31, 2023, Mr. Sutton requested a hearing.

On April 27, 2023, the Department referred the matter to the Office of Administrative Hearings ("OAH") for the scheduling of a contested case hearing. The OAH assigned Senior Administrative Law Judge ("ALJ") Jennifer H. Rackstraw to preside over the matter and scheduled a prehearing conference ("PHC") to convene by telephone on September 28, 2023.

On July 31, 2023, Mr. Sutton requested a postponement of the PHC. On August 1, 2023, ALJ Rackstraw requested additional information from Mr. Sutton to justify the postponement request. Mr. Sutton provided a response on August 3, 2023, and ALJ Rackstraw allowed the Department until August 8, 2023, to file any objections to the postponement request. The Department filed its objections on August 8, 2023. On August 18, 2023, ALJ Rackstraw denied Mr. Sutton's postponement request.

Due to ALJ Rackstraw's unavailability, Presiding ALJ Monica A. Whitaker

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

conducted the telephone PHC on September 28, 2023. Mr. Sutton represented himself. Assistant Attorney General (AAG) Nathan Karman represented the Department, with Anthony J. Estrada also appearing from the Department. The purpose of the PHC was to identify the issues for hearing, schedule the hearing, and set related deadlines. During the PHC, AAG Karman expressed the Department's intent to file a Motion for Summary Determination ("MSD"). Presiding ALJ Whitaker set the deadline for the MSD, scheduled the matter for WebEx video conference hearing on February 8, 2024, and reassigned the matter to Senior ALJ Bradley A. Schmidt.

On November 9, 2023, the Department filed its MSD. ALJ Schmidt gave Mr. Sutton until November 27, 2023, to file a response.

On November 27, 2023, attorney Robert Parker entered his appearance on Mr. Sutton's behalf and requested an extension on the MSD response deadline. ALJ Schmidt granted the request and allowed Mr. Sutton until December 4, 2023, to file a response.

Mr. Sutton filed a Memorandum in Opposition to the MSD on December 4, 2023. Thereafter, ALJ Schmidt took the matter under advisement to issue a ruling on the MSD.

ISSUES

1. Whether there are any genuine issues as to any material facts and, if not, whether the Department is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether an $80,000 civil penalty is immediately due and payable to the Department by Mr. Sutton. ORS 59.055; ORS 59.135; ORS 59.995; ORS 183.417(3)(a); OAR 137-003-0665(5).

DOCUMENTS CONSIDERED

For purposes of the issuance of the ruling and proposed order, the ALJ considered the following:

- The MSD filed by the Department with its supporting documents: the Declaration of Nathan Karman and attached Exhibit (an email thread regarding the MSD); the

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

Declaration of Anthony Estrada and its attached Exhibits 1 through 5;[1]

- Respondent's Memorandum in Opposition to Agency's MSD; and
- The pleadings, including the January 12, 2023, Proposed Order Reinstating Civil Penalties and Mr. Sutton's email request for hearing sent January 31, 2023.

STATEMENT OF UNDISPUTED FACTS

1. On February 24, 2020, Mr. Sutton and the Department entered into an Order to Cease and Desist, Order Denying Use of Exemptions, Order Assessing Civil Penalties, and Consent to Entry of Order ("Consent Order") related to alleged violations of Oregon Securities Law, ORS chapter 59. (Estrada Dec. at 1; Ex. 1 at 1, 5-8.) According to the Consent Order, Mr. Sutton, "without admitting or denying the Director's findings of fact or conclusions of law," consented to the conditions imposed by the Consent Order to settle the matter. (Ex. 1 at 1.) The Consent Order contained the following terms:

> Now therefore, the Director [of the Department] issues the following ORDERS:
>
> * * * * *
>
> As Authorized by ORS 59.995, the Director hereby ORDERS that Sutton pay a CIVIL PENALTY totaling $80,000 as follows:
>
> A. $60,000 for violating ORS 59.135(2);
>
> B. $10,000 for violating ORS 59.135(2); and
>
> C. $10,000 for violating ORS 59.055.
>
> [] The Director hereby suspends payment of $80,000 of the CIVIL PENALTY for a period of three years, provided Sutton:
>
> A. Pays $48,000 in restitution to the [alleged victims] * * * within one year from the effective date of this Order, and provides the

[1] The supporting documents for the MSD included two marked "Exhibit 1." Hereinafter, any reference to Exhibit 1 refers only to that attached to the Declaration of Anthony Estrada (the Consent Order issued February 24, 2020).

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

Division with documentation of such payments within that timeframe; and

B. Does not violate the Oregon Securities Law within the three-year time period.

[] The suspended CIVIL PENALTY ($80,000) will be waived three years from the effective date of this Order, provided Sutton has complied with the foregoing Order terms. The Director reserves the right to immediately assess and collect the suspended civil penalty upon a determination that Sutton has violated any term of this Order.

(*Id.* at 7-8.)

2. Mr. Sutton initialed each page of the Consent Order. (Ex. 1 at 1-9.) By his signature, Mr. Sutton certified that he read and understood the contents of the Consent Order, that he voluntarily agreed to its entry, that he understood "that the Director reserves the right to take further actions against me to enforce this Order," and that he would abide by the terms of the order. (*Id.* at 10.)

3. On approximately January 26, 2021, Mr. Sutton informed the Department that he would be unable to meet the Consent Order's deadline for payment of restitution. (Estrada Dec. at 1; Ex. 2 at 1.)

4. On February 4, 2021, Mr. Sutton and the Department entered into an Addendum to the Consent Order, which stated that Mr. Sutton "shall pay $48,000 in restitution to the [alleged victims] by February 24, 2022." (Ex. 2 at 1.) Per the February 4, 2021, Addendum, all other terms of the original Consent Order remained in effect. (*Id.*) As with the original Consent Order, Mr. Sutton certified by his signature that he fully understood the contents of the Addendum, that he voluntarily consented to its entry, and that he would fully comply with its terms. (*Id.* at 2.)

5. In approximately January 2022, Mr. Sutton informed the Department that he

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

would be unable to meet the Addendum's deadline for payment of restitution. (Estrada Dec. at 1.) The Department agreed to again push back the restitution deadline as follows:

1. $5,000 will be due by March 4, 2022;
2. $5,000 will be due by April 4, 2022;
3. $38,000 will be due by October 4, 2022.

(Ex. 3 at 4.)

6. On or before March 4, 2022, Mr. Sutton paid the first restitution installment of $5,000 in compliance with the newly-agreed deadlines. (Estrada Dec. at 1; Ex. 4 at 2.)

7. On March 15, 2022, Mr. Sutton and the Department entered into a Second Addendum to the Consent Order, which formally incorporated the new restitution deadlines into the Consent Order. (Estrada Dec. at 1; Ex. 3 at 1-2.) Per the Second Addendum, all other terms of the original Consent Order remained in effect. (Ex. 3 at 2.) The Second Addendum also stated, "The Director reserves the right to immediately assess and collect the suspended civil penalty upon a determination that [Mr. Sutton] has violated any term of this Second Addendum." (*Id.*) As with the Consent Order and previous Addendum, Mr. Sutton certified by his signature that he fully understood the contents of the Second Addendum, that he voluntarily consented to its entry, and that he would fully comply with its terms. (*Id.* at 3.)

8. On or before April 4, 2022, Mr. Sutton paid the second $5,000 restitution installment in compliance with the deadlines in the Second Addendum. (Estrada Dec. at 1; Ex. 4 at 2.)

9. On approximately September 22, 2022, Mr. Sutton requested an extension to the October 4, 2022, deadline for the remaining balance of restitution. (Estrada Dec. at 1; Ex. 4 at 2.)

10. On September 29, 2022, Mr. Sutton and the Department entered into a Third Addendum to the Consent Order, which stated:

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

> The Director has agreed to extend [Mr. Sutton's] deadline to make the final, $38,000 restitution payment to January 3, 2023. [Mr. Sutton] shall provide the Director with documentation of the payment by the deadline. All other terms of the Consent Order shall remain in effect. The parties agree that there will be no further addendums to the Consent Order.
>
> The Director reserves the right to immediately assess and collect the suspended civil penalty upon a determination that [Mr. Sutton] has violated any term of this Third Addendum.

(Ex. 4 at 2.)

By his signature, Mr. Sutton again certified that that he fully understood the contents of the Third Addendum, that he voluntarily consented to its entry, and that he would fully comply with its terms. (*Id.* at 3.)

11. On December 30, 2022, Mr. Sutton emailed Anthony Estrada, the Lead Enforcement Officer for the Department's Division of Financial Regulation. (Estrada Dec. at 1, 2; Ex. 5 at 2.) In his email, Mr. Sutton stated that he would be unable to meet the agreed January 3, 2023, deadline for the outstanding $38,000 restitution balance and requested additional time. (Ex. 5 at 2.) In an email response on January 5, 2023, Mr. Estrada informed Mr. Sutton that, pursuant to the Third Addendum, no additional extensions would be granted. (Ex. 5 at 1.) Mr. Sutton responded the same day by email stating, in part:

> I do understand that there will be no more extensions, as per the language in the third addendum. * * * I do look forward to bringing this matter current and paid-in-full as soon as I possibly can—along with any penalties that will be assessed pursuant to our original Agreement, as a result of my missed January 3rd deadline.
>
> As always, I will send you copies of the cashier's checks once all of the

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

restitution payments have been made.

Again, my apologies for missing the deadline.

(Ex. 5 at 1.)

12. On January 12, 2023, the Department issued to Mr. Sutton a Proposed Order Reinstating Civil Penalties, which imposed $80,000 in civil penalties based upon Mr. Sutton's failure to pay restitution as required by the Consent Order and subsequent Addendums. (MSD at 4; Proposed Order Reinstating Civil Penalties at 3.) Mr. Sutton appealed this Proposed Order Reinstating Civil Penalties on January 31, 2023, and his appeal is the subject of the present matter before the OAH. (Email Request for Hearing at 1.)

13. As of November 9, 2023, Mr. Sutton had paid no civil penalties to the Department. (Estrada Dec. at 2.)

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material facts and the Department is entitled to a favorable ruling as a matter of law.

2. An $80,000 civil penalty is immediately due and payable to the Department by Mr. Sutton.

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

In accordance with the above, administrative agencies cannot employ a motion for summary determination to enforce a sanction that is discretionary, not mandatory, under the agency's rules. *King v. Dep't of Pub. Safety Standards and Training*, 289 Or App 314 (2017). *King* involved the revocation of a corrections officer's certification under an administrative rule that gave the Oregon Department of Public Safety Standards and Training (DPSST) discretion to revoke an individual's corrections certification but which did not mandate any particular penalty. *Id.* at 316. The Oregon Court of Appeals explained the impropriety of affirming the revocation by summary determination as follows:

> Applying the governing framework of statutes and rules to [the] facts * * * does not, as a matter of law, require DPSST to revoke petitioner's certification. DPSST's rules allow it the discretion to revoke petitioner's certification; however, whether it should revoke the certification is not an appropriate determination on summary determination.
>
> The question whether DPSST *should* revoke petitioner's certification is not a question that demands a particular result as a matter of law.

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

> Whether DPSST should revoke petitioner's certification is a question of discretion * * *. Under DPSST's rules, [the] facts do not require DPSST to revoke petitioner's certification.
>
> * * * * *
>
> Summary determination is not a substitute for a contested case hearing when an agency's rules require the agency to make a discretionary decision.

Id. at 321-22.

Stated succinctly, where the facts of the case do not mandate a particular result, the moving party cannot prevail on a motion for summary determination.

The Legal Status of Consent Orders

Unlike the revocation of certification at issue in *King*, the present matter involves the reinstatement of penalties suspended pursuant to a consent order. Consent orders are informal settlements of contested cases made by consent of the parties. ORS 183.417(3)(a); OAR 137-003-0665(5); *see also* DECREE, *Black's Law Dictionary* (11th ed 2019) (defining "consent order" as synonymous with "consent decree"). ORS 183.417 states, "Unless prohibited by law, informal disposition may be made of any contested case by * * * consent order * * *." Similarly, OAR 137-003-0510 permits the resolution of contested cases by means of consent orders and states, in relevant part:

> (3) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default.
>
> (4) A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency or administrative law judge shall incorporate the disposition into a final order. A copy of any final order incorporating an agreement must be delivered or mailed to each party and, if a party is represented by an attorney, to the party's attorney.

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

Regarding consent orders entered at the trial court level, the Oregon Supreme Court stated, "a judgment or decree entered by consent of the parties is in the nature of a contract, approved by the court, and cannot be set aside except on grounds adequate to justify the rescission of a contract." *Nieminen v. Pitzer*, 281 Or 53, 57 (1978). Similarly, in the federal administrative law context, the United States Supreme Court explained that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation." *U.S. v. ITT Continental Baking Co.*, 420 US 223, 236-37 (1975).

Discussion

In the Order on appeal, the Department seeks to impose an $80,000 civil penalty upon Mr. Sutton for failing to meet the final restitution deadline established by the September 29, 2022, Third Addendum to the February 24, 2020, Consent Order. Mr. Sutton does not dispute that he failed to meet this deadline. He also does not dispute the Department's authority to impose a civil penalty under ORS 59.995, which reads as follows, in relevant part:

> (1)(a) * * * [I]n addition to all other penalties and enforcement provisions provided by law, any person who violates or who procures, aids or abets the violation of ORS 59.005 to 59.505, 59.710 to 59.830, 59.991 and 59.995 [of the Oregon Securities Law] or any rule or order of the Director of the Department of Consumer and Business Services shall be subject to a penalty of not more than $20,000 for every violation, which shall be paid to the General Fund of the State Treasury.
>
> (b) Notwithstanding paragraph (a) of this subsection, any person who violates or who procures, aids or abets the violation of ORS 59.485 or of any rule adopted by the director for administration of ORS 59.480 to 59.505 shall be subject to a penalty of not more than $1,000 for every violation, which shall be paid to the General Fund of the State Treasury.
>
> (2) Every violation described in subsection (1)(a) of this section is a separate offense and, in the case of a continuing violation, each day's continuance is a separate violation, but the maximum penalty for any

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

continuing violation shall not exceed $100,000.

Mr. Sutton nevertheless contends that, in accordance with *King*, the propriety of a discretionary penalty under ORS 59.995 must be determined at hearing, not by means of an MSD.

The existence of the Consent Order distinguishes this matter from the holding in *King.* In the Consent Order (and in the subsequent Addendums), Mr. Sutton agreed that the Department could immediately impose the $80,000 civil penalty upon his failure to meet the Consent Order's conditions. In his email to the Department confirming his inability to meet the final agreed deadline within the Third Addendum, Mr. Sutton confirmed his understanding that, pursuant to the terms of the Consent Order and Third Addendum, the civil penalty was an agreed-upon consequence of his failure.

Given the agreement of the parties, and unlike the situation presented in *King*, the ALJ here has no authority to alter the contracted civil penalty absent a basis for rescission, such as illegality or fraud. By freely agreeing to the Department's right to impose the civil penalty upon his failure to meet the Consent Order's restitution requirement, Mr. Sutton removed the penalty from its statutory scheme and made it a matter of contract. Although "[s]ummary determination is not a substitute for a contested case hearing *when an agency's rules require* the agency to make a discretionary decision," it is a different matter when a contract's terms, not the agency's rules, empower the discretion at issue. *King*, 289 Or App at 322 (emphasis added). As such, without a basis for rescission (and none has been alleged), the ALJ has no basis to interfere with the Department's exercise of an agreed-upon remedy for Mr. Sutton's failure to meet his side of the agreement.

In short, Mr. Sutton's agreement to the Department's discretion over the civil penalty removes this forum's power to render judgment over that discretion. Because the imposition of the $80,000 civil penalty is not an area in which this forum may evaluate the Department's exercise of discretion, the Department is entitled to a favorable ruling as a

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

matter of law.

EXCEPTIONS

Under ORS 183.460, a party adversely affected by a proposed order has the opportunity to file exceptions. Likewise, under OAR 137-003-0645(5), a proposed order shall include a statement that the party may file exceptions and shall include information as to where and when written exceptions must be filed to be considered by the agency. The Proposed Order in this case provided that the parties had the right to file written exceptions and written argument within 30 days from the date that the order was sent to the parties by delivering the same to the Division. On January 9, 2024, OAH served the Proposed Order on the parties, including by electronic mail to Mr. Sutton and Mr. Parker. Accordingly, Mr. Sutton had until February 8, 2024 to file written exceptions. Neither Mr. Sutton nor the Department filed written exceptions within the applicable timeframe.

ORDERS

Now, therefore, the Department issues the following Order:

The January 12, 2023, Proposed Order Reinstating Civil Penalties is AFFIRMED. The $80,000 civil penalty assessed therein is immediately due and payable to the Department of Consumer and Business Services, Division of Financial Regulation.

SO ORDERED this 19th day of March, 2024.

ANDREW STOLFI, Director
Department of Consumer and Business Services

/s/ Dorothy Bean
Dorothy Bean Chief of Enforcement
Division of Financial Regulation

[The remainder of this page intentionally left blank.]

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

NOTICE OF RIGHT TO JUDICIAL APPEAL

You are entitled to judicial review of this order in accordance with ORS 59.305 and ORS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon, within 60 days from the date this order is served.

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387