

Jeffrey Buckner (4546)  
Assistant Attorney General  
Mark L. Shurtleff (4666)  
Utah Attorney General  
Utah Attorney General's Office  
Commercial Enforcement Division  
160 East 300 South  
P. O. Box 140872  
Salt Lake City, UT 84111-0872  
Telephone: (801) 366-0310

---

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

---

In the Matter of the Registration Statement of:

**REPLY SUPPORTING MOTION TO  
STRIKE AND FOR JUDGMENT ON  
THE PLEADINGS**

**LINKNET, INC.**

**Docket No.: SD-01-0145**

Respondent.

---

**STATEMENT OF RELEVANT FACTS**

On January 22, 2002, the Division moved to strike paragraphs 1-30 of LinkNet's Response and, by separate motion, also moved for judgment on the pleadings. On February 4, 2002, LinkNet opposed both motions in a single pleading consolidating the issues. Although the issues in both motions are distinct, the Division replies to the consolidated opposition as follows:

**I This Tribunal Should Strike Paragraphs 1-30 And The Equitable Defenses Of LinkNet's Response Because It Lacks Subject Matter Jurisdiction.**

LinkNet concedes that Paragraphs 19-30 of its Answer allege tortious misconduct by the Division. Because it does not dispute them, LinkNet also concedes that all of its affirmative defenses sound in tort or equity. However, LinkNet claims the allegations of tortious misconduct are not counterclaims, but are equitable defenses necessary to a determination of the public interest and, for this reason, that the Division misunderstands their relevance. LinkNet's arguments are without merit for the following reasons.

In determining whether Paragraphs 19-30 in LinkNet's Response are defenses or counterclaim, this tribunal must decide whether the allegations are allowed by statute or rule, whether they require a responsive pleading from the Division, and what the effect would be of failure to file a response. It is, of course, axiomatic that courts construe pleadings according to their substance. See Bonneville Billing & Collection v. Torres, 2000 UT App. 338 ¶ 4, 15 P.3d 112, 113-14 (court construes motion to reconsider according to its substance regardless of caption). The fact that LinkNet does not denominate its Response a counterclaim is not necessarily determinative. "If it states a cause of action it matters not that it was not designated as a counter-claim. Its character will be determined by the court by the facts set out in the pleading." Harman v. Yeager, 103 Utah 208, 134 P.2d 695, 696 (1943)(emphasis added).

**A. LinkNet's "Equitable Defenses" Are In A Form Not Permitted By Statute Or Rule.**

In formal adjudicative proceedings, the administrative rules require a party to file a written response to agency action. Utah Admin. Code R151-46b-7(a). By statute, a response consists of a statement of the facts, a statement of the relief requested, and a statement of the reasons why the requested relief should be granted. Utah Code Ann. § 63-46b-6(1)(c)-(e). Beyond these general guidelines, the Utah Administrative Procedures Act (UAPA) and the relevant administrative rule are silent on what form a response should take. Responses in the form of a formal answer that meet the substance of the statute are certainly permitted. Informal responses by letter are even permitted since many respondents are not represented by counsel in administrative proceedings. The pleading requirements in administrative proceedings are, therefore, quite simple. Indeed, the pleading requirements are even more streamlined than they are under Utah Rules of Civil Procedure. Utah R. Civ. P. 8(1)(e)(technical forms of pleading abolished). Neither UAPA nor administrative rule address the role or form of “defenses.”

In administrative proceedings before the agency, the Utah Rules of Civil Procedure, are deemed persuasive, but are not controlling authority. Utah Admin. Code R151-46b-5(3). Rule 8, to the extent it applies, requires a party to state its defenses in short and plain terms, and to admit or deny the averments in a pleading. Utah R. Civ. P.8(b). Denials must meet the substance of the averments. *Id.* Some defenses must stated affirmatively.

In this case, LinkNet filed a formal response to the petition and asserted nine affirmative defenses. LinkNet denied the allegations in petition in paragraphs 31-41 of its response. Those

denials correspond to the eleven paragraphs of the Division's petition, fairly meet the substance of the averments, and are consistent with the streamlined, non-technical, short form permitted by rule and statute. LinkNet affirmatively denied that it did not timely file a notice of sale in Paragraph 36, but provided no contrary statement of facts in its denials that show what the true facts are or why the allegation in the petition is not true. LinkNet's affirmative defenses follow its denials and, as ground for relief, asked that the petition be dismissed. The affirmative defenses relate to the tortious misconduct alleged in Paragraphs 19-30.<sup>1</sup> The allegations of tortious misconduct in paragraphs 19-30 do not meet the substance of the statute governing responsive pleadings in administrative proceedings and the procedural rule governing defenses and denials in civil cases because they do not fairly meet the substance of the averments in the pleading. Paragraphs 19-30 allege tortious misconduct. They precede the defenses denominated as defenses. None of the allegations of tortious misconduct in Paragraphs 19-30 explain why the notice was timely filed.<sup>2</sup>

Since LinkNet's proper response is limited to a pleading that either admits or denies the allegations in the petition, an explanation of what the true facts are, and the only defense allowed

---

<sup>1</sup>Because LinkNet does not address whether the affirmative defenses in its response are available in this proceeding, the Division will not address them again.

<sup>2</sup>Even the allegation of a rescission offer in Paragraphs 17-18 is not a valid defense in an administrative proceeding to whether the notice was timely filed. A rescission offer is a valid defense to a private right of action in a civil proceeding. Utah Code Ann. § 61-1-22(7). Besides being irrelevant to this proceeding, LinkNet has not come forward with any proof of a rescission in its response to the motion for judgment on the pleadings.

by statute is a statement of the reasons why it is entitled relief based on its version the facts,<sup>3</sup> its response does not meet the form permitted by statute and relevant rule.

**B. LinkNet’s “Equitable Defenses” Are, In Substance, Not Permitted By Statute Or Administrative Rule Because They Are Counterclaims.**

In contrast to the simple response permitted by statute and administrative rule and the short form of denials and defenses permitted by procedural rule, Rule 8(a) defines a pleading, whether an original claim, counterclaim, cross-claim or third-party claim, as a “(1) short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled).” Allegations in pleadings that are not answered are deemed admitted. Utah R. Civ. P. 8(d) (averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied).

In this case, LinkNet alleges the Division engaged in tortious misconduct and, as a proximate result, caused harm. LinkNet claims the Division itself violated state securities laws, interfered with business relations, defamed LinkNet, and engaged in selective prosecution. The allegations precede the denials and defenses denominated “affirmative defenses.” LinkNet

---

<sup>3</sup>By way of example, a defendant’s defense to a petition for civil enforcement of an administrative proceeding include an attack on the jurisdiction of an agency to issue an order, that the order does not apply to the defendant, that the defendant did not violate the order, and that the defendant violated the order, but has subsequently complied. Utah Code Ann. § 63-46b-19(3).

claims that these allegations are not counterclaims, but are “equitable defenses.” LinkNet’s argument is disingenuous.

The fact that LinkNet does not denominate them as counterclaims or seek monetary damages is not determinative to whether they are counterclaims. The issue is whether they state a cause of action. Harman, 134 P.2d at 696. Because the allegations of tortious misconduct state a cause of action, they are a counterclaim. Id. at 696. Left unanswered, the allegations would be deemed admitted. This court, therefore, can look to the substance of the allegations and designate them for what they are, namely, counterclaims. Utah R. Civ. P. 8(c).

Neither administrative rule nor statute allow counterclaims in an administrative proceeding. LinkNet cites no authority that allows it to counterclaim against the Division in this forum and the Division is not aware of any. Because LinkNet alleges the Division engaged in tortious misconduct and there is no authority for LinkNet to assert a counterclaim in this forum, the “equitable defenses” are not permitted.

**C. This Court Has No Jurisdiction Over LinkNet’s Counterclaims.**

As stated in the Division’s motion to strike, this court has no jurisdiction over LinkNet’s counterclaims. Administrative proceedings are courts of limited jurisdiction, authorized to interpret only those laws they are empowered to administer. They are not courts of general jurisdiction. They are not courts of equity. They only have authority to decide violations of

securities law. They have no authority in enforcing or expertise in determining tortious misconduct or equitable claims.

LinkNet seems to concede the jurisdictional obstacle by saying it is not trying to circumvent a statutory mandate in alleging tortious misconduct, but fails to explain how the court could consider the tort claims even equitable defenses if it has no jurisdiction. To do consider them, would avoid the legislative mandate. If this court lacks jurisdiction, it cannot consider them. The purpose for which LinkNet asserts them makes no difference.

When a court lacks jurisdiction, the jurisdictional issue must be resolved first by filing the appropriate motion before further pleading is permitted. Utah Civ. P. R. 12(b).

LinkNet cites no authority that shows this tribunal has jurisdiction to decide the legal or equitable claims. LinkNet cites no authority that permits it to allege tortious misconduct against the Division in this forum. Because this tribunal lacks jurisdiction, Paragraphs 19-30 of LinkNet's response as well as the affirmative defenses that relate to those allegations should be dismissed for lack of jurisdiction.

**D. This Court Should Strike LinkNet's So-Called Equitable Defenses Are Irrelevant.**

In addition to dismissing Paragraphs 19-30 and the affirmative defenses for lack of jurisdiction, parties can also strike any immaterial or impertinent defense. Utah R. Civ. P. 12(f).

In this case, even if this court had jurisdiction to consider the allegations of tortious misconduct, the allegations should be stricken as irrelevant. The "equitable defenses" are

irrelevant because they allege tortious misconduct as a defense to a violation of statute. The “equitable defenses” would be relevant only if, as the basis for its petition, the Division had alleged tortious wrongdoing by LinkNet. The Division has not done so. The Division alleged that LinkNet violated the Utah securities laws by failure to timely file a notice of sale.<sup>4</sup> Tortious misconduct by the Division is not a defense to whether LinkNet timely filed or whether public policy should allow untimely filing. Whether the Division is comparatively more at fault than LinkNet for subsequent behavior is irrelevant to whether LinkNet timely filed its notice of sale. Applying a tort defense to a violation of statute in this case is like applying a tort defense to a contract claim. LinkNet’s “equitable defenses” mix “apples and oranges.”

For these reasons, the so-called equitable defenses are irrelevant and should be stricken.

## **II The Facts In The Division’s Motion Are Deemed Admitted Because They Are Not Properly Opposed.**

LinkNet opposes judgment on the pleadings on grounds that, in its response to the petition, it expressly disputed whether the notice of sale was timely filed and discovery has not been completed. LinkNet’s arguments are without merit for the following reasons.

A motion for judgment on the pleadings is treated as a motion for summary judgment under Rule 56 when matters outside the pleadings are presented to the Court. Utah R. Civ. P. 12(c). In order to properly oppose summary judgment, a party must identify and specifically

---

<sup>4</sup>Moreover, the allegations of tortious misconduct are irrelevant because they did not occur until well after the violation. Thus, the allegations are not defenses to the violation of the statute, but are counterclaims based on separate and subsequent activity.

controvert those facts in the moving party's statement of facts in numbered paragraphs that correspond to the numbered paragraphs of the moving party's statement of facts. Utah R. Jud. Admin. Rule 4-501(2)(B). The opposing party cannot rely on averments in its pleading, but must set forth specific facts, by affidavit or record cite, that show why there is a genuine issue of fact. Utah R. Civ. P. 56(e). Facts that are not properly opposed are deemed admitted for purpose of summary judgment. Id.

In this case, LinkNet did not properly oppose the motion for judgment on the pleadings. LinkNet failed to controvert the Division's statement of facts in numbered paragraphs that correspond to the Division's statement of facts. Instead, LinkNet consolidated its opposition to both motions and merely relied on the denial in its pleadings. LinkNet cannot rely on the denials or averments in its pleadings. LinkNet must come forward with specific facts that would be admissible in court to show why there is a genuine issue of fact for trial. LinkNet failed to show there is a genuine issue of material fact for trial. LinkNet failed to set forth a contrary version of facts, by affidavit or cite to the record, or identify what facts, if any, it opposes.

At issue is an inconsistency between LinkNet's averments about the when the sale took place in its response to the petition and when LinkNet said the sale took place in documents filed with the Division. LinkNet alone can explain the inconsistency. No amount of additional discovery from the Division will help reconcile the inconsistency. LinkNet failed to reconcile the

discrepancy and explain why additional discovery is necessary by a Rule 56(f) affidavit or otherwise.

Moreover, the Division has already provided a copy of the relevant, non privileged documents in its possession as exhibits to the motion to strike. Those documents show that LinkNet identified the date of the first sale as October 29, 1999. LinkNet said there was only one sale and never responded to the Division's request for additional information. In its response to the petition, LinkNet claimed there were at least two sales and that the date of the first relevant sale was an unspecified date in March 2000. LinkNet failed to reconcile the inconsistency between the averments in its response and the documents filed with the Division or explain why the Division should not be able to rely on the notice of sale. LinkNet cannot defeat summary judgment by relying on an unsupported averment in its response.

Because LinkNet failed to properly oppose the statement of facts in the Division's motion for judgment on the pleadings and additional discovery would be to no avail, the facts are deemed admitted.

### **III The Division Is Entitled To Judgment As A Matter Of Law.**

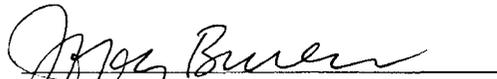
As stated in the Division's motion for judgment on the pleadings, the Securities Act of 1933 gives the Division authority to require the filing of a notice of sale based on Section 18(c)(2)(A) of the 1933 Securities Act. The Securities Act of 1933 also gives the Division power

to suspend the sale of securities for failure to file. Utah securities law requires the filing of a notice of sale. Utah Code Ann. § 61-1-15.5; see also Utah Admin. Code R164-15-2.

In this case, LinkNet's first sale of a federal covered security in Utah was in October 1999. LinkNet did not submit a notice until March 8, 2000 – nearly five months after the first sale. Because LinkNet did not file within fifteen days of sale, the notice submitted by LinkNet violated Utah Code Ann. § 61-1-15.5 of the Act and Utah Admin Code R164-15-2. Because the Division has authority to require filing and suspend a sale for failure to file, the Director should issue a stop order, suspending the offer and sale of LinkNet securities.

Respectfully submitted this February 15, 2002.

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL

  
Jeffrey Buckner  
Assistant Attorney General

**MAILING CERTIFICATE**

I hereby certify that I have this day served a copy of the foregoing **Reply Supporting Motion To Strike And For Judgment On The Pleadings** by mailing a copy, with postage prepaid, to Attorney Max D. Wheeler, Snow Christensen & Martineau, 10 Exchange Place, Eleventh Floor, P. O. Box 45000, Salt Lake City, UT 84145.

Dated at Salt Lake City, Utah this 16<sup>th</sup> day of February, 2002.

A handwritten signature in cursive script, appearing to read "Dana Jones", is written over a horizontal line.

SIGNATURE