

August 18, 2006
James L. Driessen, Bar #09473
Driessen Law
305 N 1130 E,
Lindon, Utah
Telephone: (801)796-6924
Attorney for Respondent, Elizabeth Ward

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

In the Matter of:

Jeffery Lane Mowen;
and Elizabeth Mowen, aka Elizabeth Ward

MOTION TO DISMISS AS TO
ELIZABETH WARD AND REQUEST FOR A
HEARING ON THE MOTION

Docket no. SD-06-0037
Docket no. SD-06-0038

Director: Wayne Klein

Respondent Elizabeth Ward, by and through counsel, files this motion to the Director as presiding officer, through the authority of U.C.A. 1953 § 63-46b-1 (4)(b), which motion is at a time prior to the beginning of an adjudicative proceeding or during an adjudicative proceeding, requesting that the "Agency Action" naming the Respondent shall be dismissed for failure to state a claim upon which relief can be granted. A memorandum of points and authorities is attached hereto. Respondent also request an opportunity for oral arguments on the motion.

Dated this 18th day of August, 2006
Driessen Law

By: James L. Driessen

James L. Driessen
Attorney for Defendant Elizabeth Ward

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, by first class mail, a true and correct copy of the forgoing

Motion to Dismiss to the following this 18th day of August, 2006.

7 Memo

Or, (check box and initial if appropriate)

Hand delivered _____

Jeff Buckner
Assistant Attorney General
160 East 300 South
PO Box 140872
Salt Lake City, Utah 84114-0872

Hand delivered _____

Pam Radzinski
Utah Dept. of Commerce
Securities Division
P.O. BOX 146760
Salt Lake City, Utah 84114-6760

Hand delivered J.L.M.

Jeffery L. Mowen

SIGNED,

James L. Driessen

James L. Driessen

August 18, 2006
James L. Driessen, Bar #09473
Driessen Law
305 N 1130 E,
Lindon, Utah
Telephone: (801)796-6924
Attorney for Respondent, Elizabeth Ward

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

In the Matter of:)	
)	
)	MEMORANDUM OF POINTS AND
Jeffery Lane Mowen;)	AUTHORITIES ON MOTION TO
and Elizabeth Mowen, aka Elizabeth Ward)	DISMISS
)	
)	Docket no. SD-06-0037
)	Docket no. SD-06-0038
)	
)	Director: Wayne Klein

RULES

Dismissal of an action, while a severe remedy, is the only possible one in this case, because, while U.C.A. 1953 §63-46b-1 (4)(b) does invoke Utah Rules of Civil Procedure 12(b), it does not invoke 12(e), which is a motion for a more definite statement. Therefore, there remains a jurisdictional question when the State in an administrative action, such as this case before us, seeks to use the *tactics* of bringing in the spouse of an accused, without any substantial basis for connecting her to the conduct in question.

Utah Code Section 63-46b-1 (4)(b) invokes the Utah Rules of Civil Procedure for motions of summary judgment or 12(b) type dismissals. In considering a motion to dismiss for failure to state a claim, the Director must accept (assume) all facts alleged in the complaint to be true and make all reasonable inferences in favor of the plaintiff. The law and facts as they existed at the time of the events that give rise to a suit governs, for purposes of determining whether the allegations in the complaint state a cause of action. Rules Civ.Proc., Rule 12(b)(6). See e.g. *Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226 (UT 2004), 514 Utah Adv. Rep. 10, 2004 UT 101.

The question, then, is whether the facts alleged in the complaint, even if true, fail to support the claim. See e.g. *Sony Electronics, Inc. v. Reber*, 103 P.3d 186 (UT App 2004), 513 Utah Adv. Rep. 11, 2004 UT App 420. The proper focus on a motion to dismiss for failure to state claim is not whether one party was on notice of unsubstantiated allegations that go well beyond pleadings, but on what can be reasonably inferred from pleadings themselves. Rules Civ.Proc., Rule 12(b)(6). *Wright v. University of Utah*, 876 P.2d 380 (UT App 1994).

“Reasonable inference” then is at the heart of the deficiency with the present Agency Action. Even taking into account the O.S.C. document on its face and assuming all allegations as true, the State fails to state any conduct by the Respondent that would amount to the elements for any of the claims as against her or even amount to an inference of all of those elements.

The elements of a § 61-1-1 violation are:

1. in connection with the offer, sale, or purchase of any security
2. directly or indirectly
 - a. employ any device, scheme, or artifice to defraud; or
 - b. make any untrue statement of a material fact; or

- c. 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
- d. engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

ANALYSIS

The State has failed to allege any conduct from which it could reasonably be inferred that representations made by Respondent were in connection with the offer, sale, or purchase of any security.

Turning to the allegations in the O.S.C., rather than blindly infer simply because a claim is made, let us actually turn to the “conduct” as alleged in the O.S.C., and list everywhere the Respondent’s name is mentioned in the O.S.C.:

1. General Allegations

- a. “It appears to the Director of the Utah Division of Securities (Director) that Jeffery Lane Mowen and Elizabeth Mwen, aka Elizabeth Ward (Respondents) may have engaged in action and practices that violate the Utah Uniform Securities Act, Utah Code Ann. § 61-1-1, et. Seq. (the Act). Page 1, O.S.C., (29 June, 2006).
- b. “Elizabeth Mowen, aka Elizabeth Ward (Elizabeth) resides in Utah County, Utah.” Page 2, O.S.C. (29 June, 2006).
- c. “In July 2005, Mowen and Elizabeth solicited \$200,000 in Utah from Washington residents, J.C. and C.W., husband and wife. Mowen told the investors he would invest their money in currency, international markets, and

stock, using his connections in international banking.” Page 2, O.S.C. (29 June, 2006).

- d. “J.C. and C.W. had known Mowen and his wife, Elizabeth since 2000 because they all sold products for USANA Health Sciences, Inc. a Utah based, multi-level, network marketing company.” Page 2, O.S.C. (29 June, 2006).
- e. “In approximately April 2005, Elizabeth told C.W.. she and Mowen would be selling for a new multi-level, network marketing entity, Isagenix International. C.W. then became involved in Isagenix as part of Elizabeth’s downline at Isagenix.” Page 2, O.S.C. (29 June, 2006).
- f. “During a telephone conversation with Elizabeth, C.W. told Elizabeth she was purchasing real property next to her home, but would not have enough money to close unless the value of the stock in her IRA increased. Closing was scheduled for the fall of 2005.” Page 2, O.S.C. (29 June, 2006).
- g. “During these and many other telephone conversation[s] with Elizabeth, Elizabeth told C.W. that Mowen was “brilliant with money.” Eventually, Mowen and J.C. joined the discussions between Elizabeth and C.W.” Page 3, O.S.C. (29 June, 2006).

2. Causes of Action (not allegations of conduct but conclusions of law)

- a. The investment opportunity offered and sold by Mowen and Elizabeth is a security under § 61-1-13 of the Act.” Page 7, O.S.C. (29 June, 2006).
- b. “In connection with the offer and sale of a security to investors, Mowen and Elizabeth failed to disclose material information ...” Page 7, O.S.C. (29 June, 2006). Note: the remainder of the claim only mentions “Mowen”

- c. In connection with the offer and sale of a security to J.C. and C.W., Mowen and Elizabeth made false statements, including, but not limited to, the following ...”
Page 8 O.S.C. (29 June, 2006). Note the remainder of the claim only mentions
“Mowen”
- d. “Elizabeth told C.W. that Mowen was “brilliant with money.” Given Mowen’s criminal history, his outstanding civil judgments, the fact that he had failed to pay a prior investor, and that he had no money in his own account when C.W. invested, Elizabeth had no reasonable basis on which to make this representation”
Page 9, O.S.C. (29 June, 2006).
- e. “Based on the foregoing, Jeffery Land Mown and Elizabeth Mowen willfully violated § 61-1-1 of the Act.” Page 10, O.S.C. (29 June, 2006).

As to 1 above, the allegations in number 1 above are the only allegations of actual conduct. Only in item 1 c. above, did the State even allege a “solicitation,” but then when referring to actual conduct, again they only mentioned Mowen.

Any allegations in number 2 above are hybrid mixtures of inferences along with conclusions law from which the Respondent would like the Director to form his own inferences.

For the State to simply infer that Elizabeth “failed to disclose” or “made false statements” the State should have to actually allege some conduct from which those inferences could be drawn. The State has failed to supply *any* alleged conduct from which those inferences could *reasonably* be drawn. While the O.S.C. is replete with allegations of Mowen’s conduct, the closest allegation of Respondent’s conduct was the State’s allegation that Elizabeth said that Mowen was “brilliant with money.” The State does not allege that Elizabeth’s statement was

made as a solicitation or offer to sell a security. On the contrary, if the State was to make such an inference, there would have to be some factual basis of the conduct from which to draw that inference.

To allow an inference without a factual allegation to support it, would deny the Respondent the “right,” so to speak, to confront her accusers because her accusers are not even alleging that she made any kind of solicitation; rather they are only alleging that she merely spoke highly of her then husband.

Furthermore, the State has not alleged specific conduct because they lack all factual basis from which to allege any of the sort of conduct that they would need. The Respondent was not the source of the information from which J.C. and C.W. (named victims) formed an opinion about any of the alleged securities. The alleged victims already possessed all the information about Mowen they are claiming to have been given them. The alleged victims had already requested and received directly from Mowen his own “biographical information” in written form in April of 2005 from which the alleged victims “posted” the bio information on their own website. Therefore, even if the State were now to attempt to go back and clear up their deficient allegations, they would have no factual basis to rewrite those allegations as to the source of the information about Mowen.

CLOSING

The deficiency then in the States case against this Respondent is that they fail to allege any conduct that would lead even to an inference that the first element of the claims under Count I have been met. Merely stating that the Respondent has said the words “brilliant with money” at times in the past, without some allegation of conduct to show a direct nexus to the offer or sale of a security, fails to establish an inference of that first element.

In regular civil and criminal courts, the courts are very hesitant to simply bring in a spouse under accomplice liability without some actual allegations of overt conduct by the spouse. The same rationale should be followed here under the administrative system of the State of Utah. In this case, the Respondent, Elizabeth, may have been a victim of deception herself, even having been deceived in many respects by the named victims in this case, perhaps as well as by Mowen.

The named victims in this case often questioned Respondent about her then husband, but always in respect to their multi-level, networked marketing businesses, to which the Respondent simply referred to the information previously given to her and to J.C. and C.W. by Mowen himself. All of that information, such as was used for J.C. and C.W.'s "Dream Makers" website developments, was exactly the same information that Elizabeth had to go on and at the time had no reason to disbelieve any of it. Elizabeth, just like the named victims, only had to go on what Mowen had told them. The Respondent was no different.

Any of that information should not have been confused with representations from Elizabeth or that she in any way recommended or even condoned their entering into separate business dealings with Jeff Mowen. For the State to come back now and say that Elizabeth was the one who gave them the information is ludicrous because the alleged victims already had it posted on their own website. Why in June or July of last year would they have ever asked Elizabeth about Jeff Mowen's abilities for money or investments when they already had that information? Elizabeth did not even know what it was they were up to in the first place?

We do not turn to these facts above as a defense to the allegations because that is not a part of this analysis in a motion to dismiss for failure to state a claim. Rather, we turn to the facts above to show that allowing of the State to now merely provide a more definite statement would be a remedy for which there is neither a procedural basis nor a factual basis.

The State has no way to clear up their deficiency in their failed attempt to establish some sort of accomplice liability to the Respondent. Simply because she was at the time married to Mowen, does not automatically infer complicity. Therefore, the States claims against this Respondent are deficient and the Agency Action must be dismissed.

Dated this 18th day of August, 2006

Driessen Law

By:

A handwritten signature in black ink that reads "James L. Driessen". The signature is written in a cursive style with a horizontal line above the "i" in "Driessen".

James L. Driessen

Attorney for Defendant Elizabeth Ward