

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, 5<sup>th</sup> Floor  
P. O. Box 140872  
Salt Lake City, UT 84114-0872  
Telephone: (801) 366-0310  
FAX: (801) 366-0315

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

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**IN THE MATTER OF THE LICENSES  
OF:**

**JEFFREY LANE MOWEN; and  
ELIZABETH MOWEN a.k.a.  
ELIZABETH WARD;**

**Respondents.**

**OPPOSITION TO MOTION TO  
DISMISS**

**Docket No. SD-06-0037  
Docket No. SD-06-0038**

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**STATEMENT OF RELEVANT FACTS**

On June 29, 2006, the Division of Securities (Division) petitioned for an order to show cause against Jeffery Lane Mowen (Mowen) and Elizabeth Mowen a.k.a. Elizabeth Ward (Ward) for violating Utah securities laws. The Division alleged Ward and Mowen, who were husband and wife at the time, solicited \$200,000 from two investors to help them buy real property next to C. W.'s home. OSC ¶¶ 4, 7, 15. C. W. told Ward they did not have enough money to buy the

property and needed more. Id. at ¶¶ 7, 12. Ward had known the investors for several years through mutual involvement in multilevel marketing. Id. at ¶¶ 5-6. During conversations with Ward about their pending financial needs, and gaining their confidence by assurances of continued business dealings in the future, Ward set up the contact with Mowen and what would become the investment at issue in the OSC. Id. at ¶¶ 6, 8. Ward touted her husband as the one to help them with their immediate financial needs because of his knowledge and experience, saying he was “brilliant with money.” Id. at ¶¶ 5-6. Ward failed to disclose Mowen’s criminal conviction for securities fraud, however, and had no reasonable basis to make the representation. Id. at ¶¶ 30-31(b). After setting up the contact between the investors and Mowen for what would become an investment, Mowen confirmed that he was an international banker, financial expert and author. Id. at ¶¶ 9-10. During this and subsequent conversations with the investors and Ward, Mowen told the investors there were several ways they could earn a short term profit to buy the property and still protect their money as if it were in an IRA: by investing in currency, international markets, and stock and using his connections in international banking to do so. Id. at ¶¶ 4, 11. In reliance on his representations, C. W. withdrew her money and gave it to Mowen for investment under the terms of a “letter of understanding.” Id. at ¶¶ 13-15. Instead of investing their money, however, Mowen squandered it to pay personal expenses and lost their money. Id. at ¶¶ 23-27.

On July 24, 2006, in an unsigned response, Ward filed her answer to the Order to Show Cause. Ward denied knowing anything about the investors’ intent to buy real property, their

short-term need for more money, their then current investment in an IRA, or having a three- or four-way call or any conversations with them about anything other than multi level marketing. See Ward’s Response at 3; see also Ward’s Answers to ¶¶ 4, 6-10, 18, 30-31. Indeed, Ward says the investors pressured her into disclosing her future business plans. Id. at ¶¶ 4, 6. Despite the content and nature of her specific denials, Ward tentatively acknowledges the investors “may have” expressed an interest in “picking Jeff’s [Mowen] brain” and “assumes there was an exchange of information,” but does not say what the exchange was about or why the investors would have wanted to “pick his brains.”

A pre-hearing conference was held on August 4, 2006. The parties were ordered to exchange documents.

On August 18, 2006, after having filed and served a response, denying all of the allegations, Ward moved for dismissal.

### **LAW AND ARGUMENT**

Ward claims the Division has not alleged specific wrong doing conduct against her and that none of the allegations in the OSC support a reasonable inference of wrongdoing either. See Dismissal Memorandum at 2-3, 6-7. Ward claims the OSC amounts to nothing more than improper overreaching by the State to join an innocent spouse as an accomplice. Id. at 1, 7. Ward claims the purported lack of specificity is a jurisdictional issue. Id. at 1. In support, Ward cites Utah Code Ann. § 63-46b-1(4)(b) – the statute providing that the Director, as presiding officer may dismiss an agency action at the beginning of an adjudicative proceeding for failure to

state a claim upon which relief can be granted. Instead of limiting her request to failure to state a claim and what would be grounds Rule 12(b)(6), Ward asks for dismissal under all of Rule 12(b). Ward also says she does not ask for a more definite statement under Rule 12(b)(e). Ward misapprehends the nature of jurisdiction as well 12(b) motions.

### **I The Division Has Subject Matter Jurisdiction**

Subject matter jurisdiction goes to the power of a court to hear a case or controversy. See In re Compl. of Pelland, 658 N.W.2d 849, 854 (Mich App. 2003)(subject matter jurisdiction concerns a body’s abstract power to hear a case of the kind or character of the one pending, and is not dependent on the particular facts of the case). Subject matter jurisdiction is determined, under the well-pleaded complaint rule, by examining the allegations as they appear on the face of the complaint filed in state court, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U. S. 1, 9-10, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983); “unaided by anything alleged in anticipation or avoidance of defense.” Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S. Ct. 724, 58 L.Ed. 1218 (1914); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 398-99, 107 S.Ct. 2425, 2430, 2433 96 L.Ed.2d 318 (1987)(explaining “well-pleaded” complaint rule).

In this case, the basis for jurisdiction can easily be determined on the face on the OSC alone. The Division alleges a violation of the Utah Uniform Securities Act. Utah Code Ann. § 61-1-20. Because the Division has subject matter jurisdiction to determine violations of securities laws, irrespective of any facts or purported failure to allege specific or sufficient facts,

Ward's motion to dismiss on jurisdictional grounds should be denied.<sup>1</sup>

## **II The Motion To Dismiss Should Be Denied Because The Division Has Alleged Sufficient Specific Facts**

Under Rule 12(b)(6), the allegations in a petition are accepted as true and all reasonable inferences from them are considered in a light most favorable to the plaintiff, see Russell/Packard Development, Inc. v. Carson, 2003 UT App. 316, ¶ 10, 78 P.3d.616, 619; and dismissal is proper “only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim.” Franco v. Church of Jesus Christ of Latter-Day Saints, 2001 UT 25 ¶ 10, 21 P.3d 198 (citations omitted).

In this case, the Division alleged that Ward participated in the solicitation of a \$200,000 investment with her husband. Ward acted as a shill. Ward set up the transaction by extolling her husband's brilliance in financial matters and gaining the investors' confidence. After setting up the transaction, she also participated in communications with him and them when he closed the deal afterward. They talked about their intent to buy real property, their need for more money, and where their current investment would leave them if they kept it in an IRA. He boasted about his expertise, advised them on what they could and should do to make money in future ventures.

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<sup>1</sup>Although Ward purports to seek dismissal under all other grounds under Rule 12(b), because she does address them except for Rule 12(b)(6), the Division does not address them either. The Division reserves the right to address those grounds in a sur-reply if Ward now improperly tries to address them in a reply.

His previous convictions for securities fraud show it was no accident or mistake that he was again soliciting an investment, see Utah R. Evid. 404(b), and the inference is, given what she said about him to the investors and her participation in those conversations with him and them afterward, the transaction was not set up for her by accident or mistake either.

Although puffing and baseless opinion may be common practice in multi level marketing, before making those kind of representations in a heavily-regulated industry like securities, statements that imply knowledge where there is none are actionable. See United States v. MacKay, 491 F.2d 616, 623 (10<sup>th</sup> Cir. 1973). Ignorance is no defense. Thus, either Ward knew about his convictions and failed to disclose them or she failed to exercise due diligence before making such statements. Because her husband had been previously convicted of securities fraud, Ward had no reasonable basis on which to make any such representations about him or his abilities. This case has nothing to do with joining an innocent spouse.

In this case, Ward has denied those allegations. As such, her denials create a dispute as to a genuine issue of material fact. Whether the Division will be able to prove those facts at trial remains to be seen and is a separate issue from whether the Division has alleged sufficient facts against Ward. Having denied those allegations – the specific allegations that form the basis for her involvement in securities fraud – and created a triable issue of fact, Ward wants to avoid trial, claiming that the allegations are now somehow too vague or ambiguous to respond. At the same time, she says she does not want a more definite statement either. Her requests and argument are disingenuous. They confuse what would be grounds for a more definite statement

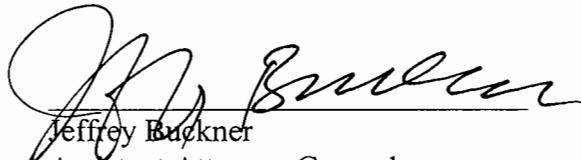
under Rule 12(e) with what would be the basis for dismissal under Rule 12(b)(6).

**CONCLUSION**

For these reasons, the motion to dismiss should be denied.

Respectfully submitted this September 5, 2006.

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL

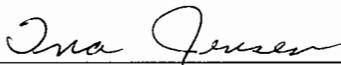


Jeffrey Buckner  
Assistant Attorney General

MAILING CERTIFICATE

I, Ina Jensen, hereby certify that I have this day served a copy of the foregoing **Opposition to Motion to Dismiss** by mailing a copy, with postage prepaid, to Attorney James L. Driessen, Driessen Law, 305 North 1130 East, Lindon, Utah 84601.

Dated at Salt Lake City, Utah this 5<sup>th</sup> day of September, 2006

  
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SIGNATURE