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September 7, 2006

**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

**REPLY MEMO ON OPPOSITION
TO MOTION TO DISMISS**

Docket no. SD-06-0037
Docket no. SD-06-0038
Director: Wayne Klein

On September 5, 2006, the Assistant Attorney General, counsel for the Division, filed a memorandum of opposition to Respondent's motion to dismiss. Respondent now files her reply memorandum limited to rebuttal of matters raised in the memorandum in opposition. However, as a general objection, the Division's opposition memo was entirely unresponsive. Respondent notes that the Division's "Statement of Relevant facts" reworded in such a manner as to try to and plead the merits of its case. The new restatement of facts now stands as new allegations, which require a response, but with limited space to do so, a five (5) page length restriction, U.R.C.P Rule 7 (c)(2), makes a complete response of right difficult. Therefore, to remain within the rules for length of memorandum and in the interest of following the case management order, a proper answer necessitates alternative pleadings (attached).

REBUTTAL

The Division's memorandum of opposition appears non-responsive on its face and is an attempt to argue the merits of its case while not specifically addressing or analyzing any of the truly procedural arguments of the properly pleaded 12(b) (6) motion to dismiss filed by the Respondent.

RESPONSE TO DIVISION'S STATEMENT OF RELEVANT FACTS: The proper analysis of relevant facts in a response to a 12(b)(6) motion would have been to analyze the facts already presented in the O.S.C.

to assist the Director in sorting out those allegations as to which were factual statements, which inferences could reasonably be drawn, and which statements were merely conjecture or conclusions of law. The State did not address any of those issues with its “restatement” of the facts, therefore all of the restatement of facts in the memorandum of opposition should have no bearing in a decision on this motion, although may be arguments for or against a possible motion to amend the pleadings.

At the heart of this procedural controversy is the Division’s allegation of a “solicitation of \$200,000.” While solicitation could certainly be a “cause” for agency action, solicitation is a conclusion of law which requires a factual basis. There are very few specific procedural opportunities when the State may properly allege a factual basis for bringing a charge or sustaining a settlement, plea, or an order. An answer to a 12(b)(6) motion to dismiss for failure to state a claim is not one of those times to argue the merits of the case. U.C.A. 1953 § 63-43b-0.5 et seq; UT. R. Civ. Pro. R. 12

RESPONSE TO DIVISION’S LAW AND ARGUMENT: Contrary to the Division’s opening argument, the Respondent did not request “dismissal under all of Rule 12(b).” Opp. Memo, pg. 4, line 2. To wit, counsel for Division was very careful to cite page and paragraph of Respondent’s answers and dismissal memorandum throughout most of his opposition, but then failed to cite any reference when purporting to the Director, “Ward asks for dismissal under all of Rule 12(b).” *Id.* Counsel for the Division could not have cited any page or paragraph of Respondent’s memorandum for the above statement, because his blatant misstatements would be impossible to cite; such an absurdity was nowhere found in the Respondent’s memorandum. Semantics between what is jurisdiction and what is failure to state a claim bear no weight in this determination. Respondent, in her motion, only referred to 12 (e) in an issue of whether a request for a more definite statement was or was not a procedural remedy in an Administrative proceeding. At any rate, Respondent has not yet filed a request for more definite statement. Counsel for the Division had no knowledge, information, or belief to conclude or even suggest that the Respondent requested anything other than 12(b)(6) remedies.

RESPONSE TO DIVISION'S ANALYSIS OF SUBJECT MATTER JURISDICTION: Division's analysis of subject matter jurisdiction also fails in its conclusions. Subject matter jurisdiction *is* determined, "under the well-pleaded complaint rule, by examining the allegations as they appear on the face of the complaint," Opp. Memo, pg. 4, line 9-10, however concluding that "jurisdiction can easily be determined on the face of the OSC alone" Opp. Memo, pg. 4, line 16-17, is a far cry from being a given. Counsel for the Division seems to persuade the Director that stating the code, "Utah Code Ann. § 61-1-20" Opp. Memo, pg. 4, line 17-18, and then merely alleging a "violation" Opp. Memo, pg. 4, line 16, will confer jurisdiction to the Division, "irrespective of any facts or purported failure to allege specific or sufficient facts." Opp. Memo, pg. 4, line 19.

Again Counsel for the Division can provide no citation to rule, statute, or case law to support the above supposition, because none exists. Counsel is merely making up the law as he goes along. Subject matter jurisdiction is determined under the well-pleaded complaint rule by "examining the allegations." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10, 103 S. Ct. 2841, 77 L.ed.2d 420 (1983). Jurisdiction is not conferred upon the Division merely by citing a statute. It is the standard analysis of any 12(b)(6) motion that the Plaintiff "must have alleged sufficient facts, which we view as true, to satisfy each element [of the charge]." *MBNA America Bank, N.A. v. Goodman*, 140 P.3d 589, 591, (Utah App.,2006). Solicitation then was merely a conclusion of law in the Division's O.S.C. and conclusions of law are a matter for the Director; the allegations from the State had to come in the form of allegations that would satisfy each element of a §61-1-20 complaint. U.C.A. 1953 § 61-1-20.

RESPONSE TO DIVISION'S ASSERTION OF SUFFICIENT SPECIFIC FACTS: Again Counsel for the Division may have proper citation of the authorities in his analysis, but we question his conclusions and object to his further offering of "restatements" of facts that were not alleged in the original complaint (O.S.C.). 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. Opp. Memo, pg. 5, line 4-5, but we cannot agree to

allow all of the Division's new allegations and conclusions of law presented in a memo with no basis and which were not alleged in the O.S.C.

The Division also attempted to persuade the Director that Respondent having given positive personal opinions in the past about her then husband must also necessarily be connected to an investment she knew nothing about – because, “making those kind of representations in a heavily-regulated industry like securities, statements that imply knowledge where there is none are actionable” Opp. Memo, pg. 6, line 6-7. But in the O.S.C., the Division offered no facts where it could even reasonably be inferred that there was any knowledge or connection to an investment. If no knowledge of an investment were required, then the purported victims or the entire Isagenix organization who posted similar information on their own website and supported Radio infomercial spots would also have been guilty themselves of soliciting investments when putting forth the same information from Jeff Mowen's “bio” that had been previously given to them directly by Jeff Mowen. The O.S.C. is deficient of any allegation the information was actually represented by Respondent in relation to an investment.

Next, the Division would wants to just assume that the Respondent had full knowledge of her then husband's previous legal ordeals. The State has not alleged, nor will they later be able to produce anything that shows Elizabeth Ward participated in, had knowledge of, or was in any way aware of the actual final dispositions in Jeffery Mowen's previous legal problems with the Securities Division of Utah. Just like everyone else, Elizabeth Ward only knew what Jeff Mowen told her. Yes, it is probably true that she could have employed an investigator or performed some other kind of public documents search, but so could have anyone else. She did not talk about this to investigators, prosecutors, attorneys, or anyone except Jeff. It is not a stretch for Respondent to show that she had the exact same knowledge as the purported victims when it came to Jeff Mowen and any of his legal battles or business problems. But again, the merits of the case are not for this discussion.

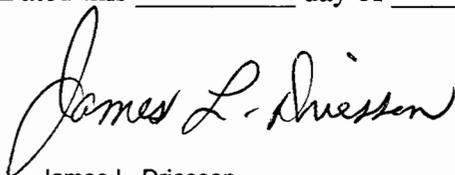
Finally, the Division argued that any of the above such denials only go to create a “dispute as to genuine issue of material fact.” Opp. Memo, pg. 6, line 13-14. To the contrary, the Respondent only makes such denials in response or anticipation to the Division and the manner in which the Division seems to be pulling facts out of a hat to try and repair their deficiencies in the Order to Show Cause document. The question before us is not whether Respondent has created a triable issue of fact by her denials, but whether the Division’s O.S.C. allegations are sufficient to create a triable issue of fact.

Respondent has not affirmatively stated that she would not require a more definite statement, she merely pleaded that it was not clear whether a request for a more definite statement is a procedural remedy offered to her in this Administrative process. Again, it is the Respondent’s position that at this point, the only proper procedural option left to the Division to correct the deficiencies in its O.S.C. document would be to motion the Director to grant leave to file an amended O.S.C. Procedure would also dictate that the Respondent would then have the opportunity to respond or object to any such motion prior to the motion being granted.

CONCLUSION: For all the reasons found in the motion and as stated above, the Respondent seeks that the Director reach a finding that the request for Agency Action along with supporting O.S.C. documents be found deficient for failing to properly state a claim for which relief may be granted. Furthermore, if the Division has not properly and timely submitted a motion to amend, then the only proper remedy which may be afforded the Respondent shall be a complete dismissal of the Request for Agency Action. We therefore pray along with any other remedy the Director may see fit and properly awarded in favor of the Respondent.

Respectfully Submitted,

Dated this 17th day of September, 2006



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

Reply Memo to the following this 8th day of September, 2006.

Or, (check box and initial if appropriate)

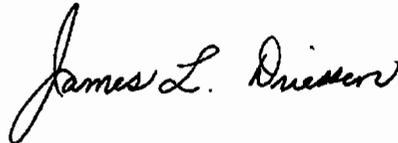
Hand delivered _____

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Pam Radzinski
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SIGNED,



James L. Driessen