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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:

JEFFREY LANE MOWEN;  
ELIZABETH WARD (fka Mowen);

Respondents.

**ORDER DENYING WARD  
MOTION TO DISMISS**

Docket No. SD-06-0037  
Docket No. SD-06-0034

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**Procedural Background**

These proceedings were initiated by an Order to Show Cause and Notice of Agency Action issued by the Division on June 29, 2006. A Response dated July 24, 2006 was submitted by Elizabeth Ward, along with a Notice of Appearance by Counsel.<sup>1</sup> A hearing was held on August 4, 2006. Ward and her counsel, James L. Drieesen attended the hearing. At that hearing, a scheduling order was issued, the terms of which were put into a written order dated August 7, 2006.

By motion dated August 18, 2006, Ward moved to dismiss the action against her. The Division filed an opposition to the motion on September 5. Ward filed two documents on September 7, Reply Memo on Opposition to Motion to Dismiss and Respondent's Ex-Parte Application to File Over-Length Pleading or Alternative Pleading for Motion to Strike Division's Pleading. On September 11, Ward filed a document entitled Submit for Decision on Motion to Dismiss. The Division filed an Objection to Ward's "Ex-Parte Application" on September 13.

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<sup>1</sup> The Response/Answer is not filed by Ward or her counsel, but the Notice of Appearance of Counsel is signed by Ward's attorney.

I have read these submissions and believe that a ruling can be made without additional submissions by the parties and that oral argument is not necessary to rule on Ward's motion. Accordingly, Ward's request for a hearing is denied. Also, to the extent that Ward's second September 11<sup>th</sup> filing is a request for permission to file additional submissions or arguments, that request is denied.

### **Ward's Motion to Dismiss**

All these submissions relate to Ward's motion to dismiss the Division's Order to Show Cause. Ward's motion is made under the Utah Administrative Procedures Act, §63-46b-1(4)(b). That statute provides that motions to dismiss must satisfy Rule 12(b) of the Utah Rules of Civil Procedure. Rule 12(b) lists seven possible grounds for a motion to dismiss including lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process, failing to state a claim, and failing to join indispensable parties.

The Division correctly points out that that Ward's motion does not identify which of the seven grounds for a dismissal motion under Rule 12(b) is the basis of the instant motion by Ward. Imprecise legal argument is not helpful to a court or the Presiding Officer. Each of the seven enumerated grounds for a motion to dismiss has its own case law setting forth what must be alleged as part of the motion and what each side must demonstrate to win or defeat a motion to dismiss. Ward's failure to identify which subpart of Rule 12(b) is the basis for her motion imposes a burden on the Presiding Officer that should be shouldered by the parties. Nevertheless, the motion does not seem to allege venue, insufficiency of process or service of process, or the lack of an indispensable party. Ward's motion seems to argue a combination of Rule 12(b)(2) and 12(b)(6).<sup>2</sup> In general, a Rule 12(b)(2) motion questions whether a person has

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<sup>2</sup> The parties are cautioned that higher standards of legal advocacy are expected. The Presiding Officer should not be expected to have to search the Rules or the pleadings to divine what the attorneys might be arguing.

been brought before a court improperly, such as where a defendant lacks minimum contacts with a state. Ward does not make such an assertion. Ward's claim, therefore, will be analyzed as a Rule 12(b)(6) motion.

### **Standard of Review**

Ward and the Division do not appear to disagree in substance regarding the standard of review to be used in analyzing this motion. For purposes of a motion to dismiss, facts alleged in the Order to Show Cause must be assumed to be true and all reasonable inferences to be drawn from them will be drawn in favor of the Division. *Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1223 (Utah 2004). Dismissal would be 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*, 21 P.3d 198 (Utah 2001).

A separate issue that Ward appears to raise is a due process claim: whether the Division has adequately alleged sufficient facts to establish the elements of the violations claimed by the Division. If I understand Ward's argument correctly, it is that the Division has not alleged sufficient facts to establish a violation by Ward. Further, she argues that the Division should not be allowed to amend its Order to Show Cause or to provide a more definite statement to cure this averred defect as such a step is not explicitly provided for in the Administrative Procedures Act. Therefore, Ward argues that the Division's case must be dismissed.<sup>3</sup>

### **Questions to be Decided**

The Division's Order to Show Cause alleges one count against Ward: that she failed to disclose material information to an investor in connection with the offer and sale of a security.

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<sup>3</sup> I apologize if I have not recounted the argument accurately. Ward's argument could be written and organized in a clearer manner. I have drawn this conclusion from Ward's Memorandum dated August 18, 2006 at unnumbered page 2 and the penultimate page.

To prevail on this count, the Division must show each of the following elements of a violation of §61-1-1(2):

1. The transaction(s) described by the Division in its Order to Show Cause involves a security. In other words, the Division must show that the circumstances surrounding the furnishing of money by C.W. to Jeffery Mowen satisfies the statutory definition of a security;
2. The security was offered or sold in (or from) Utah;
3. That Ward's discussions with C.W. were "in connection with the offer, sale, or purchase" of a security. This can be demonstrated either by a showing that Ward's discussions with C.W. constituted an offer, sale, or purchase of a security or that their discussions were in connection with the offer, sale, or purchase made by another person (in this case, Jeffery Mowen);
4. That in connection with the offer, sale, or purchase of a security, Ward failed to disclose particular types or pieces of information to the offeree or investor;
5. That the duty to disclose additional information to the offeree or investor arose from affirmative statements Ward did make to the offeree or investor; and
6. That the information not disclosed to the offeree or investor was material.

#### **Analysis of the Division's Allegations**

An analysis of the Division's Order to Show Cause reveals that the Division has alleged each of these elements of the alleged violation. The allegations are not laid out in the order listed here, but the context of the Division's allegations – the reasonable inferences, if you will – are that in connection with the offer or sale of a security, Ward made affirmative statements to C.W. and that by making those affirmative statements that were made in connection with the offer or

sale of a security, Ward had a duty to disclose additional information to C.W. about Mowen's past.

Now, just because the Division has alleged these necessary elements, does not mean that they are true or that the Division will be able to introduce admissible evidence of them at the hearing in this matter. But it does mean that Ward's motion must be dismissed. It cannot be said that it clearly appears that there is no set of facts under which the Division could establish a violation. Nor can it be said that the Division has not given reasonable notice to Ward of the conduct that the Division believes constitutes a violation of the securities laws.<sup>4</sup>

### **Unnecessary Gratuitous Attacks**

The Presiding Officer uses this occasion to make one additional observation: a warning. The briefing of both sides contains gratuitous attacks that are unrelated to the issues to be decided in this proceeding. They distract from the questions that need to be answered and require time and attention from the Presiding Officer that is unnecessary. For example, the Division remarks: "Although puffing and baseless opinion may be common practice in multi level marketing . . . ." Opposition Memorandum, Sept. 5, 2006 at 6. Ward's attorney retorts: "Counsel is merely making up the law as he goes along." Reply Memorandum, Sept. 7, 2006 at 3. Comments such as these are not only unnecessary, they are distracting and unprofessional. Any repetition of such conduct in this proceeding will not be tolerated.

Similarly, some of the filings related to Ward's motion are unnecessary and a waste of counsels' and the Presiding Officer's time. Ward had no need to make an application to file an over-length pleading or a motion to strike the Division's pleading. It would have been sufficient

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<sup>4</sup> Ward also accuses the Division of using "tactics" to bring accusations against Ward for conduct of her spouse. This accusation is moot in light of the analysis described above. If the Division prevails in its burden of proof, Ward may fairly be found to have committed a violation of the law based on her own conduct, regardless of her marriage to a co-Respondent. If the Division fails in its burden, the proceedings will be dismissed as to Ward.

to note Ward's assertion that the Division's opposition memorandum had exceeded the bounds Ward believes appropriate. Ward's "Application" led to the Division's objection to the motion. These filings were not necessary or helpful. In considering this motion, the Presiding Officer has a duty to consider only factual allegations contained in the pleadings and only those allegations that relate to the motion before him. This opinion does that and ignores information submitted by both sides that is not directed at the narrow question before the Presiding Officer.<sup>5</sup>

**ORDER**

For the reasons stated above, Ward's motion to dismiss is denied.

DATED this 4<sup>th</sup> day of October, 2006

  
WAYNE KLEIN  
Director, Presiding Officer



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<sup>5</sup> All other claims made by the parties that have not be discussed specifically in this Order have been considered by the Presiding Officer and denied, except to the extent discussed in this Order.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 4<sup>th</sup> day of October, 2006 copies of the foregoing Order Denying Ward Motion to Dismiss were served on the parties as follows:

Hand Delivered

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*Heather Bailey 10-04-06*