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Department of Commerce
Division of Securities

February 12, 2007

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

In the Matter of:

Jeffery Lane Mowen;
and Elizabeth Ward (fka Elizabeth Mowen)

**MEMORANDUM OF
OPPOSITION TO THE DIVISION'S
MOTION FOR SANCTIONS AS TO
ELIZABETH MOWEN**

Docket no. SD-06-0037

Docket no. SD-06-0038

Director: Wayne Klein

Respondent Elizabeth Ward, by and through counsel, James L. Driessen, submits this Memorandum of Opposition to the Division's MOTION FOR SANCTIONS AS TO ELIZABETH MOWEN.

Issues

ISSUE 1: Whether pretrial conference is the correct and proper remedy and procedure under current circumstances in this matter.

Respondent filed a motion to hold a pretrial conference. The Division, through its counsel, instead of answering the motion, has moved for sanctions primarily based on Respondent's failure to comply with the Scheduling Order submitted and signed by the Director on 7 August, 2006, requiring the parties to "file a list of witnesses and exhibits by January 15, 2007." See Sch. Ord., SD-06-0037, SD-06-0038 (7 Aug. 06).

Also in its motion, the Division stated that Respondent Ward, “failed to comply with the scheduling order, and offers no explanation for her disobedience or failure to pay for photocopies other than she never received a copy of a ruling on her husband’s motion to set aside default judgment.” *Div. Mot. Sanc.*, Feb. 7, 2007, pg. 3 ¶ 5.

To the issue of explanation, Respondent did offer explanation and it was much more than just a failure to receive one pleading or ruling: Respondent explained that she had not received *any* pleadings, notices, rulings, or any communications what-so-ever since the ruling on her motion to dismiss. It has since come to her attention and now verified through the Division’s own motion that numerous other pleadings have been filed, hearings have been held, stipulations have been made, scheduling orders have been changed (albeit Division is purporting only as to Mowen and not Ward) and none of these pleadings have been copied or noticed to Respondent Ward. Attorney for Respondent Ward also did communicate this problem to the Division and sought resolve on numerous occasions. Instead of even attempting useful communication with Respondent, the Division merely sent its demands and filed its motions.

The problem, therefore, with Respondent being able to submit her witness and exhibits lists to the court is that there is no agreement or rule of procedure that would allow for a “partial” witness and exhibits list. If Respondent submits her witness and exhibits list now without knowing the nature of the case presently before her and then finds that there are new issues for her to deal with, she could be forbidden from bringing in last minute witnesses or exhibits on her behalf related to those new issues.

Very substantial changes have taken place in this matter and Respondent Ward has still not received any notice of the pleadings, hearings, stipulations, or orders. Without notice of these events and rulings, it is impossible for Respondent to know how to proceed.

It was Respondent, not the Division, through counsel, who made numerous calls and attempts to get information about the status of this case and later she sought information as to why she was not receiving any notices or copies. Eventually, the only reason given by the Division for not assuring proper notice and copies were given was that “they were returned to sender” as undeliverable.

Without adequate copies and notice of the many pleadings, hearings, stipulations, and orders entered in this matter, the proper remedy and procedure at this juncture would be a pretrial conference so that the files can be compared and Respondent can be properly informed in this matter so she can then submit her complete witness and exhibits list that she can later be held to as fully inclusive.

ISSUE 2: Whether Division had reasonable excuse for not providing adequate copies and notice to the Respondent.

In the scheduling order in this matter, there was also an order that “[t]he original copies of all filings in this case must be filed with the Division. Copies are to be sent to the counsel for the opposing party.” See *Sched. Ord.*, Aug 7, 2006.

Then in the Director’s ruling on Respondent’s motion to dismiss, the Director admonished the parties to pay more attention to civility. The Director made it clear how he preferred the attorney’s to promote bringing the matter to proper resolution rather than procedural attacks or to imply malicious intent when it is not really there. For this purpose, it is

probably important now to acknowledge any possible missteps on either side as to provide understanding of how we got to the position we are today in this matter. See *Ruling on Motion to Dismiss* on file herein.

It was brought to Attorney for the Respondent's attention, by the Director through a phone call at the time; he was seeking to enter his decision on the earlier motion, that Respondent's attorney's zip code had been inadvertently excluded from the caption in the previous pleadings. Counsel for Respondent apologized and then resolved to make the proper corrections to his template for future pleadings. It is actually quite common that attorneys will build a template for pleadings in a particular matter and that if a mistake (or omission) is made in that template, it can be replicated onto all the subsequent pleadings; thus illustrating the importance of attention to detail attorneys must have in applying their craft.

It should be noted, however, that at the August hearing, business cards were exchanged and contact information was provided. Even in the scheduling order that came as a result of that hearing in August, the proper zip code for Attorney for the Respondent was included on the mailing certificate. See *Sched. Ord. 7 Aug, 2006*. The proper zip code was on the ruling and mailing certificate on Respondent's motion to dismiss. See *Ruling on Motion to Dismiss* on file herein. Attorney for Respondent is registered with the Utah State Bar and a record of proper address and phone number is included in that directory. There are phone books, reverse zip code look ups, and numerous other means of determining the proper zip code. And of course the plain old courtesy of a phone call as the Director had set the example could have rectified any difficulties derived from the omission in Attorney for the Respondent's template.

If and when the attorney for the Division began receiving the copies or notices back from the post office as “undeliverable,” the Division could have used any one of those available means to find the proper zip code and send proper copies and notices. Instead, the Division apparently chose to just discontinue sending Respondent Ward any copies of the pleadings.

Following the Director’s admonishment then, it may be improper to cast blame on the Division or the Respondent or to imply improper intent on anyone’s part for not getting the proper correction and re-mailing of those pleadings and notices to the Respondent. So, if it was reasonable then that mailing difficulties were had, it should also be reasonable that notice of the deficiencies should have been corrected prior to prejudicing the Respondent by forcing her to submit what will ultimately be held to her as a *complete* witnesses and exhibits list.

ISSUE 3: Is failure to pay a copy fee for Documentary disclosures that were not even specifically requested by Respondent, grounds for sanctions?

Attorney for the Respondent has practiced in several areas of Administrative law in other Divisions within the State of Utah and has not previously been requested to pay for voluntary initial disclosures made by the State. To the contrary, any disclosures the State felt were required were simply mailed at no charge.

In the Division’s request for payment, the Assistant Attorney General did not refer to rule or code which requires Respondents to pay for “voluntary disclosures.” Attorney for Respondent is well aware of the copy fee requirements under the Government Records Access and Management Act (GRAMA), but the copies sent to Respondent were not in answer to any GRAMA request made by Respondent.

However, since attorney for Respondent can also not find any statute or rule preventing the State from charging for voluntary disclosures, in the interest of resolving the issue, Attorney for Respondent has delivered a check in the amount requested, but herein enters an objection on behalf of Respondent to the fee charged and merely asks for an explanation. If provided a satisfactory explanation, the objection will thereby be withdrawn.

Rules

Utah Admin Code R151-46b-9(16)(a):

“A party may request entry of an order compelling discovery as follows:

- (i) If a party fails to make disclosures required by an initial prehearing order pursuant to R151-46b-9(2), or a party fails to make the disclosures required by R151-46b-9(3), or a deponent fails to answer a question propounded under Subsection R151-46b-9(13), or a corporation or other entity fails to make a designation under Subsection R151-46b-9(13)(b)(iv), or a party, in response to a request for inspection submitted under Subsection R151-46b-9(14), fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling such disclosures, or an answer, or a designation, or an order compelling inspection in accordance with the request ...” Utah Admin Code R151-46b-9(16)(a)(i).

Utah Admin Code R151-46b-9(16)(b):

“(b) Discovery Sanctions.

- (i) If a party or other person fails to comply with an order compelling discovery issued by the presiding officer, the department may seek enforcement of that order by seeking civil enforcement in the district court as provided in Section 63-46b-19.
- (ii) If a party, an officer, director, or managing agent of a party or a person designated under Subsection R151-46b-9(13)(b)(iv) to testify on behalf of a party fails to obey an order or provide or permit discovery, including an order made under Subsection R151-46b-9(16)(a), the presiding officer may make such orders in regard to the failure as are just, including:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party ...” Utah Admin Code R151-46b-9(16)(b).

Utah Admin Code R151-46b-9(13)(b)(iv):

“(b) Depositions Upon Oral Examination: General provision; Persons who may be deposed ...

- (iv) A party may, in his notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.” Utah Admin Code R151-46b-9(13)(b)(iv).

Legal Analysis

Even if a violation is found, outside the realms of serious prejudice or manifest injustice, motion to compel is the ordinary remedy for violations contained in Utah Admin. Code R151-46b-9(16)

It is normally important when citing rules to be sure to cite to as much of the substantive rules as necessary in order to make its meanings clear. Respondent, having cited above to a larger portion of the Utah Administrative rules than was offered as authority in the Division’s memorandum, Respondent would advocate a slightly different interpretation than was put forth

by the Division. Utah Admin. Code R151-46b-9. Respondent will highlight the different interpretation by referring to just a few specific rudiments of the rule.

If we look carefully at 16(b) of the rule, it basically only leaves two options for “Discovery Sanctions.” The first part being subsection (i), which refers to when an order on a motion to compel has been issued and the party still refuses to cooperate, sanctions should be imposed. The second part being subsection (ii) which refers to when a non-party witness is subpoenaed to testify or be deposed under R151-46b-9(13)(b)(iv) or when a party fails to cooperate under R151-46b-9(2) or (3).

The scheduling order (as to anything that could be considered initial disclosures only) required “The parties will exchange documents related to the *Division’s* proceeding by September 4, 2006.” See *Sch. Ord. 7 Aug, 2006, emphasis added*. The Respondent did turn over all the initial documents based on the information then reasonably available and in her possession at the time of the scheduling order, particularly the marriage documents, annulment documents, emails, and some of the “Dream Weavers” website print outs indicating that CW and JC had information that they were not telling the State. No other individuals or entities were known at the time by Respondent Ward to have any further information as to her case at the Division.

Remember, Respondent Ward is not being charged with the type of securities fraud for fraudulently dealing in securities, but is charged that she “made false statements” allegedly connected to Mowen’s alleged fraudulent dealings of securities. Although a formal initial disclosures cover letter and mailing certification was not prepared, the documents in her possession at the time of the order had been turned over in an open conference room at the

still in controversy in light of those filings and hearings that had already taken place unbeknownst to the Respondent. Until those things are provided it would be a breach of Respondent counsel's own responsibility for zealous representation to inadvertently turn over the final list of witnesses and exhibits as her final pretrial disclosures with so many unknowns still yet to be resolved. These are not unknowns to the Respondents own investigation, but unknowns to even the very nature of the case presently before the administrative action tribunal.

For the above reasons, Respondent requests that the sanctions requested by the State be denied and a properly noticed pretrial conference be held to allow the Respondent an opportunity to receive copies of all pleadings, minutes of hearings, stipulations entered, and rulings made. In the alternative to an actual pretrial conference, the Respondent would ask the Director to issue a ruling requiring the attorneys for the parties to meet, have documents presented to Respondent, and a time set for Respondent to adequately review and be informed so that she can comply with submitting her witnesses and exhibits list in adequate time prior to a trial date being set.

Respectfully submitted this 12th day of February, 2007

BY: James L. Dissen
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, by first class mail, a true and correct copy of the forgoing Memorandum of Opposition to the following this 12th day of February, 2007.

Or, (check box and initial if appropriate)

Hand delivered _____

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SIGNED,

James L. Driessen

James L. Driessen

