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

IN THE MATTER OF:

FLAVOR BRANDS, INC.,
J.D. PULVER,
TIM HASKIN, and
DENISE SULLIVAN,

Respondents.

MOTION TO STRIKE

Docket No. SD-06-0057
Docket No. SD-06-0058
Docket No. SD-06-0059
Docket No. SD-06-0060

The Division of Securities of the Utah Department of Commerce (Division), by and through Assistant Attorney General Jeffrey Buckner, and pursuant to Rules 7, 12(f) and 56 of the Utah Rules of Civil Procedure, as made permissible under Utah Code Ann. § 63-46b-1(4)(b), hereby moves to strike J. D. Pulver's (Pulver) "motion to dismiss and/or for summary judgment" on grounds that the motion for summary judgment does not comply with the rules governing summary judgment as a matter of form and substance, and that the motion to dismiss is not

adequately briefed or timely filed. The Division's motion is made and based on the accompanying memorandum of points and authorities.

Respectfully submitted this January 10, 2008.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL


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MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
MOTION TO STRIKE

Docket No. SD-06-0057
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STATEMENT OF RELEVANT FACTS

On December 28, 2007, Pulver moved for dismissal of the emergency order against him or for summary judgment in the alternative in a three-page combined motion and memorandum. Although a default order against Pulver on June 20, 2007, had been set aside on October 22, 2007, the Division has obtained judgment against all of the other respondents in this action.

LAW AND ARGUMENT

I. Pulver Failed to Move for Summary Judgment As Matter of Form or Substance.

A motion for summary judgment may be granted when the pleadings, discovery documents, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Utah R. Civ. P. 56(c)*; see also Utah Code Ann. § 63-46b-1(4)(b)(authorizing summary judgment in agency actions). Rule 56 together with Rule 7 provide a step-by-step procedure for obtaining summary judgment. A memorandum supporting a motion for summary judgment begins with a statement of facts to which the moving party contends no genuine issue exists. *Utah R. Civ. P. 7(c)(3)(A)*. Each fact is to be stated in separately numbered paragraphs supported by citation to relevant materials, such as affidavits or discovery materials. *Id.*; compare Utah R. Civ. P. 56(c)(listing types of relevant materials). Because disposition of a case on summary judgment denies the opposing party of the benefit of a trial on the merits, *Schafir v. Harrigan*, 879 P.2d 1384, 1387 (Utah App. 1994), evidence must be in a form so as to be admissible. *Utah R. Civ. P. 56(e)*. Unsupported claims are not evidence. *Ibanez v. Florida Dept. Business and Professional Regulation Bd. of Accountancy*, 512 U. S. 136, 149, 114 S. Ct. 2084, 2092, 129 L.Ed.2d 118 (1994). Unsworn statements are not evidence. *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990)(citing *Leon Shaffer Golnick Advertising, Inc., v. Cedar*, 423 So.2d 1015, 1017 (Fla. App. 4th Dist. 1982). Argument is not fact and does not create an issue of fact. *Roane v. U. S. Fidelity Guaranty Co.*, 378 F.2d 40, 42 (10th Cir. 1967).

Inadmissible evidence cannot be considered on a motion for summary judgment. D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989).

The steps, the procedure and the rule governing summary judgment are easy to follow and easy to understand. If a motion for summary is “made and supported as provided in this rule,” the Rule says, an adverse party has an affirmative duty to respond by affidavit or produce evidence otherwise that show why there is a genuine issue for trial. *Utah R. Civ. P. 56(e)*. On the other hand, if a motion for summary judgment is not made and not supported as provided by rule, the opposing party must either object to it or move to strike, otherwise any defects are waived. D & L Supply, 775 P.2d at 421; *see also Utah R. Civ. P. 12(f)*. When a matter is inadequately briefed, it may also be appropriately disregarded or stricken. Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah App. 1995); Steele v. Board of Review of Indus. Comm’n, 845 P.2d 960, 961-62 (Utah App.1993).

In this case, Pulver’s motion is not in the form required by the rule. The memorandum is not prefaced with a statement of facts let alone separately numbered paragraphs. It simply begins with argument. The various statements in the argument do not comply with the substance of the rule either. Pulver provides no support, by record cite, affidavit or other admissible evidence, for any of the statements in his argument. Those statements are not based on evidence that would be admissible at trial. The articles of incorporation and the e-mail from Gary Bowen are not relevant to any of the unsupported statements in Pulver’s argument except that Denise Sullivan signed articles of incorporation. He cites no case law or relevant authority that shows

why he is entitled judgment. He provides no analysis. His motion for summary judgment is inadequately briefed.

II. Pulver's Motion is Inadequately Briefed

As stated above, a matter that is inadequately briefed should be disregarded or stricken. Pulver's motion is inadequately briefed under Rule 12(b)(7) because it provides no analysis of the relevant rule. Even if he had briefed the issues, his argument would have failed.

Rule 12(b)(7) authorizes dismissal for failure to join an indispensable party, but the rule does not explain exactly what an "indispensable party" is. *Utah R. Civ. P. 12(b)(7)*. Although Rule 12(b)(7) is silent, Rule 19 provides the relevant guidance. Rule 19 requires joinder if, in the absence of a person who is subject to service and whose joinder does not deprive the court of jurisdiction, either (a) complete relief cannot be granted among those already parties to the action or (b) the party whose joinder is sought claims to have an interest in the proceeding and that party's absence either impairs his ability to protect that interest or would subject those persons already parties to the action to the risk of multiple or inconsistent obligations. *Utah R. Civ. P. 19(a)*.

In this case, judgment has been entered against all of the respondents. Complete relief has been afforded. Pulver's ability to protect his interest has not been impaired and he is not subject to multiple, inconsistent obligations. Neither are the other parties. The Division could proceed separately against Charles Langrill or Joseph Arcaro if it wanted to without renaming or involving Pulver. The Division is not obligated to commence an action against them. Under

these circumstances and under the relevant rule, Pulver cannot show that the Division failed to join an indispensable party.

III. Pulver's Motion Is Untimely.

The Utah Administrative Procedures Act (UAPA) permit the filing of both motions to dismiss as well as for summary judgment – both dispositive motions – as long the requirements of Rules 12(b) and 56 are met. *Utah Code Ann. § 63-46b-1(4)(b)(agency may grant a timely motion to dismiss under Rule 12(b) and 56 except to the extent modified by UAPA)*. Unlike Rule 12, all motions filed in proceedings before the Department are subject to the requirement of timeliness.

Any motion that is relevant to an adjudicative proceeding and is timely may be filed. All motions shall be filed in writing, unless the necessity for a motion arises at a hearing and could not have been anticipated prior to the hearing. . . .

Utah Admin. Code R151-46b-7(c)(emphasis added).

In this case, Pulver moved for dismissal a year-and-a-half after the order to show cause was filed. The motion states grounds that could have been anticipated well in advance of the hearing. Pulver identifies no reason why his motion could not have been filed timely.

CONCLUSION

For these reasons, Pulver's motion should be stricken.

Respectfully submitted this January 10, 2008.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL



Jeffrey Buckner
Assistant Attorney General

CERTIFICATE OF MAILING

I, Ina Jensen, hereby certify that I have this day served a copy of the foregoing **Motion to Strike and Memorandum Supporting Motion to Strike** on J. D. Pulver by mailing a copy, with postage prepaid, to the following:

J. D. Pulver
11705 Boyette Rd., #437
Riverview, FL 33569

Dated at Salt Lake City, Utah this 10th day of January 2008.


Ina Jensen