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

IN THE MATTER OF:)	
)	
CARL ROGER TODD;)	Docket No. SD-06-0089
KENNETH WLATER NORTH;)	Docket No. SD-06-0090
)	
Respondents.)	

MOTION TO DISMISS FOR LACK OF JURISDICTION

COMES NOW Defendant Carl Todd, and, pursuant to the Presiding Officer's Scheduling Order of January 22, 2007, moves for dismissal of the Order to Show Cause for want of personal jurisdiction.

I. INTRODUCTION

The Division lacks personal jurisdiction over Carl Todd. The alleged contacts between Todd and Utah occurred on October 17, 2006, were wholly instigated by and involved a single undercover agent and, under Utah law and the Fourteenth Amendment, are insufficient to confer personal jurisdiction. Todd, in fact, makes only two potential Utah contacts in the Order to Show Cause: one was "by telephone" in a meeting between Defendant Ken North and the Division's undercover investigator; the other was a meeting

with the same investigator in Kansas City. The two occurrences were hours apart on October 17, 2006. Both were procured by the investigator as part of a sting operation. For these actions to subject Todd to Utah's jurisdiction, the terms of the Uniform Securities Act (U.C.A. § 61-1-26) and Constitutional due process must both be satisfied. As discussed below, in both cases Todd's representations were not purposefully directed to Utah; rather, Utah (figuratively and literally) came to him in order to trap him in a securities violation. The Order to Show Cause fails to allege the facts necessary to show that Todd's representations were connected with an "offer to sell...made in this state."

Further, even though Todd was allegedly only present on October 17, the Order ascribes a whole series of statements spanning several days (the alleged fraudulent misrepresentations) to both Todd and North, without alleging any legal basis upon which North could have made his alleged statements as an "agent" of Todd. Without such allegations, there can be no claim that Todd, who at all times was physically in Missouri and was not alleged to have been present during or even aware of most of North's comments, was North's principal for purposes of those representations. Thus, the Order against Todd must be dismissed in its entirety, as to both the October 13 and October 17 representations and omissions, for want of personal jurisdiction.

II. STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR THE SECURITIES DIVISION'S EXERCISE OF PERSONAL JURISDICTION OVER FOREIGN RESIDENTS

The Utah Securities Division may assert personal jurisdiction over Carl Todd, a Missouri resident, only to the extent that both U.C.A. § 61-1-26 (which acts as Utah's securities long-arm statute), and Constitutional due process are satisfied. As the Utah Supreme Court recently explained, even allegations making a "prima facie" case for

liability under Utah's securities laws are not sufficient to confer personal jurisdiction. MFS Series Trust III v. Grainger, 96 P.3d 927, 930-931 (Utah 2004). "Permitting allegations of liability under Utah's security laws to automatically give rise to personal jurisdiction, without first considering whether each defendant 'purposefully availed' himself of the benefits and protections of Utah's laws, would be to ignore the due process requirements of the fourteenth amendment." Id. at 933 (citing Intl. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Thus, constitutionally required "minimum contacts" between the defendant and the forum must be established. Id. at 931. To establish minimum contacts, the Securities Division has the burden of showing that:

- (1) the defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (id.);
- (2) the contacts proximately result from actions by the defendant himself that create a connection with the forum state (id.);
- (3) the claims arise only out of the defendant's forum-state activity (id.);
- (4) the contact between the defendant and the forum state is such that the defendant should reasonably anticipate being haled into court there (id.);
- (5) even if the defendant did purposefully engage in forum activities, the concept of fair play and substantial justice does not defeat the reasonableness of jurisdiction. MFS, 96 P.3d at 931.

Further, "each defendant's contacts with the forum State much be assessed individually." MFS, 96 P.3d at 931 (citing Calder v. Jones, 465 U.S. 783, 790 (1984)). "Due process is only satisfied based on the 'quality and nature of the activity' for each individual defendant." Id. (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

The Utah Supreme Court has instructed that this required focus on the "quality and nature of the activity" has important implications where contacts are alleged based on a corporate, partnership, or principal-agent relationship. Significantly, agency-principal relationships existing within a corporation or partnership are necessary but insufficient by

themselves to assert jurisdiction over out-of-state partners, officers, or directors, for actions taken by the corporation within Utah. Id. at 931, 933 (dismissing blue sky action against out of state officers and directors for lack of personal jurisdiction). A showing of the five minimum contact elements, set forth above, must still be made. Id. at 933.

Finally, cases such as this one, where undercover agents are responsible for the defendant's alleged jurisdictional contacts, directly implicate elements (1), (3), and (5) of Utah's minimum contacts analysis. Where jurisdiction would not have arisen but for the actions of undercover agents in instigating the specific communications that seem necessary to trigger jurisdiction, it is fundamentally unfair to allow such communications to confer jurisdiction. See, e.g., United States v. Archer, 486 F.2d 670, 682-683 (2d Cir. 1973) (federal undercover agents in bribery investigation could not be sent out of state to make phone calls so that targets would be induced to make communications across state lines, converting state and local crimes into violations of federal law); United States v. Brantley, 777 F.2d 159, 163 (4th Cir. 1985) (federal agents and gambling equipment could not be moved from state to state as part of contrived activity to supply federal jurisdictional predicate). In the due process context, such contrived "contacts" are not the kinds of actions that reasonably or fairly support personal jurisdiction.

III. THE SECURITIES DIVISION LACKS PERSONAL JURISDICTION OVER CARL TODD FOR THE MISREPRESENTATIONS AND OMISSIONS ALLEGED.

The Order to Show Cause alleges that Todd and/or North made, "directly or indirectly," eight different misrepresentations in connection with the offering of a security in Utah. The allegations in the Order to Show Cause themselves show that Todd cannot be subject to the jurisdiction of the Securities Division for any of these

misrepresentations, which, for ease of reference, are discussed below in two separate categories: (A) statements allegedly made by North, and (apparently) imputed to Todd by virtue of an agency relationship between the defendants; and (B) statements allegedly made by Todd on October 17, 2007, either on the phone call with North and the undercover agent, or to the undercover agent in Kansas City later that day.

Meeting	Statement	Count I Paragraph	General Allegations
October 13	Todd was mediator for IMF.	36(a)	13
October 13	20-25 other investors were receiving 160% returns weekly.	36(b)	15-16
October 13	“bank trading” program worked and no one was losing money.	36(c)	16
October 13	Bank trading program was approved by the Federal Reserve.	36(e)	13
October 13	Investors had to undergo an FBI check.	36(f)	22
October 13, October 17 (phone with Todd)	There was no risk.	36(d)	19, 29
October 13, October 17 (phone with Todd)	25% guaranteed return on 4 weeks of trading.	36(g)	20, 29
October 17 (phone with Todd), October 17 (Kansas City visit to Todd)	Lehman Brothers in New York would receive and pool investors’ money.	36(h)	29, 31

A. October 13, 2006

As a matter of law, the Order to Show Cause does not contain allegations sufficient to impute defendant Ken North's pre-October 17 representations to Carl Todd. Therefore, Todd did not have anything close to "minimum contacts" with Utah with respect to North's representations, and Utah may not assert personal jurisdiction over Todd. Specifically, the Order does not allege that North had actual or apparent authority to make the representations he did, or that even if North had such authority, Todd played some actual role in getting North to make the comments to the undercover investigator. Utah recognizes that such allegations are the bare minimum required to satisfy fourteenth amendment due process for asserting jurisdiction over Utah blue sky violations. MFS, 96 P.3d at 931, 933 (no jurisdiction could be exercised over out of state officers for securities violations solely by virtue of their relationship to the corporation as agents, officers, directors, etc.).

The Order makes no attempt to allege that Todd had anything to do with North's statements at the October 13 meeting, which Todd did not attend. Nor does it allege that Todd later heard what North had said at the October 13 meeting and told the undercover agent that North had been speaking for him. Instead, it alleges that:

- (1) the undercover agent contacted North on his own volition, and when he met North, "North said he was acting as Todd's representative in Utah." (Paragraph 11)
- (2) during this same meeting, North claimed that Todd shared some portion of his 25% commission with North. (Paragraph 21)
- (3) "McVay [the undercover agent] asked Todd to confirm that North was in fact working with Todd. Todd told McVay that he and North had been working together for about seven or eight years, and had done "millions and millions and millions of dollars in business together." (Paragraph 28).

These statements are insufficient to allege that North had either actual or apparent authority from Todd to make the representations he made during the October 13 meeting. “Under agency law, an agent cannot make its principal responsible for the agent’s actions unless the agent is acting pursuant to either actual or apparent authority.” Zions First National Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah 1988) (applying and discussing at length Utah law of agency, and determining that principal was not liable for actions of agent). Express authority exists where the principal directly grants his agent authority to act on a particular matter, and implied authority allows an agent to accomplish tasks necessary or incidental to the performance of the main matter that has been expressly granted. Id. at 1094-1095. Apparent authority, on the other hand, is based solely on the actions of the principal in making third parties rely on the agent’s actions. Id. at 1095. “It is the principal who must cause third parties to believe that the agent is clothed with apparent authority... It follows that one who deals exclusively with an agent has the responsibility to ascertain that agent’s authority despite the agent’s representations.” Id. (emphasis added).

Under these standards, it should be clear that the Order makes no claim that North had actual (or implied) authority to make his October 13 statements, let alone specific instructions from Todd to make those statements. The Order comes closest to alleging that North at least had apparent authority, even if no actual authority existed. However, there is a crucial gap in the allegations. Paragraphs 11 and 21 relate only to statements made by North. They were not made by the alleged principal (Todd) or at least in his presence, and it is the principal’s, not the agent’s, representations that confer apparent authority. Zions, 762 P.2d at 1095. Todd was not there to confer that authority.

Further, the Order's carefully-worded account of the brief October 17 conversation (Paragraph 28) mentions only that the undercover agent asked Todd if he was "working with" North. Todd's answer is ambiguous, but neither the question nor the attempted answer references or even relates to any of the statements made by North on October 13, so as a matter of law, this brief exchange cannot ratify North's prior statements.

There is no allegation, in short, that Todd ever had knowledge of North's pre-October 17 statements and expressed approval of them (or at least acquiesced in them) to the undercover agent. Perhaps if the undercover agent had repeated North's statements to Todd from the earlier meeting and asked if North had spoken correctly, Todd's own position on whether Ken North was speaking for him could have been recorded and alleged in the Order. But the allegations are devoid of any such statement. Especially considering the fact that the entire October 13 conversation (and the subsequent conversations) were admittedly staged by an undercover agent in an effort to draw Todd into Utah's jurisdiction, the mere fact that Todd's name was mentioned a handful of times by North and the agent on October 13 cannot provide the "minimum contact" necessary for hauling Todd before a Utah tribunal to answer for North's statements on that day.

B. October 17, 2006

The three statements made or imputed to Todd on October 17, 2006 mark the first time Todd is alleged to have actually been present for or have knowledge of any statement or misrepresentation. The only fair inference from the Order is that each statement was made at the instigation of Utah's undercover agent. As discussed below, such statements fail to support personal jurisdiction over Todd. They do not provide

“minimum contacts” because, like the federal stings in Archer 486 F.2d at 682, and Brantley, 777 F.2d at 163, they occurred solely by the contrivance of an undercover agent seeking to bring within his agency’s purview a defendant who was operating outside its jurisdiction.

The contacts also do not satisfy the requirement in U.C.A. §61-1-26 of “an offer to sell...made in this state.” An undercover agent’s phone call from Utah to Missouri for purposes of obtaining statements is not a predicate for an offer that “originates from [Utah]” (U.C.A. § 61-2-26(3)(a)), nor is it “directed by the offeror to this state and received at the place to which it is directed...” (U.C.A. § 61-2-26(3)(b)). An undercover agent’s visit to Missouri for a few hours, undertaken at his own insistence, fails Utah’s statutory tests for the same reasons. Id.

A closer examination of the allegations in the Order bears out these conclusions. With respect to the first October 17 contact, the phone call, Todd is alleged to have made three actionable statements. See Order, ¶ 29. The Order alleges that the phone call took place at some point during a Utah meeting between only the undercover agent and North, and that the meeting was held at the instigation of the undercover agent. See ¶¶ 23, 25. The Order does not explain how Todd came to be on the telephone with these gentlemen during their meeting, cryptically stating only that “Todd was present at the meeting by telephone.” See ¶ 25. The Division claims to have recorded the meeting (¶ 10) and has a clear incentive to plead basic facts that would have supported an argument that Todd took affirmative actions (such as placing his own call to Utah) to purposefully avail himself of the state’s laws and protections, rather than serving as the passive recipient of a “sting” call originating from a Utah undercover agent. Given the Order’s silence on such key

facts, the more reasonable inference is that Todd was called from Utah at the instigation of the undercover agent. Under these circumstances, as set forth above, jurisdiction is improper both as a matter of due process and Utah law. See U.C.A. § 61-2-26(3).

In the same vein, the Order alleges that the October 17 meeting/phone call resulted in North handing the undercover agent the documents he would need to complete the transaction. See ¶ 26. After recounting statements Todd allegedly made on the call, however, the story abruptly shifts from the October 17 phone call and meeting to the somewhat startling fact that the undercover agent left Salt Lake City that very day and flew to Kansas City to personally meet Todd that evening. See ¶¶ 29-30. The Order is silent as to why this additional meeting was even necessary, whether the agent insisted on flying to Kansas City, whether Todd requested that the agent come visit him, or any other details leading up to this surprising development—despite the fact that the Division claims to have recorded all conversations. See ¶ 10. The Order's failure to articulate basic facts that might tend to show this particular contact reflected Todd's "purposeful availment" of Utah's laws and protections, rather than an effort by an undercover agent to convince Todd to utter a few more statements for the record, once again leads to the reasonable inference that this trip was in fact made at the insistence of Utah's agent. Again, under these circumstances, as set forth above, jurisdiction is improper both as a matter of due process and Utah law. See U.C.A. § 61-2-26(3).

IV. CONCLUSION

A close review of the allegations in the Order shows that the Division cannot assert personal jurisdiction over Todd for the misrepresentations and omissions alleged. Two related problems converge. First, the allegations rely heavily on statements made by

codefendant North, yet never establish the actual or apparent agency relationship necessary (but still not sufficient) to show Carl Todd's minimum contacts with the forum with respect to those statements. Second, the allegations rely solely on statements allegedly made by Todd under circumstances where Utah "came to him" solely for purposes of establishing jurisdiction—the opposite of the "purposeful availment" required for due process under Utah and federal law. This also fails to meet the requirement in Utah's securities statute that Todd have made his offer to sell "in this state." The failure to make allegations implicating this statute is an independent bar to jurisdiction. Accordingly, the claims against Todd must be dismissed for lack of personal jurisdiction in Utah.

Dated: February 16, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2007, a copy of this brief was served by U.S. Mail and facsimile on each of the following parties:

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