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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:**

**DAVID STERLING JENSEN,  
CRD#1109598**

**Respondent.**

**MEMORANDUM IN OPPOSITION TO  
RESPONDENT'S MOTION TO  
DISMISS, OR IN THE ALTERNATIVE,  
FOR SUMMARY JUDGMENT  
[ACCOUNTANT EXCEPTION]**

**Docket No. SD-09-0040**

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Pursuant to the Utah Department of Commerce Administrative Procedures Act Rules, Rule R151-46b-7(6)(c), the State of Utah, Division of Securities ("Division"), files this memorandum opposing the Respondent's Motion to Dismiss.

**INTRODUCTION**

Respondent's motion is styled as a motion to dismiss, or alternatively, for summary judgment<sup>1</sup> on the basis of "lack of jurisdiction". The motion is predicated on the Respondent's claim to an exception from the definition of investment adviser afforded to certain professionals

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<sup>1</sup>Respondent's motion fails to comply with Utah Rules of Civil Procedure 56 and 7, which require that a memorandum supporting a motion for summary judgment state facts "supported by citation to relevant materials, such as affidavits or discovery materials." U.R.C.P. 7(c)(3)(A). Respondent's motion contains neither, and there is accordingly no basis for summary judgment. Wilkinson v. Union Pacific Railroad Co., 975 P.2d 464, 465-66 (Utah 1998).

providing investment advisory services “solely incidental” to the professional services. The motion fails whether treated as a motion to dismiss or motion for summary judgment. Under either analysis, the motion is facially defective and Respondent fails to carry his burden of proving the exception as required under Section 61-1-14.5 of the Utah Uniform Securities Act (“Act”).

### ARGUMENT

#### **I. RESPONDENT FAILS TO MEET THE THRESHOLD REQUIREMENT FOR THE PROFESSIONAL EXEMPTION BECAUSE HE NEVER ACTED AS AN ACCOUNTANT OR PROVIDED ACCOUNTING SERVICES TO THE COMPLAINANT.**

Respondent’s reliance on the so-called professional exemption contained in Section 61-1-13(1)(q)(iii)(C) of the Act fails for the fundamental reason that he was never C.J. or C.J.’s wife’s accountant. Accordingly, it is impossible and untrue to assert that Respondent’s activities as an investment adviser were in any way “solely incidental” to the practice of his profession as an accountant. Moreover, Respondent’s CPA license expired in 1992.

In Respondent’s Answer to the Order to Show Cause, he provided a statement of facts he asserts are relevant in light of the allegations made. Among those is the following:

**Jensen was never a CPA nor an accountant for C.J.**

(Answer at 15, ¶ 151) (emphasis added).

This fact was confirmed during a November 10, 2009 telephonic conference with the undersigned and the Administrative Law Judge. Jensen admitted that:

1) he has never filed tax returns or prepared other documents as an accountant on behalf of C.J. or C.J.’s wife;

- 2) he has never entered any contracts with C.J. through which Jensen agreed to provide any services as an accountant for C.J. or C.J.'s wife;
- 3) he has never received any compensation from C.J. for the provision of accounting services.

Indeed, according to Jensen, the only discussions of accounting between Jensen and C.J. occurred when C.J. allegedly called Jensen with what Jensen characterized during the November 10 conference as "accounting questions".<sup>2</sup> If true, Jensen fielded some isolated queries that never required the preparation of any documents, reports, contracts, invoices, or payment of compensation. In contrast, the contract drafted by Jensen's attorney contains great detail as to the investment advisory services to be provided by Jensen, but is silent as to any accounting services, because none were provided. See OSC at 2-3, ¶¶ 7-8. Jensen fails to meet the prerequisite to claiming an exemption under the Act.

Section 61-1-14.5 of the Act provides, in part:

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under Section 61-1-14 or an exception from a definition under Section 61-1-13 is upon the person claiming the exemption or exception.

Jensen cannot carry his burden because he never rendered professional services as an accountant to C.J.

## CONCLUSION

There is no evidence, based upon the undisputed facts, to support Respondent's claim. Respondent cannot avail himself of the professional exemption without having provided the underlying professional services which give rise to "solely incidental" activities as an investment

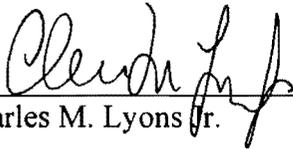
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<sup>2</sup>C.J. denies any such discussions.

adviser. Respondent's motion to dismiss and alternatively, for summary judgment must be denied.

Respectfully submitted this 24<sup>th</sup> day of November, 2009.

UTAH SECURITIES DIVISION

By:   
Charles M. Lyons Jr.

**Certificate of Mailing**

I certify that on the 25<sup>th</sup> day of November, 2009, I mailed, by first class mail, a true and correct copy of the foregoing Memorandum in Opposition to Motion to Dismiss to:

David Sterling Jensen  
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Tooele, Utah 84074-8022

Pam Bradshaw