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

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
[LICENSING AS INVESTMENT
ADVISER]**

Docket No. SD-09-0040

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 judgment¹ on the basis of "lack of jurisdiction". The motion is based on Respondent's claim he

¹Respondent'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).

did not need to be licensed to trade another Utah resident's account, for compensation, pursuant to a contract spelling out activities squarely within the definition of investment adviser under the Utah Uniform Securities Act ("Act"). The motion fails whether treated as a motion to dismiss or motion for summary judgment.

Respondent's arguments are not entirely clear, but seem to be twofold. First, he argues, "People are exempt, under Utah's Securities Laws from having to be licensed as an Investment Advisor [sic] if they have less than 6 clients, have less than \$25 million under management, don't have a firm, don't hold themselves out as investment advisers, don't receive compensation, and are not financial planners." Second, he argues that he relied on the advice of his counsel. Neither argument has merit.

STATEMENT OF FACTS

For purposes of a motion to dismiss, a court deems the facts alleged in the Order to Show Cause as true and must construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. Russell v. Std. Corp., 898 P.2d 263, 264 (Utah 1995); Munteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991).

The following facts from the Division's Order to Show Cause establish that Respondent acted as an investment adviser as that term is defined under Section 61-1-13(1)(q)(i) of the Act:

1. Between 1983 and 1986, Jensen was employed by several broker-dealer firms. He failed the Series 7 General Securities Representative Licensing Examination. He has never taken the Series 65, Uniform Investment Adviser Law Examination.
(OSC ¶ 2)
2. C.J. and Jensen discussed various options strategies in the period leading up to

September 2006. (OSC ¶ 6)

3. Jensen told C.J. he was a CPA who had successfully traded securities accounts for himself and other people. Jensen's CPA license had in fact expired in 1992.

(OSC ¶ 5)

4. Jensen told C.J. that Jensen could make higher returns in C.J.'s account than the 15% annual return C.J. was then earning in a hedge fund. (OSC ¶ 5)

5. C.J. held valid full trade authorization on his wife's TD Ameritrade online account ("the account"). (OSC ¶ 1)

6. C.J. agreed to have Jensen trade the account, pursuant to a written contract ("the contract"). (OSC ¶ 7)

7. Both parties understood and agreed that Jensen would employ a day-trading options investment strategy in the account. (OSC ¶ 6)

8. The contract contained the following terms:

[C.J.] hereby employs Jensen to manage and direct the investment and reinvestment of certain assets. . . .

Jensen accepts such employment for the compensation provided herein. . . .

Jensen shall:

(a) conduct investment research evaluate market conditions and financial data.

(b) have responsibility and discretion to invest any funds in the Account as Jensen determines in his discretion to be proper.

(c) provide reports and other information regarding the Account from time to time as requested by [C.J.].

(d) use all trading strategies to invest the funds including, but not limited to, the purchase of any type of investment, purchase or sale of options including "puts"

and “calls”, taking short positions in securities, using margin, and short-term trading. The Account shall be a “Pattern Day Trader Account.”

[C.J.] shall execute or cause to be executed any and all documents required by the brokerage firm or house to allow Jensen to trade with full discretion in the Account. . . .

Compensation to Jensen. As compensation for his services [C.J.] shall pay to Jensen monthly a fee computed by determining the profits in the account during the month and paying Jensen ten per cent² of the gain in the account. . . .

(OSC ¶ 7)

9. On or about September 5, 2006, C.J. deposited \$30,000.00 into the account.

Thereafter, Jensen made numerous options transactions in the account. (OSC ¶ 8)

10. C.J. and Jensen communicated frequently by e-mail as Jensen traded the account from his computer. (OSC ¶ 9)

11. By November 2006, the account had experienced significant losses totaling approximately \$25,000. C.J. told Jensen to stop trading the account at that time.

(OSC ¶ 10)

ARGUMENT

I. JENSEN ACTED AS AN UNLICENSED INVESTMENT ADVISER

Jensen’s conduct fits squarely the definition of investment adviser, and required that he be licensed with the Division. Section 61-1-13(1)(q)(i) states:

"Investment adviser" means a person who:

(A) for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; or

²The parties verbally agreed that Jensen would actually receive 15% of the profits in the account.

(B) for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

A. Compensation

Jensen agreed to, and did, trade C.J.'s account, in exchange for 15% of any profits made in the account, to be paid to Jensen monthly. The sole reason Jensen did not get paid as agreed is because the account made no profits and instead sustained significant losses over a short period of time – to the point where C.J. told Jensen to stop trading the account. While Jensen repeatedly raises the fact that he was not paid, this argument is irrelevant because there is no dispute that he engaged in the activity with an aim to share in the net trading profits. Sea Carriers Corp. v. Empire Programs Inc., 488 F.Supp.2d 375, 382 (S.D.N.Y. 2007) (agreement to share investment profits is compensation for purposes of investment adviser definition).

B. Jensen's Activities Constitute Investment Advisory Services

Among the obligations Jensen undertook pursuant to his agreement with C.J. are those typical of an investment adviser: conducting investment research, evaluating market conditions and financial data, investing funds in the account as the adviser in his discretion deems to be proper, and providing reports on the account as requested by the client. The agreement gave Jensen full trading discretion – in which Jensen was to “use all trading strategies to invest the funds” – employing specific “day trader” strategies involving the purchase or sale of options and taking short positions in securities.

Under both the plain language of the Act and case law, Jensen's actions are those of an investment adviser, and licensing is required. Abrahamson v. Fleschner, 568 F.2d 862, 870-71 (2nd Cir. 1977) (general partners as persons who managed the funds of others for compensation

held to be investment advisers based on plain language of federal definition of investment adviser³ and its related provisions, legislative intent, and broad remedial purposes of Investment Advisers Act); SEC v. Kenton Capital, Ltd., 69 F.Supp.2d 1, 14 (D.D.C. 1998) (agreement giving discretion and control over underlying investment constitutes investment advice requiring licensure); Sea Carriers Corp. v. Empire Programs Inc., 488 F.Supp.2d 375, 381 (S.D.N.Y. 2007) (day-to-day decision making and executing trades constitutes investment advice); United States v. Elliott, 62 F.3d 1304, 1310 (11th Cir. 1996) (finding that defendants had clearly provided investment advice by advising investors in their choices and controlling investments).

In Abrahamson, the court found that “many investment advisers ‘advise’ their customers by exercising control over what purchases and sales are made with their clients’ funds.” Abrahamson at 871. That is precisely what Jensen did with C.J.’s account, and he needed to be licensed to do so.

C. Jensen Held Himself Out to C.J. as an Investment Adviser

Section 61-1-13(1)(q)(ii) of the Act further states:

"Investment adviser" includes a financial planner or other person who:

...

(B) holds the person out as providing the investment advisory services described in Subsection (1)(q)(i) to others for compensation.

(emphasis added).

As set forth in the Statement of Facts, paras. 2-4, above, prior to the activity at issue,

³Utah’s definition of investment adviser follows Section 401(f) of the 1956 Uniform Securities Act (“‘56 Act”) – currently used by a majority of states – and is the same in substance as that of the federal Investment Advisers Act of 1940 (“IAA”). See IAA, § 202(a)(11); Abrahamson v. Fleschner, *infra*, 568 F.2d 862 at 869, n.12.

Jensen had numerous discussions with C.J. about securities, and specifically, options strategies. Jensen told C.J. he was a CPA who had successfully traded securities accounts for himself and other people. Jensen told C.J. that Jensen could make higher returns in C.J.'s account than the 15% annual return C.J. was then earning in a hedge fund. A contract outlining investment advisory services to be provided for which Jensen was to be compensated was presented to C.J. Through his representations and actions, Jensen clearly held himself out to C.J. as providing the investment advisory services as described above.

II. THE DE MINIMIS EXEMPTION IS INAPPLICABLE TO JENSEN

Jensen's motion misconstrues an exemption in the Act for non-resident investment advisers and argues, essentially, that anyone in Utah wishing to be an investment adviser may do so with up to 5 clients within a 12 month period, without a) taking any required exams to demonstrate minimum skills and knowledge; b) the oversight of either a supervisory firm or self-regulatory organization; and c) any state or federal licensing or oversight. Such fundamental misreading of the Act is wholly contradictory to the securities regulatory scheme and investor protection.

A. The De Minimis Exemption Exists for Out-of-State Investment Advisers

Section 61-1-3(3) of the Act states:

It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless:

- (a) the person is licensed under this chapter;
- (b) the person's only clients in this state are [certain listed entities]; or
- (c) the person has no place of business in this state and during the preceding 12-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

The exemption from licensing contained in Subsection (c) applies to non-resident investment advisers who are licensed elsewhere who have a limited number of Utah resident clients. It follows an analogous provision, Section 201(c) of the '56 Act⁴, the official commentary to which makes clear the intent:

A de minimis exemption for out of state investment advisers and investment adviser representatives has been added to permit such persons to accommodate a limited number of noninstitutional clients.

1986 NASAA Comment to § 201(c). See Strategic Advisors Overseas Ltd. No Action Letter, 1996 Mich. Sec. LEXIS 8 (July 31, 1996) (no-action relief granted to out-of-state SEC-registered investment adviser with no place of business in Michigan).

From a policy perspective, the exemption makes sense, because it permits those with a minimal business presence in a particular state to serve a limited number of customers located in that state. In permitting such activity, however, the assurance of regulatory oversight elsewhere is presumed and a significant consideration. See Joseph C. Long, Blue Sky Law, Vol. 12A, §8:79 (de minimis exemption for investment advisers with limited number of a clients in a state is similar to and should be interpreted in the same way as the exemption for broker-dealers: “[t]here is no question that these firms are broker-dealers in the sense of the first portion of the statutory definition. They must be registered at the federal level with the SEC and are subject to ongoing supervision by the National Association of Securities Dealers, a self-regulatory organization created under the Securities Exchange Act of 1934. Further, these firms will be subject to registration and supervision by state securities agencies in the states in which they locate their

⁴See <http://www.nasaa.org/content/Files/UniformSecuritesAct1956withcomments.pdf>

offices...”) (quoting *Id.*, § 8:66); *Id.*, § 8:70 (discussing Official Commentary to foreign broker-dealer exclusion: “[t]he purpose of this exclusion is to allow a foreign broker-dealer to service a limited number of customers in a state without local registration. This would be important where an established customer moves into another state, or where a broker-dealer is just beginning operations in a state and wants to test the water....[a] second purpose of the exclusion is to allow a broker-dealer to service an existing account while his customer is temporarily in a state, e.g., on business or a vacation. An example would be a New York customer who winters in Florida. Without this provision, a New York brokerage firm could not service this account by calling or mailing information to Florida, or receiving instructions from Florida, without registering in Florida. In either event, the exclusion is a very narrow one...”)

As Long observes, the above reasoning is equally applicable to investment advisers with limited clients in a given state. The exclusion is narrow, and premised upon licensure in one’s home state. Because Jensen is not licensed in any state as an investment adviser, nor registered as an investment adviser with the United States Securities & Exchange Commission, the licensing exemption under Section 61-1-3(3)(c) does not apply.

B. Jensen Had a Place of Business in Utah

“Place of business” is defined in Black’s Law Dictionary as “[t]he location at which one carries on his business or employment.” *Id.* at 1149 (6th ed. 1990). The term is defined by federal rule under the IAA as:

“Place of business” of an investment adviser representative means:
(1) an office at which the investment adviser representative regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients...

17 C.F.R. § 275.203A-3.

There is no dispute that all of the activity at issue in this matter occurred in Utah. The representations made by Mr. Jensen in which he held himself out to C.J. as an investment adviser – concerning successfully trading Jensen’s own account and the accounts of others – were made in Utah. Mr. Jensen had telephone calls and e-mail exchanges with C.J. During the relevant period, he traded the account on a computer from his home – at which time he frequently communicated with C.J. by e-mail, discussing specific trades and market activity. Accordingly, he had a physical presence and place of business – where he engaged in the activity at issue – in Utah. *Cf. Strategic Advisors Overseas Ltd. No Action Letter, supra.*

III. RESPONDENT HAS NO ADVICE OF COUNSEL DEFENSE

Jensen asserts that he was advised by legal counsel that his activities were legal, but offers no evidence to support such claim. In this regard, Mr. Jensen was afforded an opportunity by the Administrative Law Judge to file an affidavit from his counsel, prior to the due date of the Division’s response to his motion, but none was received. See November 18, 2009 Division Notice of Failure to File Affidavit, on file with the Court. Accordingly, there is no basis for the Administrative Law Judge to further consider such argument.

CONCLUSION

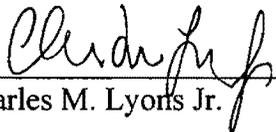
Consistent with the goal of investor protection, the licensing requirements of the Act ensure that individuals rendering investment advice for compensation in Utah have demonstrated a minimum level of proficiency in the highly regulated securities industry. This is accomplished by passing the investment adviser exam and licensing with an entity to whom the person is subject to supervision. In cases where an investment adviser has full trading discretion as Mr. Jensen did, a bond is also required. The narrow exemption for out-of-state advisers who meet

these criteria is inapplicable to Jensen because he is not licensed in another jurisdiction.

Accordingly, his motion must be denied.

Respectfully submitted this 24th day of November, 2009.

UTAH SECURITIES DIVISION

By: 
Charles M. Lyoris Jr.

Certificate of Mailing

I certify that on the 25th 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:

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Pam Radzinski