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

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<p>IN THE MATTER OF:</p> <p><b>WING HAVEN FARM, LLC GARY G. HATCH,</b></p> <p>Respondents.</p>	<p><b>POST-TRIAL BRIEF</b></p> <p><b>Docket No. SD-10-10-0072 Docket No. SD-10-10-0073</b></p>
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**STATEMENT OF RELEVANT FACTS**

Gary Hatch, His Clients, and Wing Haven

Gary Hatch (Hatch) is a Utah resident, *Answer* ¶ 3 (admitting, Utah residency), who provides “personal management services” – described broadly as “advisor management, bookkeeping and transactional assistance, and access to the most up-to-date tax, litigation, and legislative research.” *Respondent’s Exhibit 1* (quoting text of Hatch’s signature block).<sup>1</sup> Hatch

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<sup>1</sup>Hatch claims these personal management services are like those in *Zinn vs. Parrish*, *Answer* ¶ 3(2), but did not provide a case cite for *Zinn*, and did not explain its significance. The cite for *Zinn* appears to be 644 F.2d 360, 364 (7th Cir. 1982) (holding, personal manager who provided advice on isolated business investments, housing, rentals, not required to register as investment advisor). Hatch previously passed Series 6 and 63 exams in 1989, but

provides these services under the name “McKenzie Finch.” See e-mail from Hatch to Division, dated April 19, 2011, accompanying Respondent’s Motion to Dismiss (“McKenzie Finch” appears below Hatch’s name, and the name is included in his e-mail address); accord *Respondent’s Exhibit 1* (similar references to McKenzie Finch after Hatch).<sup>2</sup> He also provides other types of services.<sup>3</sup> See e.g. *Answer* ¶¶ 3(2) (asserting, the Crandalls had “tasked” him mere leasing, performing due diligence on an investment platform for a company, eight other projects in 2006, five projects in 2007, and other “outstanding” projects in 2008); ¶ 17 (asserting, Hatch was “tasked” with researching an accounting firm); ¶ 24(v).

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is no longer licensed. *Petitioner’s Exhibit 7*.

<sup>2</sup>McKenzie Finch is not registered in Utah as either a domestic or foreign a business entity, and Hatch has not registered it as an assumed business name. UTAH CODE ANN. §§ 42-2-5 (name registration required to conduct business under assumed name); -10 (penalties for violations). Ten years ago, however, McKenzie Finch, LLC, had been registered here, *Petitioner’s Exhibit 1*, Tab 1 (McKenzie Finch was registered in 1999), but was dissolved in 2002 for failure to file an annual renewal. *Id.* After dissolution, however, Hatch held himself out as McKenzie Finch, describing it as a “multi-disciplinary, multi-national consulting firm specializing in wealth preservation techniques to affluent individuals. For over 34 years, the global professional network of over 350 JDs, CPAs, CFPs, and MBAs has been helping clients reduce capital gain, ordinary income, business and estate taxes while protecting the client’s corporate and personal assets from frivolous litigation using high-impact, legally backed strategies.” *Respondent’s Exhibit 1* (quoting text of signature block). Hatch claims McKenzie Finch to operate in Salt Lake City and other places. *Id.* (“Locations in the United States. St. Thomas, USVI. New York City. Salt Lake City. Also Office’s [sic] in the UK. Bahamas & the British Virgin Islands.”) (quoting text of signature block).

Hatch uses 6905 S. 1300 East, Suite 240, Salt Lake City, UT as his business address, *Respondent’s Exhibit 1*, but also says it is only a mail box. *Answer* ¶ 8; *Hatch Affidavit* accompanying Motion to Dismiss at 12 (explaining history of addresses). When the company was registered, however, it identified 7090 S. Union Park Ave. Ste. 400, Midvale, UT 84047 as its business address. *Petitioner’s Exhibit 1* (printout of business search).

Hatch has also used two Utah telephone numbers as McKenzie Finch since dissolution. *Respondent’s Exhibit 1* (e-mail from Hatch to the Crandalls, dated November 23, 2003, identifying telephone number as (801) 558-3737); *Exhibit 1e* (e-mail from Hatch to Melanie Crandall, dated July 19, 2008, identifying telephone number as (801) 944-9797); see also e-mail from Hatch to Division, dated April 19, 2011 (identifying telephone numbers as (435) 848-5858, and (801) 944-9797). Area codes 801 and 435 are Utah area codes.

<sup>3</sup>Hatch is also the owner and operator of Western Capital Management, LLC (Western Capital) (*Petitioner’s Exhibit 1*, Tab 2); and Hatch Family Limited Partnership (Hatch Family Limited). *Id.* Western Capital dissolved in 2010. *Id.* Hatch Family Limited is still active. *Id.*

David and Melanie Crandall (the Crandalls) are clients of Hatch.<sup>4</sup> *Answer* ¶ 3(2) (admitting, e-mail from Hatch to the Crandalls, dated November 25, 2003, that refers to an “engagement agreement” for his services in Respondent’s Exhibit 1 is the first e-mail he sent to the Crandalls); *see also Respondent’s Exhibit 1*.<sup>5</sup> The Crandalls retained him as their personal manager in late 2003.<sup>6</sup> *Answer* ¶¶ 3(2), 7, 9-10, 12(f), 24(v)(2) (admitting, Hatch was or acted as personal manager for Crandalls); *Hatch Affidavit* accompanying Motion to Dismiss at 3-5 (acknowledging he acted as personal manager, and that the Crandalls were his clients). The services he provided included financial and tax advice. *Answer* ¶ 3(2) (asserting, the Crandalls had “tasked” him with various projects between 2006 and 2007, and asked him to research § 1031 exchange); *accord* Hatch Affidavit at 3; *Respondent’s Exhibits 1b* (e-mail from Hatch to Crandalls, dated April 21, 2005, addressing question about § 1031<sup>7</sup> exchange); *1c* (e-mail from Hatch to Crandalls, dated April 10, 2006, discussing plans to move ahead with unidentified issue); *1d* (e-mail from Hatch to the Crandalls, dated October 3, 2007, listing life insurance, new accountant, year end planning, and mortgage loan to client as items on agenda needing follow up); *1e* (e-mail from Hatch to Melanie Crandall, dated July 29, 2008, requesting telephone call to

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<sup>4</sup>Hatch claims to now have six clients, and never more than sixteen clients. *Answer* ¶¶ 3(1), 24(v); *but see Hatch Affidavit* at 14(8)(asserting, he has no more than five clients in the last twelve months).

<sup>5</sup>Hatch did not provide a copy of the engagement agreement, and the e-mail does not detail the services to be provided.

<sup>6</sup>The Crandalls are residents of Colorado and own a company called Good Earth Landscaping & Maintenance. *Respondent’s Exhibit 5*; *see also Motion to Dismiss* at 5-13 (identifying Colorado clients to be among his seven clients in 2004, six clients in 2005, five clients in 2006, and six clients in 2007).

<sup>7</sup>26 USC § 1031 (IRS Code section, authorizing exchange of property held for productive use or investment).

catch up on outstanding projects); *Respondent's Exhibit 3* (profit and loss statement created by Hatch for the Crandalls' company from January 1 through November 6, 2007).

Hatch's wife Gail owned or operated a Utah company with their daughter Jillian called Wing Haven Farm, LLC (Wing Haven). *Petitioner's Exhibit 1*, Tab 3.<sup>8</sup> Wing Haven was registered on December 12, 2007, but was dissolved two years later on January 12, 2009. *Id.*; *Answer* ¶ 2 (admitting this allegation).<sup>9</sup>

Hatch lives in Tabiona with his wife. *Answer* ¶ 3 (admitting, Utah residency); *Respondent's Exhibit 6* at 4 (mare lease and breeding agreement, stating Wing Haven Farms is located at Hanna).<sup>10</sup> Hanna is in Duchesne County, near Tabiona.<sup>11</sup>

### The Offer and Sale

In late 2007, the Crandalls needed a tax shelter for \$200,000, and discussed it with Hatch. *Answer* ¶ 9 (admitting, it was common from him, as personal manager, to recommend steps to reduce tax liability, to annualize year-to-date income, and that these were "various projects [that] were open tasks and . . . projects" for 2007, and that there would have been a "discussion" about

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<sup>8</sup>Gale also owns a company called DOJ, LLC (DOJ). *Petitioner's Exhibit 1*, Tab 2 (delinquent).

<sup>9</sup>Wing Haven used the same Midvale address that Hatch did for McKenzie Finch after dissolution. *Respondent's Exhibit 6* (identifying Wing Haven's address as 6905 S. 1300 East #240, Midvale, UT 84047); *but see Petitioner's Exhibit 1*, Tab 3 (printout out identifying business address for Wing Haven as 3626 McLain Mtn. Circle, Salt Lake City, UT 84121). DOJ also uses the same address as Wing Haven, and McKenzie Finch. See *Petitioner's Exhibit 1*, Tab 2 (printout identifying business address for DOJ as 6905 S. 1300 East, Suite 240, P. O. Box 57185, Midvale, UT 84047, Gary Hatch as registered agent, and his address as 3626 McClaim [sic] Cir., Salt Lake City, UT 84121).

<sup>10</sup>The mare lease and breeding agreement (*Respondent's Exhibit 6*) is the same *Petitioner's Exhibit 11*.

<sup>11</sup>UTAH R. EVID. 201 (authorizing judicial notice of facts generally known and capable of accurate determination).

them); *Respondent's Exhibit 3* (Profit and Loss Statement for the Crandalls' company Good Earth from January 1 through November 6, 2007, prepared by Hatch); *Respondent's Exhibit 4* (spreadsheet, also prepared by Hatch, showing the Crandalls' taxable income to be \$200,000); *Respondent's Exhibit 1a* (e-mail between Melanie Crandall and Hatch, dated January 7, 2008, asking about steps to reduce tax liability for 2007).

Hatch proposed the idea of a mare leasing program as a means of providing them a tax shelter. *Answer* ¶ 6 (admitting, the leasing program could have saved the Crandalls \$80K almost immediately); ¶ 9 (admitting, Hatch recommended steps to reduce the Crandalls' current financial liability); ¶ 10 (admitting, Hatch discussed the plan with the Crandalls in November 2007); ¶ 11 (admitting, thoroughbred racing would provide tax benefit); ¶ 12 (a) (admitting, a projected tax benefit was made to that effect); *Respondents's Exhibit 4* (showing, mare leasing program would net the Crandalls a tax savings of \$81,260).<sup>12</sup>

Hatch also told them the mare lease program would provide an eight percent return. *Answer* ¶ 11(d) (admitting, Hatch told the Crandalls the program historically averaged eight percent over a fourteen-years period); ¶ 11(c) (admitting, sale of foals would net an overall return on the investment); *see also* ¶ 6 (admitting, amount of loss sustained by investors could be offset by proceeds from sale of foals); ¶ 12(c) (admitting, the sale of foals would be taxed as capital gains on the overall return of the investment); ¶ 12(e) (admitting, sale of foals or racing could

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<sup>12</sup>Respondent's Exhibit 4 is dated November 19, 2009. But that document was not provided to the Crandalls until March 6, 2008. *See Petitioner's Exhibit 10* (letter from Hatch to Crandalls, dated March 6, 2008). It was included, along with other documents explaining assumptions and risk, as an attachment; *Answer* ¶ 16 (admitting, the information dated November 19, 2007 was included in the information provided March 6, 2009).

produce revenue);<sup>13</sup> *Petitioner's Exhibit 10* at 6 (“The goal is to earn a profit from the sale and/or racing of the thoroughbred foals”). He also said it involved no risk.<sup>14</sup> Hatch said his wife could form a company to offer the leasing program with their daughter if he could not find one for the Crandalls. *Id.* ¶ 10 (asserting, daughter Jillian had experience in equestrian industry); ¶ 11. Hatch also “instructed” the Crandalls “to set up a family limited liability company to operate as the Lessor in the Wing Haven Mare Lease program,” *Hatch Affidavit* at 12-13, 15(14); and even suggested the name “*Crandall Family Thoroughbred Breeding, LLC.*” *Id.*

The Crandalls never formed the company, *see Respondent's Exhibit 6* (“mare lease and breeding agreement” identifies the Crandalls as “David & Melanie Crandall *dba* Crandall Family

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<sup>13</sup>While Hatch denies promising the Crandalls an eight percent return, *Answer* ¶¶ 12(d), -(e), in a prior statement, he admitted discussing it with them.

As we have discussed, the goal is to provide you with a return of principle [sic] and a *targeted 8%* rate of return net of all tax benefits and costs . . .  
*Petitioner's Exhibit 8* at 2 (letter from Hatch to Crandalls, dated March 6, 2008) (emphasis added).

<sup>14</sup>Because Hatch did not provide a copy of the mare lease agreement to the Crandalls until March 6, 2006, *Answer* ¶ 17; *Respondent's Exhibit 6*, he cannot rely on it or other documents provided that were provided later to show he disclosed risk and never claimed no risk. *Id.* ¶¶ 12(d), (e), (6) (asserting, risk was fully disclosed).

Moreover, his denials contradict his previous statements about risk:

. . . As you know there is no guarantee that we will be able to obtain this goal, however, Wing Haven has taken steps to *provide* you with a *guarantee* of your net after tax *investment*. To explain this, see the following: You *invested \$200,000*. I have estimated your tax savings to be \$81,260.00 leaving you a net out of pocket of \$118,740.00. To back this *minimum guarantee* possible. Wing Haven Farm has, to date, purchased 5 additional Mare's. . . . To further provide assets to *back this guarantee*. Wing Haven consummated the purchase of Nordic Storm today. . . . All the income from the eight foals that will be born in the next 12 months will come to you. . . . Why would Wing Haven Farm *provide you with this guarantee*? Two reasons: 1) This is a new line of business for the principles' of Wing Haven and everyone at Wing Haven is going through a Hugh learning curve and anticipate many mistakes will be made during this learning curve. 2) The is an inherent conflict of interest between Myself as your advisor and the owner of Wing Haven, my daughter Jill. . . .

*Petitioner's Exhibit 8* at 2-3 (emphasis added).

Thoroughbred Breeding”) (emphasis added), but Wing Haven did get set up in late 2007, *Petitioner’s Exhibit 1*, Tab 3 (Wing Haven registered on December 12, 2007); *see also Answer ¶* 10 (asserting, Jill had simply formed the company in case the Crandalls decided to become involved in thoroughbred breeding business). A few weeks went by, and then the Crandalls and Hatch exchanged the following e-mail:

- On December 27, 2007, the Crandalls asked Hatch for the name of the mare leasing program: “What is the name of the company that I need to make the check out for the mare leasing?” *Respondent’s Exhibit 5a*.
- Hatch provides the name and address for Wing Haven in Salt Lake City, and then asks: “[t]ell me what you’re thinking so I can get all the information to you.” *Id.*
- The Crandalls replied: “[a]ll I’m thinking about is getting a check out to you.” *Id.*
- Hatch then responded: “OK, what I mean is when you decide how much that check is, let me know so I can get the right paperwork together for you guys.” *Id. 5b*.

The e-mail thread ends two days later December 29, 2007 with “[s]ent check out for \$200,000.” *Id.*

In the meantime, Melanie Crandall wrote to Hatch for more information in a separate e-mail thread that began on December 28, 2007.

Gary,

David has sent a check for the mare leasing. I am curious how this will work. Will we get paper work that shows we have invested in the Winghaven Farms? I understand that we need to read about mare leasing and possibly do some traveling around mare leasing but what else do we need to do. I have looked over the web sites you have sent and am very overwhelmed with it all. There is so

much to learn I wish I had paid attention to the horse stuff while I was growing up.  
Melanie

*Id.* 5c; *see also Answer* ¶ 13 (admitting, Hatch told the Crandalls they needed to learn about horses, attend races, visit farms).

In response, Hatch tried to correct the Crandalls' characterization of the transaction as an investment in Wing Haven:

You are not making an investment in Wing Haven, you are leasing the reproductive rights of one or more Thoroughbred [sic] mares. You will be leasing these mares from Wing Haven. There is [sic] a number of services that come along with the lease, such as management of the mares, Shire fees, cost of boarding the mares, insurance on the mares, etc. When I find out my above question concerning the amount you are putting toward mare leasing, I will start to prepare all the documents that give you legal title to the foals born to the mares you lease. I will also be outlining the entire program from beginning [sic] (two months ago) to the time you make a disicission [sic] to sell the foal or train to race.

*Answer* ¶ 4 (quoting, e-mail from Hatch to Crandall, dated December 28, 2007, and referred to as Exhibit 2); Respondent's Exhibit 2; *accord Answer* ¶ 10 (quoting same e-mail). Elsewhere, Hatch described the \$200,000 to be an "investment." *Petitioner's Exhibit 10* (letter from Hatch to Crandalls, dated March 6, 2008 at 2 ("your investment of \$200,000"); at 3 ("The Race Horse and Breeding business is a business of invest. [sic] then invest more and then in about 3 years you start to see some return on your investment."); at 4 ("[t]he participant may lose all of his investment");<sup>15</sup> at 10 ("With your investment in the Wing Haven 2007 Mare Leasing program . . .

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<sup>15</sup>Hatch does not dispute he never disclosed whether the investment was a security, whether it was registered, or whether he needed to be licensed.

To due [sic] this you will need to first decide at what level you want to invest. When you decide how much you want to invest, you will need to pay” certain percentages by specific dates).

These two e-mail exchanges are the only contemporaneous documents of the lease at the time of the transaction. When read together, they establish: (a) the existence of a mare lease program in concept; (b) the name Wing Haven; (c), Melanie’s self-report of what she understood her duties to be; (d) her frustration; (e) a request for more information; (f) an incomplete description by Hatch of some of the services to be involved; (g) no mention of associated costs for those services; and (h) \$200,000 payment.<sup>16</sup>

Despite few specifics and Melanie’s cry for help, Hatch tried to assuage her concerns, saying more information would be forthcoming. *Respondent’s Exhibit 2* (e-mail from Hatch to Crandall, dated December 28, 2007, “Please don’t worry about the amount of information you need to take in. Jill will be providing you with information on an ongoing basis”). Hatch did not answer her question though or provide the information. Indeed, Hatch did not even begin putting together any documents for them about the lease program until sometime after December 27, 2007. *Respondent’s Exhibit 2* (e-mail from Hatch to Melanie Crandall, dated December 28, 2007, stating that when he finds out how much the Crandalls are putting toward mare leasing. “I will start to prepare the documents that give you legal title to the foals born to the mares you

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<sup>16</sup> Although Hatch mentions management, shire fees, and insurance, *Respondent’s Exhibit 2*, neither the general reference nor these e-mails establish the essential terms of the lease, namely, the names of the actual parties to the lease, the duration of the lease, the specific property being leased, conditions for renewal, consideration, restrictions, let alone control or participation of the Crandalls in the enterprise, or risk. He made no assessment of suitability. Hatch does not dispute bankruptcy in 2001, *Petitioner’s Exhibit 4*; various civil actions and judgments against him, *Petitioner’s Exhibits 5-6*; tax liens, *Petitioner’s Exhibit 8*; the notation on U4 of the CRD for “conversion.” *Petitioner’s Exhibit 7*. Nor does he dispute that he failed to disclose them.

lease. I will also be outlining entire program from the beginning [sic] (two months ago) to the time you make a disicission [sic] to sell the foal or train to race); *Answer* ¶ 12(f) (“Upon receiving word from DC on 12-27-2007, Hatch, acting as the Personal Manager for DC &MC started working with Wing Haven to put the program together in order to benefit DC & MC”). None of these documents were provided before March 6, 2008. *Id.* ¶ 19 (asserting, “mare boarding agreement” was sent March 6, 2008); *but see* ¶ 19 (asserting, documents were provided from the beginning).

Because no written documents were provided to the Crandalls until March 2008, when they sent the check, they did so in reliance on Hatch’s statements about the mare lease program and the tax benefit. *Answer* ¶ 13 (admitting, Hatch told the Crandalls they needed to make that payment before 12-31-07 if they wanted the tax deduction and benefit from the mare lease program).

That check was deposited into Wing Haven’s bank account at Zions Bank on December 31, 2007. *Petitioner’s Exhibit 9* (copy of \$200,000 check); *Answer* ¶ 4 (admitting, Crandalls paid \$200,000 in December 2007); ¶ 14 (denying, Hatch deposited the check, but not denying that the check had been deposited); ¶ 15(c)(xiii) (admitting, money was loaned to DOJ and was used to buy horses).

#### Lease Documents Provided After The \$200,000 Payment

##### 1. Mare Lease Breeding Agreement (Lease Agreement)

On March 6, 2008, two months after the Crandalls had already parted with the \$200,000, Hatch asserts he provided them with a “mare lease and breeding agreement.” *Answer* ¶ 17

(asserting, “mare lease and breeding agreement,” and other documents were sent on March 6, 2008); *Petitioner’s Exhibit 10* (letter from Hatch to Crandalls, dated March 6, 2008, referring to “explanation” of Wing Haven leasing program “below,” followed by other documents); *Respondent’s Exhibit 6* (mare lease breeding agreement). The Lease Agreement purports to be dated October 24, 2007, Section 1, but the signatures are not dated, and the fax from Good Earth (the Crandalls’ company) with their signatures is dated November 2, 2008 – eight months after it was purportedly sent. The Lease Agreement contains other irregularities. For example, the lease term purports to run from December 1, 2007 to July 1, 2008. Assuming Hatch provided a copy in March 2008 date, the term started three or four months before the actual lease agreement was even provided.

The Lease Agreement also establishes a rental payment for the mares of \$105,000, 2.1; as well as other additional costs and fees. *Id.* 2.2 (stallion service of \$28,000); 2.3 (foal insurance of \$13,500). The Lease Agreement disavows any representations about projected or future revenues, Section 9.2; and contains several disclosures about risk, among other things, that there was no guarantee of live birth, 3.3. the possibility of risk of loss, 8; and that the Crandalls had fully evaluated the risks of breeding, raising, racing, and selling horses, and had relied on their own examination and experience. and had fully evaluated the economic and financial risks. Section 9.

By March 20, 2008, two weeks after Hatch’s letter and when the Lease Agreement was purportedly sent, most of the \$200,000 had already been spent. *Petitioner’s Exhibit 10* (letter from Hatch to Crandalls, dated March 6, 2008, providing an “update” on the mare lease program

and admitting their “investment of \$200,000 paid my management fees and leased eight mare” to be bred); *Petitioner’s Exhibit 13* (\$120,550 of the \$200,000 was transferred to DOJ).

2. Mare Boarding Agreement (Boarding Agreement)

On February 6, 2009, Hatch sent the Crandalls a “mare boarding agreement.” *Answer* ¶ 19 (admitting, the agreement was sent on February 6, 2009, but also on March 6, 2008); *Respondent’s Exhibit 7*.<sup>17</sup> In the Boarding Agreement, Wing Haven seeks an additional \$56,000 from the Crandalls for costs of the Mare Lease. *Id.* Section 2. The purpose of the Boarding Agreement is “lock in cost of the care and breeding services and to eliminate these expenses as a variable in projecting a *possible profit* on the Mare Lease.” *Id.* Section 4 (emphasis added). The Boarding Agreement gives the Crandalls the right to inspect the mares upon notice, 7, and establishes a one-year term from December 15, 2007, but then extends the term for another year beyond that date. *Id.* 3.1. The Boarding Agreement also discloses the possibility of risk of loss, 5, but the Crandalls never signed. *Answer* ¶ 12(b).

## LAW AND ARGUMENT

Hatch claims the mare leasing program is not an investment because it is a lease – a commercial transaction in which one party leases property from another to enjoy the benefits of

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<sup>17</sup>The Boarding Agreement (Respondent’s Exhibit 7) is the same as Respondent’s Exhibit 1g accompanying his Motion to Dismiss except pages 1 and 2 of Exhibit are missing. In the missing pages, Wing Haven agrees to advise the Crandalls about scheduled dates for breeding, to review the status of both the mares and the assigned stallions, Section 1.1, assisting in preparing mares for foaling with the objective of producing live foals, 1.3, as well feed, give vitamins, maintain health, inspect and provide medical care, board, and groom. Sections 1.2, 1.4, 1.5. Respondent’s Exhibit 7 is the same as Petitioner’s Exhibit 12.

the property. *Answer* ¶¶ 1, 5, 22, 24(f)(i), (iii), (iv). Hatch identifies that property as the foals to be produced, but he does preclude the possibility of profits from the sale of those foals, profits from horse racing or that the expectation of profits was the motive of the investor. Indeed, he has admitted that sales would net a return on the investment. *Id.* ¶ 11(c); *Petitioner's Exhibit 10* at 2-3. The question of whether this transaction is a security, therefore, turns on economics, not whether it is called a lease. *Reves v. Ernst & Young*, 494 U. S. 56, 60-61, 70 (1990) (question turns on economic reality of transaction, not legal formalisms) (citing *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967)).

To begin, the argument that leases cannot be securities should be rejected because certain types of lease interests are specifically included within the statutory list of securities under the Utah Security Act. UTAH CODE ANN. § 61-1-13(1)(w)(i)(O) (defining a “certificate of interest or participation in an oil, gas, or mining title or lease in payments out of production under such a title or lease” to be a security). Conceptually, the reason certificates of interest in oil, gas and mining lease payments are securities because the economic reality of those transactions is that they function like an investment. They expect profits, namely, payments from the oil, gas or minerals produced. They do not become owners of the enterprise. Their investments are completely uncollateralized, and the certificates of interest have no risk reducing factors to suggest that they are not securities. *Reves*, 494 U. S. at 953 (demand notes are securities, after applying “family resemblance” test, among other things, because they are uncollateralized).

More important, these leases satisfy all four elements of *Howey*, namely, (a) an investment; (b) in a common enterprise; (c) with a reasonable expectation of profits; (d) to be derived from the entrepreneurial efforts of others. *SEC v. W. J. Howey, Co.* 328 U. S. 293 (1946); *see also Cont'l Mktg. Corp. v. Sec. & Exch. Comm'n*, 387 F.2d 466, 470 (10th Cir. 1967) (oil drilling involves involve efforts of third parties) (citing *Roe v. United States*, 287 F.2d 435, 439 (5th Cir. 1961).

A. The Mare Lease Program is a Security

Several courts have determined animal breeding/feeding enterprises to be securities as investment contracts under *Howey*. *See. e.g. Cont'l Mktg.*, 387 F.2d at 470-71 (holding, investment in beaver production enterprise to be a security under *Howey*); *Miller v. Cent. Chinchilla Group, Inc.*, 494 F.2d 414, 417 (8th Cir. 1974) (holding, investment in chinchilla production enterprise to be a security under *Howey*); *Long v. Shultz Cattle Co., Inc.*, 881 F.2d 129 (5th Cir. 1989) (holding, cattle feeding consulting agreement to be a security under *Howey*); *Ronnett v. American Breeding Herds, Inc.*, 464 N.E.2d 1201, 1206 (Ill. App. 1984) (holding, cattle breeding program to be a security under *Howey*); *see also DeWit v. Firststar Corp.*, 879 F.Supp. 947, 982 n. 28 (N. D. 1995) (listing other decisions addressing cattle investment schemes).<sup>18</sup> In each of these cases, more than one investor was involved.

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<sup>18</sup>However, *DeWit* held a cattle investment scheme not to be security under *Howey* because investors owned specific cattle and retained right.

Here, only one investor was involved, and the Division used the risk capital test<sup>19</sup> Under risk capital analysis, an investment contract is a security if it includes

(1)(b) any investment, by which:

(1)(b)(i) an offeree furnishes initial value to an offerer;

(1)(b)(ii) a portion of this initial value is subjected to the risks of the enterprise;

(1)(b)(iii) the furnishing of the initial value is induced by the offerer's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offeree as a result of the operation of enterprise; and

(1)(b)(iv) the offeree does not receive the right to exercise practical or actual control over the managerial decisions of the enterprise.

UTAH ADMIN. CODE R164-13-1(B)(1)(b).

The first three elements of risk capital test are easily satisfied because the Crandalls (the offerees) furnished \$200,000 – the initial value – to Wing Haven. The \$200,000 was subject to the risk of the mare lease program. Under the program, mares are leased for production of foals for later sale or racing, but it is impossible to guarantee to live births, profits from sales or horse racing. The economic value of horse racing lies in its association with gambling, but gambling, by its very nature, involves risk because it is impossible to guarantee a win. The entity created for the mare lease program itself – Wing Haven – was risky. Wing Haven was created only two weeks before the Crandalls parted with the \$200,000. There was no discussion with the Crandalls prior to the investment, however, that Wing Haven actually owned any mares at the

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<sup>19</sup> *But see* Respondent's Exhibit 7, Section 9 (Boarding Agreement gives Wing Haven the right to provide similar services to other parties as long as those services do not conflict with services provided to the Crandalls).

time it was created,<sup>20</sup> that Wing Haven would be acquiring any mares later, that it had the capital to do so, or that the Crandalls would be acquiring an ownership interest in mares, foals or even Wing Haven itself. There was a brief discussion about the name of the payee for the check in an e-mail exchange, and an amount. That was it. Indeed, there could have been no discussion with the Crandalls about Wing Haven because Hatch claims he did not hear from them several weeks after he first discussed the program. He did not hear from them either in the weeks just before or after Wing Haven was created. Moreover, it appears the \$200,000 was the first infusion of any significant capital to Wing Haven, but that money was completely uncollateralized, and there were no risk reducing factors associated with it. The money was furnished on Hatch's representation of a tax benefit and a return on their investment from the sale of foals or racing. The Crandalls had no experience with horses. Hatch said his daughter did, however.

The economic reality of the lease program, as described so far, is that the transaction functions like an investment regardless of what name its called. *Reves* at 61.<sup>21</sup> Hatch even

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<sup>20</sup>Hatch identifies the eight mares leased for the first time in a letter dated March 6, 2006, *Petitioner's Exhibit 10*; and admits some of the \$200,000 was used to buy them. *Answer* ¶ 15(c)(xiii).

<sup>21</sup>“The fundamental purpose undergirding the Securities Acts is ‘to eliminate serious abuses in a largely unregulated securities market.’ In defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of ‘countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.’ and determined that the best way to achieve its goal of protecting investors was ‘to define ‘the term ‘security’ in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.’” Congress therefore did not attempt precisely to cabin the scope of the Securities Acts. Rather, it enacted a definition of ‘security’ sufficiently broad to encompass virtually any instrument that might be sold as an investment.” *Reves v. Ernst & Young*, 494 U. S. 56, 60-61, 70 (1990) (internal citations omitted).

pitched the transaction as an investment. The question here ultimately turns on whether the Crandalls had a right to exercise practical or actual control over the managerial decisions of the enterprise. The relevant time frame for determining that issue, as with all of the other factors of risk capital, is when the Crandalls parted with the \$200,000 in late December 2007 and just before, but not any documents that were later provided. Hatch did not begin putting together documents until after he got the money. He said information would be provided later. The only contemporaneous documents are the e-mail exchange.

In the e-mail exchange, Melanie said she had looked at websites, and understood she needed to read about mare leasing. She also acknowledged the possibility of some travel, but she was overwhelmed and needed more information. Her self-report of her role does not reflect any understanding of a right to managerial control. Neither does Hatch's response. In response, Hatch largely confirmed her understanding, saying the Crandalls' responsibilities included "learn[ing] about horses, attend[ing] some horse races, and visit[ing] the farms." *Answer* ¶ 13. But his statement does not establish the right to managerial control either. Later assertions by him do not establish that right either.

In his answer, for example, Hatch asserted that he told them, on "numerous occasions," they needed to be "materially involved" if they wanted to qualify for the tax deduction from the lease program. *Id.* ¶ 12(a) (asserting Hatch told the Crandalls in 2008 that they needed to spend

between 100 and 500 hours in operating the thoroughbred program); *accord* ¶ 13; *Hatch Affidavit* at 13, 15(15). Hatch does not explain what he meant by “material involvement” or say what the Crandalls’ involvement needed to be, but the need for them to have some involvement to qualify for a tax exemption for income – income for 2007 would not be determined until the end of the year and they would not be applying for an exemption until after the year end – does not establish the right to managerial control in the lease program at the time they parted with their money.<sup>22</sup> Hatch provided no proof of these communications and, by his own admission, he did not communicate with them about the needed involvement to them until 2008. *Answer* ¶ 12(a). By that time, the Crandalls had already paid \$200,000. Moreover, the possibility of a contemporaneous or an even earlier disclosure than December 2007 is precluded by his assertion that he did not begin to put together documents until after December 27, 2007.<sup>23</sup>

Despite efforts to shift responsibility to the Crandalls, Hatch’s own admissions show they had no actual or practical ability to control or manage. The Crandalls lived in Colorado, Wing Haven was in Utah. They had not practical way of being involved. They had no background in horses. He claimed previous involvement so they relied on him (and his daughter). He made decisions for them. He offered to set up a company for the program, and instructed them to set

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<sup>22</sup>Hatch fails to explain how spending somewhere between less than two hours up to nine hours a week, and visiting farms, going to races or learning about horses gave the Crandalls any managerial control.

<sup>23</sup>The Mare Lease (Respondent’s Exhibit 6), allows the Crandalls to lease mares owned by Wing Haven, Section 4.1, 4.2, 6, and purports to give the Crandalls to the ability to breed mares with stallions, both selected by the Crandalls. Sections 3.1, 7.

up their own company for the program. He even came up with a name. His daughter managed the program. *See also Answer* ¶ 12(b) (asserting, the mare lease program had to be managed, Jill managed it for six months and got paid, she continued to manage it afterward without pay, and Wing Haven paid boarding costs for eight mares, and foals); ¶ 15(c)(xiii) (asserting, Wing Haven loaned part of the \$200,000 to DOJ, and used some of the money to secure eight mares, boarding expenses, prepaying expenses); ¶ 6 (asserting, Wing Haven authorized surgery and made the decision to “put down” a mare); ¶ 13 (asserting, Wing Haven set up a trip to Kentucky Derby, and California Breeders Cup, and invited Crandalls to attend); *accord* ¶ 11(a) (asserting, Wing Haven set up events and invited the Crandalls to attend); ¶ 11(b) (asserting, Wing Haven was responsible for paying Jill for six months, boarding eight mares and foals for 150 days after birth if costs exceeded the lease payment, for covering the costs of the mares, and paying Jill for six months); 12(f) (Hatch negotiated an agreement for Wing Haven to use assets to provide a profit for the Crandalls).

For these reasons, the mare lease is a security because it satisfies all four prongs of the risk capital test.

B. Hatch Made False Statements or Material Omissions in Connection with the Offer or Sale of Mare Lease.

It is a violation of the Act for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly to make untrue statement of a material fact or to omit them. UTAH CODE ANN. § 61-1-1(2).

Hatch made several false statements of material fact in connection with the offer and sale of the mare lease program. These statements include the absence of risk, the amount of the return, the promise of a guarantee, and that more information would be forthcoming. Indeed, Hatch admits he does not know whether the Crandalls made any money at all, but assumes they did. *Answer* ¶ 6. Documents that were later provided were backdated and contained other irregularities that did not reflect the reality of the transaction, such as disavowals about previous representations about expected earnings, any rights given to the Crandalls to select mares and stallions, and the statement that the Crandalls had fully evaluated the risks of breeding, raising, racing, and selling horses, and had relied on their own examination and experience, and had fully evaluated the economic and financial risks when communication with the Crandalls showed they knew very little. He also misrepresented the existence of McKenzie Finch, his connection with it, and an office in Salt Lake County.

Hatch failed to disclose other material information that necessary to make his statements not misleading at the time of the investment,<sup>24</sup> such as whether the lease program was a security, whether it was registered (or exempted from registration) and whether he licensed to sell. He failed to disclose a prior bankruptcy involving a family entity, various tax liens, civil actions and judgments against him, and notations on the CRD which an investor would want to know before

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<sup>24</sup>Hatch did disclose the program was not registered in documents provided on March 6, 2008. *Petitioner's Exhibit 10* at 4. However, he also says there have been no determinations by an federal or state agency about breeding programs. *Id.* In fact, there are several decisions, and Hatch never said whether he had ever requested a decision.

investing. He also failed to disclose the duration of the lease (and other conditions and terms), that he would be loaning more than half of the money to his wife's company, and that most the money was gone before he provided any documents to the Crandalls.

For these reasons, Hatch violated 61-1-1(2) by making false statements and omitting material information in connection with the offer, sale or purchase of a security.

### CONCLUSION

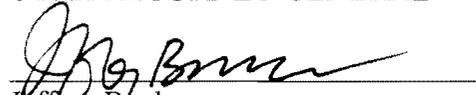
The Order to Show Cause dated October 13, 2010, should be granted. The Commission should find that the mare lease program to be a security, and that Hatch violated the Act by making false statements and omitting material information in connection with the offer, sale or purchase of it.

The Division further asks the Commission to order Hatch to cease and desist from further violations of the Act.

Finally, the Division asks the Commission to impose a fine in the amount of \$200,000 which may be reduced by restitution to the investors.

Respectfully submitted this October 14, 2011.

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