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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:

**WING HAVEN FARM, LLC,  
GARY G. HATCH**

Respondents.

**OPPOSITION TO MOTION TO  
DISMISS**

Docket No. 10-10-0072

Docket No. 10-10-0073

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**STATEMENT OF RELEVANT FACTS**

On October 12, 2010, the Division of Securities (Division) petitioned for an order to show cause (OSC) against Wing Haven Farm, LLC, and Gary G. Hatch (collectively hereinafter "Wing Haven") for offering and selling a security in violation of the § 61-1-13 of the Utah Uniform Securities Act (Act). OSC ¶ 21. The Division alleged that Wing Haven ran a mare leasing program that promised both an eight percent return for investors as well as a tax shelter for the investment opportunity. *Id.* ¶¶ 9-10, 12, 16-20. The Division alleged that the investors in the OSC had invested \$200,000, but lost their money. *Id.* ¶¶ 6, 9, 13-15, 20. The Division also

alleged that the investment opportunity was a security, and that Wing Haven made material misrepresentations in connection with the offer or sale of the security. *Id.* ¶¶ 22-24.

On January 10, 2011, Wing Haven filed an answer to the OSC. In the Answer, Wing Haven denied whether the leasing agreement was an investment. *Answer* ¶ 1. Wing Haven also denied offering an investment, and disputed whether Hatch was required to be licensed as a broker-dealer or agent. *Id.* ¶¶ 3-4. Wing Haven denied most of the remainder of the general allegations in the OSC. *Id.* ¶¶ 5-10, 12(b), -(d)-(g), 13 (admitting in part, denying in part), 14-23, 24(f).

On April 19, 2011, Wing Haven moved to dismiss. As grounds for dismissal, Wing Haven disputes whether Hatch or the company he manages (McKenzie Finch) is required to be an investment advisor, advises, held itself out as an investment advisor, or received compensation as such. *Memorandum* at 2-15.<sup>1</sup> Wing Haven also claims it has no more than five clients and that the mare leasing program was an isolated transaction. *Id.* at 17. Wing Haven also disputes having a “formal place of business” in Utah. *Id.* at 16. Wing Haven also asserts that the Act. Wing Haven supports its motion with six exhibits.

## LAW AND ARGUMENT

### **1 Wing Haven’s Motion to Dismiss is Untimely and Should be Denied.**

UAPA permits the agency to grant a timely motion to dismiss under Rule 12(b) of the

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<sup>1</sup>The memorandum supporting the motion to dismiss is also styled “motion to dismiss.” but is denominated here as “memorandum.”

Utah Rules of Civil Procedure. UTAH CODE ANN. § 63G-4-102(4)(b). Wing Haven cites no specific rule for its motion, but Rule 12(b) motions must be filed before filing an answer. UTAH R. CIV. P. 12(b). Since Wing Haven has already filed an answer, the motion to dismiss must be denied.

## 2 The Division Has Subject Matter Jurisdiction

Subject matter jurisdiction, however, cannot be waived and can be raised at anytime. *Chen v. Stewart*, 2004 UT 82, ¶¶ 36-39, 100 P.3d 1177. Motions to dismiss for lack of subject matter jurisdiction take two forms under Rule 12(b)(1): facial or factual attacks. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). In a facial attack, the movant challenges the sufficiency of the complaint and the district court accepts the allegations as true. *Holt*, 46 F.3d at 1002. In a factual attack, the court “may *not* presume the truthfulness of the complaint’s factual allegations.” *Id.* at 1003 (emphasis added). The movant may go beyond those allegations and “challenge[] the facts upon which subject matter jurisdiction depends.” *Paper, Allied-Industrial, Chemical & Energy Workers Int’l Union v. Cont’l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005); see also *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin (Shiffrin I)*, 46 F.Supp.2d 143, 149-50 (D. Conn. 1999), *aff’d (Shiffrin II)*, 205 F.3d 1321, 2000 WL 232656. “It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.” *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

Here, Wing Haven does not claim the OSC to be insufficient. Nor does it claim that the Division lacks subject matter jurisdiction to make that determination.<sup>2</sup> Instead, Wing Haven goes outside the OSC and asserts that the leasing program is not a security because neither Hatch nor McKenzie Finch are investment advisors, never held themselves out to be advisors, never gave advice and never received compensation as such. None of those issues were asserted in the OSC. Wing Haven also claims it has no “formal place of business” in Utah and claims it has no more than five clients. Here, Wing Haven misstates the requirements of the Act. The Act does not require a “formal place of business,” but links receiving compensation with a regular part of a business activity. Whether the transaction qualifies for an exemption as a limited offering does

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<sup>2</sup>Subject matter jurisdiction is the power and authority to determine controversy. *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989). It is the authority to decide a case either way, *The Fair v. Koehler Die & Specialty, Co.*, 228 U. S. 22, 25 (1913), correct or incorrect, *Mann v. Morrison*, 144 P.2d 543, 545 (1943). It is the power to declare the law. *Ex parte McCardle*, 74 U. S. (7 Wall.) 506, 514 (1868). Subject matter jurisdiction refers to the relationship between the claim under adjudication and the forum that exercises jurisdiction. *Chen v. Stewart*, 2004 UT 82, ¶ 35, 100 P.3d 1177. Subject matter jurisdiction is founded in or derived from some source. In the case of courts, the most common source for that authority is the constitution or the statute that created them. *See Gaines v. Fuentes*, 92 U. S. 17, 18 (1875); *Sheldon v. Sill*, 49 U. S. (8 How.) 441, 443, 449 (1850); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U. S. (1 Pet.) 511, 546 (1828); *State v. Taylor*, 664 P.2d 439, 441 (Utah 1983). In the case of administrative agencies, they have no jurisdiction to regulate or determine controversies beyond what their statutes confer. *Sheldon*, 49 U. S. 441. When jurisdiction exists, courts have the duty to exercise jurisdiction to the extent of those limitations. *Id.* at 443. These principles of jurisdiction are well settled. *Id.*

Utah’s Constitution gave the Utah Legislature authority to create courts, UTAH CONST. art. VIII, § 1 (Legislature, by statute, may establish other courts), and the Legislature gave the Division authority to determine violations of the Act. UTAH CODE ANN. § 61-1-18 (Division established); § 61-1-18.6 (Division has authority to convene administrative hearings in accordance with UAPA); § 61-1-20(1)(Division authorized to issue OSC, convene hearings to determine violations of the Act). The Division has subject matter jurisdiction to determine violations of the Act outside the judicial system. *See e.g., McKesson Corp. v. Labor Comm’n*, 2002 UT App 10, ¶ 11, 41 P.3d 468 (citing UTAH CODE ANN. § 34A-1-301 (1997) (“The commission has the duty and the full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.”)); *see also Adolph Coors Co. v. Liquor Control Comm’n*, 105 P.2d 181, 184 (Utah 1940) (if liquor commission lacks jurisdiction, commission has no authority to regulate or enforce liquor laws). The citation alleges a violation of the Act, a statutory cause of action. The statutory violation appears on the face of the citation. The OSC alleges a violation of the Act. Even if the leasing program is not a security, the Division has jurisdiction to determine violations of the act. Wing Haven does not claim that the Division lacks jurisdiction to enforce the Act.

not negate whether it is a security. Wing Haven does not claim it applied for an exemption.

Finally, even if these factors are material, whether the leasing program is a security is a mixed question of fact and law that must be decided in favor of the Division at this stage of the litigation. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (under Rule (12)(b)(6), the court accepts all well-plead facts as true and draws inferences from those facts in favor of the plaintiff).

### **3 Wing Haven's Motion to Dismiss Fails as a Motion for Summary Judgment and Should be Denied.**

“[S]ummary judgment should be granted only if there has been a showing ‘that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Rawson v. Conover*, 2001 UT 24, ¶ 25, 20 P.3d 876, 882 (quoting Utah R. Civ. P. 56(c)). If a movant presents matters outside the pleading in a 12(b)(6), the motion can be treated as a motion for summary judgment. UTAH R. CIV. P. 12(b). UAPA permits the agency to grant a motion for summary judgment under Rule 56. UTAH CODE ANN. § 63G-4-102(4)(b). Rule 7 provides a step-by-step procedure for Rule 56 motions. The moving party moves for summary judgment: paragraph by paragraph, and by citation to the record, affidavit or other document. UTAH R. CIV. P. 7(c)(3)(A).

Wing Haven presents matters outside the OSC in its motion, but they are not presented in the manner required by Rule 56, paragraph by paragraph, with citations to the record. For example, none of the statements about the unnamed clients are supported by citation to document or affidavit. *Memorandum* at 6 -14. Likewise, none of the statements about compensation are

supported by proof. *Id.* 14-15. The statements in the memorandum about what Hatch believes the management of McKenzie Fitch to be as well as other statements about the creation of limited liability company are unsworn. UTAH R. CIV. P. 56(e) (evidence supporting summary judgment must be in admissible form). They are not supported by affidavit as required by rule. *Id.* Moreover, statements must be based on personal knowledge. *Id.* Belief is inconsistent with personal knowledge.

Wing Haven's motion does not comply with Rule 56, and should be denied. The Division cannot meaningfully respond to it.

#### CONCLUSION

For these reasons, Wing Haven's motion to dismiss should be denied.

Respectfully submitted this May 18, 2011.

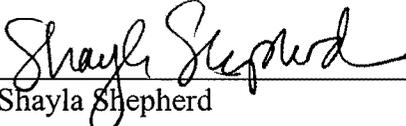
MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL

  
Jeffrey Buckner  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, Shayla Shephed, certify that on the 18 day of May 2011, I served the foregoing **Opposition to Motion to Dismiss** upon Wing Haven Farm, LLC, and Gary Hatch by mailing a copy to:

Gary Hatch  
6905 South 1300 East, #240  
Midvale, UT 84047

  
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Shayla Shephed