

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

**IN THE MATTER OF
WING HAVEN FARM, LLC
AND GARY G. HATCH**

**ORDER ON
MOTION IN LIMINE
CASE NO. SD-10-0072
CASE NO. SD-10-0073**

BY THE ADMINISTRATIVE LAW JUDGE:

Pursuant to an August 8, 2011 Order, the Division and Respondents were to exchange witness and exhibit lists no later than September 8, 2011. The Order recites each witness list shall identify the possible witnesses for that party and include a brief summary of their anticipated testimony. The Order also recites each exhibit list shall identify the potential exhibits which may be offered by that party.

The parties exchanged witness and exhibit lists as scheduled. The Division filed a September 12, 2011 motion in limine, asserting Respondents failed to comply with the August 8, 2011 Order when they did not provide the required summary of witness testimony and also failed to adequately identify and, as necessary, produce documents intended to be offered in evidence during the September 22, 2011 hearing before the Utah Securities Commission. The Division thus sought the entry of sanctions and identified four (4) potential sanctions under Utah Admin. Code R151-4-516(d).

The Division, through legal counsel Jeff Buckner, and Respondents -- through Gary G. Hatch -- exchanged numerous electronic mail between September 12 and 14, 2011 regarding the pending motion. Respondents thus acknowledged they had not provided the witness and exhibit lists as generally required by the August 8, 2011 Order. The Court also exchanged electronic mail with the parties on September 13 and 14, 2011.

Spring extended detail, the Court conducted oral argument with the parties on the pending motion during a September 14, 2011 teleconference. When that argument had concluded, the Court informed the parties of its ruling on the motion and that the Court would issue a written order to that effect by September 19, 2011.

CONCLUSIONS OF LAW

R151-4-516 of the Department of Commerce rules which govern discovery in formal adjudicative proceedings generally addresses a motion to compel discovery. Subsection 1(a)(i) provides the discovering party may move for an order compelling discovery if “a party fails to make disclosures required by a prehearing order”.

Further, Subsection 2(a)(ii) authorizes a presiding officer, for good cause, to issue an order:

- (A) that the related matters and facts shall be taken to be established;
- (B) refusing to allow the disobedient party to support or oppose designated claims or defenses; or
- (C) prohibiting the disobedient party from introducing designated matters in evidence:

- (D) striking out pleadings or portions of pleadings;
- (E) dismissing the proceeding or a portion of the proceeding; or
- (F) rendering a judgment by default against the disobedient party.

The August 8, 2011 Order was entered to require basic disclosures to thus notify both parties of the general nature and scope of evidence to be offered during the September 22, 2011 hearing in support of or in opposition to the claims and defenses of each party. Such disclosures were intended to reduce the possibility that a party might be substantially unable to anticipate what would likely be presented by the opposing party and/or meaningfully respond to such evidence.

A September 11, 2011 electronic mail sent by Respondents to the Division recites Respondents should have paid closer attention to the documents provided by the Division and Respondents should have responded with their evidence sooner. While all that may be true, those recitals are not responsive to the deficiencies in Respondents' witness and exhibit lists as noted by the Division and this Court.

Specifically, Respondents' witness list sets forth no summary of the general nature and scope of testimony to be offered by the potential witnesses on that list. Moreover, Respondents' exhibit list fails to adequately identify the documents which may be offered in evidence. The Division is thus left to speculate what Respondents may offer during the September 22, 2011 hearing. Respondents' had the opportunity to cure those deficiencies before the pending motion was filed. However, Respondents took no

remedial action in that regard.

The Court thus readily concludes Respondents have failed to comply with the August 8, 2011 Order and a proper factual and legal basis exists to enter a sanction(s) for that noncompliance. Given the nature of such noncompliance, the Court is convinced that the sanction(s) to be imposed should predominately operate to minimize or preclude an adverse impact on the Division during the hearing.

The Court is not persuaded that Respondents' noncompliance with the August 8, 2011 Order establishes any willful conduct taken in bad faith or represents a pattern of repeated avoidance of or abiding disregard for the rules which govern this proceeding. Proper disclosure, not to be confused with a party's elected strategy in presenting one's case, is the elemental threshold requirement to avoid any trial by ambush. Respondents' failure to make the required disclosures warrants a restriction and/or preclusion of Respondents' undefined evidentiary presentation.

However, the Court readily concludes no matters or facts should be taken as established by Respondents' nondisclosure. Further, no proper basis exists to refuse to allow Respondents to support or oppose any claims or defenses in this proceeding, strike any pleadings or portions thereof, dismiss all or any part of this proceeding or render any default judgment against Respondents.

Accordingly, it is wholly proper that Mr. Hatch testify in his own behalf and be subject to testimony elicited by the Division. Moreover, David and Melanie Crandall were initially listed as individuals who may be called by the Division. However, it now appears the Division will not call those witnesses to testify. Given the foregoing, Respondents should be allowed to possibly present testimony from the Crandalls. This Court can not identify any prejudice to the Division for Respondents' failure to disclose a summary of the testimony which would be offered through those witnesses.

The Court further concludes Respondents should be allowed to offer exhibits during the hearing which are identified in the context of Respondents' prior motion to dismiss this proceeding. There is no element of surprise to the Division regarding the identity of those possible exhibits. The other exhibits in Respondents' exhibit list have not been duly identified and it is thus uncertain whether such exhibits are already in the Division's possession. Simply put, the Division should not be expected to speculate as to the specific nature of the merely numbered exhibits.

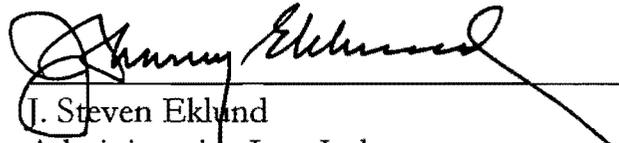
Nothing herein should be construed to necessarily warrant the receipt of testimony or exhibits during the September 22, 2011 hearing. In other words, any question as to the relevancy of possible testimony or other issues possibly affecting the receipt of any evidence will necessarily await possible objections and rulings thereon during the hearing.

Based on the foregoing, the Court now enters the following:

ORDER

WHEREFORE, IT IS ORDERED the September 12, 2011 motion in limine is granted in part and denied in part, consistent with that set forth herein.

Dated this 20th day of September 2011.

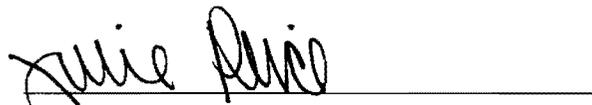


J. Steven Eklund
Administrative Law Judge
Department of Commerce

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document on the parties of record in this proceeding set forth below, by delivering a copy thereof in person to, Jeff Buckner, Assistant Attorney General, Heber M. Wells Building, Second Floor, 160 East 300 South, Salt Lake City, UT; and by mailing a copy thereof, properly addressed by regular mail with postage prepaid, to Gary G. Hatch, 6905 South 1300 East, #240, Midvale, UT 84047.

Dated this 20th day of September 2011



Julie Price
Executive Secretary
Division of Securities