

**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  
AND GARY G. HATCH**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER  
CASE NO. SD-10-0072  
CASE NO. SD-10-0073**

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**APPEARANCES:**

Jeffrey Buckner and D. Scott Davis for the Division of Securities

Gary G. Hatch for Respondents

**BY THE SECURITIES COMMISSION:**

A September 22, 2011 hearing was conducted in this proceeding before J. Steven Eklund, Administrative Law Judge, and the Securities Commission. Members of the Commission present were Erik Anthony Christiansen (Chair), Jane Cameron, Laura Polacheck and Tim Bangerter. Keith Woodwell, Director of the Division of Securities, was also present. The remaining Commission member (Jan Graham) was not present. The hearing was concluded on that date, the record was closed and the Commission conducted initial deliberations in this case.

Based on those deliberations, the Commission requested that a copy of the exhibits received during the September 22, 2011 hearing be provided to each of the Commission members. It was anticipated those exhibits and a preliminary draft of the

Findings of Fact, Conclusions of Law and Order would be provided to the Commission for its further review on October 27, 2011.

The Court contacted Mr. Buckner by telephone on October 14, 2011 to thus confirm those exhibits which were offered by the Division and received during the September 22, 2011 hearing. The Court informed Mr. Buckner of the Commission's request for a copy of those exhibits and that the Commission would resume its deliberations on October 27, 2011.

The Division then submitted an October 14, 2011 request for leave to file a post-trial brief in this proceeding. The Division also filed that brief, were its request to be granted. The Court notified Respondents by electronic mail on October 17, 2011 of the foregoing matters. The Court thus granted leave to Respondents until October 25, 2011 to submit any opposition to the Division's request to file a post-trial brief. Respondents were similarly granted leave until that date to file a response to the Division's post-trial brief.

The Court also ordered that, if the Commission granted the Division's request to file a post-trial brief, the brief and any response thereto by Respondents shall be provided to the Commission on October 27, 2011. Alternatively, if the Commission denied the Division's request, the record of this proceeding would remain closed and no post-trial submission would be permitted from any party.

The Commission met on October 27, 2011 and the Court informed the Commission that the threshold question to be addressed was whether the submission of the post-trial briefs should be permitted. The Commission determined those submissions may be helpful and also noted that no party had objected to those submissions. Accordingly, the submissions were provided to the Commission for their review with the expectation that the Commission would conduct further deliberations in November 2011.

The Court provided a November 7, 2011 electronic mail message to the Division and Respondents. The Court thus informed the parties that, effective October 25, 2011, Mr. Davis was designated as substitute counsel for the Division in this proceeding. Moreover, the Court disclosed that the Commission had determined to allow the supplementation of the record with the post-trial briefs and the Commission would reconvene on November 29, 2011 to conduct further deliberations.

The Commission concluded its general deliberations at that time and the Court was to then prepare and submit a draft of the findings, conclusions and order to the Commission for its final action. Respondents sent a November 30, 2011 electronic mail message to the Court for possible review by the Commission. The Court notified both parties of that submission and that the Court had concluded the record was duly closed, the Commission's deliberations were essentially done and leave had not been granted by

the Commission to reopen the record as to receive Respondents' additional submission.

The Court thus notified the parties that Respondents' submission would not be presented to the Commission and would be disregarded. Based on the foregoing, the Commission now enters the following Findings, Conclusions and Order:

#### **FINDINGS OF FACT**

1. Respondent Wing Haven, LLC is a Utah limited liability company, formed on December 12, 2007. Jillian C. Hatch is a manager and registered agent of Respondent Wing Haven. She is the daughter of Respondent Gary G. Hatch. Gale M. Hatch is the wife of Respondent Gary G. Hatch and she is also a manager of Respondent Wing Haven. The status of that business entity has expired. Respondent Wing Haven has never been licensed by the Division as a broker/dealer agent nor an issuer agent to sell securities in this state.

2. Respondent Hatch is, and at all time relevant to this proceeding has been, a Utah resident. He has never been licensed in Utah as a broker/dealer, agent, investment advisor, or investment advisor representative.

3. Based on a referral during 2002, Respondent Hatch met DC and MC. He subsequently acted as DC and MC's investment and tax advisor. During October 2007, Respondent Hatch contacted DC and MC and suggested that they needed a tax shelter as the means to address projected taxable income in excess of \$200,000 for that year. He

thus suggested they invest in a mare leasing program as both a potential tax shelter and investment opportunity.

4. He further informed DC and MC that the investment would be through a company known as Wing Haven, as owned and operated by his wife and daughter, Gale M. and Jillian Hatch. Respondent Hatch made various representations to DC and MC regarding the tax advantages of the proposed investment and that the funds provided by DC and MC would be used to breed a stable of foals for future sale, racing or other disposition. Respondent Hatch also informed DC and MC they would receive a return of at least eight (8) percent for the one (1) year term of that investment.

5. Respondent Hatch further informed DC and MC that the funds in question had to be provided to him prior to the end of the December 31, 2007 tax year. He generally informed DC and MC as to the nature of their active involvement in the investment, which may have been described as learning about horses, attending some horse racing and visiting the horse farms. However, there is a lack of sufficient evidence as to the specific representations of that nature made by Respondent Hatch at that time.

6. Based on the foregoing, DC and MC invested \$200,000 and provided those funds to Respondent Hatch on or about December 28, 2007 by check payable to Respondent Wing Haven. Respondent Hatch provided a "Mare Breeding Agreement" to DC and MC on March 6, 2008. Sparing extended detail, the \$200,000 provided by DC

and MC had been expended for various purposes by March 20, 2008.

### **CONCLUSIONS OF LAW**

The Division contends the investment opportunity offered and sold by Respondent Hatch is a security, various false statements were made relative to that offer and sale and Respondent Hatch failed to disclose material information to DC and MC in that regard. The Division thus seeks entry of a cease and desist order as to any future securities violations and the assessment of a fine against Respondent Hatch. The Division asserts that fine should be set at \$220,000 less the value of foals produced through the mare leasing agreement.

Respondent Hatch asserts the transaction with DC and MC constitutes a commercial business transaction which provided DC and MC with an opportunity to exercise active managerial control in the selection of a mare and after a foal is born. Respondent Hatch also claims DC and MC elected to defer the exercise of any such control and they thus permitted him to solely exercise that control.

Given the foregoing, Respondent Hatch repeatedly contends the transaction under review is neither an investment program nor a security. He thus asserts the Division has no subject matter jurisdiction to proceed with this case and it should be dismissed.

The Commission initially notes factual disputes exist as to various representations allegedly made by Respondent Hatch to DC and MC regarding this transaction.

Significantly, the Division elected not to offer testimony from either DC or MC during the September 22, 2011 hearing.

The Commission also notes that, given the testimony provided by Respondent Hatch and the absence of testimony by DC and/or MC, or other admissible evidence offered by the Division, the Division has not adequately satisfied either the Division's burden of going forward or its burden of proof as to DC and MC's actual or potential exercise of managerial control during the ongoing course of this transaction.

The Commission readily finds and concludes that, given Respondent Hatch's testimony and characterization of that issue and the absence of testimony by DC and/or MC, or other admissible evidence offered by the Division, the Division has not satisfied its burden to prove the Division's allegations in that regard, particularly as to any discussion in December 2007 between DC and MC with Respondent Hatch on the issue of managerial control.

The Division contends the mare leasing program under review satisfies the four (4) elements of the risk capital test set forth in **SEC v. W. J. Howey Co.**, 328 U.S. 293 (1946). Namely, the Division asserts the mare leasing program constitutes: (a) an investment; (b) in a common enterprise; (c) with a reasonable expectation of profits; (d) to be derived from the reasonable efforts of others.

The Commission readily finds and concludes the first three (3) elements in question

have been established. The Commission also acknowledges that it appears no managerial efforts would have been exercised by DC and MC at the time they made the investment before the birth of the foals, although it appears that they were encouraged to educate themselves about assuming some measure of managerial control in anticipation of the birth of the foals.

However, then Commission finds and concludes there is a lack of sufficient evidence in the record as to whether DC and MC ever were intended to be given or had any managerial control once the foals were born or, conversely, whether Respondent Hatch was to have sole managerial control after the investment was made.

The Commission also notes Utah Admin. Code R164-13-1(B)(1)(b), which defines “investment contract” as follows:

- (i) an offeree furnishes initial value to an offerer;
- (ii) a portion of this initial value is subjected to the risks of the enterprise;
- (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 the enterprise; and
- (iv) the offeree **does not receive the right to exercise practical or actual control over the managerial decisions of the enterprise.** (Emphasis added).

It is the substance, rather than the form of the transaction, which controls this issue and the economic reality of each situation must be duly considered. **Ronnett v. American**

**Breeding Herds, Inc.**, 464 N.E.2d 1201 (1984).

However, absent testimony from DC and MC, or other admissible evidence in the record, and given the unrebutted testimony of Respondent Hatch, there is no adequate basis on this record to find a complete lack of requisite managerial control was available to those investors or otherwise contemplated by the transaction. This decision is limited to its facts, and should not be considered to have any precedential value as to the legality or illegality of mare leasing programs.

**ORDER**

WHEREFORE, IT IS ORDERED that the October 12, 2010 Notice of Agency Action and Order to Show Cause is dismissed with prejudice, consistent with the matters set forth herein.

Dated this 2<sup>nd</sup> day of February 2012.

BY THE COMMISSION:



Erik Anthony Christiansen (Chair)



Jane Cameron



Tim Bangerter

I hereby dissent from the Commission's dismissal of this proceeding. It was

Respondent Hatch who brought the possibility of this investment to DC and MC. There is no evidence that either DC or MC had any prior knowledge or experience in the horse breeding business, nor did they have the ability to control the actual or practical management of the enterprise at the time the investment was made, which is the relevant consideration.

For Respondent Hatch to urge them to attend the Kentucky Derby or other major races as a means to become educated about selecting race horses cannot be construed as a viable means to exercise control. Further, those dubious suggestions were not made until well after the investment was made.

DC and MC with Respondent Hatch should have acted with an appropriate degree of diligence. It is troublesome that no written agreement was executed at or about the time when DC and MC provided the substantial funds to Respondent Hatch. There is scant difference between an investor who has no managerial control over an enterprise as opposed to an investor who has no practical means to exercise control, given the obvious lack of any substantive ability to do so.

To reiterate, the communications made by Respondent Hatch to DC and/or MC several months after the investment was made do not “fix” the question of whether the investors were given managerial control when they actually made the investment. I would conclude the Division has subject matter jurisdiction in this case and the

Commission should proceed with an analysis of the remaining issues presented to determine whether entry of the relief sought by the Division is warranted.

Dated this 2 day of February 2012.

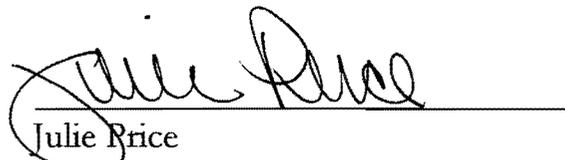
  
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Laura Polacheck

Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order. The laws and rules governing agency review are found in §63G-4-301 of the Utah Code, and §R151-46b-12 of the Utah Administrative Code.

### CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing document on the parties of record in this proceeding by delivering a copy thereof in person to D. Scott Davis, Assistant Attorney General, Heber M. Wells Building, Second Floor, 160 East 300 South Salt Lake City, UT; and by mailing a copy thereof, property addressed by first class mail, to Gary G. Hatch, 6905 South 1300 East #240, Midvale, UT 84047.

Dated this 2nd day of February 2012.

  
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Julie Price  
Executive Secretary  
Division of Securities