

DAVID O. BLACK, #0346  
**BLACK & ARGYLE, P.C.**  
Williamsburg Office Park  
5806 South 900 East  
Salt Lake City, UT 84121  
Telephone: (801) 484-3017  
Facsimile: (801) 892-0116  
*Attorney for Respondent*

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

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**IN THE MATTER OF:**

**MARK JAMES SAIN,**

**Respondent.**

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

**Docket No. SD-12-0076**

**Judge: Jonnson**

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Respondent, Mark James Sain (hereafter "Sain"), by and through his counsel of record, hereby files this Memorandum in Support of Motion for Summary Judgment.

**INTRODUCTION**

In or about March, 2012, Respondent Sain was introduced to K.E. who indicated that he wanted to obtain an interest in a company known as Alivamax Worldwide, LLC, a Utah LLC., (hereafter "Alivamax"). Alivamax is a multi-level network company which manufactured and sold health supplements. K.E. indicated to Sain that he wanted a 25% interest in the company; that he wanted a management and ownership say in the company and that he wanted to pay \$50,000 for those rights.

In or April, 2012, K.E. advised Sain that the company would require additional capital for which he wired an additional \$25,000 to Sain's Zions Bank account to be used as capital in connection with the business. After the first payment, Sain met daily with K.E. and others in connection the management and running of the business. K.E. was responsible for the development of network marketing professionals and also did the accounting, branding of products, compensation plan for the distributors and fund raising. It is uncontroverted that K.E. became involved in Alivamax based upon his desire to run, manage, control and participate in the potential upside of the business. K.E. did not rely upon the entrepreneurial expertise or energy of Sain and in fact intended to, and ultimately did, manage all of the operations of Alivamax.

Seventy (70) days after K.E. signed the Operating Agreement with Alivamax, on approximately June 4, 2012, K.E. took over Alivamax, took sole possession of the Alivamax accounts, took possession of the Alivamax inventory and sold it and appropriated all customer lists and downline of Alivamax. K.E. informed the distributors that Alivamax was out of business and the only way to buy products was from K.E.'s new company, Epic Life. In doing so, K.E. received in excess of \$77,800.

#### **STATEMENT OF UNDISPUTED FACTS**

1. On or about September 2011, Beau Dorius came to the office of Alivamax Worldwide to introduce a social media website known as Bojapie. Sain did not know Dorius or the company he represented but reviewed the printed materials that Dorius left. After reviewing the materials, Sain contacted Dorius to get more information about the social media software. (See Ex.'s 20, 29-30).

2. On or about October, 2011, Dorius, Andrew Moleff, Brooks Anderson, Sain, and Sheri Greene attended a meeting at the office of Bojabis for an extensive presentation of Bojabis's social media website and software. Moleff was introduced as a network marketing professional who had recruited over 10,000 people with the last company he represented. (See Ex.'s 20, 29 and 30).
3. On or about January, 2012, Dorius attended a meeting at Alivamax and discussed the business opportunity available for Alivamax Worldwide and Bojabis. Sain told Dorius that the timing was bad because of Alivamax's poor cash flow and said that he was thinking seriously of shutting down the business. Sain stated that what Alivamax needed was marketing professionals like Dorius and Moleff that could help build the distributor base. Sain represented that he would be willing to give up a portion of the company to get distributors who would market the Alivamax products. Dorius represented that he and Moleff were in the process of putting together a network marketing company and told Sain not to shut down Alivamax. (See Ex.'s 20, 29 and 30).
4. On or about February, 2012, Dorius, Moleff, Greene, Sain, and Pam Hunt, attended a meeting at the offices of Alivamax wherein they discussed the network marketing company that Dorius and Moleff had previously stated they were creating. Dorius and Moleff said that the only product they had was the Bojabis social media software and that they were interested in creating a business opportunity with Alivamax wherein they would own 50% of the company and Sain and Dinesh Patel would control the other 50%. Dorius and Moleff stated they would take over the marketing of Alivamax and boasted of Dorius' ability to create large distributions and Moleff's past success in network marketing as a distributor. Dorius and Moleff stated that the first thing that needed to

happen was to create an agreement with Bojable so that Bojable, Dorius and Moleff would be able to recruit key people and get them excited about the Alivamax business opportunity. Sain agreed and signed a contract with Bojable. (See Ex.'s 20, 29-30).

5. On or about March 1, 2012, Sain signed an agreement to implement the Bojable software for Alivamax. Dorius and Moleff asked that the partnership agreement remain confidential. They agreed that Sain, Dorius and Moleff would meet Patel and propose the 50% ownership of Alivamax for Dorius and Moleff and 50% for Sain and Patel. (See Ex.'s 20, 29-30).
6. On or about March 1, 2012, following the signing of the contract between Bojable and Alivamax, Moleff started recruiting a core master distributor group consisting of Greg VanKamp, K.E., Mike McOmber, Art McOmber, Joe Herrick and M. McOmber. M. McOmber, represented to Sain that Dorius, Moleff, Van Kamp, K.E., A. McOmber, and M. McOmber were responsible for the growth of a company known as Xfuse and that they grew the company to \$400 million in annualized revenue. (See Ex.'s 3, 29-30).
7. On or about March 2012, Dorius and Moleff, introduced K.E. as a requested partner of Alivamax to Sain. Dorius, Moleff and K.E., requested numerous meetings on a daily to discuss the new partnership. All aspects of the business were discussed, including the history of the company, accounting, checks that had bounced in the past, compensation plan, founding partners, financial statements, the number of distributors, active distributors, and any question that Dorius, Moleff, and K.E. had, Sain, Hunt, and Greene answered. (See Ex.'s 3, 29-30)
8. On or about March, 2012, Dorius, Moleff, K.E, Sain, Hunt and Greene, held meetings to discuss all aspects of the current and past history of Alivamax, including accounting,

bounced checks, compensation plan, founding partners, financial statements, the number of distributors, and active distributors. Sain, Hunt, and Greene answered all of their questions. Sain directed Hunt to provide K.E. with all accounting documents and answer all accounting questions prior to K.E.' purchase of his share of Alivamax Worldwide. (See Ex.'s 1-3, 9, 15, 29-30).

9. K.E. represented to Sain, Hunt and Greene that he was a network marketing professional; that he was an accredited investor and owned many companies and was qualified to make financial and business decisions. K.E. stated that he would only become a partner if he had control over the company. (See Ex.'s 3, 25-30).
10. K.E. was provided unlimited access with Hunt to review all accounting documents prior to the purchase. K.E. requested and was provided all accounting information including current financial statements, all previous year ending financial statements, accounts payable, loans payable, accounts receivable, check registers, transactions, and complete access to Alivamax's financials. Hunt provided all of Alivamax's accounting records to K.E. (See Ex.'s 1-3, 5, 9, 29-30).
11. K.E. was informed that Alivamax was overdrawn at Zions Bank. K.E. was given access to all of Alivamax's bank statement at Zions Bank. (See Ex.s 1-2, 29-30).
12. On or about March, 2012, Dorius, Moleff, K.E., M. McOmber and A. McOmber began creating a new compensation plan for Alivamax Distributors. ByDesign Technologies would create the software to provide distributors of Alivamax with their new compensation plan. (See Ex.'s 19, 29, 30, 35, 36).
13. On or about March 17, 2012, Sain, Dorius, Moleff, K.E., Herrick, VanKamp, M. McOmber, A. McOmber, L. Dorius, B. McOmber, Br. McOmber and W. Moleff met at

the Texas Roadhouse in Lehi, Utah to discuss the new ownership and marketing plans for Alivamax. (See Ex.'s 3, 29-30).

14. On or about March 18, 2012, Dorius, K.E., Sain, Hunt and Greene met at Alivamax where K.E. indicated to Sain that he wanted to become a full-time working partner and stated that he wanted to invest \$50,000 with Alivamax and that he wanted to be part of the management of the company. K.E. also indicated to Sain that there would be millions of dollars in the future invested in Alivamax. (See Ex.'s 3, 25, 29-30).
15. All of Alivamax's debts and financial statements, including schedules attached thereto, were disclosed to K.E. by Sain, Greene and Hunt. (See Ex.'s 1-2, 4-8, 19, 20, 29-30, 32).
16. K.E. provided a new compensation plan document to be implemented with Alivamax dated March 20<sup>th</sup>, 2012, the same day he provided \$50,000 cash to Pamela Hunt to invest in Alivamax. K.E. desired to become a partner of Alivamax and paid the \$50,000 only if he was a full-time working partner and could make decisions. The \$50,000 cash was paid to Hunt in care of Alivamax and then deposited over 5 consecutive days. (See Ex.'s 3, 10, 29, 30, and 32).
17. After receiving the \$50,000 from K.E., Sain sent an email to ByDesign Technologies with the attached compensation plan that Dorius, Moleff and K.E. wanted to implement into Alivamax Worldwide. (Ex. 35).
18. The sale of 65% of Alivamax Worldwide was completed on March 22, 2012. (See Ex. 3).
19. 3/22/2012 – There was no agreement that the K.E. money would be safe. (See Ex.'s 3, 28-30).
20. On or about March 22, 2012, the parties agreed upon the following:

Percentage of Ownership

Sain Select Connection would own 25% of Alivamax  
K.E. KTE Trust would own 25% of Alivamax  
Dorius Beau & Leslie Holdings would own 23% of Alivamax  
Patel Patel Family Investments would own 10% of Alivamax  
Molleff JAM327, LLC would own 12% of Alivamax  
Herrick Jating Investments, LLC would own 2.5% of Alivamax  
(See Ex. 3)

Officers

Mark Sain Chief Officer  
K.E. VP Advisor of Network Marketing Professionals  
Beau Dorius VP Director of Sales  
Andrew Molleff VP Business Development  
Joe Herrick VP Operations  
Dr. Dinesh Patel Advisor of Science (the only part-time member)  
(See Ex.'s 3, 21).

21. K.E. became a full-time working partner on March 20th, 2012. (See Ex. 3)
22. Sain did not represent that Alivamax would pay Patel. See Promissory Note Signed by Patel on March 23<sup>rd</sup>, 2012. Patel agreed to a Promissory Note of \$49,988 to be paid back over a period of 1 year. (See Ex.'s 4, 21, 28-30).
23. On or about March 26, 2012, ByDesign Technologies provided estimate of \$24,750 - \$33,000 to change the compensation plan of Alivamax. (Ex. 36).
24. 3/28/2012 – Alivamax, at the direction of K.E., sent an email to ByDesign Technologies requesting to establish new contacts to negotiate the compensation plan document while Sain was away on honeymoon. (Ex. 36).
25. On March 28<sup>th</sup>, 2012 Sain got married and left on his on honeymoon until April 16<sup>th</sup>. During that time, K.E. and Dorius directed Alivamax full-time. (See Ed.'s 28-30).

26. On March, 29, 2012, Sain sent an email to ByDesign Technologies stating that Dorius and M. McOmber would negotiate all matters regarding the new compensation plan, including pricing. (Ex. 36).
27. During the period of March 30, 2012 through May 30, 2012, on every Wednesday by FAX, email, or at the office of Alivamax, a weekly accounting meeting took place. Each week all expenses, charges, commissions, accounts receivable and accounts payable were discussed. (Exhibit 6, 28-30 and 45).
28. On April 12, 2012, a meeting was held at Cabelas wherein K.E., on behalf of Alivamax, made a marketing presentation to prospective distributors. (Ex. 7).
29. On April 16, 2012, Sain returned to work. (See Ex.'s 28-30).
30. From April 16 through April 23, 2012, Dorius and K.E. conducted daily meetings without Sain. In attendance were Dorius, K.E., M. McOmber, A. McOmber, B. McOmber, Br. McOmber and L. Dorius. (See Ex. 6, 28-30).
31. From April 23, 2012 through June 5, 2012, Dorius, K.E., Sain, M. McOmber, A. McOmber, Hunt, Greene and Lebaron, attended daily meetings to discuss matters concerning Alivamax (See Ex.'s 6, 28-30).
32. Patel signed a Promissory Note on March 23, 2012 for \$49,988 to be paid back over a period of 1 year. Subsequently, K.E. agreed to a Promissory Note of \$25,000 with the same terms. (See Ex.'s 4, 28-30).
33. On or about April 27, 2012, a meeting was held at the home of Dorius which included Dorius, K.E., Sain, Greene, VanKamp, M. McOmber, A. McOmber, B. McOmber, Br. McOmber, L. Dorius and W. Moleff. They discussed the master distributor position promised to VanKamp. It was then disclosed the VanKamp and Moleff had secretly

created a company to share the money they earned as master distributors and would not share those monies with the other master distributor team. It was discussed having VanKamp be the team distributor instead of a master distributor and that Sain did not want VanKamp as master distributor because of these findings and suggested a grace period be established prior to making VanKamp master distributor. M. McOmber suggested Alivamax build two sales organizations under VanKamp; one side for the existing Alivamax distributors, the other side for Dorius, K.E., M. McOmber and A. McOmber. Sain suggested that the top 3 positions of the binary would remain company owned until the grace period was over. (See Ex's 4, 21, 28-30 and 39).

34. On or about April 18, 2012, K.E., Dorius and Sain met to remove members and Herrick for non-payment of their capital investment and failure to provide services for Alivamax. It was agreed that Moleff and Herrick would have an additional 30 days to comply with services required and promised investment. (Ex. 33).

35. Between April 23, 2012 and June 4th, 2012, Sain, K.E., Dorius, Hunt, Lebaron, M. McOmber and A. McOmber met every day and recorded minutes of their daily discussions. The meetings allowed each party to express their opinions and concerns regarding Alivamax Worldwide. (Ex.'s 6, 17, 28-30).

36. On or about May 9, 2012, Alivamax agreed to the following positions:

Dorius	Chairman
Sain	VP Corporate Development
K.E.	VP Network Marketing Professionals
M. McOmber	VP Network Marketing Professionals
A. McOmber	VP Network Marketing Professionals

(Ex.'s 21, 28-30).

37. On or about May 16, 2012 through May 19 2012, Sain and K.E. traveled to and attended meetings in Indiana where Sain introduced K.E. to key Alivamax distributors. (Ex.'s 7, 28-30).

38. On or about May 23, 2012, the following changes were agreed upon:

Sain	Select Connection would own 30% of Alivamax
K.E.	KTE Trust would own 30% of Alivamax
Dorius	Beau & Leslie Holdings would own 30% of Alivamax
Patel	Patel Family Investments would own 10% of Alivamax
Molleff	JAM327, LLC would be removed from Alivamax
Herrick	Jating Investments, LLC would be removed from Alivamax

(Ex.'s 3, 33-34).

39. On or about May 25, 2012 – The following changes were agreed upon:

Sain	Chief Officer
K.E.	Advisor of Network Marketing Professionals
Dorius	VP Director of Sales
Patel	Advisor of Science (the only part-time member)

(See Ex. 3)

40. Between March 23, 2012 and June 4, 2012, Sain cashed or deposited checks that were paid to Select Connection for commissions earned from sales pursuant to the advanced commission program for Alivamax. Sain did not receive a salary of any kind from the company and his only compensation for full-time work performed was from sales and commissions earned under Alivamax's new commission schedule.

Check Date 2/3/12 Commissions for December 2011 #40239 - \$2638.31  
Check Date 3/12/12 Commissions for January 2012 #40885 #1859 - \$2251.57  
Check Date 3/12/12 Commissions for February 2012 #40895 - \$26.67  
Check Date 3/20/12 Commissions for February 2012 #40740 - \$1409.18  
Check Date 3/20/12 Commissions for Week 1 March 2012 #41251 - \$16.59  
Check Date 3/20/12 Commissions for Week 1 March 2012 #41252 - \$64.00  
Check Date 3/20/12 Commissions for Week 2 March 2012 #41267 - \$11.00  
Check Date 4/10/12 Commissions for March 2012 #41315 - \$1953.95  
Check Date 4/20/12 Commissions for March 2012 #41318 - \$29.59  
Check Date 4/20/12 Commissions for Fast Start 2012 #41423 - \$19.78

See Bank Statements (Ex. 5, 40-47).

41. During the period of March 23, 2012 through June 4, 2012, all transactions were in the ordinary course of business and were reported to K. E. (Ex. 40).
42. During the period of March 23, 2012 through June 4, 2012, there are two transactions that are out of the ordinary, i.e., 1 cash advance for \$200.00 and 1 website expense for \$749.00. The company was using the credit cards owned by Sain for its use and Sain needed to use the card 2 times. K.E. agreed that the amounts would be deducted from Sain's future commissions. (Ex.5, 41-47).
43. The compensation plan offered by Alivamax Worldwide to its distributors was completely changed from the compensation plan Alivamax offered its distributors prior to the relationship with K.E., Andrew, Beau, Joe and their respective marketing group that included Greg, Art and Michael. Mark Sain created a compensation plan at the beginning of Alivamax Worldwide in December 2008 that was referred to as a Forced Matrix. The compensation plan created by the new group was referred to as a Binary Compensation Plan. Sain did not like the Binary Compensation Plan but he agreed to provide the new method of payout because the new ownership and marketing team required the new compensation plan to be successful in their marketing efforts. (See Ex.'s 8, 32)
44. During the period of March 23, 2012 through June 4, 2012, multiple purchases were made by K.E. on behalf of Alivamax and then he resold these purchases. (Ex.'s 12, 28-30, 40- 47).
45. The only monies received by Affiant from Alivamax during the period of March 23, 2012 through July 1, 2012 were approved by K.E. as payment for commissions with the

exception of the \$200 and \$749.00 which were personal disbursements from Affiant's credit cards which Affiant repaid out of his commissions.

46. The commission checks were made payable to Select Connection during the month of May on Alivamax compensation software program were cancelled by K. E.

47. During March 23, 2012 through July 1, 2012, K. E. received in excess of \$77,000 from Alivamax in the form of compensation and/or the appropriation of the funds or assets of Alivamax.

## ARGUMENT

### I.

#### (The Interest of K.E. in Alivamax is Not a Security)

The Division, in its Amended Order to Show Cause, has alleged at paragraph 4 that the Respondent Mark Sain sold an interest to K.E. in a limited liability company that was a security within the meaning of U.C.A. 61-1-13, and in paragraph 5 that the Respondent made misstatements of material facts in connection with the offer of the sale of securities and that K.E. lost \$72,467.00. It is the Respondent's position that the transaction between Alivamax, LLC and K.E. in which the Respondent was involved falls within the statutory exception to an interest in a limited liability company being a security found in U.C.A. 61-1-13(ee)(ii)3(b) ... the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company.

The Limited Liability Operating Agreement provides at Section 4.1 "this LLC shall be managed and the manager Mark Sain." In fact, Section 3.4 and 3.5 of the Limited Liability Operating Agreement and the actual acts of the parties demonstrate that this was a member managed entity. Section 3.4 of Operating Agreement provides as follows:

Section 3.4 Access to Books and Records of LLC. Each LLC member shall have the right to inspect the books and records of the LLC during normal business hours after the giving of reasonable notice of this intent to the LLC custodian of said documents and information; however, each member gaining access to the books and records of the LLC shall hold this information confidential and only use LLC information or the furtherance of LLC business and interest or for making investment decisions regarding the member's interest. Upon withdrawal or departure as a member of an LLC, a member shall deliver all LLC books and records in his or her possession to the remaining LLC members or managers.

And Section 3.5 provides as follows:

Section 3.5 Actions by Members; Meetings; Quorum.

- a. The LLC members may take any action at a meeting in person, by proxy, or without a meeting by written resolution in accordance with Section 3.5(d). Meetings of LLC members may be conducted in person or by telephone conference. A voting proxy given by an LLC Member to another person must be in writing.
- b. Voting. Each LLC member shall be entitled to vote upon all matters for which LLC members have the right to vote. All LLC member votes shall be tallied by interest under which each member shall be entitled to one vote for each LLC Unit possessed (for example, a member possessing 150 LLC Units shall be entitled to 150 votes upon any matter submitted to the LLC Members for a vote). Each vote per LLC Unit shall carry the same weight and have the same value, for voting purposes, as every other LLC Unit. Should state law create statutory situations where LLC member votes are to be taken on a one vote per member basis, votes per member (as opposed to per LLC Unit interest) shall be limited to those specific circumstances under which state law requires such a vote.
- c. Unless another percentage is given elsewhere in this operating agreement or by state law, all LLC member votes on any matter shall require an affirmative vote in interest by LLC members of the LLC Unit in excess of 50% of the outstanding total to pass or approve the motion, resolution, or otherwise take action by the LLC members. For example, if there are 1000 Units outstanding, a vote of 501 LLC Units in favor of a resolution is required for its passage unless the resolution involves a matter for which this operating agreement or state law requires a higher percentage.
- d. Any action required or permitted to be taken at any meeting of the Members may be taken without a meeting if Members with the percentage of votes (per LLC Units) sufficient to approve the action pursuant to the terms of this Agreement resolve thereto in writing and the writing or writings are filed with the LLC records of actions taken by Members. In no instance where action is authorized by written resolution shall it be required that a meeting of Members be called or notice be given; however, upon passage, a copy of the action taken by written resolution of the members shall be sent promptly to all

LLC members.

- e. Meetings of Members may be called by any LLC member, or members, collectively holding 25% or more of the outstanding LLC Units upon seven (7) days written notice to the other LLC members. Notice of a meeting called for hereunder may be made by standard U.S. mail, electronic mail, or facsimile transmission and shall contain the time, place, and purpose of such meeting. A quorum for any action to be taken at a meeting of LLC members shall be LLC members present (in person, via telephone, or by proxy) holding more than 50% of the LLC Units. Any Member may through a written instrument waive the right to receive prior notice of a meeting of the Members as described herein.
- f. Notwithstanding any other provision of this Agreement, the following actions shall require a Supermajority vote in the interest of the LLC members:
  - i. any merger, consolidation or other business combination;
  - ii. sale or other disposition of substantially all of the assets of the LLC;
  - iii. dissolution of the LLC (unless Utah law requires another percentage);
  - iv. filing of a petition or commencing other proceedings seeking reorganization, liquidation, arrangement or other similar relief under any federal or state law relating to bankruptcy or insolvency.
  - v. The amendment or modification of any provision of this Agreement;
  - vi. The issuance of additional LLC Units (other than those issued pursuant to the founding of the LLC as set forth in Section 3.1 of this operating agreement) to any Member or other party including any other individual, trust, corporation, partnership, limited liability company or any other incorporated or unincorporated entity ("Person") permitted to be a member of a limited liability company under the Act;
  - vii. The removal of any Member based on felonious criminal activity as well as under Section 7.4;
  - viii. The decision to appoint managers for the LLC under Article IV hereof.

And Section 3.6 provides as follows:

Section 3.6. Power to Bind the LLC. No LLC member or group of members acting in their individual capacity-separate and apart from action as LLC members pursuant to this operating agreement-shall have any authority to bind the LLC to any third part with respect to any matter.

## II.

### (K.E. Actively Managed the Operations of Alivamax)

There is some ambiguity contained within the operating agreement of Alivamax. At one point it states "this LLC shall be managed and the manager Mark Sain." Grammatically, the statement is meaningless. The agreement thereafter provides in detail how the members will

manage the operations of the company (see Section 3.4, 3.6, supra).

In the end, however, what the operating agreement contains regarding management is not controlling. What is controlling is what actually happened. Subsection (ee)(ii) of U.C.A. 61-1-13 provides as follows:

For purposes of Subsection (1)(ee)(ii)(B), evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, may not establish, without more, that all members are actively engaged in the management of the limited liability company.

Because active management of the company looks directly at whose entrepreneurial skills the parties were looking to, the federal cases on the topic are analytically helpful.

The Utah Supreme Court in *Pueblo County Court v. McKinley*, 667 P.2d 15 (Utah 1983) adopted the United States Supreme Court's definition of what is a security, as follows:

1. A contract, transactions or scheme;
2. Whereby a person invests his money in a common enterprise; and
3. Is lead to expect profits solely from the efforts of the promoter or a third party.

The Supreme Court in *McKinley* adopted that language from *SEC v. W.J. Howey Company*, 328 U.S. 293 (1946).

The Utah Supreme Court has adopted further permutations of the federal definition of a security in *Ball v. Volken*, 741 P.2d 958 (Utah S. Ct. 1987), as set out in *SEC v. Glen W. Turner Enterprises*, 474 F.2d at 482. In *Turner*, the 9<sup>th</sup> Circuit held that the term "solely" in connection with the third requirement as an investment contract was overly narrow and that the requirement is now that the efforts made by those other than the investor are undeniably significant when those essential managerial efforts affect the failure or success of the enterprise.

The 9<sup>th</sup> Circuit further held in *Matekv v. Murat*, 862 F.2d 720 (9<sup>th</sup> Circuit 1988) that there

was not a security in a partnership interest provided that the investors had sufficient power to protect their investments and that the investors made no showing and are unable to show that they were prevented from exercising their powers under the agreement. Citing *Williamson*, the 9<sup>th</sup> Circuit further held that the court examined the economic reality of the investor's relationship with the manager and/or the promoter. In *Hawking v. DuBois*, 885 F.2d 439 (9<sup>th</sup> Circuit 1989) cited *Williamson v. Tucker*, 645 F.2<sup>nd</sup> 404 (5<sup>th</sup> Circuit 1981) which held as follows:

an investor who is a general partner or a joint venture to prove that a security contract was involved must establish that "(i) an agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as a limited partnership or (ii) the partner or venture is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers or (iii) the partner or venture is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise and otherwise exercise meaningful partnership or venture powers."

In *Banqhart v. Hollywood General Partnership, et. al.*, the 10<sup>th</sup> Circuit adopted the rule which it thought to be uniform amongst the circuits that general partnerships are not investment contracts because the partners-investors are ordinarily granted significant control over the enterprise. See *Banqhart v. Hollywood General Partnership*, 902 F.2d 805. In *Banqhart*, the 10<sup>th</sup> Circuit upheld a grant of summary judgment because the parties were part of a contract where there was theoretical as well as actual control. The 10<sup>th</sup> Circuit in *Banqhart* further held that ultimately that issue of control is determined by the general partnership agreement. In the present matter, K.E. obtained an interest in Alivamax, LLC. The characteristics of the LLC with regard to control are similar, if not identical, to a partnership. The Utah Division of Corporations and Commercial Code states at paragraph 3 under considerations in forming a limited liability company as follows:

- (a) An LLC differs from a general partnership inasmuch as its members are not personally liable for the obligations of the LLC. It also differs from a limited

partnership in that no member is jointly and severally liable for obligations of the LLC, unlike the general partner in a limited partnership. An LLC is subject, however, to disclosure, record keeping and reporting requirements that do not apply to a general partnership.

The corporations further indicated under the historical review of limited liability companies as follows:

- (b) In 1988, the IRS indicated that it would issue rulings on the tax treatment of LLC's. In Revenue Ruling 88-76, 1988-2 C.B. 360, the IRS ruled that a Wyoming LLC would be treated as a partnership for federal tax purposes. The 1988 ruling was based on a finding that a Wyoming LLC did not have a majority of four specified corporate attributes.

These corporate attributes, as set forth in Treas.Reg.301 7701-2 (1983), are as follows: centralized management; limited liability; free transferability of interest; and continuity of existence. The IRS determined that the Wyoming LLC has the first two corporate attributes, but lacks the latter two. This ruling affirmed the IRS' long-standing position that an entity having two or less of the four specified corporate attributes will be treated as a partnership for federal income tax purposes. In February of 1992, the IRS issued a favorable ruling regarding the tax treatment of Utah Limited Liability Companies. Utah LLC's will be treated as partnerships for tax purposes.

Partnership tax treatment is advantageous because the earnings of a partnership are treated as the earnings of its partners. No separate tax is imposed on the partnership entity. In contrast, the earnings of a corporation are taxed at the entity level; any dividends which are distributed to the shareholders are also taxable to the shareholders. Thus, the distributed earnings of a corporation are taxed twice, while the earnings of a partnership are only taxed once. Like a partnership the earning of the LLC are taxed only once.

In fact, the members of the LLC referred to themselves as partners and acted out that role in intimate detail. As set forth in the uncontroverted facts above, K.E. and the members managed the company on an hour by hour, day by day, basis. Every penny spent by Alivamx was approved by the members prior to the expenditure. All of the financial affairs were considered and formally approved at weekly meetings of the investors. In the end, the active management of the members demonstrated itself by the capacity to and the actual act of K.E. using his voting rights to strip the company of all of its assets.

**CONCLUSION**

For the reasons set forth herein, Respondent's Motion for Summary Judgment should be granted.

DATED this 23rd day of May, 2013.

BLACK & ARGYLE, P.C.

  
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David O. Black, Attorney for Respondent

**CERTIFICATE OF MAILING**

I hereby certify that on the 23rd day of May, 2013, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be hand-delivered to the following:

Paul Amann  
Assistant Attorney General  
Utah Division of Securities  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, UT 84114-0872

  
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