

2002

# Mountain America Financial Services, Inc. v. G. EDWARD LEARY, as the Commissioner of the Utah Department of Financial Institutions : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MOUNTAIN AMERICA FINANCIAL	)	
SERVICES, INC.,	)	
	)	
Petitioner/Appellee,	)	Case No. 20020438-CA
	)	
vs.	)	
	)	
G. EDWARD LEARY, as the	)	
Commissioner of the Utah Department	)	Priority No. 15
of Financial Institutions,	)	
	)	
Respondent/Appellant.	)	

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BRIEF OF APPELLEE MOUNTAIN AMERICA FINANCIAL SERVICES, INC.

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ON APPEAL FROM AN ORDER OF THE THIRD DISTRICT COURT  
STATE OF UTAH, JUDGE GLENN IWASAKI

---

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MOUNTAIN AMERICA FINANCIAL  
SERVICES, INC.,

**VS.**

Respondent/Appellant.

Priority No. 15

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STATE OF UTAH, JUDGE GLENN IWASAKI

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## JURISDICTION

Because this is an appeal from the District Court's review of an informal adjudicative proceeding of the Utah Department of Financial Institutions (the "DFI"), the Utah Court of Appeals has original jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-3(2)(b)(i)(1996).

## ISSUES PRESENTED AND STANDARD OF REVIEW

**ISSUE #1:** Did G. Edward Leary (the "Commissioner"), acting in his capacity as Commissioner of the DFI, err in holding that the business lending restrictions and limitations found in Utah Code Ann. § 7-9-20(7) apply not only to credit unions, but also to credit unions' wholly owned credit union service organizations (collectively, "CUSOs" or, individually, a "CUSO")?

a. **Standard of Review:** Absent either an explicit or implicit grant of discretion to an agency to interpret or apply a statute, an agency's interpretation or application of the applicable statute's terms should be reviewed under a correction of error standard. *Esquivel v. Labor Commission*, 7 P.3d 777, 780 (Utah 2000).

b. **Record Citation:** The District Court held that "CUSOs are not governed by § 7-9-20(7) of the Credit Union Act." (*See R.* at 144, ¶ 12.)

**ISSUE #2:** Did the District Court correctly hold that the business lending activities of Mountain America Financial Services, Inc. ("MAFS"), a wholly owned CUSO of Mountain America ("Mountain America"), cannot be imputed to Mountain America absent a piercing of the corporate veil?

a. **Standard of Review:** "When a district court's review of an administrative decision is challenged on appeal and the district court's review was limited to the record before the board, we



review the administrative decision just as if the appeal had come directly from the agency.” *Wells v. Board of Adjustment of Salt Lake City Corp.*, 936 p.2d 1102 at 1104 (Utah Ct. App. 1997).

b. **Record Citation:** The District Court held that “MAFS and Mountain America are incorporated as separate legal entities and as such this precludes the imputation of the actions of one to another absent a piercing of the corporate veil.” (*See R.* at 144, ¶ 9.)

**ISSUE #3:** The Commissioner’s Third Issue is not distinct from the First Issue. CUSOs are either subject to the business loan restrictions and limitations of Utah Code Ann. § 7-9-20(7), or they are not. If CUSOs are not subject to such restrictions and limitations, then the Commissioner has no authority to hold Mountain America in violation of § 7-9-20(7) as a result of business loans extended by MAFS.

a. **Standard of Review:** Absent either an explicit or implicit grant of discretion to an agency to interpret or apply a statute, an agency’s interpretation or application of the statute’s terms should be reviewed under a correction of error standard. *Esquivel v. Labor Commission*, 7 P.3d 777, 780 (Utah 2000).

### **DETERMINATIVE STATUTORY PROVISIONS**

Subsections (b)(ii) and (c) of Utah Code Ann. § 7-9-20(7) provide:

(b) . . .

(ii) Beginning March 24, 1999, a credit union may not extend a member-business loan to a person:

(A)(I) if the person is a business entity, unless at least one individual having a controlling interest in that business entity has been a member of the credit union for at least six months prior to the date of the extension of the member-business loan; or

(II) if the person is an individual, unless the individual is a member of the credit union for at least six months prior to the date of the extension of the member-business loan; or

(B) if as a result of the extension of the member-business loan, the total amount outstanding for all member-business loans that the credit union has extended to that person at any one time exceeds the lesser of:

(I) 10% of the credit union's capital and surplus; or

(II) \$ 250,000.

(c) (i) Beginning March 24, 1999, a credit union may not extend a member-business loan if as a result of that member-business loan the credit union's aggregate member-business loan amount calculated under Subsection (7)(c)(ii) at any one time exceeds 1.25 times the sum of:

(A) the actual undivided earnings; and

(B) the actual reserves other than the regular reserves.

(ii) For purposes of Subsection (7)(c)(i), the aggregate member-business loan amount of a credit union equals:

(A) the sum of the total amount financed under all member-business loans outstanding at the credit union; minus

(B) the amount of the member-business loans described in Subsection (7)(c)(ii)(A):

(I) that is secured by share or deposit savings in the credit union; or

(II) for which the repayment is insured or guaranteed by, or there is an advance commitment to purchase by an agency of the federal government, a state, or a political subdivision of the state.

### STATEMENT OF THE CASE

On or about March 15, 2000, MAFS requested a ruling, from the Commissioner, as to whether MAFS, the wholly-owned CUSO of Mountain America, could extend business loans. (*See* R. at 6-11). In connection with such request, MAFS also reported that it had recently made two business loans to members of Mountain America. (*See* R. at 6-7). One of such business loans was in the principal amount of \$768,750.00, and the other was in the principal amount of \$525,000. (*See id.*)

In response to MAFS's request for a ruling, the Commissioner issued his Findings, Conclusions and Order Denying Request (the "Commissioner's Denial") on or about June 9, 2000. (*See R.* at 12–14.). In pertinent part, the Commissioner's Denial holds that: (i) because a CUSO is a wholly owned subsidiary of one or more credit unions, "any legal limitation imposed on a credit union applies equally to a 'subsidiary' because the financial statement of the subsidiary is consolidated in the financial statement of the parent" (*See R.* at 12), and (ii) that Mountain America had already submitted a report to the DFI indicating outstanding member-business loans in excess of statutory limits applicable to credit unions. (*See R.* at 13) As a consequence, the Commissioner concluded that the loans extended by MAFS were a continuing violation, by Mountain America, of the credit union business lending limitations of Utah Code Ann. § 7-9-20(7) (b)(ii) and (c). (*See id.*)

MAFS appealed the Commissioner's Denial to the Third Judicial District Court in and for Salt Lake County. On April 4, 2001, MAFS filed a Motion For Summary Judgment (the "MAFS Summary Judgment Motion"), arguing: (i) that nothing in the statutory language of Utah Code Ann. § 7-9-20(7) indicates that such statute was meant to restrain CUSOs from making business loans (*See R.* at 66–71), and (ii) that the Commissioner had, by imputing the actions of MAFS to Mountain America, ignored the status of MAFS as a separate and distinct corporate entity (*See R.* at 71–73), which action was tantamount to a piercing of the corporate veil between MAFS and Mountain America without sufficient legal justification. (*See id.*)

Upon submission of the Commissioner's Opposition Memorandum, and a Reply Memorandum by MAFS, the District Court granted the MAFS Summary Judgment Motion, holding that. (1) "CUSOs

are not subject to or governed by § 7-9-20(7) of the Credit Union Act.” (See R. at 144.), and (ii) that “MAFS and Mountain America are incorporated as separate legal entities and, as such, this precludes the imputation of the actions of one to another absent a piercing of the corporate veil.” (*See id.*)

### SUMMARY OF THE ARGUMENTS

In holding, and now arguing, that Utah Code Ann. § 7-9-20(7)’s lending limitations apply to CUSOs, the Commissioner has misconstrued the legislature’s intent and exceeded his administrative authority. The plain and unambiguous language of the statute refers only to credit unions, and is silent on the subject of CUSOS. By holding that the statute applies to MAFS, the Commissioner has essentially encroached on the province of the legislature and amended the statute by fiat. Because the statute neither explicitly nor implicitly grants the Commissioner the authority to interpret its terms, it was impermissible for him to alter and enlarge its effect by applying it to MAFS.

While the Commissioner invokes Utah Admin. Code R331-23, pertaining to banks, industrial loan corporations, and their subsidiaries as an example of DFI’s policy of applying identical regulations to the subsidiaries of other financial institutions, the comparison is inapposite. Unlike R331’s governing statute, Utah Code Ann. § 7-9-20(7) does not explicitly or implicitly grant authority to the Commissioner to interpret its terms. Therefore, the Court should not look beyond the plain language of § 7-9-20(7) to divine its intent. Because the language of the statute refers to credit unions only, the Court should hold that it has no application to MAFS, or CUSOs generally.

The Commissioner further argues, without justification, that if § 7-9-20(7) does not apply to CUSOs, he has no authority to regulate their lending practices. To the contrary, the Financial Institutions Act gives him the power to establish limitations on the amount and nature of loans by each

class of financial institution, in relation to the amount of that institution's capital. Instead of doing so, the Commissioner has merely parroted statutory lending limitations that are inapplicable to CUSOs, without making any rational findings as to why these limitations are appropriate for CUSOs.

The Commissioner's argument that Mountain America's investment in MAFS would not be "prudent and reasonable" if MAFS can make unregulated loans, and that Mountain America will be exposed to an unacceptable risk of loss if § 7-9-20(7) does not apply to MAFS, is without factual support. The Commissioner made no such factual findings below. Furthermore, credit union investments in CUSOs are already regulated. Credit unions are currently limited to investing five percent of their capital in CUSOs. This regulatory protection should be adequate to protect credit unions from any unacceptable risks until such time as the Commissioner promulgates an appropriate rule to address CUSO lending.

The only way the Commissioner can apply § 7-9-20(7) directly to MAFS is by piercing its corporate veil and imputing its acts to Mountain America. Under Utah law, a two-prong test must be fulfilled before this is judicially appropriate. First, a court must make findings that there is such a unity of interest between the one entity and the other that the one is essentially the alter ego of the other. Second, the court must find that observance of the corporate form would result in inequity.

With the exception of noting that MAFS's and Mountain America share a consolidated financial statement, the Commissioner has wholly failed to show that the elements of the "alter ego" test have been met. It was therefore inappropriate for the Commissioner to disregard MAFS's separate corporate form and to impute its actions to Mountain America in order to subject MAFS to the lending restrictions of Utah Code Ann. § 7-9-20(7). The District Court's decision should therefore be upheld.

## ARGUMENTS

### I. NOTHING IN THE PLAIN LANGUAGE OF THE BUSINESS LENDING LIMITATIONS SET FORTH IN § 7-9-20(7) SUGGESTS THAT SUCH LIMITATIONS WERE MEANT TO APPLY TO CUSOS AS WELL AS CREDIT UNIONS

MAFS does not dispute that the Commissioner has the authority to regulate CUSOs.

Unquestionably, he does. *See* Utah Code Ann. § 7-1-501(5) (providing that CUSOs are subject to the jurisdiction and supervision of the DFI “as provided in this title and the rules of the department.”).

At the same time, the Commissioner does not have the power to issue rules, regulations, or decisions that misinterpret or misapply the plain language of the statutes he administers. This, however, is precisely what the Commissioner did when he held that the business loan restrictions and limitations set forth in Utah Code Ann. § 7-9-20(7) applied to CUSOs as well as to credit unions. In so holding, the Commissioner went far beyond the statute, which by its plain terms does not apply such restrictions and limitations to CUSOs.

#### A. The Commissioner’s Decision Impermissibly Adds Terms to § 7-9-20(7) And, in Effect, Amends The Statute to Include CUSOs

It is a basic principle of administrative law that an agency cannot alter the effect of a statute by adding terms that are not found in such statute. *See Bonneville International Corp. v. State Tax Comm’n*, 858 P.2d 1045, 1049 n.6 (Utah Ct. App. 1993) (*citing Ferro v. Dept. of Commerce*, 828 P.2d 507, 513-14 (Utah Ct. App. 1992)); *see also Crowther v. Nationwide Mutual Insurance Co.*, 762 P.2d 1119, 1121 (Utah Ct. App. 1988). Indeed, an agency’s powers of statutory interpretation are extremely limited unless “there is a grant of discretion to the agency concerning the language in

question, either expressly made in the statute or implied from the statutory language.” *See Morton Int’l, Inc. v. Auditing Div.*, 814 P.2d 581, 589 (Utah 1991).

In *Bonneville International*, a corporation appealed the Utah State Tax Commission’s denial of a sales tax exemption for manufacturing equipment purchased by the corporation’s video tape production division. The Tax Commission’s denial was based upon an interpretation of Utah Code Ann. § 59-12-104(15) (1992), which provided a tax exemption to certain manufacturers that purchased or leased equipment for use in new and expanding operations. *See Bonneville International*, 858 P.2d at 146. The statutory exemption was limited to facilities classified by certain “SIC” code numbers contained in a 1972 federal industrial classification manual. Bonneville claimed that its video tape division fit the definition of SIC code 3652, which included manufacturers “primarily engaged in manufacturing phonograph records and pre-recorded magnetic tape.” *See id.* at 1047.

The Tax Commission held that SIC code 3652 referred to audio tapes only, reasoning that the term “phonograph records” modified the reference to magnetic tape. The Tax Commission also based its interpretation upon the 1987 version of the SIC manual, despite the specific statutory reference to the 1972 manual. *See id.*

In reversing the Tax Commission’s decision, the *Bonneville International* Court held that “[a]n administrative agency may not alter the effect of a statute by adopting an interpretation that imposes additional terms not found in the statute.” *Id.* at 1049 n.6. The Court then concluded that the Tax Commission violated this principle when it relied upon the 1987 manual in the face of the applicable statute specifying that only the 1972 manual was to be used. *See id.* at 1049. Further, the Court held that the plain meaning of “pre-recorded magnetic tape” expressly included video tape. *See id.*

Similarly, in *Crowther*, the Court invalidated an agency's attempt to add, by regulatory interpretation, terms that did not exist in, and were not authorized by, the governing statute. In that case, the State Insurance Commission promulgated a rule that prohibited the stacking of benefits under two or more automobile policies up to the amount of medical expenses incurred. Because nothing in the language of the Utah Automobile No-Fault Insurance Act prohibited such duplicate coverage, the court invalidated the regulation, holding that the Insurance Commission had exceeded its statutory authority. The Court stated that the statute "permit[s] stacking either by its language or its silence on the subject." *Crowther*, 762 P.2d at 1121. The Court went on to conclude that "'when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted.'" *Id.* at 1122, citing *Travelers Indem. Co. v. Barnes*, 552 P.2d 300, 303 (Colo. 1976).

Turning to the statutory provisions at issue in the present appeal, there is no room for dispute as to the meaning of subsections (b)(ii) and (c) of Utah Code Ann. § 7-9-20(7). These provisions are specific and unambiguous. When the language of a statute is unambiguous, it is inappropriate to look beyond the plain meaning of such language to divine legislative intent. *See Lyon v. Burton*, 5 P.3d 616, 622 (Utah 2000). The literal meaning of the statute should be controlling, unless such meaning is confused or inoperable. *See Olsen v. Samuel*, 956 P.2d 257, 259 (Utah 1998).

Both of the statutory provisions at issue in this appeal begin with the following language: "Beginning March 24, 1999, a **credit union** may not extend a member-business loan . . ." (emphasis supplied) *See* Utah Code Ann. § 7-9-20(7), subsections (b)(ii) and (c). Sections (b)(ii) and (c) merely place explicit limits on the individual and aggregate amounts a **credit union** can extend in



member-business loans, and limit such loans to *credit union* members. If the legislature had intended these provisions to apply to CUSOs as well as credit unions, then CUSOs would have been specifically listed. Section 7-9-20(7), however, is entirely silent on the subject of CUSOs.

Just as the Tax Commission in *Bonneville International* improperly added terms that distorted the applicable statute's plain language, so too has the Commissioner distorted the plain language of Utah Code Ann. § 7-9-20(7) by baselessly decreeing that such statute also applies to CUSOs. The Commissioner, by himself and without any legislative authorization or mandate, has effectively amended Utah Code Ann. § 7-9-20(7) to read, 'Beginning March 24, 1999, *neither a credit union nor a CUSO* may extend a member-business loan . . . .' *Compare with* the first sentences of Utah Code Ann. § 7-9-20(7)(b)(ii) and (c). Under *Bonneville International* and *Crowther*, the Commissioner's alteration of the statute's meaning is impermissible.

Further, like the Tax Commission in *Bonneville International*, the Commissioner has attempted to justify his interpretation of a statute through the use of non-statutory standards. In *Bonneville International*, the Tax Commission employed the 1987 version of the SIC manual as an interpretive aid, notwithstanding that the statute at issue in that case specifically mandated the use of the 1972 manual. In the case at bar, and in an effort to justify his interpretation of § 7-9-20(7), the Commissioner employs Utah Admin. Code R331-23. *See* Commissioner's Brief at 16-17. Such reliance is inapposite. As even the most cursory analysis of R331-23 indicates, such rule expressly deals with general lending limitations applicable to - and only applicable to - all state-chartered banks, industrial loan corporations, and their subsidiaries. Nowhere in R331-23 is there even the remotest hint that it applies to either credit unions or CUSOs.

Furthermore, R331-23's enabling statutes contain explicit grants of interpretive authority to the Commissioner. *See* Utah Code Ann. § 7-8-20(3)(b) (giving the Commissioner authority to define terms and phrases necessary to interpret and implement the section, which relates to industrial loan limitations); *see also* Utah Code Ann. § 7-3-19(4)(a) (giving the Commissioner power to define terms used in such section, which relates to bank lending limitations). No such grant of interpretive authority or discretion is given to the Commissioner by Utah Code Ann. § 7-9-20(7), the statute at issue in this case.

The Commissioner's attempted application of § 7-9-20(7) to CUSOs also invites comparison to *Crowther*, described above, where the court invalidated a rule of the State Insurance Commission. Just as nothing in the No-Fault Insurance Act in *Crowther* prohibited the "stacking" of insurance policies, nothing in § 7-9-20(7) places limitations on CUSO business loans. Section 7-9-20(7) is silent on the subject of CUSOs, and by its plain terms can have no application to them. Thus, the Commissioner's Denial, in its attempt to apply the business lending limits of credit unions to MAFS and other CUSOs, goes beyond the statutory authority granted to DFI.

**B. The Commissioner's Decision Is Not Otherwise Justifiable by the Powers Conferred upon Him Through Title 7**

The Commissioner argues that the "only way that loans made by a CUSO could be considered reasonable and prudent is if they comply with . . . Utah Code Ann. § 7-9-20(7)." *See* Commissioner's Brief at 23. The Commissioner further argues that if he cannot apply the business loan limitations of section 7-9-20(7) to CUSOs, then he has no jurisdiction over CUSOs. *See id* at 15.

In addition to having no legal merit or factual justification, these arguments significantly underestimate the authority of the Commissioner and the discretion he possesses to establish independently derived and reasonably based business loan lending limitations for CUSOs. Various portions of Title 7 and the Administrative Rulemaking Act, Utah Code Ann. § 63-46a-1 through 17, provide the Commissioner and the DFI with powerful tools to supervise and regulate CUSOs without the need to rely upon the business lending limitations of Utah Code Ann. § 7-9-20(7).

1. **By Statute, the Lending Limits the Commissioner Imposes on a Financial Institution must Relate to Such Financial Institution's Capital**

The Commissioner correctly asserts that, under Utah Code Ann. § 7-1-501(5), he has jurisdiction over CUSOs. MAFS does not now, nor has it ever, disputed this contention. In fact, MAFS acknowledges the need for, and even welcomes, the Commissioner's regulation of CUSOs and the business loans which they extend. Broad though the Commissioner's powers may be, however, they are not without limit. The legislature has prudently decreed that the DFI must supervise financial institutions, "as provided in this title and the rules of the department." *See* § 7-1-501. Thus, the Commissioner's supervisory powers are limited to those powers granted by statute or rule.

Perhaps most relevant to the question of CUSO business loans is the Commissioner's power to establish "limitations on the amount and nature of loans and extensions of credit to any person or related persons by each class of financial institution *in relation to the amount of its capital.*" *See* Utah Code Ann. § 7-1-301(8)(b)(vi) (emphasis supplied).

Because CUSOs are financial institutions that are classified separately from credit unions, the Commissioner has explicit statutory authority to limit the amount and nature of CUSO business loans.

Under the plain language of § 7-1-301(8)(b)(vi), however, such limitations must be in relation to the CUSO's own capital; they cannot be a mere parroting of the lending limitations placed upon its parent credit union. *See* Utah Code Ann. § 7-1-301(8)(b)(vi). By slavishly repeating his mantra that 'the business loan limitations applicable to a credit union must apply to such credit union's CUSO as well,' the Commissioner has subverted the mandate of § 7-1-301(8)(b)(vi). Rather than making independent findings, and then implementing standards which are based upon the capital and capacity of CUSOs, the Commissioner has instead, without justification, superimposed the business loan standards set forth in § 7-9-20(7), a statute that does not mention CUSOs, and was never meant to be applied to them.

2. **The Commissioner Did Not Need to Apply The Standards Set Forth in § 7-9-20(7) in Order to Impose Business Lending Limitations on CUSOs**

The Commissioner essentially argues that he has no option but to apply the business loan limitations of Utah Code Ann. § 7-9-20(7) to CUSOs because there are no other statutes or rules which specifically grant him authority over CUSO business lending. This argument is as simplistic as it is inaccurate. As discussed above, Utah Code Ann. § 7-1-301(8)(b)(vi) explicitly gives the Commissioner power to set the lending limitations for all institutions under his jurisdiction, including CUSOs. With such authority firmly in hand, but lacking specifically delineated statutory loan limitation standards, the Commissioner should have applied a 'reasonable and rational' standard. *See, Utah Department of Administrative Services v. Public Service Commission*, 658 P.2d 601 (Utah 1983). In order to do so, the Commissioner should have found facts and then set forth independently derived rules that reasonably relate to CUSO business loans.

Instead of analyzing CUSO business loans on their own merits, however, and then developing customized, reasonable, and rational rules reflecting his findings, the Commissioner engaged in a wholesale adoption of standards set forth in a statute that does not apply to CUSOs. While in no way denying that the Commissioner has the statutory authority to regulate CUSOs, MAFS does not believe that the Commissioner has the power to merely graft standards from inapplicable statutes absent independent findings which justify such action.

**C. The Commissioner Has Improperly Raised Arguments Based on Utah Code Ann. § 7-9-26 Because These Arguments Were Not Raised in the First Instance Before the Trial Court**

The Commissioner now argues, for the first time, that under Utah Code Ann. § 7-9-26, Mountain America may not invest capital in a CUSO that makes loans. This issue was never before the trial court. The Court of Appeals will not ordinarily consider arguments on appeal that were not raised before the trial court. *See Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1358-59 (Utah Ct. App. 1991). Therefore, the Court should decline to consider the Commissioner's arguments in this regard.

**1. Section 7-9-26(3)(E) Specifically Authorizes Credit Unions to Invest in Loans of Credit Union Organizations**

Even if the Court considers the Commissioner's arguments relating to § 7-9-26 to have been properly and timely raised, such arguments are wholly unsupported by either the plain language of § 7-9-26 or any factual findings of the DFI. The Commissioner first argues that, if CUSOs are permitted to make business loans, CUSOs would replace credit unions rather than strengthen them, in violation of § 7-9-26(3)(e). Such reasoning, however, overlooks the plain language of the statute, which permits a credit union to invest in "loans" of "any organization, corporation, or association, if the

membership or ownership of the organization, corporation, or association is primarily confined or restricted to credit unions, and if the purpose for which it is organized is to strengthen or advance the development of credit unions or credit union organizations.” *See* Utah Code Ann. § 7-9-26(3)(e).

A credit union’s investment of funds in CUSOs clearly satisfies the requirements of § 7-9-26(3)(e) because ‘the ownership’ of a CUSO is wholly restricted to credit unions and because the ‘purpose’ for which a CUSO is organized is to ‘strengthen or advance the development’ of a credit union service organization.

2. **The Commissioner’s Conclusion That the Loans at Issue Are Not “Prudent and Reasonable” is Unsupported**

The Commissioner also argues that, under Utah Code Ann. § 7-9-26(3)(f), Mountain America’s investment in MAFS would not be reasonable and prudent if MAFS can make unregulated loans. According to the Commissioner, this would subject Mountain America’s capital to an “unacceptable risk of loss.” *See* Commissioner’s Brief at 23.

First, and as more particularly discussed above, the Commissioner’s continued insistence that CUSO business loans will be unregulated if the standards of § 7-9-20(7) are not applied to them is perplexing. Yet again, MAFS states that it is undisputed that the Commissioner has the right to properly regulate CUSOs, and that MAFS is not asking the Court to make any determination to the contrary. MAFS is only asking that the Commissioner be required to promulgate regulations that are reasonable, rational, and in harmony with his statutory duties and mandates.

Second, the risk of credit union losses through investments in CUSOs is minimal given the provisions of Utah Admin. Code R337-4-3. Such Rule limits a qualified credit union’s investment in

CUSOs to five percent of the capital of the credit union. *See* Utah Admin Code R337-4-3(2). This limitation protects credit union losses from unacceptable risks of loss through CUSO business loans or other CUSO activities.

Finally, there are no factual findings in the record to suggest that MAFS has engaged in imprudent lending practices. Given the absence of such findings, the Commissioner's claim that Mountain America's investments in MAFS would not be reasonable or prudent is nothing more than speculation.

**II. ONLY BY PIERCING THE CORPORATE VEIL OF MAFS MAY THE COMMISSIONER APPLY THE STATUTORY CREDIT UNION LENDING LIMITATIONS DIRECTLY TO MAFS**

Because the business lending limitations of Utah Code Ann. § 7-9-20(7) plainly apply only to credit unions, the Commissioner may apply them to MAFS only by piercing the corporate veil and imputing the actions of MAFS to its sole shareholder, Mountain America. Although the Commissioner now denies piercing the corporate veil of MAFS, he clearly did so in the Commissioner's Denial without providing sufficient justification. Hoping to disguise and sugar-coat his action, he now claims he was merely "tracing the capital" of MAFS back to its parent. *See* Commissioner's Brief at 23–26. The Commissioner may not avoid, through this euphemism, the requirements of the law.

Utah law requires that a two prong test be fulfilled before a court can pierce the corporate veil and find that one corporation is, in reality, the "alter ego" of another. Under the first, the so-called "formalities" prong, there must be such a unity of interest between two entities that one corporation is in fact the alter ego of the other. Under the second, the so-called "inequity" prong, the court must find that observance of the corporate form would result in inequity, fraud or injustice. *See Salt Lake City*

*Corp. v. James Constructors*, 761 P.2d 42,46 (Utah App. 1988), citing *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028 (Utah 1979).

In the Commissioner's Denial, no distinction was made between MAFS and Mountain America. To the contrary, MAFS and Mountain America were, for purposes relating to the extension of business loans, treated as part and parcel of one another. Although MAFS had in fact requested the Commissioner's ruling (*see* R. at 6), the Commissioner treated the request as Mountain America's. (*See* R. at 12 (Order, ¶ 4). The Commissioner therefore concluded that Mountain America could not exceed the limitations of Utah Code Ann. § 7-9-20(7) "through its CUSO." (*See* R. at 14.) Thus, there is no question that the Commissioner disregarded MAFS's separate corporate identity, and imputed its actions to Mountain America.

In doing so, Commissioner payed scant attention to the "formalities" prong of the alter ego test articulated in *James Constructors*. There, the court, stated that "the central focus of the formalities prong is 'the degree of control that the parent exercises over the subsidiary and the extent to which the corporate formalities of the subsidiary are observed.'" *James Constructors*, 761 P.2d at 47 (quoting Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 376 (1981).

While the *James Constructors* court noted that up to eleven factors should be considered under the "formalities" prong, the Commissioner, in the Commissioner's Denial, considered only one: that "the financial statement of [MAFS] is consolidated in the financial statement of [Mountain America]." In addition, the Commissioner's Denial wholly failed to make any findings or conclusions under the "inequities" prong of the alter ego test. Thus, the Commissioner's Denial improperly pierced the corporate veil by imputing the actions of MAFS to Mountain America without providing adequate



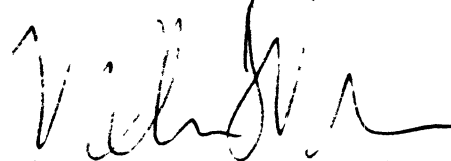
factual support or legal analysis. In light of the Commissioner's failure to provide such support or analysis, the District Court's conclusion that the activities of MAFS cannot be imputed to Mountain America absent a piercing of the corporate veil should be affirmed.

### CONCLUSION

The District Court's decision should be upheld. Nothing in the plain language of Utah Code Ann. § 7-9-20(7) suggests that the statute was meant to apply to CUSOs. While MAFS does not dispute that CUSOs are subject to regulation by the Commissioner, such regulation should have an independent, rational basis, and should come in the form of a duly promulgated rule rather than in the form of the ad hoc misapplication of statutory language. Moreover, the Commissioner has inappropriately imputed the acts of MAFS to Mountain America in order to apply § 7-9-20(7) directly to MAFS. This should not be permitted, absent sufficient factual findings to show that MAFS is in actuality an alter ego of Mountain America.

DATED this 24<sup>th</sup> day of October, 2002

SCALLEY & READING, P.C.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of October, 2002, two (2) true and correct copies of the foregoing BRIEF OF APPELLEE was served upon counsel of record by depositing the same in the United States mail, postage prepaid and addressed as follows:

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