

2000

# Horton Hodsen v. Craig Jackson : Brief in Opposition to Certiorari

Utah Supreme Court

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Matthew Hilton; Attorneys for Appellants.

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IN THE UTAH SUPREME COURT

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HORTON HODSEN, as agent for  
Nutriphysiology (previously  
known as Nutribionics and  
Biochem Research Services)  
and for himself personally, as  
HORTON E. TATARIAN, and  
GAIL ANDERSON,

Plaintiffs/Appellants,

vs.

CRAIG JACKSON, Director of the  
Division of Occupational and  
Professional Licensing,  
Department of Commerce, State  
of Utah, in his official capacity,

Defendant/Appellee.

Priority 13

Case No. 20000005 - SC

Appellate No. 981554-CA

---

**BRIEF OF THE STATE OF UTAH IN OPPOSITION  
TO PETITION FOR CERTIORARI**

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Attorneys for Defendants/Appellees

**FILED**

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IN THE UTAH SUPREME COURT

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Department of Commerce, State )  
of Utah, in his official capacity, )  
Defendant/Appellee. )

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**BRIEF OF THE STATE OF UTAH IN OPPOSITION  
TO PETITION FOR CERTIORARI**

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The State of Utah, Department of Commerce, Division of Occupational and Professional Licensing and Craig Jackson oppose the request by the Plaintiff/Appellants that this Court exercise its discretionary jurisdiction and re-examine on certiorari the issues briefed, argued to, and ruled upon by the Court of Appeals.

## **QUESTION PRESENTED**

Have Hodsen and Anderson presented any special or important reasons why this Court should exercise its discretionary jurisdiction and essentially conduct a second appellate review of the issues previously presented to and ruled upon by the trial court and the Court of Appeals?

## **DETERMINATIVE LAW**

The Utah Medical Practices Act (“UMPA”), Utah Code Ann. § 58-67-101 (1998) et. seq., defines “medical practice” as follows:

“Practice of Medicine” means:

(a) to diagnose, treat, correct, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, or to attempt to do so, by any means or instrumentality, and by an individual in Utah or outside the state upon or for any human within the state;

....

(d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationery, letterhead, envelopes, signs, or advertisements, the designation “doctor”, “doctor of medicine”, “physician”, “surgeon”, “physician and surgeon”, “Dr.,” “M.D.,” or any combination of these designations in any manner which might cause a reasonable person to believe the individual using the designation is a licensed physician and surgeon, and if the party using the designation is not a licensed physician and surgeon, the designation must additionally contain the description of the branch of the healing arts for which the person has a license.

U.C.A. § 58-67-102(8) (1998). The UMPA defines “diagnose” as follows:

(4) “Diagnose” means:

(a) to examine in any manner another person, parts of a person’s body, substances; fluids, or materials excreted, taken, or removed from a person’s body, or produced by a person’s body, to determine the source, nature, kind, or extent of a disease or other physical or mental condition.

(b) to attempt to conduct an examination or determination described under Subsection (4)(a);

(c) to hold oneself out as making or to represent that one is making an examination or determination as described in Subsection (4)(a); or

(d) to make an examination or determination as described in Subsection (4)(a) upon or from information supplied directly or indirectly by another person making or attempting the diagnosis or examination.

Utah Code Ann. § 58-67-102 (1998).

The UMPA exempts the following from the requirement of licensure:

(2) an individual administering a domestic or family remedy;

(3)(a)(i) a person engaged in the sale of vitamins, health foods, dietary supplements, herbs, or other products of nature, the sale of which is not otherwise prohibited by the state or federal law; and

(ii) a person acting in good faith for religious reasons, as a matter of conscience, or based on a personal belief, when obtaining or providing any information regarding health care and the use of any product under Subsection (3)(a)(i); and

(b) Subsection (3)(a) does not:

(i) allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain, or other condition; or

(ii) prohibit providing truthful and non-misleading information regarding any of the products under Subsection (3)(a)(i);

(4) a person engaged in good faith in the practice of religious tenets of any church or religious belief, without the use of prescription drugs;

Utah Code Ann. § 58-67-305 (1998).

### **STATEMENT OF THE CASE**

On February 6, 1996, Hodsen filed a complaint challenging the application of certain 1996 amendments to the Utah Medical Practices Act. Hodsen sought declaratory judgment and injunctive relief. (Record p.3 [hereafter R.]) A third amended complaint was filed July 8, 1996. (R.47) DOPL's answer was filed January 6, 1998. (R. 251) The parties filed a stipulation of facts on May 6, 1998 (R.272), and Anderson filed an affidavit May 12, 1998. (R.329) Hodsen



and Anderson filed a motion for partial summary judgment on May 6, 1998. (R. 285) DOPL filed a motion for summary judgment on May 12, 1998. (R.333) On June 30, 1998, following a hearing, the trial court denied Hodsen and Anderson's motion for partial summary judgment and granted DOPL's motion for summary judgment, finding that the UMPA did not deprive Hodsen or Anderson of their constitutionally protected rights to free speech and free exercise of religion. (R.373) Hodsen and Anderson filed a motion to alter or amend the judgment on July 14, 1998. (R.375) The motion was denied July 30, 1998. (R.404) A Notice of Appeal was filed August 27, 1998. (R.418).

On November 2, 1999, following briefing and argument, the Utah Court of Appeals affirmed the trial court. Hodsen and Anderson filed a petition for rehearing on November 13, 1999. The Court of Appeals denied this request on December 2, 1999. Appellants filed the petition for writ of certiorari on Monday January 3, 2000.

### **STATEMENT OF FACTS<sup>1</sup>**

The Appellant ("Hodsen") is a graduate of the University of California Los Angeles School of Medicine and has a degree in biochemistry from University of California Berkeley. (R.273). He is not licensed as a physician, surgeon, or dietician in the State of Utah. (R.273).

Hodsen operates a business distributing herbal and other non-prescription products. (R.273).

Appellant Anderson consulted with Hodsen for a health condition from which she

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<sup>1</sup> These facts are uncontested, having been stipulated to by all parties in the lower proceedings. All of these facts are set forth in the stipulated facts, attached as Addendum 1. Appellee objects to Hodsen's statement of facts because it mixes stipulated facts with argument.

suffered. (R.274).

Hodsen's business practice with Anderson and other potential customers begins when the person approaches Hodsen and provides him information regarding the person's medical ailment or conditions. (R.282). The information may have originated from a health care provider; it may have been gathered by the person through home medical testing or home study of medical literature; it may have come to the customer from intuitive or spiritual impressions or blessings; or the customer may simply tell Hodsen, either orally or in a written history, his or her symptoms of health conditions. (R.283). Using this information, Hodsen identifies what he believes the needs of the person are and which herbal or other products would satisfy those needs. He then identifies the herbs or other products for the person and offers them for sale. (R.283).

Hodsen believes that he has a divine mission to assist people in obtaining and properly using herbal and other products of nature. (R.274). Hodsen admits that his receipt and review of information from people and his determinations and recommendations do not, in and of themselves, constitute religious practices or belief. (R.274).

Hodsen uses prayer to guide his interpretation of scientific data and information provided by the customer for the purpose of making recommendations. (R.274). He believes that he receives divine assistance regarding these matters. (R.274).

It is uncontested in this appeal that the conduct of Hodsen constitutes diagnosis, and therefore the practice of medicine, pursuant to U.C.A. § 58-67-102(4)(d). (R.284) Hodsen did not appeal a 1995 Fifth Judicial District Court order finding that his practices constitute "diagnosis" and therefore the practice of medicine (R.276), and Hodsen does not take issue with this finding in this appeal.

Although Hodsen is not licensed to practice medicine, he wishes to use the designations “M.D.” on commercial or personal literature, or other communications. (R.280-281). He states he will qualify the designations with an asterisk indicating “Graduate of U.C.L.A. School of Medicine Research biochemist not in medical practice.” (R.280-281).

POINT I: HODSEN FAILS TO DEMONSTRATE SPECIAL  
OR IMPORTANT REASONS FOR GRANTING CERTIORARI

Rule 46, Utah Rules of Appellate Procedure, provides that, “[r]eview by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons.” Although not wholly measuring the Court’s discretion, the rule lists four reasons for granting certiorari: First, a panel of the Court of Appeals has rendered a decision in conflict with another panel of the Court of Appeals. Second, the Court of Appeals ruling is in conflict with a ruling of the Supreme Court. Third, the Court of Appeals ruling has “so far parted with the accepted and usual course of judicial proceedings or sanctioned such a departure by another court, that the Supreme Court should exercise its supervisory function. Finally, fourth, when the Court of Appeals has decided an important question of state or federal law which has not been decided by the Supreme Court but should be. None of these reasons are remotely applicable to this case.

**A. The Court of Appeals’ ruling is consistent with controlling precedent from the Utah Supreme Court, as well as holdings from other courts examining the same issues.**

Hodsen does not claim that the Court of Appeals’ ruling in his case is in conflict with any other ruling by the Court of Appeals. It is not. Likewise, Hodsen does not claim that the ruling is in conflict with any ruling of the Supreme Court. In fact, Hodsen concedes that the ruling is

consistent with the two Hoffman<sup>2</sup> decisions from this Court, both of which squarely held that the Utah Medical Practices Act does not violate federal First Amendment protections of free speech. While Hodsen claims that an amendment to the Act justifies another look at the constitutionality of the Act, he is really asking this Court to overrule its Hoffman decisions. Despite Hodsen's attempt to minimize the holdings in the Hoffman cases by calling those holdings "overly broad dicta" (Appellant's petition at 14), the Hoffman decisions are squarely on point and dispositive of this case, as both the trial court and the Court of Appeals have held.

Not only is the Court of Appeals ruling consistent with prior Utah Supreme Court case law, it is also consistent with case law from other states holding that their medical practice acts do not violate the First Amendment rights of unlicensed "healers."<sup>3</sup> In attempting to convince this Court to grant certiorari, Hodsen argues, "many cases increasing the protections of individual rights of speech and religious conduct have been decided on both state and federal grounds since 1983." Appellant's petition at 14. Significantly, Hodsen cannot point out a single holding in which a state statute regulating the practice of medicine has been held to be violative of an unlicensed individual's First Amendment rights. Rather, he cites to factually inapposite "commercial speech" cases dealing with advertising by *licensed* professionals. The Utah Medical Practices Act does not limit the commercial speech of licensed professionals. The commercial advertising cases Hodsen relies upon simply are not on point.

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<sup>2</sup> State v. Hoffman, 558 P.2d 602 (Utah 1976) and State v. Hoffman, 733 P.2d 502 (Utah 1987).

<sup>3</sup> Department of Health v. Hinze, 441 N.W.2d 593 (Neb. 1989); People v. Jeffers, 690 P.2d 194 (Colo. 1984); People v. Ray, 119 Ill.App.3d 180, 456 N.E.2d 179 (Ill. 1983).

**B. The UMPA is clear and unambiguous. Diagnosing or treating physical or mental conditions constitutes the Practice of Medicine, for which licensure is required.**

Hodsen next argues that, because the UMPA does not contain the word “advice,” he must be free to advise his customers as he sees fit, without having to be licensed. The Act is clear and unambiguous. The “practice of medicine means to diagnose, treat, correct, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental . . .”. Utah Code Ann. §58-67-101. When “advice” is simply another word for the diagnosis or treatment of a medical condition, then the “advice” constitutes the practice of medicine for which licensure is required.

The UMPA provides that an unlicensed individual may provide truthful, non-misleading information about vitamins, health foods, dietary supplements, herbs, or other lawful products of nature, provided that the information does not constitute the diagnosis of a human disease, ailment, injury, infirmity, deformity, pain, or other condition. Utah Code Ann. §58-67-102(3). Clearly, Hodsen can provide advice regarding these lawful products of nature, provided he does not diagnose and/or treat medical conditions. However, this is not enough for Hodsen. He seeks to diagnose and treat medical conditions without being licensed, and in so doing, runs afoul of the Utah Medical Practices Act.

**C. The UMPA does not allow Hodsen to use professional designations such as “M.D.” because a) his proposed use would be misleading to the public, and b) because he is not licensed in any of the healing arts.**

The Utah Medical Practices Act provides that the definition of the “practice of medicine” includes “to use, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationery, letterhead,

envelopes, signs, or advertisements, the designation ‘doctor,’ ‘doctor of medicine,’ ‘physician,’ ‘surgeon,’ ‘physician and surgeon,’ ‘doctor,’ ‘M.D.’ or any combination of these designations in any manner which might cause a reasonable person to believe the individual using the designation is a licensed physician and surgeon, and if the party using the designation is not a licensed physician and surgeon, the designation must additionally contain the description of the branch of the healing arts for which the person has a license.” Utah Code Ann. § 58-67-102(8)(d). The scrutiny to be applied to the Utah Medical Practice Act, like other regulations on entry into a profession, is the lowest form of scrutiny, the “rational basis test.”<sup>4</sup> So long as the regulation bears a rational basis to an important governmental interest, the regulation should be upheld. Clearly, the use of certain professional designations which connote licensed professional status may be limited by the legislature in order to prevent confusion among the public.

Hodsen claims that his use of “M.D.” on advertising and letterhead is not misleading because he will qualify the designation with an asterisk indicating “[G]raduate of U.C.L.A. School of Medicine Research biochemist not in medical practice.” However, nothing in this disclaimer informs the public that Hodsen is not a licensed physician and surgeon. Regardless of whether he is “not in medical practice,” the fact that he uses the professional designation “M.D.” would lead a reasonable person to believe that he is a licensed physician. If Hodsen really did not want to mislead the public, it would be very simple to include the disclaimer, “Not a licensed physician or surgeon.” He does not propose such a disclaimer, however.

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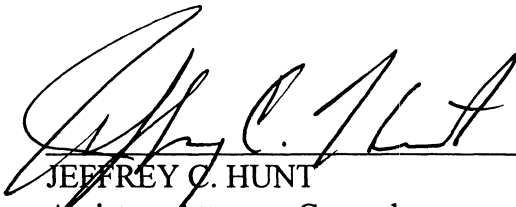
<sup>4</sup> Watson v. Maryland, 218 U.S. 173, 178 (1910). The rational basis test was again reiterated as the standard for examining licensure statutes even against First Amendment attack in Justice White’s concurring opinion in Lowe v. S.E.C., 472 U.S. 181, 228-229 (1985).

Even if Hodsen's use of the professional designation "M.D." was followed by an adequate disclaimer such that a reasonable person could not be confused as to his licensure status, he still cannot use the professional designation because he is not licensed in any other healing art. The UMPA's requirement that "the designation must additionally contain the description of the branch of the healing arts for which the person has a license" means that Hodsen would have to be licensed in one or more of the healing arts before he could use a professional designation.

### CONCLUSION

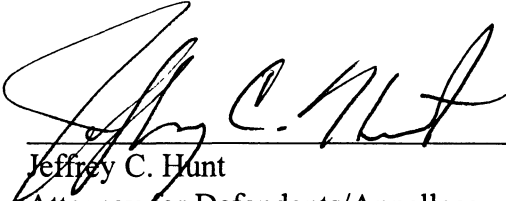
Hodsen has failed to meet his burden of demonstrating special and important reasons for this Court to grant his petition for certiorari. He simply wants a second opportunity to make the same arguments he made before the Court of Appeals. He failed to adequately brief state constitutional issues before the Court of Appeals, and his federal constitutional concerns were adequately and correctly addressed by that court. For the foregoing reasons, the Appellee/Respondent requests that Appellant's Petition of Writ of Certiorari be dismissed.

Respectfully submitted this 2<sup>nd</sup> day of February, 2000.

  
JEFFREY C. HUNT  
Assistant Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of February, 1999, I caused two copies of the foregoing State of Utah's Brief In Opposition To Petition For Certiorari to be mailed, with first class postage pre-paid, to the following person: Matthew Hilton, 1220 N. Main Street #5A, P.O. Box 781, Springville, UT 84663.



Jeffrey C. Hunt  
Attorney for Defendants/Appellees.



# ADDENDUM

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FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

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HORTON HODSEN, as agent for Nutriphysio- logy, (previously known as Nutribionics and Biochem Research Services), and for himself ) personally, as Horton E. Tatarian, and GAIL ANDERSON, )	AGREED STATEMENT OF UNDISPUTED FACTS
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Plaintiffs. )

vs. )

Civil No. 960500182

CITY OF ST. GEORGE, a municipality under )  
Utah Law, and CRAIG JACKSON, Director  
of the Division of Occupational and )  
Professional Licensing, Department of  
Commerce, State of Utah, in his official )  
capacity,

Judge James L. Shumate

Defendants. )

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COMES NOW the parties above-named, by and through their attorneys of  
record, Thom D. Roberts, Assistant Attorney General, on behalf of Defendant Craig  
Jackson, Director of the Division of Occupational and Professional Licensing, and  
Matthew Hilton, on behalf of Plaintiffs, and solely for the purpose of resolving the

motions for summary judgment filed by the parties, hereby stipulate and agree that the following may be considered as undisputed facts for purposes of those motions:

1. Hodsen is a graduate of the University of California Los Angeles School of Medicine and has a degree in biochemistry from University of California Berkeley. He did not complete his medical internship after medical school due to a debilitating illness which resulted in his discharge from the United States Army with a one hundred percent (100%) medical disability. Since that time he has not taken the necessary examinations to receive a license as a physician or surgeon from DOPL. As a matter of conscience and deeply held scientific belief, Hodsen does not desire to practice medicine as it is generally practiced today nor obtain a license to do so.

2. Since the early 1980's, many people in and out of the State of Utah have sought information from Hodsen that was available in published medical journals, books, and other sources, including Hodsen's own research, regarding various biochemicals and what naturally occurring products are lawfully sold on the open market as herbal or nutritional supplements that contain these biochemicals.

3. Hodsen distributes herbal and other nutritional (non-prescription) products to chiropractors, physicians, and other health professionals as well as to health food stores and to individuals.

4. In 1983, DOPL staff determined that Hodsen's practice and business was exempted from regulation of the practice of medicine and issued him a letter to that effect.

5. From 1983 to the present, DOPL has not received a complaint regarding the conduct or actions of Hodsen.

6. Anderson consulted with Hodsen during the time period that DOPL had determined he was exempted from the licensure requirements for the practice of medicine for a health condition which had not responded to conventional medical treatment that had been applied. She followed the recommendation of Hodsen and she believes her condition has become manageable and the quality of her life vastly improved. Anderson also currently is under the care of a licensed physician and also receives acupuncture treatments from another licensed provider.

7. Hodsen believes that through the gift of the Holy Ghost, special priesthood (or church related) blessings he has received, and other spiritual experiences, that he has a divine mission to assist his fellow man in obtaining and properly using herbal and other products of nature. Hodsen believes that while the process of receipt of information from people, his review thereof, and his determinations and recommendations does not in and of itself constitute religious practices or belief, it provides assistance to him in fulfilling to the best of his ability his believed duty to learn, teach, and serve by study and faith. (Doctrine and Covenants 88:74-80.) Hodsen's approach to advising customers about the use of herbs or nutritional products is based on the use of regular prayer to guide his interpretation of scientific data and information provided by the customer for the purpose of making recommendations. He believes that he can and does receive divine assistance regarding these matters. Hodsen believes his knowledge obtained through formal training in biochemistry and medicine also enable him to interpret the meaning of the information provided to him.

8. In 1991, Hodsen submitted an application for business license to the City of St. George seeking permission to proceed with his on-going business of consulting and supplying of herbs and other products of nature that Hodsen referred to as nutritional biochemicals.

9. Throughout 1991 and early 1992, the City worked with Hodsen regarding a number of applications for city licensure, but determined, after consultation with DOPL staff, that Mr. Hodsen's practice constituted the practice of medicine and indicated that Hodsen must have the matter clarified or be licensed by DOPL before the City would issue a business license.

10. In response to the written requirements of the City, in 1992, Hodsen petitioned DOPL for a ruling regarding his ability to conduct his business and talk with customers concerning his business without being licensed as a physician or surgeon in the State of Utah.

11. The administrative proceedings conducted by DOPL in response to Hodsen's request resulted in the issuance of a Declaratory Order (October 20, 1992), an Order on Review (December 11, 1992), an Amendment to Declaratory Order (December 15, 1992), and Amended Order on Review and Denial of Request for Agency Review (January 26, 1993). The result of the administrative proceedings was that DOPL concluded that Hodsen was required to either be licensed as a physician or surgeon or certified as a dietitian. An appeal was timely filed in Fifth Judicial District Court.

12. Eventually, Anderson joined with Hodsen in litigation as a party plaintiff against DOPL in the Fifth Judicial District Court case number 930500251. Before summary

judgment motions were heard in that case, DOPL stipulated to Anderson's claimed need for information, advice, and recommendations from Hodsen regarding herbal treatments and other forms of natural healing, and that these recommendations were related to her religious beliefs and practices as well as the determination of her own and her family's health care. DOPL also stipulated that these actions were consistent with Hodsen's personal, religious, and commercial beliefs.

13. After joint summary judgment motions and briefing on various legal issues, as well as oral argument, District Court Judge J. Philip Eves issued a ruling in March of 1995, finding that under the relevant statutory requirements Hodsen's conduct was exempt from the requirements of licensure of DOPL. Judge Eves stated:

The activities of the Plaintiff do in fact come within the definition of the practice of medicine. The stipulated facts clearly indicates that the plaintiff engages in diagnosing and treating or advising for human disease, ailment, injury, infirmity, or deformity or pain or any other condition by any means or instrumentality. Clearly that broad definition includes the activities in which Mr. Hodsen engaged, including obtaining a medical history, analyzing the complaints of his patrons, and attempting to fashion a medicinal remedy to improve the complained of condition.

The parties also stipulated that the "substances in question [were] in fact herbs and other products of nature within in the meaning of the statute," and the Court determined Hodsen's actions were thus within the statutory exemption for those "engaged in administering or selling health foods or health food supplements, herbs, or other products of nature which do not require a prescription under law" pursuant to § 58-12-30(4) U.C.A., the law in effect at that time. That ruling was not appealed by either party.

14. During the 1996 Legislative session, the Utah Medical Practice Act was amended and recodified, including a change in the definition of the practice of medicine and altered the exemption involving the sale of herbs and other products of nature.

15. The previous and present language of the term “diagnose” in the practice of medicine included the following:

a. Pre-1996 language contained in § 58-12-28(2) U.C.A.:

(2) “Diagnose” means to examine in any manner another person, parts of a person’s body, substances, fluids, or materials excreted, taken, or removed from a person’s body, or produced by a person’s body, to determine the source, nature, kind or extent of disease or other physical or mental condition, or to attempt to so examine or to determine, or to hold oneself out or represent that an examination or determination is being made or to make an examination or determination upon or from information supplied directly or indirectly by another person, whether or not in the presence of the person making or attempting to make the diagnosis.

b. 1996 language contained in § 58-67-102(4) U.C.A.:

(4) “Diagnose” means:

(a) to examine in any manner another person, parts of a person’s body, substances, fluids, or materials excreted, taken, or removed from a person’s body, or produced by a person’s body, to determine the source, nature, kind or extent of disease or other physical or mental condition;

(b) to attempt to conduct an examination or determination described under Subsection 4(a);

(c.) to hold oneself out as making or to represent that one is making an examination or determination as described in Subsection 4(a); or

(d) to make an examination or determination as described in Subsection 4(a) upon or from information supplied directly or

indirectly by another person, whether or not in the presence of the person making or attempting to make the diagnosis or examination.

16. The previous and present language dealing with the definition of the practice of medicine are as follows:

a. Pre-1996 language contained in § 58-67-102(4) U.C.A.:

(4) "Practice of medicine" means:

(a) to diagnose, treat, correct, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, or to attempt to do so, by any means or instrumentality; . . . .

b. 1996 language contained in § 58-67-102(8) U.C.A.:

(8) "Practice of medicine" means:

(a) to diagnose, treat, correct, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, or to attempt to do so, by any means or instrumentality, and by an individual in Utah or outside of the state upon or for any human within the state; . . . .

17. The previous and present language dealing with the term "Dr." or "M.D." are as follows:

a. Pre-1996 language contained in § 58-67-102(4)(c) U.C.A.:

(4) "Practice of medicine" means: . . .

(c.) to use, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationary, letterhead,



envelopes, signs, advertisements, the designation "doctor," "doctor of medicine," "physician," "surgeon," "Dr.," "M.D.," or any combination of these designations, unless the designation additionally contains the description of the branch of the healing arts for which the person has a license.

b. 1996 language contained in § 58-67-102(8)(d) U.C.A.:

(8) "Practice of medicine" means:

(d) to use, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human diseases or conditions in any printed material, stationary, letterhead, envelopes, signs, or advertisements, the designation "doctor," "doctor of medicine," "physician," "surgeon," "Dr.," "M.D.," or any combination of these designations in any manner which might cause a reasonable person to believe the individual using the designation is a licensed physician or surgeon, and if the party using the designation is not a licensed physician or surgeon, the designation must additionally contain the description of the branch of healing arts for which the person has a license.

18. The previous and present language dealing with exemption for those involved with domestic and household remedies, herbs, and other products of nature are as follows:

a. Pre-1996 language contained in § 58-12-30(4) U.C.A.:

In addition to exemptions from licensure in Section 58-1-307, the following individuals may engage in the practice of medicine subject to the stated circumstances and limitations without being licensed under this chapter: . . . .

(4) any individual administering a domestic or family remedy including those persons engaged in the sale of vitamins, health food or health food supplements, herbs or other

products of nature, except drugs or medicines for which an authorized prescription is required by law;

b. 1996 language contained in §§ 58-67-305(2) & (3) U.C.A.:

In addition to exemptions from licensure in Section 58-1-307, the following individuals may engage in the described acts or practices without being licensed under this chapter: . . . .

(2) an individual administering a domestic or family remedy;

(3) (a)( i) a person engaged in the sale of vitamins, health foods, dietary supplements, herbs or other products of nature, the sale of which is not otherwise prohibited by state or federal law; or

(ii) a person acting in good faith for religious reasons, as a matter of conscience, or based on a personal belief, when obtaining or providing any information regarding health care and the use of any product under Subsection 3(a)(I); and

(b) Subsection 3(a) does not:

( i) allow a person to diagnose any human disease, ailment, injury, infirmity, deformity, pain, or other condition; or

(ii) prohibit providing truthful and non-misleading information regarding any of the products under Subsection 3(a)(I);

19. Hodsen seeks to place the following language on his commercial or personal literature or other expression without offending the provisions of the statute regarding the use of the term "Dr." or "M.D." Hodsen desires to use a business card which states the following:

## NUTRIPHYSIOLOGY

Free Expert Service for Obtaining Effective Nutritional Supplements  
From Carefully Selected Firms

Horton Tatarian, M.D.\*  
Horton: (1-888-852-8887)  
(435-673-8887)  
Orders: (1-888-352-8885)  
(435-673-8885)  
Fax: (1-888-852-8289)  
(435-673-8886)  
Box 1990, St. George, UT 84771

\*Graduate of U.C.L.A. School of Medicine  
Research biochemist not in medical practice

In addition, Hodsen desires to know if when writing educational publications he may list his name as follows: Horton Tatarian, M.D. (Graduate of U.C.L.A. School of Medicine, Research biochemist not in medical practice)

20. Having reviewed Hodsen's request, it is the position of DOPL that such a use of the initials "M.D." might cause a reasonable person to believe that Hodsen is a licensed physician or surgeon and that such use, in connection with Hodsen's businesses, may be deceptive or misleading regarding Hodsen's status or qualifications as it applies to DOPL's regulatory function.

21. Because of the 1996 changes in the Utah Medical Practice Act , Hodsen is unsure as to what information he may share with Anderson or any other person. Hodsen is and remains concerned that without assistance from this Court clarifying the application of the 1996 Utah Medical Practice Act to him, he will be subject to felony prosecution, misdemeanor prosecution for violation of city licensing laws, and/or injunctive proceedings

from both Defendants for practicing medicine without a license. In addition, Hodsen believes on religious grounds that he is required to obey the law of the land. (Twelfth Article of Faith) and appeal to civil law for redress of wrongs. (Doctrine and Covenants 134:11). Hodsen feels he can not be relieved from these concerns unless there is a ruling of this court regarding the application of UMPA to his situation.

22. Hodsen and also some of his customers believe that mankind is under divine command to use wholesome herbs for the maintenance of their health, with "prudence and thanksgiving." (Doctrine and Covenants 89:10-11) To further this divine commandment (commonly called the "Word of Wisdom"), they believe they need to identify, assert and explain their religiously based beliefs regarding the divine nature of the human body, its relationship to the Universe, and the role of biochemistry, herbs and nutrition in the appropriate maintenance of the same. They believe that obtaining and sharing information regarding the prudent use of herbs or other matters can aid in a natural healing process. They do so to the end that they can more fully live and practice their religious beliefs. By so doing, they feel they will be entitled to physical and spiritual blessings. (See Doctrine and Covenants 89:18-21; Bible, Daniel 2; Book of Mormon, Alma 46:40.)

23. Hodsen's interactions with Anderson and any other potential customers of herbs and other products of nature (in both a selling and non-selling situation) can be summarized as follows:

A. Anderson (or any other person as a customer) approaches Hodsen and shares with him any of the following information:

(1) gives him a written diagnosis by a licensed health care provider indicating she has a certain health condition, or

(2) explains that on her own she used home medical testing equipment or studied medical literature and has concluded she has a certain health condition, or

(3) states she had an intuitive or spiritual impression, or is told in a religious blessing or otherwise, that she has a certain health condition; or

(4) indicates orally or in writing that she had experienced symptoms of a health condition (written examples are attached );

B. Using any or all of the information provided by Anderson or any other potential customer, Hodsen identifies what he believes the nutritional needs of the person most likely are, and pursuant to the process identified in paragraph 7 of these stipulated facts, determines what lawful herbal or other products of nature would likely contribute to satisfying those needs; and

C. With or without disclosing his rationale for his recommendation, Hodsen advises Anderson or any other potential customer that she should purchase the identified lawful herbs or other products of nature, which the person is free to purchase from Hodsen, or any other person, or source, and may refer her to or supply her with peer reviewed academic or religious materials regarding the ingredients of the herbs or other products of nature.

24. As found by Judge Eves, and presently interpreted by DOPL, the conduct of Hodsen described in paragraphs 23, *supra*, constitutes diagnosis as defined by the provisions of U.C.A. § 58-67-102(4)(d), and is the practice of medicine.

25. There are numerous scientific publications and other studies that indicate the use of herbs or products of nature, religiously based belief or prayer, and other aspects of holistic healing may have a positive impact upon the maintenance of one's health.


26. Nothing in this stipulation shall be construed as limiting the Defendants from asserting any defense, including the legal relevancy of any undisputed fact or the court's authority to consider the merits of the claims of the Plaintiffs.

27. It is anticipated by the parties that Plaintiff Anderson will file an affidavit regarding her sentiments and conduct regarding her religious, medical and personal autonomy beliefs.

DATED this 28th day of April, 1998.

JAN GRAHAM  
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Assistant Attorney General  
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Attorney for Plaintiffs