

1990

Johnson-Bowles Company Inc., and Marlen  
Johnson v. John C. Baldwin, M. Truman Bolwer,  
Kent Burgon, David Hardy, Margaret Wickens, and  
Keith Cannon : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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IN THE COURT OF APPEALS OF THE STATE OF UTAH  
DOCKET NO. 900210 CA

JOHNSON-BOWLES COMPANY, INC., a )  
Utah Corporation and MARLEN V. )  
JOHNSON, )

Petitioners and )  
Appellants, )

v. )

JOHN C. BALDWIN, Director, )  
Securities Division of the )  
Department of Commerce, State )  
of Utah, and M. TRUMAN BOWLER, )  
KENT BURGON, DAVID HARDY, )  
MARGARET WICKENS, and KEITH )  
CANNON, members of the )  
Securities Advisory Board )  
overseeing the Securities )  
Division, )

Respondents and )  
Appellees. )

**BRIEF OF THE APPELLEE**

Case No. 900210-CA

Rule 29(b)(15) Priority

Appeal from a Rule 54(b) Order Denying Reinstatement of an  
Extraordinary Writ and Order in the  
Third Judicial District Court in and for  
Salt Lake County, State of Utah  
The Honorable Judge James S. Sawaya Presiding  
(District Court Case No. 89-0906506-CV)

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## **JURISDICTION**

Utah Code Ann. Section 78-3-4(4) (Supp. 1989) provides that appeals from final orders of the district court come under §§ 78-2-2 and 78-2a-3. Section 78-2a-3(2)(j) jurisdiction based on transfer from the Supreme Court depends initially on whether the case was properly before the Utah Supreme Court.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether a judge acts within his discretion in setting aside an extraordinary writ when 1) the writ is based on a petition that misstates or omits facts, 2) the writ seeks to order an agency to act in an area over which the agency has discretion to act, 3) the petitioners seeking the writ have not exhausted their administrative remedies, and 4) the district court lacked jurisdiction to issue the writ.

## **STATUTORY PROVISIONS**

Utah Code Ann. § 61-1-6 (1989);  
Utah Code Ann. § 63-46b-12 (1989);  
Utah Code Ann. § 63-46b-13 (1989);  
Utah Code Ann. § 63-46b-17 (1989);  
Utah Code Ann. § 78-2a-3 (Supp. 1989).

## **STATEMENT OF THE CASE**

Johnson-Bowles, Inc. and Marlen V. Johnson are registered with the Utah Securities Division as Broker-Dealer and Agent, respectively. In January 1989, Johnson-Bowles sold-short shares

in a company called U.S.A. Medical, Inc. The price of the U.S.A. Medical stock thereafter rose dramatically in the over-the-counter market. Johnson-Bowles, rather than pay the increased price to cover its short sales, began a campaign with securities regulators to convince these agencies to investigate for fraudulent practices in the trading of U.S.A. Medical stock. Failing that, Johnson-Bowles filed for injunctive relief in the United States District Court for the District of Utah and was granted a temporary restraining order. On March 1, 1989, Judge J. Thomas Greene found that the stock had been traded illegally as part of a fraudulent scheme and in violation of federal and state registration provisions, but refused to relieve Johnson-Bowles of its obligations under its brokerage sales contracts.

On March 1, 1989, the Utah Division of Securities ("the Securities Division"), armed with a copy of Judge Green's findings, and in order to protect Utah residents from unlawful distributions and fraud, issued an order suspending the availability of all exemptions under the Utah Uniform Securities Act for the offer or sale of U.S.A. Medical stock. That same day, a copy of the Division's Order was hand-delivered to Johnson-Bowles.

By suspending sales, the Securities Division intended to halt manipulation and fraud in the sale of that stock in Utah. As a consequence of the March 1, 1989 Order, the price of U.S.A. Medical stock dropped dramatically. During the time that the Division's order was in place, Johnson-Bowles offered to purchase

and did purchase U.S.A. Medical stock from Utah citizens at the lower price in an attempt to cover its stock delivery obligations and extricate itself from a financial predicament.

On April 27, 1989, upon discovery of the purchases, the Securities Division filed administrative proceedings against Johnson-Bowles and its principal, Marlen Johnson (appellants hereafter referred to collectively as "Johnson-Bowles").<sup>1</sup> The Securities Division sought to revoke or suspend their respective registrations. Among other charges, the Division alleged that Johnson-Bowles had engaged in "dishonest or unethical practices" within the meaning of Utah Code Ann. § 61-1-6(1)(g) because the actions of Johnson-Bowles "in soliciting and/or purchasing the USA medical shares during the pendency of the Division's Order, encouraged or otherwise aided in the violation of Section 61-1-7 of the Act."<sup>2</sup>

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<sup>1</sup> Both Johnson and Johnson-Bowles were licensees of the Division. Johnson-Bowles also seeks to raise a plethora of substantive arguments in this appeal. One of these arguments is lack of subject matter jurisdiction or federal securities preemption under National Association of Securities Dealers rules. These arguments were addressed before the Securities Division, (R. 123-125), and all can be addressed on review of the Division's final order. Nevertheless, the Securities Division has jurisdiction over the state licenses it grants to dealers. There is no question that Johnson-Bowles is subject to the Securities Division's jurisdiction. Section 61-1-6(1)(g) gives the Division jurisdiction to suspend or revoke a license for dishonest or unethical practices.

<sup>2</sup> Section 7 of the Securities Act reads: "It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14."

Johnson-Bowles moved to dismiss under Utah Rule of Civil Procedure 12(b)(1) and 12(b)(6). The Administrative Law Judge (hereafter, "ALJ") held that Johnson-Bowles' conduct circumvented the Division's efforts to prevent trading and denied Johnson-Bowles' motion to dismiss the dishonest and unethical practices claim. Johnson-Bowles requested that the ALJ certify his decision as a "final order" of the Division. The ALJ stated: "It is not within the province of this Court to decide whether the order set forth below is 'final', as to allow for subsequent judicial review, nor to certify any such order as being final for purposes of such review." (R. 16).

On September 11, subsequent to the ALJ's denial of the motion to dismiss and before the ALJ had made findings of fact, conclusions of law or a recommendation to the Division with respect to license revocation, Johnson-Bowles filed under Utah Code Ann. § 63-46b-12 a Request for Agency Review of the denial of its motion to dismiss. (R. 8-11).

On September 26, 1989, the Securities Division filed its "Brief in Reply to Respondents Request for Agency Review and Hearing." (R. 120-134). The brief stated that agency review of the matter was discretionary and review of the interlocutory order was not the appropriate subject of review under the Administrative Procedures Act.

On October 6, 1989, Johnson-Bowles also filed an additional reply brief in support of its Request for Review. (R. 78-88).

On October 27, Johnson-Bowles filed its Petition in the Third District Court for an Ex Parte Extraordinary Writ. In its petition, Johnson-Bowles declared, "Since September 11, 1989, the date Petitioners filed their Requests for Agency Review or for Certification, Petitioners have heard nothing from either Respondent Baldwin or the Securities Advisory Board Member Respondents. Petitioners believe and allege that respondent Baldwin is deliberately or negligently stalling the disposition of Petitioners Request for Agency Review. . . ." (R. 4).

Johnson-Bowles' Petition failed to point out that on September 26th the Division had filed a response to the Request for Review. Additionally, it failed to indicate that the Rules of the Department of Commerce allow the Division 20 days after the last responsive pleading before the Division need issue an Order on Review.<sup>3</sup> It failed to point out in the body of the Petition<sup>4</sup> that the last responsive pleading was filed by Johnson-Bowles on October 6, 1989. It further failed to note that under an appropriate calculation of the timing of the issuance of the Order in Review, the Division need not have issued a response until October 27th, the very day upon which Johnson-Bowles

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<sup>3</sup> Rule R151-46b-12D of the Department reads as follows: "A written order on review shall issue within 20 days after the filing of any response or, if applicable, the submission of the matter after oral argument."

<sup>4</sup> The body of the Petition mentions the existence of Johnson-Bowles' reply brief without referring to the date of its filing: "Subsequently, Petitioners further filed a Reply Brief to their Request for Agency Review, a true and correct copy of which is attached hereto. . . ." (R. 4) The actual date of the filing of the Reply Brief would only be apparent to the Judge had he examined the copy of the brief attached to Johnson-Bowles' petition.

applied to the District Court for its Extraordinary Writ.

Nevertheless, on October 27, 1989, Judge Sawaya granted Johnson-Bowles' Rule 65B(e) ex parte request for an Extraordinary Writ and Order. (R. 91-92).

On October 30, 1989, the Division issued its Order on Agency Review, denying the Request for Review and refusing to certify the ALJ's order as final. Also on October 30, 1989, the Division received notice of Judge Sawaya's October 27th Extraordinary Writ.

On November 1, 1989, the Division filed an Ex Parte Petition under Rule 7(b)(2)<sup>5</sup> to set aside the District Court's ex parte order. (R. 105-112). The Division's Petition argued that Johnson-Bowles had "hoodwinked" the judge into granting extraordinary relief by failing to disclose the matters cited in the preceding paragraphs. Additionally, the Division pointed out that review under the Department's rules of purely "interlocutory" orders would be inappropriate, and that the Division had in its October 30th Order refused to review the order of the ALJ because of its interlocutory nature. The Division attached a copy of that October 30th Order to its petition.

Judge Sawaya granted the Division's request to set aside the previous order on November 1, 1989. (R. 103-04). Thereafter, Johnson-Bowles then asked Judge Sawaya to reinstate his writ of

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<sup>5</sup> Rule 7(b)(2) of the Utah Rules of Civil Procedure provides in part, "Except as otherwise specifically provided by these rules, any order made without notice to the adverse party may be vacated or modified without notice by the judge who made it. . . ."



October 27. (R. 144-45). The request was denied. This appeal is based on Judge Sawaya's denial of Johnson-Bowles' request to reinstate.

On August 13, 1990, following a full hearing before the Securities Advisory Board, the Securities Division issued its final order suspending the registration of Johnson and Johnson-Bowles for one year. (See Appendix A).

### **SUMMARY OF ARGUMENTS**

Whether Johnson-Bowles' appeal should be granted depends on whether it was an abuse of discretion for the lower court to set aside an extraordinary writ of mandamus. This discretion vested in the lower court certainly includes the prerogative to withdraw a writ when the initiating petition has clearly misled the court.

Johnson-Bowles, in its petition for an extraordinary writ, by means of omitting to clearly state the relevant facts, law, and applicable rules, convinced the court below that the Division was not taking action on Johnson-Bowles' request for agency review. In fact, the Division had responded to Johnson-Bowles Request for Review, and Johnson-Bowles had replied to the response. There was nothing in the ordinary course of these pleadings to justify a writ in equity.

Even assuming that Johnson-Bowles was entitled to agency review of the ALJ's order, Johnson-Bowles requested mandamus from the district court before the issuance of the Order on Review was required under Department Rules.

As a general principle, a court should not assume equity jurisdiction when administrative remedies are in progress. In the present case, administrative proceedings were in progress when Johnson-Bowles filed its petition for mandamus. Further, mandamus should not issue where the administrative body has discretion to act. The Director of the Securities Division has discretion to reviewing or not review interlocutory recommendations by administrative law judges.

The Securities Division has discretion in determining whether to give agency review to Johnson-Bowles' claims. Section 12 of the Utah Administrative Procedures Act dictates the procedure for agency review. While the language of Utah Code Ann. § 63-46b-12 allows a party to "seek review of an order by the agency," this does not mean that all orders are immediately reviewable under that section. "Order" in the section means "final order" by the agency head or one authorized to make such an order. Under the Utah Uniform Securities Act, only the Director of the Division, with the consent of the Advisory Board, may enter an order affecting the status of one of its registrants. The ALJ makes only recommended findings and recommended orders to the Division. These do not become orders of the Division unless they are adopted under Utah Code Ann. § 61-1-6.

Furthermore, the ALJ's denial of a motion to dismiss is also not an "order" as contemplated by Utah Code Ann. § 63-46b-12. A party wishing to dismiss a suspension/revocation proceeding has no right of immediate interlocutory appeal for administrative

review to the agency. If all litigants had an unfettered right to interlocutory appeals, then parties could cripple the administrative process by appealing at every stage of the proceedings.

This case is not properly before the court because there is no "order" to which the party can request review. The ALJ's denial of the motion to dismiss was subject only to discretionary review by the Division because the ALJ had not submitted a final recommendation. Because this was a formal adjudicative proceeding, initial judicial review of the interlocutory proceeding, if available at all, would have only been proper before the Court of Appeals. And, even though jurisdiction might have been proper in the Court of Appeals, there are valid policy reasons for leaving review of ALJ interlocutory recommendations to the discretion of the agency head.

The question of whether this court should order the lower court to reinstate the Extraordinary Writ is now moot owing to the Division's entry of its final order on August 13, 1990.

Finally, Rule 33 damages are appropriate. The issues Johnson-Bowles sought to raise below were not ripe for review. The entry of the Extraordinary Writ was predicated upon erroneous information provided by Johnson-Bowles ex parte. When the court below was adequately apprised of the true facts, law and governing rules, the court appropriately set aside its order and rightly refused to reinstate. The appeal is frivolous because it lacks any substantive foundation in fact or law and the issue it deals with, whether this court should order the lower court to

reinstate its order is entirely moot at this point in these proceedings.

## **ARGUMENT**

### **I. A Judge Has Discretion in Determining Whether a Writ of Mandamus Should Issue, and Writs of Mandamus Do Not Issue Where the Government Entity has Discretion to Act**

#### **A. Standard of Review**

A judge has discretion to grant or deny extraordinary writs of mandamus, and the decision will be sustained unless there is an abuse of that discretion. Garcia v. South Tucson, 135 Ariz. 604, 663 P.2d 596, 598 (Ct. App. 1983); Cain v. Dept. of Health, 582 P.2d 332, 334 (Mont. 1978). Therefore, this Court should uphold Judge Sawaya's decision not to reinstate the extraordinary writ unless this Court finds such action is an abuse of discretion.

#### **B. The District Court Lacked Equity Jurisdiction Because Johnson-Bowles Had Not Exhausted its Administrative Remedies**

As its name indicates, an extraordinary writ does not issue in ordinary circumstances. Mandamus, therefore, should not issue before the exhaustion of administrative remedies, in the ordinary course of administrative proceedings. Levie v. Sevier County, 617 P.2d 331, 332 n.1 (Utah 1980). A party cannot expect a trial court to exercise equity jurisdiction when that party has failed to pursue adequate and available administrative remedies. All Purpose Vending, Inc. v. Philadelphia, 561 A.2d 1309, 1311 (Pa. Commw. Ct. 1989). Additionally, a writ cannot be used as an alternative way to appeal administrative decisions. Merrihew v. Salt Lake County Planning, 659 P.2d 1065, 1067 (Utah 1983).

In Merrihew v. Salt Lake County, the Planning Commission revoked Merrihew's building permit. Merrihew did not appeal the revocation. Instead he asked the District Court for an extraordinary writ to require the Planning Commission to reinstate his permit. On appeal the Utah Supreme Court reaffirmed its position that parties must exhaust administrative remedies as a prerequisite to seeking judicial review. Id. This approach is consistent with the basic principles underlying the writ of mandamus, namely: "[It] is not for the courts to intrude into or interfere with the functions or the policies of other departments of government." Wright Development v. City of Wellsville, 608 P.2d 232, 233 (Utah 1980).

Johnson-Bowles sought reversal of the ALJ's denial of Johnson-Bowles' motion to dismiss. It filed a Request for Agency Review under Utah Code Ann. § 63-46b-12 and Department Rule R151-46b-12. The record demonstrates that while this review process was still under way, Johnson-Bowles sought recourse in state court by asking the court to issue an extraordinary writ to compel the Securities Board or Securities Director to take action on the motion to dismiss. The Record is clear that the last responsive pleading filed in the matter was Johnson-Bowles' Reply, submitted to the Division, October 6, 1990. Even assuming the Securities Division was obligated to review the decision, which obligation was contested in the Division's responsive brief, under Utah Admin. Code R151-46b-12D., the Securities Division had until October 27, 1989 to issue its written order.<sup>6</sup>

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<sup>6</sup> See supra note 3.

However, that was precisely the day that Johnson-Bowles, not willing to wait for the Division's decision, and without notice to the Division, convinced the lower court to issue its writ. Therefore, the Petition for the Extraordinary Writ was an attempt to circumvent the exhaustion of administrative remedies requirement and judicial review by going to the courts for a writ of mandamus.

Johnson-Bowles relies heavily on Alcoa v. ICC, 761 F.2d 746 (D.C. Cir. 1985), to support its claim that the proper remedy is a writ of mandamus to the administrative agency. In Alcoa, an administrative law judge with the ICC dismissed a shipper's complaint. Railroad companies appealed the commission's adoption of the ALJ decision. The Interstate Commerce Act required that the ICC make a final decision on the appeal within 180 days.

Alcoa is inapposite to the issues raised in this appeal. First, in Alcoa the ICC fully dismissed the case. A summary disposition of the proceedings is final action. Here, by denying the motion to dismiss, the ALJ continued the proceedings. Second, in Alcoa, a statutory 180-day period was running. Id. at 748. And, by statute, the ALJ's decision in that case became the decision of the ICC when the ICC did not complete its review within the 180-day period. In this case, the ALJ's order at best was of an interlocutory nature, not disposing of the action. Therefore, Appellants' reliance on the Alcoa case is misplaced.

**C. An Extraordinary Writ Should Not Issue to Force a State Agency to Take an Action or Make a Decision that is in Its Discretion**

**1. Mandamus should not direct performance of discretionary duties**

Mandamus should not issue against government agencies to force them to make decisions or to take actions which are within their discretion. Rule 65B(b)(2) of the Utah Rules of Civil Procedure provides for the issuance of an extraordinary writ where an officer, exercising judicial functions abuses the discretion of that function. If an act is discretionary, mandamus does not lie. Ingram-Clevenger, Inc. v. Lewis & Clark County, 636 P.2d 1372, 1374 (Mont. 1981). Mandamus should not issue to compel a public official with discretion to act in a certain way. Olson v. Salt Lake City School Dist., 724 P.2d 960, 967 (Utah 1986). Only when a public official has exceeded the boundaries of the discretion may a writ of mandamus be granted. Id. In this case, Appellants did not show at any stage of the proceedings leading to this appeal that the Director had exceeded the boundaries of his discretion, nor could they because, again, the time for the Division to issue its order on review had not run.

**2. The Securities Division has the Discretion to Review the Interlocutory Decisions of Its Administrative Law Judges**

The Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1, et seq. (1989) (hereafter, "UAPA") provides two levels of appeal from an ALJ's decision. Administrative review is through §§ 12 and 13, and judicial review comes via § 14. Judicial review under § 14 is not at issue here, as § 14 deals with review

by a state court of a final agency action. Though the pleadings in the court below are packed with arguments on the merits of Johnson-Bowles' arguments to dismiss, as is its Appellant's Brief, Judge Sawaya was asked to issue a writ, not to review the agency's decision. Sections 12 and 13 do not apply here either because both contemplate final agency action.

**a. Section 12 of the Utah Administrative Procedures Act Only Provides for Review of "Final," not "Interlocutory" Orders.**

Sections 12 and 13 of the UAPA provide for two mutually exclusive means of review at the agency level. Section 12, agency review, governs review of a final order to a higher level within the agency. Section 13, reconsideration, governs review of a final order when there is no higher level within the agency to review the decision.

Section 12 of the UAPA provides a procedure for agency review of a final adjudicative proceeding. However, it is clear that the review is conditional:

If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency . . . the aggrieved party may file a written request for review. . . .

Utah Code Ann. § 63-46b-12(1)(a) (1989). The Department of Business Regulation has promulgated rules consistent with section 12 which allow a request for agency review. However, the term "order" in this context, does not include an order of the type issued by the ALJ in this case. Though the ALJ employed the term "order" in his ruling, the ruling amounts to a refusal to recommend to the agency head a dismissal of the charges. No



action of the agency is an order of the agency without adoption by the Director and the Securities Advisory Board under Utah Code Ann. § 61-1-6.<sup>7</sup>

A logical construction of the language of the Department's Rules compels this conclusion as well. Utah Admin. Code R151-46b-12B, provides that "the effective date of the previously issued order shall be suspended until ten days after the order on review has been mailed to all parties." This language contemplates only orders which have some effect upon their entry or have an "effective date," i.e., final orders, because the language makes no sense if applied to the type of interlocutory order that is the subject of this dispute. The rule only contemplates orders that have an affirmative "effect" that may be suspended during the course of review and for 10 days thereafter.

The final order of the Division entered on August 13, 1990 contained an effective date. The ALJ's order denying the motion to dismiss did not have an effective date; it merely endorses the status quo and allows the action to go forward, not recommending dismissal of the count in question. Furthermore, it would make little sense to suspend the effectiveness of an order denying a

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<sup>7</sup> The decision of an agency is not final where the decision maker does not have the power to issue a final decision. This is so even where it appears to be the order of the agency. Ledbetter v. Alcohol Beverage Laws Enforcement, 764 P.2d 172, 182 (Okla. 1988). In Ledbetter, the Director of Alcoholic Beverage Enforcement had only the power to recommend the imposition of fines to the Commission, yet the Director of Alcoholic Beverages' order was titled "Order of the Commission." The Oklahoma Supreme Court held that even though the Commission apparently acquiesced, the Director had no statutory authority to impose fines. Similarly, in the present case, the ALJ only has power to recommend to the Board and Division Director a proposed course of action. See Utah Code Ann. § 61-1-6(1) (1989).

motion. Therefore, the ALJ's order was not an order of the type contemplated by Rule R151-46b-12. And if it is not contemplated by the agency's rule, then Section 12 of the Administrative Procedures Act does not apply by its own terms.

Section 12 says that where the statute or rule permits, agency review is available to the entity that the statute or rule designates for that purpose. Section 61-1-6(1) vests power to suspend or revoke a dealer's license with the director and a majority of the Securities Division. An ALJ has no power to make a final decision. An "order" of the ALJ, therefore, is not an "order" of the agency. It is a recommendation. The Director or the Securities Advisory Board may choose to adopt or to reject the recommendation of the ALJ.<sup>8</sup> Because the administrative law judge acts in an advisory capacity, orders to dismiss or to deny dismissal are not binding upon the Division, not subject to review.

**b. For Policy Reasons, Mandatory Interlocutory Review is Undesirable**

Johnson-Bowles claims "[i]t makes no difference what kind of order is involved in a Request for Agency Review." (Brief 17). It is precisely that view that would lead to the type of

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<sup>8</sup> In Capital General Corporation v. Dept. of Business Regulation, 777 P.2d 494 (Ut. Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989) this Court reviewed a case in which this "recommending" posture of the ALJ was most evident. In Capital General, the ALJ, after a hearing on the merits, recommended that the Division deny the staff's petition. The matter went to a further evidentiary hearing on the merits before the Securities Advisory Board and the Board rejected the ALJ's position, adopting their own findings and order which were upheld on appeal. Id. at 496.

frivolous interlocutory litigation evident in this appeal. If all orders, and not just final orders, were reviewable, then parties could cripple the administrative process by requesting a review of every ALJ decision.

The major policy reason behind prohibiting all orders from being appealable is administrative economy. In denying the Request for Agency Review of the matter, Securities Division Director John Baldwin stated,

Review of interlocutory matters would necessarily deprive agency adjudicative proceedings of the simplicity and speed contemplated by the Administrative Procedures Act and the rules governing adjudicative proceedings in this Department, and would inappropriately interpose an interlocutory appeal process within the Department.

(R. 116).

Other jurisdictions have made similar pronouncements:

The agency head should be accorded even wider discretion in determining when to review an order on an interlocutory basis. His powers of review are related to his regulatory authority, an executive function, and, consequently, are more expansive and flexible than those of an appellate judge. The agency has the sole authority to decide each case in order to effectuate regulatory policy. The decision is not that of the ALJ, but of the agency head.

In Re Uniform Administrative Procedure Rules, 90 N.J. 85, 447 A.2d 151, 159 (1982).

### **III. Johnson-Bowles' Appeal is Moot**

On August 13, 1990, the Securities Division issued its final order suspending the registration of Johnson and Johnson-Bowles for one year. Johnson-Bowles' appeal from Judge Sawaya's order setting aside of the writ of mandamus is now moot. Even if this Court reinstates the writ of mandamus, the Securities Division has already reviewed and approved the findings, conclusions and

order that was the product of a full hearing before the Securities Advisory Board. Many of the same issues that Appellants argue in their brief were argued before the Advisory Board at hearing. Appellants may argue the same matters in administrative and judicial review of the August 13, 1990 order. Therefore the question of whether this court should command the lower court to reinstate its writ is now moot. There is no current harm that threatens Appellants if that order is not reinstated. In fact, reinstatement at this point will likely lead to duplication of appeals, wasting the resources of both parties.

### III. The District Court Lacked Jurisdiction

The District Court lacked statutory jurisdiction to issue the extraordinary writ requested by the petition. Utah Code Ann. Section 78-2a-3 provides in part:

- (1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary . . . (b) In aid of its jurisdiction.
- (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
  - (a) The final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the District Court review of informal adjudicative proceedings of agencies, . . . .

Utah Code Ann. § 78-2a-3 (Supp. 1989). (Emphasis added).

Because the administrative proceeding below was a formal adjudicative proceeding, the District Court lacked proper jurisdiction to issue the extraordinary writ. (R. 156-57).

Furthermore, § 17 of the UAPA provides:

- (1)(a) In either the review of informal adjudicative proceedings by the district court or the review of formal

adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

(i) order agency action required by law;

(ii) order the agency to exercise its discretion as required by law; . . . .

Utah Code Ann. § 63-46b-17 (1989). (Emphasis added).

While the above provisions contemplate "review" of agency proceedings, they clearly indicate a legislative intent to assign jurisdiction over extraordinary writs and interlocutory appeals of formal administrative proceedings to the Court of Appeals, not the District Court. Therefore, since the appellate function and all matters dealing with the review of administrative proceedings have been assigned by statute to the Court of Appeals for disposition, it is safe to assume that original equity jurisdiction to issue necessary writs to administrative agencies now rests exclusively with the Court of Appeals.

#### **IV. Johnson-Bowles' Appeal is Frivolous**

Finally, the Securities Division is entitled to Rule 33 damages. Rule 33(a) of the Utah Rules of Appellate Practice provides for damages, specifically, attorney fees in opposing a frivolous appeal. Rule 33 damages are appropriate because Johnson-Bowles has brought this appeal solely to harass and perpetuate litigation. There is no justiciable issue presented to this court by the appeal.

A frivolous appeal is "one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever

succeed." Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990).

Further, Rule 33(b) states:

For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

Utah Rule App. P. 33(b) (1990).

Johnson-Bowles' appeal serves no legal purpose. There are no justiciable issues before this Court. All issues have been resolved or can be resolved through the proper channels of appeal. That the appeal is frivolous is apparent in the observation that the standard on review is abuse of discretion. See Fife v. Fife, 777 P.2d 513, 514 (Utah Ct. App. 1989) (where a judge's decision is obviously not clearly erroneous Rule 33 damages are appropriate).

It has always been the position of Appellees that the chief cause of the issuance of the lower court's writ was Johnson-Bowles' blatant failure to inform the lower court of the ongoing nature of the proceedings, that its application for the extraordinary writ was acutely premature, and the relevant statutes, and agency rules would not support use of an extraordinary equitable remedy to address wrongs that were purely the matter of invention on the part of Johnson-Bowles. Continued pursuit of this appeal serves no practical purpose other than to satiate Appellant's desire to "teach the agency a lesson" by forcing the expenditure of sparse resources in pointless litigation.


## CONCLUSION

Johnson and Johnson-Bowles have yet to articulate the remedy they seek in this appeal. However, close examination of the record of the proceedings below must lead this court to the conclusion that the appeal lacks merit. The court below was on absolute sure-footing in its order setting aside the writ and in its refusal to reinstate. Pursuing the matter through this appeal is a step that should not have been taken and it is the type of wrong for which the Appellees are entitled to fees under Rule 33.

Other issues raised by Appellants concerning the propriety of the ALJ's denial of the motion to dismiss have either already been resolved or can be resolved through appropriate administrative or judicial review of the August 13, 1990 order of the Division. The Securities Division has considered Johnson-Bowles' arguments and addressed them in its Order on Agency Review and its Findings of Fact, Conclusions of Law and Order. Johnson-Bowles can raise its substantive arguments in appellate review proceedings. For the foregoing reasons, this appeal should be dismissed with attorneys fees granted under Rule 33 in favor of appellees.

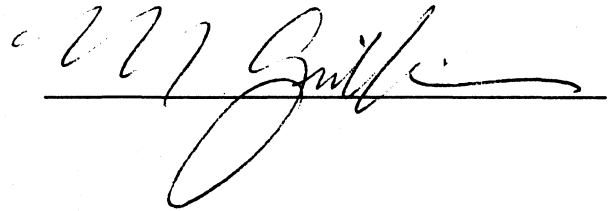
DATED THIS 24<sup>th</sup> day of August, 1990.

R. Paul Van Dam  
Attorney General

  
\_\_\_\_\_  
Mark J. Griffin  
Assistant Attorney General

PROOF OF SERVICE

Pursuant to Utah Rule of Appellate Procedure 26(b) the undersigned hereby certifies that on the 24<sup>th</sup> day of August, 1990, four (4) copies of the foregoing BRIEF OF APPELLEES were hand-delivered to Attorneys for Appellants John Michael Coombs and Craig F. McCullough at 72 East 400 South, Suite 220 Salt Lake City, Utah 84111 and eight (8) copies, one of which contained an original signature, were filed with the Clerk of the Court of Appeals.

A handwritten signature, likely of Craig F. McCullough, is written over a horizontal line. The signature is in cursive and includes the name "McCullough".



Tab R

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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Johnson - Bowles Company  
Plaintiff - Appellant

VS

John C. Baldwin  
Defendant - Appellee

Clerk's Certificate

District Court No. 890906506  
Appellate Court No. 90021Q-CA

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I, clerk of the above entitled court, do hereby certify that the hereto attached file contains all the original papers as requested by the designation on file herein, filed in the court in the above entitled case, including the Notice of Appeal which was filed on the 14th day of March, 1990 I further certify that the above described documents constitute the Judgment Roll and that the same is a true and correct transcript fo the record as it appears in my office.

I further certify that an Undertaking on Appeal in due form has been properly filed and that the same was filed on the 14th day of March, 1990.

I further certify that said Judgment Roll is this date transmitted to the Appellate Court of the State of Utah, pursuant to such appeal.

Witness my hand and the seal of said court at Salt Lake City, Utah, this 12th day of June 1990.

CRAIG E. LUDWIG  
CLERK OF THE COURT

By

Craig E. Ludwig

JOHN MICHAEL COOMBS, ESQ., No. 3639  
72 East 400 South, Ste. 220  
Salt Lake City, UT 84111  
Telephone: (801) 359-0833  
Attorney for Petitioners

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

JOHNSON-BOWLES COMPANY, INC., a  
Utah corporation and MARLEN V.  
JOHNSON,

Petitioners,

v.

JOHN C. BALDWIN, Director,  
Securities Division of the  
Department of Commerce, State  
of Utah, and M. TRUMAN BOWLER,  
KENT BURGON, DAVID HARDY,  
MARGARET WICKENS, and KEITH  
CANNON, members of the Securities  
Advisory Board overseeing the  
Securities Division,

Respondents

PETITION FOR EX PARTE  
EXTRAORDINARY WRIT

CASE NO.

890906506 CV

JUDGE JAMES S. SAWAYA

Petitioners Johnson-Bowles Company, Inc., and Marlen V. Johnson, by and through their counsel and pursuant to Rule 65B(a)(2),(3), and (e) of the Utah Rules of Civil Procedure, hereby petition the above Court for an Ex Parte Extraordinary Writ. Based on Rule 65(B)(e), the Writ may be granted without notice and in this case there is no reason why it should not be granted without notice, particularly when Respondents will incur no damage or liability by its issuance. Such writ is solely intended to get Respondents to act under the Administrative Procedures Act as set forth below.

## PETITION

1. Petitioner Johnson-Bowles Company, Inc., is a securities broker-dealer registered with the Securities Division, a sub-agency under the Department of Commerce, State of Utah. Petitioner Marlen V. Johnson is registered with the Securities Division as a securities agent.

2. Respondent Baldwin is the director of the Securities Division and is responsible for the initiation and perpetuation of the existing administrative adjudicative proceedings against Petitioners. The remaining individual Respondents are each and all members of the Securities Advisory Board as set forth and established in §61-1-18.5, Utah Code Ann. Such Respondents have been appointed by the Governor to oversee Respondent Baldwin and the Securities Division. Petitioners believe that the Securities Advisory Board has neither been made aware of the existing administrative proceedings nor of Petitioners' Requests for Agency Review or Certification of Order as set forth below.

3. On April 27, 1989, Respondent Baldwin in his capacity as director of the Securities Division of the Department of Commerce, State of Utah, filed administrative adjudicative proceedings against Petitioners, alleging violations on Petitioners' part of §61-1-6(1)(g), Utah Code Ann. Such administrative adjudicative proceedings seek to revoke or suspend the registrations of Respondents with the Division and are denominated by Case Nos. SD-89-46BD and SD-89-47AG.

4. On July 3, 1989, Petitioners moved the Administrative Law Judge in said administrative adjudicative proceedings for an Order dismissing such proceedings under Rule 12(b)(1) of the Utah Rules of Civil Procedure, alleging that, based on §27 of the Securities Exchange Act of 1934, the Securities Division lacked subject-matter jurisdiction and therefore such proceedings were and are unlawful.

5. On August 29, 1989, the Administrative Law Judge in the above-proceedings issued an Order denying Petitioners' Rule 12(b)(1) motion, erroneously concluding that NASD rules do not have the force and effect of federal law, among other assignments of error.

6. On September 11, 1989, Petitioners timely filed a Request for Agency Review and Request for Hearing on such Order in accordance with §63-46b-12, Utah Code Ann. A true and correct copy of such Request for Agency Review is attached hereto and incorporated by reference as Exhibit "A". On September 11, 1989, Petitioners also filed an alternative Request for Certification of the August 29, 1989 Order as a "Final Agency Action", a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "B". Petitioners further filed on said date a Request for Disclosure of Appellate Body Conflicts by and between them and the Securities Advisory Board, a true and correct copy of which is attached hereto as Exhibit "C". On September 11, 1989, Petitioners also filed a Brief in Support of their Request for Agency Review, a true and correct copy of which is attached hereto as Exhibit "D". Subsequently, Petitioners further filed a Reply Brief to their Request for Agency Review, a true and correct copy of which is attached hereto and incorporated by reference Exhibit "E".

7. Since September 11, 1989, the date Petitioners filed their Requests for Agency Review or for Certification, Petitioners have heard nothing from either Respondent Baldwin or the Securities Advisory Board Member Respondents. Petitioners believe and allege that Respondent Baldwin is deliberately or negligently stalling the disposition of Petitioners' Request for Agency Review and that nothing will transpire in that regard in the immediate future in the absence of the granting of this Extraordinary Writ. Petitioners

further believe that Respondent Baldwin has failed to notify or properly inform the Securities Advisory Board of Petitioners' formal Requests.

8. Petitioners have been substantially damaged in their property, business, and reputations by the Division's initiation of the above-referenced administrative adjudicative proceedings and because of the Respondents' unwillingness or failures to diligently act on Petitioners' Requests for Agency Review or for Certification, Petitioners are continuing to be substantially damaged in their business, property, and reputations. (See Affidavit of Petitioners attached as Exhibit "C" to Exhibit "D" hereto.)

#### GROUNDS FOR RELIEF

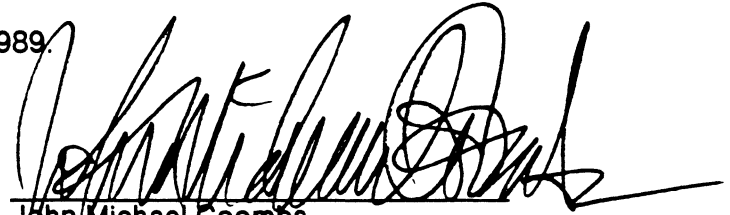
9. Under Rule 65(B)(b)(2), an extraordinary writ may be granted where an inferior tribunal, board or officer exercising judicial functions has abused its discretion. In this case, Petitioners allege that Respondent Baldwin in particular has abused his discretion on behalf of the Securities Division and the other Respondents in failing to act on Petitioners' September 11, 1989, Requests for Agency Review or for Certification.

10. Under Rule 65(B)(b)(3), an extraordinary writ may also be granted where the relief sought is to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully excluded by such inferior tribunal . . . board or person. In this case, the Respondents, by and through Respondent Baldwin, have failed to act on Petitioners' Requests for either Agency Review or for Certification -- "rights" to which they are entitled and from which they have been unlawfully excluded to date under the Administrative Procedures Act.

WHEREFORE Petitioners pray for the granting of an Ex Parte Extraordinary Writ directing the Respondents to either (1) grant their Request for Agency Review as

contemplated in Exhibits "A" – "E" hereto or (2) otherwise certify the Administrative Law Judge's Order of August 29, 1989, as a "final agency action" as contemplated in §63-46b-14, Utah Code Ann. Because there is nothing to dispute with respect to the foregoing Petition, because Respondents will not be damaged in the least by the issuance of such a writ, and further, because Petitioners will continue to be damaged and prejudiced by further delay and stalling on the part of Respondents acting through Baldwin, Petitioners pray that their Petition be granted immediately and without notice as provided in Rule 65(B)(e), Utah Rules of Civil Procedure. In the event the Court does not grant this writ ex parte and the Division resists this Petition at a forthcoming hearing, Petitioners pray for an award of substantial Rule 11 and §78-27-56 sanctions against the Division.

DATED this 27th day of October, 1989.



John Michael Coombs  
Attorney for Petitioners

PETITION.1-2

**JOHN MICHAEL COOMBS, ESQ., No. 3639**  
**72 East 400 South, Ste. 220**  
**Salt Lake City, UT 84111**  
**Telephone: (801) 359-0833**  
**Attorney for Respondents**

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

**IN THE MATTER OF THE REGISTRATION  
OF:**

**JOHNSON-BOWLES COMPANY, INC.**

**CRD NO. 07678**

**REQUEST FOR AGENCY REVIEW  
AND REQUEST FOR HEARING**

**Case No. SD-89-46BD**

**IN THE MATTER OF THE REGISTRATION  
OF:**

**MARLEN VERNON JOHNSON**

**CRD NO. 2598888**

**Case No. SD-89-47AG**

PLEASE TAKE NOTICE that in accordance with §63-46b-12, Utah Code Ann., and/or R151-46b-12(A) of the Rules of Procedure for Adjudicative Proceedings Before the Department of Business Regulation, Respondents hereby request agency or superior agency review of the Administrative Law Judge's Order dated August 29, 1989, a true and correct copy of which is attached hereto and incorporated by reference as Respondents' Exhibit "A". Respondents further request oral argument in accordance therewith. This Request is timely filed in that Respondents' counsel did not receive the August 29, Order until August 31, 1989.



**Respondents' grounds for requesting agency or superior agency review and oral argument thereon include but are not limited to the following:**

**(1) the Court's August 29, 1989, Order, Exhibit "A" hereto, is non-responsive to Respondents' Motion to Dismiss under Rule 12(b)(1) and erroneously treats Respondents' motion as a Motion to Dismiss under Rule 12(b)(6) as argued at the hearing by the Division;**

**(2) the Order contains erroneous, superfluous, and irrelevant findings of fact and conclusions of law relative to Respondents' Rule 12(b)(1) Motion and otherwise assumes facts neither pleaded, admitted, nor in evidence and which otherwise improperly tend to go to the merits of the Division's case;**

**(3) the Order erroneously compels the necessary legal conclusion that it would have been possible for Respondents, as Utah residents, to have complied with their federal NASD and SEC obligations, either themselves or by allowing "buy-ins" for their "own account", without violating the Division's unilateral and capricious interpretation of its own March 1, Order;**

**(4) the Order is erroneous as a matter of law in concluding that the Division has been delegated power and authority (i.e., jurisdiction) to issue orders, unilaterally interpret them, and thereby discipline an NASD member merely for obeying and complying with superseding and pre-emptive federal securities law -- "state action" further repugnant to the Supremacy and Commerce Clauses of the Constitution in that Congress has expressly delegated enforcement and interpretation of an NASD and SEC duty, liability, or obligation to the federal courts under the Securities Exchange Act of 1934;**

**(5) the Order could not be more erroneous as a matter of law in concluding on page 4 that "NASD rules . . . should not be accorded the force and effect of federal law . . .**

(6) the Order is erroneous in concluding that the Division's March 1, 1989 Order — which says nothing of prohibiting "purchases" — quite literally supersedes and overrides federal securities law specifically governed under the Exchange Act and over which federal courts have exclusive jurisdiction;

(7) the Order is erroneous as a matter of law insofar as it concludes that the Division, in light of §28(a) of the Securities Exchange Act, can inconsistently regulate and even discipline federal licensees contrary to express mandates of federal law, specifically, that the Division can deem an act "unethical" when the preemptive federal regulatory scheme declares the very same act "ethical";

(8) the Order is erroneous in concluding that the Division can give unlawful extra-territorial effect to its Order of March 1 and otherwise give such Order a predatory and discriminatory effect on Respondents; and

(9) the August 29, 1989 Order is erroneous in not concluding that the Division's Amended Petitions are barred by pre-emption under the Securities Exchange Act of 1934 and otherwise repugnant to the Supremacy and Commerce Clauses of the Constitution.

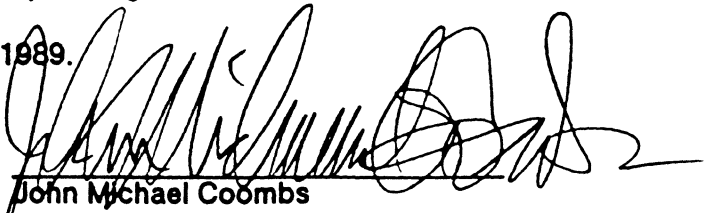
Respondents have the right to seek agency review of the August 29, Order and otherwise exhaust their administrative remedies in that if the Division lacks subject-matter jurisdiction, which it does, these entire proceedings are unlawful and a waste of all parties' time, energy, and money, particularly when such proceedings have already subjected and continue to subject Respondents to substantial damages. Respondents further have a right to seek agency review of the Order of August 29, because it is not a "non-final procedural ruling" of the Division. Thermal Ecology Must Be Preserved v. Atomic Energy Commission.

433 F.2d 524, 526 (D.C.Cir. 1970). See also Ecee, Inc. v. Federal Power Commission, 526 F.2d 1270, 1273 (5th Cir.), cert. denied, 429 U.S. 866, 97 S.Ct. 176, 50 L.Ed.2d 147 (1976); Coca-Cola Company v. Federal Trade Commission, 475 F.2d 299, 302 (5th Cir.), cert. denied, 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973).

Based on the foregoing and §63-46b-12(1)(b)(ii), Utah Code Ann., Respondents pray for immediate reversal of the August 29, 1989 Order and for an Order declaring that the Division has no jurisdiction to either unilaterally interpret its March 1, 1989 Order inconsistently with federal securities law or otherwise bring a revocation proceeding against an NASD member merely for obeying, complying, or attempting to comply with superseding Exchange Act rules and regulations.


In accordance with applicable Department of Commerce rules, Respondents herewith file a Brief in support of their grounds for review. The parties seeking review further sign this Request as required under §63-46(b)-12(b)(i), Utah Code Ann. Respondents further hereby give notice that the Division shall have fifteen (15) days from the date of its receipt hereof to file a responsive pleading if it so desires.

DATED this 11<sup>th</sup> day of September, 1989.



John Michael Coombs  
Attorney for Respondents

JOHNSON-BOWLES, COMPANY, INC.,  
Respondent



By: Marlen V. Johnson  
Its: President

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

---

In the Matter of the Registration of	:	MOTION TO DISMISS AND
Johnson-Bowles Company, Inc.	:	ACCOMPANYING ORDER
CRD No. 07678	:	
	:	Case No. SD-89-46BD
In the Matter of the Registration of	:	
Marlen Vernon Johnson	:	Case No. SD-89-47AG
CRD No. 2598888	:	

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**Appearances:**

John Michael Coombs and Craig F. McCullough for Respondents

Mark J. Griffin for the Division of Securities

**By the Administrative Law Judge:**

By Motion, dated July 3, 1989, Respondents seek a dismissal of the instant adjudicative proceedings. A memorandum in opposition thereto was filed by the Division on July 13, 1989. On the just-stated date, Respondents also filed an affidavit in support of the motion to dismiss.

Oral argument on the pending motion was conducted on July 14, 1989, at which time Respondents filed a reply memorandum and copies of six (6) letters relative thereto.

The Administrative Law Judge, being fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law and Recommended Order.

**FINDINGS OF FACT**

1. Respondent Johnson-Bowles Company, Inc. is a securities broker and Respondent Marlen Vernon Johnson is a securities agent and principal of the just-named company. Respondents are duly registered by the Division of Securities of the State of Utah.

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EXHIBIT "A"

2. By Summary Order, dated March 1, 1989, the Division denied the availability of all transactional exemptions relative to the securities of U.S.A. Medical Corporation. The Summary Order has been in effect on a continuous basis since the just-stated date.

3. Prior to entry of the March 1, 1989 Summary Order, Respondent Johnson, as an agent and principal for Respondent Johnson-Bowles Company, Inc., had effected transactions in the securities of U.S.A. Medical Corporation. Sparring detail, outstanding contracts existed between Respondent Johnson-Bowles Company, Inc. and various third parties respecting the sale of the securities in question by Respondent Johnson-Bowles Company, Inc. to those third parties. Specifically, said contracts existed prior to issuance of the March 1, 1989 Summary Order.

4. Given the just-described contracts, and in order to effect the delivery of the securities in question to various third parties, Respondent Johnson-Bowles Company, Inc., through Respondent Marlen Vernon Johnson, purchased approximately 364,000 shares of U.S.A. Medical Corporation stock from seven (7) individuals between April 3, 1989 and April 13, 1989. Respondents were aware of the March 1, 1989 Summary Order when the just-described purchases were made.

5. On April 27, 1989, the Division filed a Notice of Agency Action and Petition, wherein it was alleged that Respondents had willfully violated or willfully failed to comply with the March 1, 1989 Summary Order and that they had engaged in dishonest or unethical practices in the securities business. Pursuant to an Amended Petition, dated July 19, 1989, the Division has withdrawn the allegation that Respondents had either willfully violated or willfully failed to comply with the March 1, 1989 Summary Order. However, based on the allegation that Respondents have engaged in dishonest or unethical practices in the securities business, the Division seeks entry of an order suspending or revoking the respective registration of Respondents Johnson-Bowles Company, Inc. and Marlen Vernon Johnson.

#### CONCLUSIONS OF LAW

Respondents assert that the Division lacks subject matter jurisdiction to initiate the instant proceeding and to enter any disciplinary sanction as to their existing registration. Specifically, Respondents contend that rules of conduct promulgated by the National Association of Securities Dealers (NASD)

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required that they complete their existing contracts by either payment or delivery of the securities in question. Respondents further contend that compliance with that directive prompted their purchase of U.S.A. Medical Corporation securities from certain Utah residents subsequent to the issuance of the March 1, 1989 Summary Order and that said Order prohibited only the sale, but not the purchase, of the just-stated securities. In essence, Respondents urge that the pertinent NASD rules of conduct promulgated pursuant to the Securities Exchange Act of 1934 necessarily supercede the operation of the March 1, 1989 Summary Order and, thus, the instant proceeding should be dismissed.

During oral argument on the pending motion, counsel for Respondents extensively addressed those rules of conduct which govern NASD members and whether Respondents could have been subject to disciplinary sanction regarding their membership in that organization for any failure to comply with said rules. In rejoinder, counsel for the Division has urged that Respondents could have fulfilled their contractual obligations to third parties by means other than a purchase of U.S.A. Medical Corporation securities, but that it was financially advantageous for Respondents to act as they did. The Division has also asserted that Respondents solicited the sale of U.S.A. Medical Corporation securities and that any such solicitation is relevant to whether Respondents engaged in dishonest and unethical securities practices.

Notwithstanding the belabored arguments which were presented as to the foregoing matters, the operative effect of the March 1, 1989 Summary Order was to prevent the sale of unregistered securities to Utah residents. Both parties concede that those securities had been the subject of market manipulation and securities fraud. Under such circumstances, issuance of the Summary Order was clearly intended to preclude any subsequent sale of those securities within this state.

With knowledge of the existence of the Summary Order, Respondents purchased said securities from certain Utah residents. In so doing, Respondents' conduct effectively frustrated the attempts of the Division to preclude the trading of those unregistered securities. Whether Respondents solicited the sale of U.S.A. Medical Corporation securities (and Respondents have strenuously urged that they did not), it is obvious that their participation in those transactions as a purchaser of those securities facilitated a violation of the Summary Order as to potentially subject them to disciplinary sanction in these proceedings.

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Respondents' assertion that NASD rules of conduct should be accorded the force and effect of federal law, as to thus obviate compliance with the March 1, 1989 Summary Order, is not well-founded.

Concededly, had Respondents owned the securities prior to March 1, 1989 and merely delivered those securities to third parties after the Summary Order had been issued, such a ministerial act may not have exposed Respondents to possible revocation or suspension of their registration. However, Respondents' purchase of the securities after March 1, 1989 to effect their subsequent delivery of those securities to third parties was squarely at odds with the operative effect of the March 1, 1989 Summary Order. Simply put, any necessary compliance by Respondents with NASD rules as a member of that self-regulatory organization does not lend support to the conclusion that the Division lacks subject matter jurisdiction in this case.

Two further matters should be addressed. Both parties have noted certain aggravating and/or mitigating factors in this case and have urged that such factors should be considered relative to the merits of the pending motion. Without doubt, such circumstances are relevant as to any possible entry of a disciplinary sanction at some subsequent stage in these proceedings. However, those factors are not germane to the matter presently before the Court.

Respondents have also requested that any order denying the pending motion be certified as "final", so that necessary review of that order can be sought. Section 63-46b-12, Utah Code Ann. (1953), as amended, provides that parties to any adjudicative proceeding may seek review "of an order by the agency" and sets forth the procedure to obtain any such review. R151-46b-12(A) is further applicable in that respect. Presumably, Respondents' request that any order issued on the pending motion be certified as final is one directed toward the provisions of Section 63-46b-14, which provides:

(1) Any party aggrieved may obtain judicial review of *final* agency action, except in actions where judicial review is expressly prohibited by statute. (All emphasis herein added).

It is not within the province of this Court to decide whether the order set forth below is "final", as to allow for subsequent judicial review, nor to certify any such order as being final for purposes of such review.

However, the order herein is subject to agency review, as set forth above.

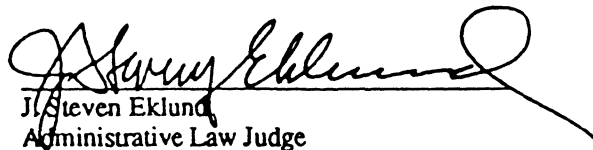
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ORDER

WHEREFORE, IT IS ORDERED that Respondents' motion to dismiss the July 19, 1989

Amended Petition is denied.

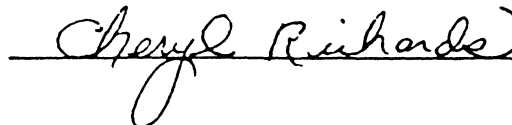
Dated this 29<sup>th</sup> day of August, 1989.

  
J. Steven Eklund  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed the foregoing Motion to Dismiss and Accompanying Order, properly addressed, postage prepaid, to John Michael Coombs, 72 East 400 South, Suite 220, Salt Lake City, Utah 84111; to Craig F. McCullough, Callister, Duncan & Nebeker, 8th Floor, Kennecott Building, 10 East South Temple Street, Salt Lake City, Utah 84113, co-counsel for Respondents; and to Mark J. Griffin, Assistant Attorney General for the Division of Securities at Tax & Business Regulation Division, 130 State Capitol, Salt Lake City, Utah 84114.

Dated this 29 day of August, 1989.



00317



**JOHN MICHAEL COOMBS, ESQ., No. 3639**  
**72 East 400 South, Ste. 220**  
**Salt Lake City, UT 84111**  
**Telephone: (801) 359-0833**  
**Attorney for Respondents**

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

**IN THE MATTER OF THE REGISTRATION  
OF:**

**JOHNSON-BOWLES COMPANY, INC.**

**CRD NO. 07678**

**REPLY BRIEF OF RESPONDENTS  
IN SUPPORT OF REQUEST FOR  
AGENCY REVIEW**

**Case No. SD-89-46BD**

**IN THE MATTER OF THE REGISTRATION  
OF:**

**MARLEN VERNON JOHNSON**

**CRD NO. 2598888**

**Case No. SD-89-47AG**

**Respondents, by and through their counsel, hereby submit this Reply Brief In Support of their September 11, 1989, Request for Agency Review of an August 29, 1989, Order and for a Hearing thereon.**

## COUNTERPOINT I

**The discussion on pages 4 through 5 of the Division's Opposing Brief (mischaracterized as a "Brief in Reply") is illogical. Therein, the Division fallaciously argues that because the NASD is authorized under the Exchange Act to discipline a member for**

~~violating its rules, such does not mean that a member is required by law to obey such rules.~~

This makes no sense whatsoever, especially if one realizes that to engage in the business of a securities broker-dealer and agent in these United States, one must, as a matter of law, be a member of the NASD. (This is only true, however, if one is not simultaneously a member of a national securities exchange which Respondents are not.) In other words, if one must obey NASD rules to not only lawfully engage but lawfully remain in business, such person is clearly required by law to obey such rules. The Division's argument on this point is inexcusable nonsense, particularly when the NASD exists solely by virtue of the Exchange Act and the SEC. Certainly NASD rules are not hollow and meaningless as the Division would want us all to believe in these proceedings and there is no question that they have the effect of federal law --the contrary of which was concluded in the August 29, 1989, Order subject to this request for agency review. Lastly, if NASD rules meant nothing, why has the Division itself specifically "patterned" its own R177-6-1g after the very NASD rules in issue in this case?

#### COUNTERPOINT II

On the last paragraph of page 4 of the Opposing Brief, the Division argues that §28(a) and §27 of the Exchange Act do not exist as far as the Division is concerned and that federal courts apparently do not have exclusive jurisdiction over that which is contemplated in and governed under the Exchange Act. Nonetheless, whatever the "intention" of the Division may be by way of its amended petitions, the fact remains that the instant proceedings are in diametric conflict with Exchange Act mandates. For the sake of interstate commerce and ensuring that the economy operates smoothly, the Exchange Act requires completion of brokerage transactions and does not tolerate excuses in that

regard. (The Exchange Act does, however, allow trades to be "broken" on mutual consent of the parties but such is not at issue in these proceedings since those out-of-state entities to whom Respondents owed stock refused or were contractually unable to "break" the trades in issue.) Because the Division is apparently unable to comprehend this point and Respondents cannot state it more clearly than they have, nothing more can be said in this regard.

### COUNTERPOINT III

Securities Exchange Act Rel. No. 34-7920 is relevant to these proceedings because it was issued to give people like Respondents guidance in their business. Contrary to what the Division asserts, the Release does not say that "completion" of outstanding federal obligations entered into prior to the date of a federal suspension order (not a state order) excludes buying stock to ministerially complete such federal executory contracts. [Emphasis added.] The Release also has no bearing on and says nothing of state suspension orders. In fact, the Release does not contemplate any state orders of any kind. Further, the Release clearly permits completion of federal contracts by "delivery" which is exactly what Respondents did. The Division is hopelessly trying to read something into Rel. No. 34-7920 which is simply not there. The Division has also cited no authority lending itself to the Division's own self-serving interpretation of the Exchange Act Release. Because such Release has the effect of federal law or rule, the Division's position is in further diametric conflict with the Exchange Act.

### COUNTERPOINT IV

In Argument A, page 7 of the Opposing Brief, the Division argues that §63-46b-12, Utah Code Ann., and R151-46b-12, Department of Commerce Rules, only

contemplate review of "final" orders of the Division. This position is antithetical to the express language of such statute and the concomitant rule which merely contemplate an agency "order". The Division has §12 of the APA confused with §14 which requires a "final agency action" prior to seeking "judicial review", not agency review. The Division's argument on this point is thus a total misreading and misunderstanding of applicable law.

Agency review of the Order of August 29, 1989, also does not cause any delay in these proceedings as desperately argued by the Division. This is because the Administrative Law Judge has ordered Respondents to file an answer, which they did on October 4, 1989. Further, because a reversal of the August 29, Order, would be entirely dispositive of these proceedings, review of such Order would in fact expedite the just and proper resolution of the amended petitions as contemplated in the APA. It is accordingly undisputed that agency review is thus in everyone's best interests, including the Division's.

#### COUNTERPOINT V

The Division's Argument B on pages 7 and 8 of their Opposing Brief has no merit for the reasons contained in the preceding Counterpoint. Further, a balancing test of any kind is neither required nor necessary and to not review the Order of August 29, when it may indeed be error, would substantially prejudice Respondents. Again, this is because a reversal of such Order would immediately dispense with these entire proceedings and save everyone, including the Utah taxpayer, a lot of time, energy, and expense.

#### COUNTERPOINT VI

With respect to Argument C in the Opposing Brief, Respondents acknowledge that in oral argument on their Rule 12(b)(1) Motion to Dismiss the words "non-delegation" and ultra vires were not stated. This is because when a court engages in a pre-emption

analysis, it is not necessary to get into a further analysis of the Supremacy and Commerce Clauses. Schneiderwind v. ANR Pipeline Company, 108 S.Ct. 1145, 485 U.S. 293 (March 22, 1988)(holding that a pre-emption question only involves an analysis of Congressional intent and does not, at that point, require deciding Constitutional issues such as the Commerce Clause). Respondents have asserted that the primary and most readily dispositive issue in this case is pre-emption. For this reason, Respondents did not contemplate that this specific issue would be either misunderstood or by-passed in the August 29, 1989, ruling. Regardless, because pre-emption was an issue and was apparently deemed by the Administrative Law Judge to have no merit, Respondents believe and assert that it was incumbent upon the Administrative Law Judge to then go the required step further and apply Constitutional principles such as "non-delegation" and ultra vires. In other words, Respondents should not be penalized in these proceedings merely because their counsel lacked the foresight to anticipate how the Administrative Law Judge would rule on the pre-emption issue. Based on the foregoing, such issues are relevant and they were therefore indirectly before the Administrative Law Judge at the hearing, particularly when the Administrative Law Judge undoubtedly knows far more about Constitutional law than Respondents' counsel. Respondents thus contend that because these issues were not addressed in the August 29, Order, it is thus reversible error.

The fact that the Division is so viciously fighting any just resolution of these proceedings on the merits is disconcerting to say the least. For instance, why is it so difficult for the Division to simply say: "If we are wrong, perhaps the amended petitions ought to be dismissed and we should get on to something more noble?" Is such a position really something so terrible? Surely, if there is merit to the "non-delegation" and ultra vires

arguments posed by Respondents in their Supporting Brief, such arguments ought to be considered in the interests of justice. Simply put, how much of the taxpayers' money is really justified in being spent prosecuting Respondents for something that harmed no one, especially if these entire proceedings can be resolved quickly on agency review? One can only conclude that because the Division is so irrationally concerned with Respondents' raising of an issue which is dispositive of this case, these proceedings are obviously brought in bad faith. As stated before, it is unfortunate that the Division's very last concern in these proceedings is the doing of justice.

#### COUNTERPOINT VII

In Argument D, the Division claims that NASD rules do not have the force and effect of law. If not, why has the Utah Court of Appeals in the Western Capital case held that a Utah court has no jurisdiction to hear or interpret NASD rules? This argument is particularly ironic in that the Division's own "dishonest and unethical practices" rule is specifically and expressly "patterned" after the very NASD rule in issue in this case. Clearly, the NASD was created to help the SEC administer the Securities Exchange Act of 1934. How then, can the NASD not only not be accorded the force and effect of federal law, but any law at all? Is it really the Division's position that the NASD was not created in and under the '34 Act and that Respondents are somehow miraculously making this all up?

The amended petitions are in conflict with federal law simply because Respondents could not have complied with Judge Greene's ruling and NASD rules, on the one hand, and the Division's unilateral interpretation of its own March Orders, on the other, at the same time. If the Division does not see this as a conflict then there is simply nothing more that can be said by anyone. Section 27 of the Exchange Act expressly provides that

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obligations, duties, and liabilities relative to trading securities in interstate commerce must be redressed in a U.S. District Court. The Division's amended petitions seek to create a liability for Respondents' trading of securities in interstate commerce in conformity with Exchange Act mandates and a federal judge's ruling. For this reason, it is impossible that there could be no conflict. It is further impossible that the Division could have subject-matter jurisdiction relative to these proceedings when the enforcement of Exchange Act obligations, duties, and liabilities are the only issue in this case.

In Argument D the Division proceeds to argue that the thrust of the Division's amended petitions impose no burden on interstate commerce. This statement ignores the facts of this case. Had Respondents not honored their Exchange Act contracts, several out-of-state NASD member broker-dealers and perhaps the largest clearing corporation in the United States would have been severely damaged. At the same time, the Division does not see this as having any impact on interstate commerce. If not, then what is it? The Division would also have us all believe that Respondents should have allowed those out-of-state entities to have bought Respondents "in." This argument ignores the fact that such would have immediately put Respondents out of business and such would have even more severely damaged each of those out-of-state entities who were owed U.S.A. Medical stock. This is because Respondents could not have repaid such entities and each would have forever been out-of-pocket whatever each would have had to expend to effect the necessary "buy-ins".

The Division further argues that if the court engages in a balancing test "the interest of the state in containing the further distribution of U.S.A. Medical stock" outweighs Respondents' interest in complying with federal law. This statement ignores the

~~fact that there are also two out-of-state nominees~~  
enormous clearing corporation which also have an interest in seeing Respondents complete their federal contracts. Further, this argument is astoundingly hypocritical and preposterous in that if the Division were sincerely concerned about any U.S.A. Medical stock not being distributed out of the state of Utah, it would not have given Susan Slattery and P.B. Jameson a secret and private No-Action Letter which accomplishes the exact opposite of this purported goal, namely, to encourage the unlawful distribution of U.S.A. Medical stock out of the state of Utah at great benefit to the U.S.A. Medical Co-Conspirators. (A true and correct copy of such No-Action Letter is attached hereto and incorporated by reference as Exhibit "A". See also Respondents' Answer and Counterclaim on file herein dated October 4, 1989, Affirmative Defense 8 therein.) To be sure, such No-Action Letter clearly enables a Utah resident (more especially a U.S.A. Medical Co-Conspirator) to contact an out-of-state "nominee" and ask him or her to place a so-called "unsolicited order" with Susan Slattery and P.B. Jameson. If necessary, the Utah resident, to cover his tracks, can mail or federal express the stock certificates to the out-of-state resident who in turn can easily furnish them to the alleged selling broker -- all as necessary to technically comply with the August 9, 1989 No-Action Letter. Further, the stock confirmation would be routinely stamped "unsolicited" and so no one, including the Division, would be any the "wiser". All of this, by the way, while the U.S.A. Medical Co-Conspirators are "touting" the stock of U.S.A. Medical all over the United States and creating a market for their stock which they can then sell via a Utah agent and a Utah broker-dealer (whom they control) at substantial illegal profits to themselves. This is but a simple example of the effect of the Division's ingenious No-Action Letter on which there are an infinite number of variations.



**On the other hand, if the Division fails to see this as a complete undermining of its March Orders and as a natural consequence of its brilliant No–Action Letter and, if it otherwise fails to see that such No–Action Letter enables and encourages a nationwide distribution of the entire U.S.A. Medical “box” from the state Utah, the Division is surely naive to say the least and has no business whatsoever regulating securities in this state or any other state.**

**On the other hand, if the Division’s March Orders have the effect of deeming U.S.A. Medical stock as “bad stock” which no Utah agent or broker should have anything to do with, it is grossly inconsistent for the Division to say that a Utah agent such as Slattery and a Utah broker–dealer such as P.B. Jameson can effect transactions in such stock they clearly know to be “bad stock” and not be engaging in “dishonest and unethical practices” -- the very same allegation presently being leveled against Respondents. By the same token, if the Division concedes that it has no jurisdiction over a U.S.A. Medical transaction between an out–of–state broker and a Utah broker or agent -- as clearly set forth in the No–Action Letter -- how can the Division simultaneously have jurisdiction over the instant amended petitions and the conduct of Respondents in completing broker–to–broker transactions entered into prior to March 1?**

**In sum, the Division argues that its amended petitions do not impose a burden on interstate commerce merely because it doesn’t think they do. The Division forgets the other part of the Supreme Court’s balancing test which requires a “local putative benefit” that “outweighs” the burden on interstate commerce. Unfortunately for the Division, there is no such “local putative benefit” resulting from the amended petitions and the Division has shown none, and therefore, as a matter of law, the amended petitions impose a substantial burden on interstate commerce in relation to local needs and objectives. Just ask one of**

the out-of-state NASD members and Midwest Clearing if they would presently rather be arbitrating and litigating against a bankrupt debtor whose assets have been thrown into the Securities Investor Protection Corporation ("SIPC"). The answer is obvious.

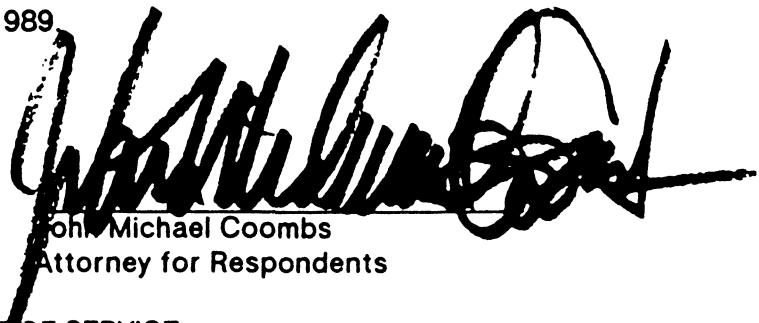
#### CONCLUSION

In so adamantly resisting Respondents' Request for Agency Review, the Division's attitude brings to mind the words of philosopher Herbert Spencer who said:

There is a principle which is a bar against all information, which is proof against all arguments and which cannot fail to keep a man in everlasting ignorance -- that principle is contempt prior to investigation.

Because all parties have something to gain by this Request for Agency Review, Respondents urge that it be granted forthwith and that they get an opportunity to make their arguments before the Securities Advisory Board as set forth in their pleadings on file herein. Surely the Securities Advisory Board should know what is going on in this case and its input may well shed valuable light on the issues presented. Finally, because Respondents also believe the Order of August 29, 1989, improperly has the effect of a premature ruling on the merits of this case, it must be reversed.

DATED this 6th day of October, 1989.

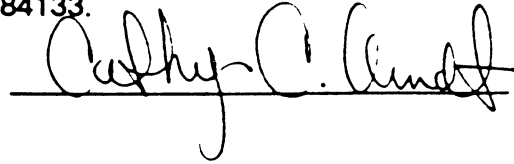


John Michael Coombs  
Attorney for Respondents

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of October, 1989, (s)he hand-delivered a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENTS IN SUPPORT OF REQUEST FOR AGENCY REVIEW, including Exhibit "A", to John C. Baldwin, Director and Kathleen C. McGinley, Director of Broker-Dealer Section, Securities Division,

Utah Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Administrative Law Judge and Presiding Officer J. Stephen Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Mark J. Griffin, Esq., Assistant Attorney General, 115 South State Capitol, Salt Lake City, Utah 84114; and mailed the same, postage prepaid to Craig F. McCullough, Esq., Callister, Duncan, & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84133.

A handwritten signature in black ink, appearing to read "Cathy C. Lind", is written over a horizontal line.

J:RLYBF.1-3

JOHN MICHAEL COOMBS, ESQ., No. 3639  
72 East 400 South, Ste. 220  
Salt Lake City, UT 84111  
Telephone: (801) 359-0833  
Attorney for Petitioners

DEC 17 11 17 AM '89  
*[Signature]*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY, STATE OF UTAH

JOHNSON-BOWLES COMPANY, INC., a  
Utah corporation and MARLEN V.  
JOHNSON,

Petitioners,

v.

JOHN C. BALDWIN, Director,  
Securities Division of the  
Department of Commerce, State  
of Utah, and M. TRUMAN BOWLER,  
KENT BURGON, DAVID HARDY,  
MARGARET WICKENS, and KEITH  
CANNON, members of the Securities  
Advisory Board overseeing the  
Securities Division,

Respondents

EX PARTE ORDER GRANTING  
EXTRAORDINARY WRIT AND  
EXTRAORDINARY WRIT

CASE NO. 890906506 CV

JUDGE JAMES S. SANAYA

The Petition for Extraordinary Writ in the above-matter seeking issuance of a writ from this Court to be directed to Respondents to either grant Petitioners' Request for Agency Review (and thereby review the same) or to otherwise certify the subject order on review as a "final agency action" having come before this Court; the Court having reviewed the Petition and having determined that a hearing is not necessary, and good cause further appearing, the Court hereby orders as follows:

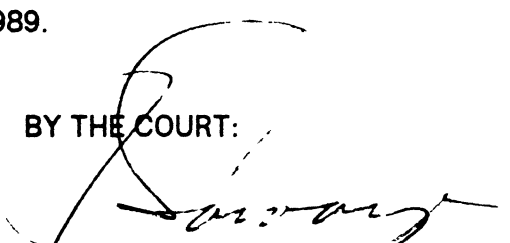
1. The Petition for Extraordinary Writ in the above-matter is hereby granted.

**2. The Respondents are hereby immediately directed to undertake one of the following courses of action:**

- (1) Either grant Petitioners' Request for Agency Review as contemplated in the Exhibits attached to the Petition and thereupon resolve all issues presented therein, or
- (2) Certify the Administrative Law Judge's Order of August 29, 1989, as a "final agency action" as contemplated in §63-46b-14, Utah Code Ann.

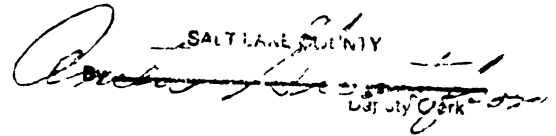
DATED this 27 day of October, 1989.

BY THE COURT:

  
\_\_\_\_\_  
Third District Court Judge

ORDER.1

1989 OCT 31

  
SALT LAKE COUNTY  
County Clerk

R. PAUL VAN DAM, #3312  
Utah Attorney General  
MARK J. GRIFFIN, #4329  
Assistant Attorney General  
115 State Capitol  
Salt Lake City, Utah 84114  
(801) 538-1331

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

---

JOHNSON-BOWLES COMPANY, INC., a : EX PARTE ORDER SETTING  
Utah Corporation and MARLEN V. : ASIDE EXTRAORDINARY WRIT  
JOHNSON, :

Petitioners, :

vs. :

JOHN C. BALDWIN, Director, :  
Securities Division of the :  
Department of Commerce, State : Case No. 890906506 CV  
of Utah, and M. TRUMAN BOWLER, :  
KENT BURGON, DAVID HARDY, :  
MARGARET WICKENS, AND KEITH :  
CANNON, members of the : Judge James S. Sawaya  
Securities Advisory Board :  
overseeing the Securities :  
Division, :

Respondents.

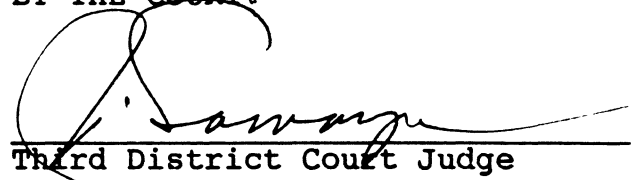
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The Court having reviewed the Ex Parte Petition to Set Aside  
Ex Parte Order issued by this Court on October 27, 1989, and the  
Court being satisfied in having heard the Respondent's arguments  
in support of the Petition and being satisfied that there is just  
cause appearing therefore, hereby

ORDERS, ADJUDGES, AND DECREES that this Court's Ex Parte  
Order dated October 27, 1989, requiring the Respondents to  
perform certain acts, is hereby set aside.

DATED this 1<sup>ST</sup> day of November, 1989.

BY THE COURT:

  
Third District Court Judge

R. PAUL VAN DAM, #3312  
Utah Attorney General  
MARK J. GRIFFIN, #4329  
Assistant Attorney General  
115 State Capitol  
Salt Lake City, Utah 84114  
(801) 538-1331

THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY  
DEPUTY CLERK

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY, STATE OF UTAH

---

JOHNSON-BOWLES COMPANY, INC., a :	EX PARTE PETITION TO
Utah Corporation and MARLEN V. :	SET ASIDE <u>EX PARTE</u> ORDER
JOHNSON, :	
Petitioners, :	
vs. :	
JOHN C. BALDWIN, Director, :	
Securities Division of the :	
Department of Commerce, State :	Case No. 890906506 CV
of Utah, and M. TRUMAN BOWLER, :	
KENT BURGON, DAVID HARDY, :	
MARGARET WICKENS, AND KEITH :	Judge James S. Sawaya
CANNON, members of the :	
Securities Advisory Board :	
overseeing the Securities :	
Division, :	
Respondents. :	

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The respondents by and through their attorney, Mark J. Griffin, Assistant Attorney General, pursuant to Rule 7(b)(2) of the Utah Rules of Civil Procedure, hereby petition the above court ex parte to set aside court's order dated October 27, 1989. Rule 7(b)(2) provides in pertinent part that "any order made without notice the adverse party may be vacated or modified without notice by the judge who made it".

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The respondents request that the court set aside its October 27th order based upon the following facts and arguments:

1. On April 27, 1989 the Utah Securities Division, whose director is respondent John C. Baldwin, initiated an administrative adjudicative proceeding against the petitioners in this matter, alleging violations of the statutory prohibition against dishonest and unethical conduct in the petitioners' capacity as licensees of the Division. The aim of the ongoing adjudicative proceeding is to determine whether or not to revoke or suspend the registration of the petitioners.

2. On August 29, 1989, following hearing and briefs, the Administrative Law Judge denied petitioners' motion to dismiss the administrative action, previously filed July 3, 1989. On September 11, 1989 petitioners filed a request for agency review and request for hearing of their request. The petition was filed with the Utah Securities Division, and John C. Baldwin acted as presiding officer, designated by the Division to review petitioners' request.

3. On September 26, 1989 the Division filed a brief in reply to petitioners' request for agency review and hearing, which set forth the reasons underlying the Division's belief that agency review in this matter, being discretionary with the administrative forum, would not be appropriate because the order of the Administrative Law Judge to deny petitioners' motion to

dismiss was in the nature of an "interlocutory order", not the appropriate subject for review under §63-46b-13 of the Administrative Procedures Act. A copy of the division's reply brief was mailed to petitioners' counsel of September 26, 1989 at his business address.

4. On October 6, 1989 the petitioners' counsel filed a reply brief with the Division in support of petitioners request for agency review. All told, 93 pages of pleadings and exhibits were filed for Mr. Baldwin's review. On October 30, 1989 John C. Baldwin, as the presiding officer, issued the Division's order on agency review, attached as Exhibit A. The order, among other things, denies the petitioners request for agency review.

5. On October 30, 1989 the Division received the court's ex parte order granting petitioners' extraordinary writ requiring the respondents in this matter to elect between granting the petitioners' request for agency review or certify the Administrative Law Judge's order denying petitioners' motion to dismiss as a "final agency action".

#### **ARGUMENT IN SUPPORT OF PETITION TO SET ASIDE**

##### **EX PARTE ORDER**

##### **POINT I**

##### **THE PETITIONERS HAVE SOUGHT TO DECEIVE THE COURT**

Petitioners have attempted to hoodwink this Court into believing that the Division was not responding to Petition's

Request for Review. The Petitioners have deliberately omitted to state facts in their petition necessary to the Court's determination as to whether the Court should issue this extraordinary writ. For example, the Petitioners have failed to state to the Court that this matter was a matter of ongoing pleading, i.e., that Petitioner's counsel had spoken to counsel for the Respondents and such conversations were concerning the ongoing pleading which was to take place pursuant to the Petitioner's request for agency review. Further, the Court is not notified by Petitioners that the Respondents had filed on September 26, 1989 a brief in reply to Petitioners' request for agency review. Petitioners neatly leave that document out of their exhibit list so that the Court does not have an opportunity to examine the true facts which were that this matter was a matter of ongoing pleading. Omission of that brief in reply (Exhibit B) was calculated again to misinform the Court, by not acquainting the Court with the substantial reasons contained therein that indicate that the Petitioners' request for agency review was wholly inappropriate. Petitioners have hoped that by denying the Court these facts, the Petitioners would be able to secure ex parte relief which might somehow stampede the Division into acting in a way which prudent judgment and timely review would not consider.

POINT II

THE PETITIONERS HAVE NO BASIS UNDER RULE  
65B OR THE ADMINISTRATIVE PROCEDURES ACT  
SECTION 63-46b-1 ET SEQ. TO PETITION FOR  
AN EXTRAORDINARY WRIT FROM THIS COURT.

Rule 65B(b) provides, in pertinent part, that:

(b) appropriate relief may be granted: . . .

(2) where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; or

(3) the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such inferior tribunal or by such corporation, board or person; [emphasis added]

Therefore, it is incumbent upon the petitioners to base their petition for an ex parte writ upon facts which would indicate to this Court that the Respondents, in exercising judicial functions, have exceeded their jurisdiction or abused their discretion. Alternatively, Petitioners may support their petition by demonstrating facts which indicate that the Court needs to compel the Respondents to perform an act which the law specially enjoins as a duty resulting from an office.

The Petitioners know or have reason to know that they can allege no facts in this regard that can support the issuance of this ex parte order.

Section 63-46b-12 (copy attached, Exhibit C) provides for agency review of administrative orders. In pertinent part, the section states:

"If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency . . ., the aggrieved party may file a written request for review within thirty days . . ."

This section also contemplates the filing of responsive pleadings, and allows the administrative forum to permit parties to file briefs, to conduct oral argument, and to have hearings on the matter.

The Department of Commerce of the State of Utah has also promulgated a rule concerning agency review. Rule R151-46b-12 of the Department (copy attached, Exhibit D) provides for the filing of a request for agency review and also for the filing of responsive pleadings.

None of the foregoing contemplates that the agency will be reviewing orders which are "interlocutory" in nature, i.e., orders concerning the Petitioner's Motion to Dismiss. The rules contemplate only the review of "final" agency orders. Petitioners have wished, in this action, to take what is, in essence, an interlocutory appeal to the agency itself when the administrative law judge rules against them. The procedure contemplated by the Petitioners in their request for review is erroneous and not in conformance with the commonly accepted

notion that an administrative forum is more summary in nature than are normal civil proceedings.

Additionally, there is absolutely nothing contained in the Administrative Procedures Act, or in the Rules of the Department of Commerce which would provide a basis for this Court issuing an ex parte order requiring the Division to grant the Petitioner's request for agency review. Nor is there any portion of the Administrative Procedures Act, or the Rules of the Department of Business Regulation which provides a basis for this Court to grant Petitioner's ex parte order requiring the Respondents to certify the administrative law judge's interlocutory order as a "final agency action."

The Petitioners simply are not entitled to take an appeal from an interlocutory order of an administrative law judge. This is born out in the case of Sloan v. Board of Review, 118 Utah Adv. Rep. 68 (October 2, 1989). In Sloan, the Utah Court of Appeals stated "an order of the agency is not final so long as it reserves something to the agency for further decision". Id at 68. In the Sloan case, the court dismissed an appeal due to the lack of a final agency order.

Therefore, it has been the position of the Division, taken in its Order on agency review issued October 30, 1989, that the Petitioner's request for agency review was based on review of an order which was interlocutory in nature, not a final agency

action, and therefore was an inappropriate subject for agency review.

**REQUEST FOR RELIEF**

The Respondents respectfully request that the Court set aside its ex parte order, based on the fact that the Division has issued its order on agency review which specifies that the Petitioners had no basis for requesting review of the administrative law judge's order. Additionally, there appears no statutory authority for this Court to order the Respondents to grant the Petitioners' request for agency review or to certify as "final" the administrative law judge's order dated August 29, 1989.

It is respectfully requested that the order be set aside ex parte pursuant to Rule 7(b)(2) on the basis that Respondents had no notice of the original ex parte proceeding before this Court and petitioners will not be damaged in anyway if the order is set aside.

DATED this 1<sup>st</sup> day of November, 1989.



MARK J. GRIFFIN  
Assistant Attorney General

R. PAUL VAN DAM, #3312  
Attorney General  
Mark J. Griffin, #4329  
Assistant Attorney General  
Attorney for Petitioner  
115 State Capitol  
Salt Lake City, Utah 84111

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

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IN THE MATTER OF THE	:	BRIEF IN REPLY TO RESPONDENTS
	:	REQUEST FOR AGENCY REVIEW AND
REGISTRATION OF:	:	HEARING.
	:	
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
CRD NO. 07678	:	Case No. SD-89-46BD

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IN THE MATTER OF THE	:	
REGISTRATION OF:	:	
	:	
MARLEN VERNON JOHNSON	:	
	:	Case No. SD-89-47AG
CRD NO. 2598888	:	

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The Utah Securities Division, by and through its counsel,  
Mark J. Griffin, hereby submits this Brief in Reply to Request  
for Agency Review and Hearing thereon. This brief is submitted  
to the Division in compliance with Utah Code Ann. §63-46b-12(2).



It is urged that the Division not undertake a review of the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order at this time for the reasons set forth out hereinafter.

STATEMENT OF FACTS

1. On March 1, 1989, the Division issued a Summary Order, case number SD-89-030, denying the availability of all transactional exemptions for the securities of U.S.A. Medical Corp., pursuant to the authority granted to the Division in Section 61-1-14(3) of the Act. A copy of the Summary Order was hand delivered to Johnson-Bowles on March 1, 1989.

2. On March 1, 1989, the Division commenced an administrative action to deny the availability of all transactional exemptions from registration pursuant to Section 61-1-14(3) of the Act for the securities of U.S.A. Medical Corp., case number SD-89-031. A copy of the Notice of Agency Action and Petition was mailed to Johnson-Bowles on March 2, 1989.

3. On March 27, 1989, the Division issued Findings of Fact, Conclusions of Law and Default Order denying the availability of the transactional exemptions from registration contained in Section 61-1-14(2) of the Act for the securities of U.S.A. Medical Corp. and any affiliates who are successors. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Johnson-Bowles on March 27, 1989.

4. On March 31, 1989, the Division sent a letter to Johnson-Bowles restating the Division's Summary Order and Default Order.

5. On or about April 3, 1989, through April 18, 1989, respondent Johnson, acting in his capacity as an agent and principal for Johnson-Bowles, attempted to affect or affected transactions in the securities of U.S.A. Medical Corp., which transactions are more accurately recorded at pages 4 and 5 of the Division's initial Petition in this matter. On April 27, 1989, the Division filed the instant action against Johnson-Bowles Company Inc. and Marlen Johnson requesting administration relief against the registration of the respondents under authority of Section 61-1-6(1)(b) and Section 61-1-6(1)(g).

6. Upon motion, dated July 3, 1989, a oral argument was held on July 14, 1989 before the Administrative Law Judge in this matter.

7. On August 29, 1989, the Administrative Law Judge entered an order denying the motion to dismiss.

#### PRELIMINARY STATEMENT

Pages 3 through 11 of the Respondents' brief purport to contain statements of material fact. Many of these "statements" are statements of law. Many also contain mixed questions of law and fact and are argumentative in nature. While it is the contention of the Division that many of these "statements of

material fact" might well be disputed, a complete reply to all of the factual and legal and argumentative discrepancies is not the intent nor the aim of this brief. However, some of the points of law contained in this same section are so erroneous as to merit individual attention. For example, at page 3, paragraph 1 of the statement of material facts, Respondents state "as members of the NASD, Respondents are required by law to obey its rules and regulations, including its rules of fair practice. 15 U.S.C. §78-o-3(b)(7)". However, 15 U.S.C. §78-o-3(b)(7) says no such thing. 15 U.S.C. §78-o-3(b) indicates that an association of brokers or dealers shall not be registered as a national securities association unless the Commission determines that the association meets the criteria listed in the section. Subsection 3(b)(7), cited in Respondents' brief, is actually one of those criteria and reads as follows.

"The rules of the association provide that...its members and persons associated with its members shall be appropriately disciplined for violation of...the rules of the association...."

Therefore, the statement that Respondents are required by law to obey the rules and regulations of the NASD has no basis in the section cited in the United States Code. In fact, the obligation to adhere to the rules and regulations of the association is quite simply a function of the enforcement by the NASD of its own rules and regulations. The fact that the Securities Exchange Act requires that the registered national

association have rules which provide for the discipline of its members, does not lead to the conclusion that Respondents are required by law (i.e. the Securities Exchange Act) to obey the rules and regulations of the NASD. If there exists such a portion of the Securities Exchange Act which stands for the proposition espoused by the respondents it is certainly not found in 15 U.S.C. §78o-3(b)(7).

At page 4, paragraph 2 counsel claims that it is "undisputed that obligations under the NASD and SEC rules and regulations are preempted under the Securities Exchange Act of 1934 over which Federal Courts have exclusive jurisdiction." Assuming, that it was Respondents intent to indicate that it is the *interpretation by state courts* of the regulations of the NASD and the SEC which are preempted under the Securities Exchange Act of 1934, the statement nevertheless is still useless to the determination of the issues before the Division at this time. It is clearly not the intention of the Division to interpret or enforce the duties, liabilities or obligations of the Respondents under the NASD or SEC rules. The Division has brought this action, based on an allegation of dishonest and unethical conduct on the part of the respondents concerning the purchases of shares of U.S.A. Medical during the pendency of the Division's order which effectively suspends the availability of secondary trading exemptions for U.S.A. Medical stock.

Referring again to the errors in Respondents' "Statement of Facts" it is beyond belief that the Respondents continue to cite to release number 34-7920 of the Securities Exchange Commission. It is a continuing example of Respondents' refusal to articulately address the legal and factual issues of this case. As the Division forcefully pointed out at the hearing on the Motion to Dismiss, release number 34-7920 has little to do with the facts of this case. First of all, the release is in the nature of a "no-action", or "safe harbor" for those brokers who, during a trading suspension, complete their agency or principal contracts entered into prior to the suspension order. A careful reading of the release would yield the conclusion that the release in no way covers the conduct of the Respondents, nor provides a basis for the Respondents to argue that the release entitles them to participate materially in the violation of Utah law. The release covers merely the *completion* of an agency or principal transactions. The example given by the release is "by payment or delivery." It does not go so far as to say that individuals may go out into the market place during the period of the suspension and acquire securities from the market place or from any source, for the purpose of effecting delivery in order to cover short sales.

That concludes some observations concerning the most erroneous sections contained in Respondents' "Statements of

Facts." Since we urge the Division not to review the Order at this time, no effort is made here to point out the existence of less troubling or obvious error.

#### ARGUMENT

A. The Requested Review is of an Order Which is Not a Final Agency Order, and, Therefore, the Request Should be Denied.

The Respondents' request is in the nature of an interlocutory appeal. The Administrative Procedures Act §63-46b-1 et seq. is a relatively recent statute, and as such, there is very little case law available for the interpretation of the various provisions of the Act. It is the position of the Division that Utah Code Ann. §63-46b-12 and R151-46b-12, of the rules of the Department of Commerce, contemplate only the review of the final orders of the Division. Review of interlocutory matters would necessarily deprive the Administrative Law Forum of its native simplicity and speed, interposing levels of delay that were not contemplated by the framers of the Administrative Procedures Act, nor by the rules of the Department of Commerce, effectively interposing an interlocutory or secondary level of appeal. This level of complexity in an Administrative Forum, is highly undesirable and as such provides an ample basis for the denial of the Respondents' request.

B. The Granting of a Request for Agency Review is a Discretionary Function of the Agency, and Balancing the Interest

of the Party at this Stage of the Proceeding, the Division should Deny the Request.

Utah Code Ann. §63-46b-12 and the corresponding rule of the Department of Commerce make the granting of a request for review a matter of discretion with the Division. The consideration of a grant of review would necessarily require a balancing of the interest of the parties at this stage of the proceeding. It is the belief of the Division that the likelihood of the success of the motion is considerably out weighed by the forum's interest in proceeding expeditiously to the merits of the case. Respondents are not prejudiced because they may still raise the issue in their memorandum on appeal of the Division's final order.

C. The Arguments Pertaining to the "Non-Delegation Documents" and "Ultra Vires" Activity Were Not Raised in the Previous Hearing nor Briefed in the Memorandum Submitted Pursuant to the Motions to Dismiss, and Therefore, Ought Not to be Reviewed at this Stage of the Proceeding.

It is the best recollection of counsel for the Division that the matters raised by the respondents in their brief on pages 11-19 concerning "Ultra Vires" activity by the Division and the doctrine of "non-delegation" were not raised in the previous hearing so that they could be addressed by the Administrative Law Judge. It is not in the best interest of the Forum to examine piece meal the theories that the Respondents may conjure up after

the fact. Therefore, the interest of the forum would require that the Division not review at this time new theories presented, but since those matters alleged pertain to a jurisdictional question these matters ought to be raised or combined with any appeal that the Respondents may file of the Division's final order.

Setting aside the issue of whether the Division should exercise its discretion to review the interim order of the Administrative Law Judge, based on these new theories propounded by respondents, and looking beyond at the merits of the arguments raised in Respondents' brief pertaining to the "non-delegation doctrine" and "Ultra Vires" activity by the Division, it is clear that the arguments of the Respondents' are merely misinterpretations of law.

D. The Securities Division, in this action, is not seeking to enforce any duty or liability under the Federal Securities Exchange Act; therefore, no preemption issue arises.

Counsel can plainly read that the Division's Petition cites two instances of dishonest and unethical conduct which are sanctioned under §6 of the Utah Uniform Securities Act. Nowhere mentioned is the Securities Exchange Act of 1934. Similarly Respondents have argued that this action is in conflict with the Securities Exchange Act of 1934. Distilled to its finest elements, Respondents' preemption argument is that this



proceeding is in conflict with the Rules of Fair Practice of the NASD, and, therefore, it is in conflict with the Securities Exchange Act of 1934. The Respondents cite to no provision of the Securities Exchange Act which endows the Rules of Fair Practice of the NASD with the force of law. Assuming, for the moment, that Respondents could demonstrate that such provision existed, Respondents would also be required to demonstrate that this action was in conflict with that law. This they cannot do. Respondents continually and disingenuously assert that Respondents were put in the position of disobeying state law or complying with the NASD rules of fair practice. The Division has repeatedly contended that such is not the case; that Respondents were pursuing a course of conduct which would necessarily involve a violation of state law on the part of another individual and that the primary justification for Respondents engaging in the conduct was monetary gain - not compliance with the NASD Rules of Fair Practice. Additionally, Respondents continually assert that the Rule of Fair Practice with which they were bound to comply is the rule regarding the honoring of outstanding contracts with other broker-dealers. The Division has repeatedly countered that the principal reason for the transaction engaged in by the Respondents was to remedy the firm's extensive problems with regard to its net capital which were called into question by the NASD when Respondents voluntarily engaged in short selling of

U.S.A. Medical securities. Admittedly, the respondents have extensively briefed the issue of whether or not this proceeding is, in conflict with federal law and is therefore, preempted under the Supremacy Clause of the United States Constitution. The vigor with which the Respondents have undertaken to continue to argue this point does not give credence to the Respondents' argument. The administrative law judge having had a complete opportunity to hear the arguments of both sides and read the briefs in connection therewith determined in the August 29th Order that "any necessary compliance by respondents with NASD rules is a member of that self-regulatory organization does not lend support to the conclusion that the Division lacks subject matter jurisdiction in this case."

There is no basis for the Respondents' position that the rules of fair practice of the NASD supply a regulatory scheme of such a nature and extent that state regulation with regard to this proceeding is preempted by the Supremacy Clause of the United States Constitution. Additionally, counsel for the Division is familiar with the cases cited by Respondents in support of their contention that the Division's action gives rise to "dormant" commerce clause concerns. Counsel has not demonstrated in his brief, or in the hearing before the Administrative Law Judge, that there is any burden imposed interstate commerce as a result of this action. If such a burden

could be shown, that burden, under Edgar v. Mite Corp. 457 U.S. 624 (1981) and Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), must be shown to outweigh the competing state interest in the institution of these proceedings. In reply to the "dormant" commerce clause argument, the Division would simply state that the interest of the state in containing the further distribution of U.S.A. Medical stock, in light of Judge Green's order, would significantly out weigh the Respondents' interest in complying with the rules of any self-regulatory organization. In the determination of the "dormant" commerce clause issue, the finder of fact would necessarily have to take into consideration the true motivation of the Respondents in acting as they did. Clearly, the financial motivation cannot be disregarded as the chief motivator in the Respondents determination to participate materially in violation of state law. Of course, the finder of fact may determine that compliance with the NASD regulations may have caused the Respondents serious financial hardship. However, the Respondents, and this is in accordance with the findings of Judge Green, were not altogether blameless for their financial situation. The Respondents cannot in good faith claim that the instant proceedings impose a significant burden on the gigantic and all encompassing interests of interstate commerce. The arguable impact of the instant proceedings is microscopic compared to the impact in Edgar and Bruce Church. In Edgar, the

U.S. Supreme Court grappled with the issue of whether a state's tender offer statute could preclude a nationwide tender offer. The court in Edgar was particularly concerned with the vast discretion that lay in the hands of the Illinois Secretary of State. The statute would allow the Secretary to effectively exercise that discretion to prohibit these vast tender offer transactions in interstate commerce.

Pike v. Bruce Church dealt with the ability of a state to require fruit packing facilities to be built in Arizona and inhibited the interstate transportation of fruit which was not packaged within the boundaries of the state. Both those cases held that the state's various interests paled by comparison to the significant burdens the respective statutes imposed on interstate commerce. In this proceeding, however, the Division is dealing with the dishonest and unethical conduct on the part of two of its state licensees. No evidence has been introduced at hearing or in Respondents' memorandum and supporting documents to lead a finder of fact to reasonably conclude that there is any sizeable burden on interstate commerce threatened by the Division's action in this proceeding.

#### CONCLUSION

Though there may have been a considerable financial burden upon the Respondents by the operation of the NASD Rules of Fair Practice and the net capital requirements of both state and

federal agencies, the risk of those financial burdens were voluntarily undertaken by the respondents when they engaged in short sales of the U.S.A. Medical Stock. Additionally, those financial burdens do not justify knowing and material participation in a violation of State law. It simply cannot be said that the effects of this proceeding reach beyond the Respondents into the vast arena of interstate commerce raising constitutional commerce clause issues. Nor have the Respondents shown a conflict with federal laws or regulatory schemes sufficient to provide a basis for preemption of this proceeding.

It is urged that the Division rely upon the opinion of the Administrative Law Judge with respect to these issues and deny Respondents' request for review of these issues at this time, noting that the Respondents may raise these very same issues in any appeal of the Division's Final Order in this matter.

Finally, the Respondents' Request for a Hearing in this matter will likely result in significant delay of this proceeding and, particularly in light of the insubstantial arguments supporting the Request for Review, such a hearing is not warranted on the issues presented.

DATED this \_\_\_\_ day of September, 1989.

---

MARK J. GRIFFIN  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the above and foregoing Brief in Reply to Respondents Request for Agency Review and Hearing was mailed, postage pre-paid on this 21 day of September 1989 to the following:

John Michael Coombs  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111

by 

JOHN MICHAEL COOMBS, ESQ., No. 3639  
72 East 400 South, Ste. 220  
Salt Lake City, UT 84111  
Telephone: (801) 359-0833  
Attorney for Petitioners

Nov 2 1989  
The Honorable  
*Paul H. Sawaya*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

JOHNSON-BOWLES COMPANY, INC., a  
Utah corporation and MARLEN V.  
JOHNSON,

Petitioners,

v.

JOHN C. BALDWIN, Director,  
Securities Division of the  
Department of Commerce, State  
of Utah, and M. TRUMAN BOWLER,  
KENT BURGON, DAVID HARDY,  
MARGARET WICKENS, and KEITH  
CANNON, members of the Securities  
Advisory Board overseeing the  
Securities Division,

Respondents

MOTION TO REINSTATE OCTOBER  
27, EXTRAORDINARY WRIT AND  
ORDER

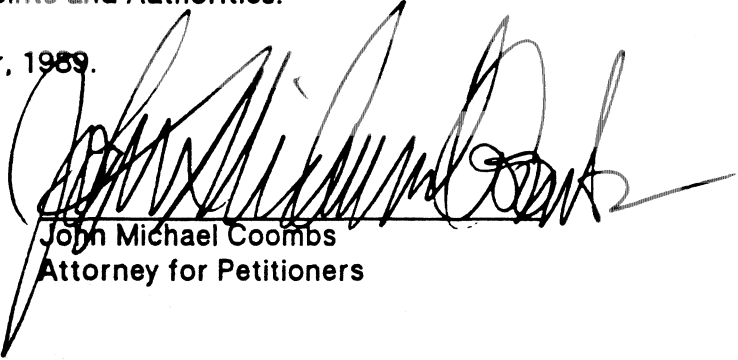
CASE NO. 890906506CV

Judge Sawaya

Petitioners, by and through their counsel, hereby move the Court for an Order **Reinstating** the Court's Extraordinary Writ and Order dated October 27, 1989, an order which would have the effect of vacating Respondents' November 1, 1989, Ex Parte Order **Setting Aside** Extraordinary Writ. The basis for this Motion is that the Respondents' November 1, 1989, Counter-Petition is misleading and a misstatement of the law and the facts. For this reason, the October 27, Writ and Order of this Court should be reinstated. Further, the Respondents' Ex Parte Counter-Petition evidences that Respondents acted in

knowing contempt of Court on October 30, 1989, regardless of whether this Court subsequently set the October 27, Order aside. In support of this Motion, Respondents herewith file a Supporting Memorandum of Points and Authorities.

DATED this 2nd day of November, 1989.



John Michael Coombs  
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 1989, (s)he hand-delivered a true and correct copy of the foregoing MOTION TO REINSTATE OCTOBER 27, EXTRAORDINARY WRIT AND ORDER to Mark J. Griffin, Esq., Assistant Attorney General, located at 115 State Capitol, Salt Lake City, Utah 84114; and mailed, postage prepaid to Craig F. McCullough, Esq., Co-Counsel for Petitioners, located at 10 East South Temple, Suite 800, Salt Lake City, Utah 84133, JOHN C. BALDWIN, Director of Securities Division, located at 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; and to M. TRUMAN BOWLER, Securities Advisory Board Member, located at 124 South 200 East, St. George, Utah 84770, KENT BURGON, Securities Advisory Board Member, located at 60 East South Temple, Salt Lake City, Utah 84111; DAVID E. HARDY, Securities Advisory Board Member, located at 215 South State Street, Suite 900, Salt Lake City, Utah 84111-2309; MARGARET WICKENS, Securities Advisory Board Member, located at 376 East 400 South, Suite 200, Salt Lake City, Utah 84111; and KEITH CANNON, Securities Advisory Board Member, located at 115 South Main Street, Salt Lake City, Utah 84111.

L:MOTION.1





Tab A

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

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In the Matter of the	:	<b>FINDINGS OF FACT</b>
Registration of	:	<b>CONCLUSIONS OF LAW</b>
Johnson-Bowles Company, Inc.	:	<b>AND ORDER</b>
CRD No. 7678	:	Case No. SD-89-46BD
	:	
In the Matter of the	:	
Registration of	:	
Marlen Vernon Johnson	:	
CRD No. 259888	:	Case No. SD-89-47AG

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**Appearances:**

Mark J. Griffin and Kathleen C. McGinley for the Division of Securities

John Michael Coombs and Craig F. McCullough for Respondents

**BY THE SECURITIES ADVISORY BOARD:**

The above entitled matter came on regularly for hearing on July 16, 1990 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Securities Advisory Board. Four (4) members of the Board were present for the hearing, to wit: Keith Cannon, Kent Burgon, Margaret Wickens and Truman Bowler. Thereafter, evidence was offered and received.

The Board, being fully advised on the premises, now submits the following Findings of Fact, Conclusions of Law and Order to John C. Baldwin, Director of the Division of Securities, for his review:

**FINDINGS OF FACT**

1. **Respondents** Johnson-Bowles Company, Inc. and Marlen

Vernon Johnson are, and all times relevant to these proceedings have been, registered with the Division of Securities as a broker-dealer and agent, respectively. Respondent Marlen Vernon Johnson is the President of Respondent Johnson-Bowles Company, Inc.

2. As of January 22, 1989, Respondent Johnson-Bowles Company, Inc. was short 53,500 shares of the securities of U.S.A. Medical Corporation, a Wyoming corporation. On January 23, 1989, U.S.A. Medical Corporation effected a 10 for 1 forward split, which increased Respondent Johnson-Bowles Company, Inc.'s short position to 535,000 shares. Following the just-described forward split, the price of U.S.A. Medical Corporation stock rapidly increased to approximately \$1 per share.

3. During February 1989, Respondent Marlen Vernon Johnson had furnished information to the Division as to the problems associated with U.S.A. Medical Corporation and its securities. On February 6, 1989, Respondent Johnson-Bowles Company, Inc. received notice from Oтра Clearing, Inc. of the latter's buy-in of 150,000 shares of U.S.A. Medical Corporation securities at \$.10 per share and that Respondent Johnson-Bowles Company, Inc. had until February 15, 1989 to make delivery of those securities. As of February 14, 1989, the price of those securities had risen to approximately \$10 per share.

4. By letter, dated February 15, 1989, Respondent Marlen Vernon Johnson informed Oтра Clearing, Inc. that Respondent Johnson-Bowles Company, Inc. would not honor the buy-in notice because it (Respondent Johnson-Bowles Company, Inc.) considered

U.S.A. Medical Corporation common stock to be unregistered securities and it declined to "engage or participate in an unlawful distribution of unregistered securities".

5. On February 16, 1989 Respondent Johnson-Bowles Company, Inc. filed a 10b-5 securities fraud action in Federal District Court seeking a preliminary injunction and declaration that Respondent Johnson-Bowles Company, Inc.'s outstanding contracts and obligations to certain brokerage firms and clearing corporations, to whom Respondent Johnson-Bowles Company, Inc. owed U.S.A. Medical Corporation securities, were void for illegality. In the just-described action, Respondent Johnson-Bowles Company, Inc. alleged improprieties and fraud in the issuance and trading of U.S.A. Medical Corporation securities.

6. On February 17, 1989, the Court in the just-referenced litigation granted Respondent Johnson-Bowles Company, Inc.'s motion for a temporary restraining order as to Midwest Clearing Corporation, thus preventing Midwest Clearing Corporation from effecting any "buy-ins" for ten (10) days as against Respondent Johnson-Bowles Company, Inc. A hearing on the pending motion for a preliminary injunction was conducted on February 27-28, 1989. The Court denied that motion, but found as follows:

"...the stock of U.S.A. Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

The stock of U.S.A. Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially

inflate the price of that stock in violation of the securities laws."

7. On March 1, 1989, the Division issued a summary order suspending all Section 14(2) exemptions under the Utah Uniform Securities Act relative to U.S.A. Medical Corporation securities. Also on March 1, 1989, Respondent Johnson-Bowles Company, Inc. received notice from Otra Clearing, Inc. of the latter's buy-in of 150,000 shares of U.S.A. Medical Corporation securities.

8. On March 6, 1989, the U.S. Securities and Exchange Commission suspended trading in the securities of U.S.A. Medical Corporation for ten (10) days. By letter, dated March 21, 1989, Respondent Marlen Vernon Johnson advised the National Association of Securities Dealers (NASD), Inc. of the March 1, 1989 notice from Otra Clearing and stated as follows:

"On March 1, 1989 at 2:00 p.m. (MST), Otra Clearing called, buying-in 150,000 shares of U.S.A. Medical Corp. The buy-in price was \$.70 based on guaranteed delivery of 148,000 (P.B. Jameson, seller) and the buy-in price of \$.50, 2,000 shares (R.A. Johnson, seller). See attached confirmation of Execution of Buy-ins:

It is Johnson-Bowles Company, Inc.'s position that these buy-ins were illegal. First, shares of stock in U.S.A. Medical Corp. were unlawfully issued, were never lawfully registered and do not qualify for any valid exemption under federal or state law. As such, any trading of or transaction involving U.S.A. Medical stock has been, would have been and is unlawful under Section 5 of the Securities Act of 1933, 15 U.S.C. §77e, and Section 10 of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b).

Second, all open trades or outstanding contracts for the purchase or sale of shares of stock in U.S.A. Medical Corp. are illegal contracts

and therefore unenforceable. The enforcement or performance of any and all such open trades or contracts would constitute and serve to complete illegal trades and unenforceable contracts. This would violate securities laws."

Respondent Marlen Vernon Johnson sent the just-stated letter to prompt the initiation of an NASD arbitration proceeding with respect to the dispute concerning the buy-in of U.S.A. Medical Corporation securities by Otra Clearing, Inc.

9. On March 29, 1989, the Division's March 1, 1989 Summary Order was made permanent by default. Respondents received copies of the Division's March 1, 1989 and March 29, 1989 Orders on or about the date of their respective issuance.

10. As of March 1, 1989, Respondent Johnson-Bowles Company, Inc. owed several hundred thousand shares of U.S.A. Medical Corporation securities to several broker-dealers and clearing corporations. Sometime after the just-stated date, Respondents purchased a total of 397,900 shares of U.S.A. Medical Corporation securities from six (6) Utah residents and one (1) New York resident. The Utah residents and the amount of shares so purchased were: Paul Jones (180,900), Nick Julian (69,500), Leo Pavich (67,500), Jim Coleman (30,000), Philip Tanzani (20,000) and Richard Sax (18,000). The New York resident was Sheldon Flateman (12,000). Respondents purchased U.S.A. Medical Corporation securities as the means to satisfy outstanding contracts for the delivery of those securities to several broker-dealers and clearing corporations.

11. Prior to Respondents' purchase of U.S.A. Medical Corporation securities from the above-named seven individuals,

Respondent Marlen Vernon Johnson informed Mr. Julian, Mr. Pavich, Mr. Coleman, Mr. Tanzani and Mr. Sax of the February 28, 1989 ruling which had been entered by the Court in the previously-referenced security fraud action and the March 1, 1989 and March 29, 1989 Orders entered by the Division. Mr. Flateman and Mr. Jones, who were both registered NASD representatives, were also aware of the Federal Court ruling and the Division's Orders. Prior to March 1, 1989, Mr. Jones, a licensed securities agent with Wasatch Stock Trading, was involved with the trading of U.S.A. Medical Corporation securities.

12. During April 1989, Respondent Marlen Vernon Johnson was informed by a Karl Smith that a John Dawson had U.S.A. Medical Corporation securities which Mr. Smith believed Mr. Dawson was desirous of selling. Based on that information, Respondent Marlen Vernon Johnson contacted Mr. Dawson to determine if he was interested in selling those securities. No sale resulted and the conversation between Respondent Marlen Vernon Johnson and Mr. Dawson did not constitute a violation of the Division's March 1989 Order. Further, there is no sufficient evidence to find that Respondents or their agents solicited any of the above-named seven (7) individuals to sell their U.S.A. Medical Corporation securities.

13. Given the price which Respondents sold U.S.A. Medical Corporation securities prior to entry of the March 1, 1989 Order and the subsequent price which Respondents paid the above-named seven (7) individuals to purchase said securities after March 1,

1989, Respondents realized a profit totalling \$6,538 in that regard to thus deliver those securities to satisfy existing contracts with various broker-dealers and clearing corporations.

14. On March 20, 1990, Respondent Marlen Vernon Johnson purchased 54,000 shares of U.S.A. Medical Corporation securities from Mr. Sax. During the instant proceeding, Respondent testified that he purchased those securities for an entity known as the January Corporation as the means to possibly satisfy a pending NASD arbitration proceeding between Respondent Johnson-Bowles Company, Inc. and Oтра Clearing, Inc. regarding the March 1, 1989 buy-in of U.S.A. Medical Corporation securities by Oтра Clearing, Inc. On March 29, 1990 Respondent Marlen Vernon Johnson - through the January Corporation - sold the 54,000 shares to a firm known as Sorenson, Chiddo & May.

15. Sometime within the last two (2) months, Respondent Johnson-Bowles Company, Inc. filed a Form BDW with the Division to request that its' broker-dealer registration be withdrawn. Said request was denied, given the pending disciplinary proceeding as to that registration.

#### CONCLUSIONS OF LAW

Respondents contend they did not engage in any dishonest or unethical conduct and that no disciplinary sanction should enter with regard to their registration as a securities broker-dealer and agent, respectively. Specifically, Respondents assert that: (1) the Division's March 1, 1989 Order prevented only the sale of U.S.A. Medical Corporation securities; (2) Respondents purchased



those securities to satisfy existing contracts to thus deliver the securities to various broker-dealers and clearing corporations; and (3) Section 61-1-6(1)(g), Utah Code Ann. 1953 (as amended), quoted below, may not be applied to interfere with Respondents' attempts to honor their contractual obligations to such third parties.

Respondents urge that the Division has taken no action against other individuals who may have participated in the purchase or sale of U.S.A. Medical Corporation securities after entry of the March 1, 1989 Order. Respondents also contend that the imposition of any sanction in this proceeding would be inconsistent with their duty to have complied with NASD requirements which prompted their purchase of the securities in order to avoid entry of a possible sanction with regard to their NASD affiliation.

Section 61-1-6(1) provides as follows:

"Upon approval by a majority of the Securities Advisory Board, the director...may issue an order...suspending, or revoking any registration,...if the director finds that it is in the public interest and if he finds...with respect to the...registrant or, in the case of a broker-dealer..., any partner, officer, or director or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer..., that such person:

(g) engaged in dishonest or unethical practices in the securities business..."

To be further noted is Section 61-1-7, which provides:

"It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14."

The proper scope and operative effect of the March 1, 1989 Order

entered by the Division was to prohibit any trading of U.S.A. Medical Corporation securities within this state. Since those securities were neither registered nor exempt from registration and had been traded in a fraudulent scheme designed to manipulate the price of those securities, the just-stated order was duly entered to protect the public interest. It is specious to argue, as Respondents assert, that the order only prohibited the sale of U.S.A. Medical Corporation securities. Given the unlawful issuance of those securities and that the subsequent trading of those securities was tainted by fraudulent and manipulative practices, the proper scope of the March 1, 1989 Order must be broadly interpreted and in a manner consistent with the purpose for the issuance of that order.

Concededly, Respondents had an existing contractual obligation to deliver U.S.A. Medical Corporation securities to various broker-dealers and clearing corporations prior to the entry of the March 1, 1989 Order. It is obvious that Respondents elected to trade in the securities at issue in an effort to mitigate their "short" position, avoid potentially severe economic consequences and escape the entry of a possible sanction on their NASD membership. Under the circumstances, no other alternative existed to thus foster Respondents' economic interests and the motivation for their conduct is clearly understandable.

Nevertheless, Respondents purchased U.S.A. Medical Corporation securities after March 1, 1989 with knowledge that a sale of those securities would constitute a violation of the March 1, 1989 Order.

Such conduct clearly constitutes a "dishonest or unethical practice" within the meaning of Section 61-1-6(1)(g) and provides a sufficient basis upon which to enter a disciplinary sanction as to Respondents' registration.

Regardless of the factors which prompted Respondents purchase of U.S.A. Medical Corporation securities, that conduct frustrated the Division's appropriate efforts to preclude trading in those securities and thus partially emasculated the effect of the March 1, 1989 Order. While the record does not identify when Respondents purchased U.S.A. Medical Corporation securities after March 1, 1989, any delay between entry of the March 1, 1989 Order and Respondents' subsequent purchase of the securities appears to be more reflective of the common knowledge that the price of those securities would decrease after entry of the March 1, 1989 Order rather than any intended compliance by Respondents with that order.

Respondents' contention that the Division has engaged in selective enforcement of the March 1, 1989 Order lacks serious merit. The Board notes that a disciplinary proceeding has been initiated as to Mr. Jones. It is unknown whether any disciplinary proceeding may be subsequently initiated as to Otra Clearing, Inc., P.B. Jameson, R.A. Johnson or any of their agents with regard to the buy-in notice issued to Respondents by Otra Clearing, Inc. In any event, the fact remains that Respondents engaged in misconduct which subjects them to entry of a disciplinary sanction regardless of whether other proceedings are initiated by the Division as to other entities or individuals.

Given the circumstances of this case, it may well have been impossible for Respondents to have either satisfied their existing contractual obligations to various broker-dealers and clearing corporations and avoid the subsequent entry of a disciplinary sanction in the proceeding or to have scrupulously avoided trading in U.S.A. Medical Corporation securities and escape possible action on their NASD membership. However, the existence of that dilemma does not support Respondents' assertions that their duty to comply with the March 1, 1989 Order was inferior and subordinate to their satisfaction of any NASD requirements and that no disciplinary sanction can enter in this forum because they could have been potentially subject to adverse NASD action if they did not satisfy their contractual obligations to third parties.

Concededly, there is no evidence that Respondents' violation of the March 1, 1989 Order resulted in any harm to the investing public. Nevertheless, entry of a disciplinary sanction in this proceeding is in the public interest and clearly warranted due to Respondents' non-compliance with the March 1, 1989 Order which was duly entered to regulate the trading of U.S.A. Medical Corporation securities. The record reflects that Respondents' dishonest and unethical conduct was driven by a desire to realize monetary gain and/or avoid financial loss and that Respondents' willingness to engage in trading the securities shifted over time, depending upon whatever would promote Respondents' economic interests. Adherence to orders duly entered by the Division which govern the practices of broker-dealers and agents engaged in the securities business

should not be a matter dictated by the potential for monetary gain. By reason of the serious nature of Respondents' misconduct, an appropriately severe sanction should be entered.

ORDER


WHEREFORE, IT IS ORDERED that the registration of Respondent Johnson-Bowles Company, Inc. as a broker-dealer in the State of Utah and the registration of Respondent Marlen Vernon Johnson as an agent in this state shall be suspended for one (1) year.

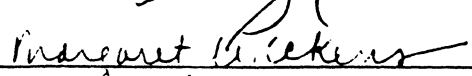
It is further ordered that said suspensions shall be deemed retroactively effective from the date that Respondent Johnson-Bowles Company, Inc. filed its' Form BDW with the Division of Securities.


It is further ordered that, upon expiration of the period of suspension set forth above, Respondents' registration shall be placed on probation for two (2) years. Should Respondents fail to comply with the statutes and rules which govern their registration during that time, further proceedings shall be conducted and a determination made whether a sanction of greater severity than that set forth herein is warranted.

Dated this 10th day of August, 1990.

  
Keith Cannon

  
Kent Burgon

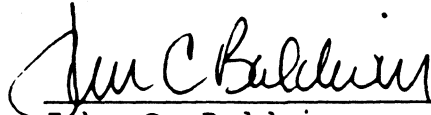
  
Margaret Wickens

  
Truman Bowler

BY THE DIRECTOR:

The foregoing Findings of Fact, Conclusions of Law and Order are hereby approved. Said Order shall become effective thirty (30) days from the date set forth below.

Dated this 13<sup>th</sup> day of August, 1990.



John C. Baldwin  
Director

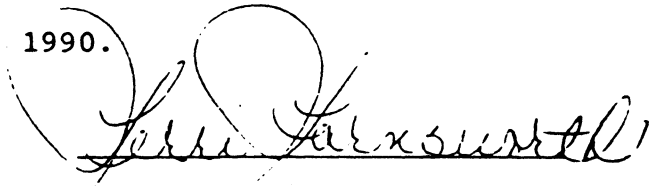
Administrative Review of this Order may be obtained by filing a Request for Review within thirty (30) days after the issuance of this Order. Any request for a review shall comply with the requirements set forth in Sections 61-1-23, 63-46b-12(1) and the departmental rules which govern agency review.

Judicial Review of this Order may be obtained by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any petition for such Review shall comply with the requirements set forth in Section 63-46b-16.

# CERTIFICATE OF SERVICE

I hereby certify that I have this day hand-delivered the foregoing Findings of Fact, Conclusions of Law and Order properly addressed to: Mark J. Griffin, Assistant Attorney General for the Division of Securities at Tax & Business Regulation Division, 130 State Capitol, Salt Lake City, Utah 84114; Kathleen C. McGinley, Director, Broker/Dealer Section, Division of Securities, Department of Commerce; Steven J. Eklund, Administrative Law Judge, Department of Commerce; John Michael Coombs, 72 East 400 South, Suite 220, Salt Lake City, Utah 84111; and mailed postage prepaid to: Craig F. McCullough, Callister, Duncan & Nebeker, 8th Floor, Kennecott Building, 10 East South Temple, Salt Lake City, Utah 84113, co-counsel for Respondents.

Dated this 13<sup>th</sup> day of August, 1990.

A handwritten signature in dark ink, appearing to read "John Michael Coombs", is written over a horizontal line. The signature is fluid and cursive.