

1990

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN AND BEFORE THE UTAH

NO. 900210-CA COURT OF THE APPEALS

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.

APPELLANTS' BRIEF

CASE NO. 900210-CA

Rule 29(b)(15) Priority

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

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FILED

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(j), as amended, 1990.

STATEMENT OF ISSUES

1. Whether the trial court erred in not reinstating its October 27, 1989, Extraordinary Writ and Order which compelled all Appellees to grant and otherwise resolve the issues presented in Appellants' Requests for Agency Review. (See Exhibits "B", "C", "E", "U", and "V", Appendix hereto.)

2. Whether Appellants had the right to seek and obtain an Extraordinary Writ and Order under Rule 65B from the district court -- one which should not have later been secretly set aside under Rule 7(b)(2), Utah Rules of Civil Procedure, without either notice to Appellants or an opportunity to be heard. (Exhibit "R", App. hereto.)

3. Whether a Utah district court has the power and authority to compel the Securities Division, a Utah government agency, to abide by its own agency rules and the UAPA.

4. Whether Appellees committed contempt of the district court by ignoring its Extraordinary Writ and Order on October 30, 1989, and hurriedly issuing an Order on Agency Review in violation thereof. If so, whether there is any relief or remedy presently available to Appellants for Appellees' contempt of the district court. (See Exhibits "E" and "H", App. hereto.)

5. Whether it is Constitutional for Securities Division Director John C. Baldwin to exercise investigatory and prosecutorial powers and, at the same, render judicial functions (as "presiding officer") by unilaterally, arbitrarily, hastily, and capriciously denying, on October 30, 1989, Appellants' Requests for Agency Review under §12, UAPA. (See Exhibits "D", "O", "H" and "I", Appendix hereto.) If such is unconstitutional, whether the district court erred in not dismissing the Division's amended petitions. (See Exhibit "S", App. hereto.)

6. Whether the Securities Advisory Board, which was not engaged in investigatory and prosecutorial functions like Appellee Baldwin, should have acted as the "presiding officer" under §12 of the UAPA as opposed to Appellee Baldwin alone. In other words, did Baldwin (or the Division) commit contempt of the district court or otherwise violate the lower court's Writ and Order by unilaterally acting as "presiding officer" on October 30, 1989. (See Exhibits "E", "F", and "H", App. hereto.)

7. Whether §12 of the UAPA only contemplates "final agency action" as specifically provided in §14 of the UAPA, especially when neither §12 nor the corollary rule say such on their face. Whether §12 is identical to §14, UAPA, and therefore statutorily superfluous.

8. Whether Appellants have any remedy or relief presently available to them for the Appellees' violations of §12, UAPA, and the Department of Commerce corollary rule.

9. Whether it is Constitutional for Appellee Baldwin to continue to act as judge (i.e., agency director and "presiding officer") for purposes of reviewing any "final agency action" in this case. In other words, whether it is just and fair for "presiding officer" Baldwin to "sign off" on, modify, or approve the ultimate findings of the Securities Advisory Board in the on-going administrative adjudicative proceedings. Whether someone unbiased and impartial (i.e., someone other than any of the Appellees) should act as "presiding officer" in the administrative adjudicative proceedings after October 30, 1989.

10. Whether it is inherently prejudicial or unconstitutional for the prosecutor, the judge(s), jury, and executioners to be represented by the same counsel (i.e., the Attorney General) at the same time in the same administrative proceeding. If so, whether there is any remedy or relief presently available to Appellants for such blatant conflict of interest.

11. Whether the Utah Securities Division has power and authority to enforce regulation against Appellants which is diametrically inconsistent with existing federal law, specifically, Appellants' contrary legal obligations under Article III, §1, NASD Rules of Fair Practice. (See Exhibits "K", "L", and "P", App. hereto.) Whether the NASD Rules of Fair Practice, in light of Utah Code Ann. §61-1-27, preempt Utah Code Ann. §61-1-6(1)(g) under the highly unusual facts and

circumstances of this case. If so, whether the administrative adjudicate proceedings should be dismissed in their entirety.

A. Standard of Review. The standard of review for each of the foregoing issues is simply whether the district court incorrectly applied the law or otherwise abused its discretion.

DETERMINATIVE CONSTITUTIONAL PROVISIONS

The due process provisions of the federal Constitution and the Constitution of the State of Utah, are determinative of this case. Specific reference is also made to the U.S. Supreme Court case of Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), a significant administrative law decision which does not appear to have been cited in any previous Utah decision. This case also involves issues of federal preemption and reference is made to Point IV below, including this Court's decision in Western Capital & Securities, Inc. v. Kundsvig, 779 P.2d 688, 113 Utah Adv. Rep. 53, (Ut. Ct. of App. February 7, 1989) [1989 Transfer Binder] Fed.Sec.L.Rep.(CCH) ¶94,337. Finally, Appellee Baldwin and the Attorney General's inherent (and continuing) conflicts of interest in the administrative proceedings relating to this appeal are issues having Constitutional implications.

STATEMENT OF THE CASE

(a) Nature of the case. This case is one of first impression in Utah; it involves an interpretation of Utah Code Ann. §63-46b-12 (the "UAPA") and the corollary rule promulgated

by the Department of Commerce. It further involves a determination as to whether Appellants' Constitutional rights were and are being violated by Appellees, thereby justifying complete dismissal of the administrative adjudicative proceedings. This case also involves a determination as to whether Appellees' violation of §12, UAPA, have prejudiced and otherwise violated Appellants' Constitutional rights to the extent of further justifying either dismissal of the existing administrative adjudicative proceedings or other comparable relief such as a new administrative trial before impartial judges.

The Appellees have also raised issues as to whether the district court has jurisdiction to have heard Appellants' Petition for Extraordinary Writ. Thus, an additional issue is whether the district court erred in deciding -- after the fact -- that it lacked jurisdiction to compel Appellees not to act capriciously and arbitrarily with respect to Appellants. Finally, the most significant issue in these proceedings is whether the Division has jurisdiction to have brought the administrative adjudicative proceedings at all -- proceedings entirely inconsistent, on their face, with Appellants' federal obligations under Art. III, §1 of the NASD Rules of Fair Practice. (See Exhibits "J", "K", and "S", App. hereto.)

(b) Course of proceedings. Based on the district court's failure to reinstate its October 27, 1989, Extraordinary

Writ and Order, the administrative adjudicative proceedings have continued in violation of Appellants' Constitutional rights.¹ For example, on July 16, 1990, after nearly 1½ years of relentless litigation, an administrative trial was held before the Securities Advisory Board. No ruling as a result of such hearing has been rendered to date. Yet the continuation of such administrative adjudicative proceedings after October 27, 1989, has been at great and substantial expense and damage to Appellants and had the district court and the ALJ not erred, such unlawful proceedings would not have continued.

RELEVANT FACTS

In April 1989, the Utah Division of Securities ("Division") filed administrative adjudicative proceedings against Appellants seeking to revoke or suspend their securities brokerage licenses under Utah Code Ann. §61-1-6. Such petitions were amended by the Division in July 1989 to delete one of three causes of action alleged against Appellants. In December 1989, the ALJ, in response to a Rule 12(b)(6) motion of Appellants, dismissed Count II of such amended petitions, a Division allegation that Appellants' conduct violated so-called "suitability rules." This resulted in the amended petitions only stating a claim against Appellants for alleged "dishonest or unethical practices" under §61-1-6(1)(g). (Exhibits "M" and "S",

¹This naturally includes Appellants' Constitutional rights under the Commerce Clause of the U.S. Constitution, Art. I, §8(3) and §8(18).

App. hereto.) In the amended petitions the Division alleges that simply buying securities from persons who lacked Utah exemptions from registration (no matter what the purpose) was a "dishonest or unethical practice" on the part of the buyers (i.e., Respondents). Because the Division's proceedings are legally and logically inconsistent with Appellants' Securities and Exchange Commission ("SEC") and National Association of Securities Dealers, Inc. ("NASD") obligations under the Securities Exchange Act of 1934 and, because such are further inconsistent with a previous February 28, 1989, Order of U.S. District Judge J. Thomas Greene compelling Appellants to honor outstanding NASD contracts [R. 63; page 4, ¶10, Exhibit "T" and R. 33-34; p. 8-9, ¶'s 15 and 16, Exhibit "J", App. hereto], Appellants filed a Rule 12(b)(1) Motion to Dismiss the Division's amended petitions. In such Motion, Appellants argued before the ALJ that the Division lacked jurisdiction to discipline them simply for complying with their obligations under federal law. Specifically, Appellants argued that the Division's amended petitions were repugnant to federal securities law as exclusively reserved to District Courts of the United States under §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa. In other words, Article III, §1 of the NASD Rules of Fair Practice -- which are, in turn, exclusively governed under §19(c) of the Exchange Act [Exhibit "K", App. hereto] -- compels a broker-dealer to honor trades, whereas the Division's amended petitions sought to discipline

Appellants -- at the same time -- merely for honoring the very same trades. (See In re: Shaskan & Co., Inc., SEC Docket 775 (May 28, 1976) and Friedman & Co., 45 SEC 393 (1973), both holding that broker-dealers can be disciplined and their licenses revoked under the NASD Rules of Fair Practice for failing to honor trades.) Simply put, the Division sought to discipline Appellants for doing something they were required to do under federal law (i.e., honoring outstanding NASD contracts previously entered into in interstate commerce with fellow out-of-state NASD member securities broker-dealers). (See Exhibit "J" and "Q", App. hereto.) As a result, Appellants are now being severely punished and otherwise placed in the impossible position of having had to comply at the same time with antithetical and diametrically conflicting regulation on the part of the NASD, on the one hand, and the Division, on the other. [Emphasis added.] Significantly, this preemption principle (i.e., that federal securities law supersedes state blue sky law (more especially with respect to broker-dealer regulation)) is specifically incorporated into Utah law in Utah Code Ann. §61-1-27. (See Exhibit "N", App. hereto.) This statute requires that the Utah Uniform Securities Act be interpreted in uniformity and consistently with federal law, of which the NASD Rules of Fair Practice necessarily have the same force and effect. (See, e.g., Exhibit "L", App. hereto and this Court's decision in Western Capital, supra.) With regard to this

*argument, specific reference is made to pages 28-36 of the Record, Appellants' "Statement of Material Facts" in their Brief Supporting Agency Review.*² (Exhibit "J", App. hereto.)

The Administrative Law Judge ("ALJ") denied Appellants' Rule 12(b)(1) Motion on August 29, 1989. (R. 72-76; Exhibit "A", App. hereto.) As a result, on September 11, 1989, pursuant to Utah Code Ann. §63-46b-12, including the corollary Department of Commerce Rule, Appellants timely filed a Request for Agency Review of that order. (R. 8-12; Exhibit "B", App. hereto.) Appellants further filed, alternatively, a Request for *Certification of the ALJ's August 29, Order as a "final agency action"*. (R. 19-20; Exhibit "C", App. hereto.) Obviously, if the Division either lacks jurisdiction or its action is preempted as contemplated in Western Capital, there is no legal basis for the existence of such administrative adjudicative proceedings. Thus, Appellants' §12, UAPA, Request for Agency Review and alternative Request for Certification were more than reasonable under the circumstances.

Between September 11, and October 27, 1989, Petitioners heard nothing from the Division relative to such Requests as specifically required of the Division under Department of

²Reference is further made to Exhibits "P" and "Q", Appendix hereto, copies of pertinent parts of §15A of the Securities Exchange Act of 1934 which exclusively governs self-regulatory securities organizations such as the NASD and, Securities Exchange Act Release No. 34-7920, July 19, 1966, 31 F.R. 10076, an SEC policy statement permitting consummation of securities transactions by broker-dealers when trading in a security is suspended. This latter authority further confirms that the Division's amended petitions are inconsistent on their face with federal law and policy. See Point IV below.

Commerce R151-46b-12. (R. 139, 163, 193-194; Exhibit "D", App. hereto.) Because an Order on Review was never issued as required under the Rule, Appellants, on October 27, 1989, filed an Ex Parte Petition for Extraordinary Writ in the Third Judicial District Court and obtained, on that same date, an Extraordinary Writ and Order directing the Respondents/Appellees to comply with the Division's own rules and either (1) grant the Appellants' Request for Agency Review and resolve all issues therein, or (2) certify the ALJ's August 29, 1989, Order as a "final agency action". (R. 91-92; Exhibit "E", App. hereto.) Such Order and Writ were served on each Appellee named herein no later than October 30, 1989, and in fact, 4 of the 5 Appellee/Securities Advisory Board Members were served by hand-delivery on October 27, 1989. (R. 93-94; Exhibit "F", App. hereto.)

On November 1, 1989, Appellees -- in apparent reliance on Rule 7(b)(2), Utah Rules of Civil Procedure -- secretly filed their own Ex Parte Counter-Petition with the district court and, without any notice to Appellants or their counsel, secretly induced the district court ex parte (and for reasons wholly unknown) to set aside its previously-entered Writ and Order of October 27, 1989. (R. 103-104; Exhibit "G", App. hereto.)³ The Appellees' Counter-Petition, was then served on Appellants'

³This gives rise to another issue: If the Securities Advisory Board is and would be acting as Appellants' judge and jury after October 30, 1989 -- which they did on July 16, 1990 -- how can the Securities Advisory Board members, in light of what has occurred herein, be able to act as impartial judges and jurors?

counsel the following day, namely, November 2, or, six (6) days after 4 of the named-Appellees were personally served with the district court's Writ and Order. In such Ex Parte Counter-Petition, Appellees boldly argue that the district court lacks jurisdiction to force Appellees to comply with the very rules governing the Division. (R. 105-112.) As per such Ex Parte Counter-Petition, the Appellees further acknowledge that they received and were all on actual notice of the district court's October 27, 1989, Extraordinary Writ and Order by as early as October 30, 1989. Furthermore, the Appellees admit that on October 30, Appellee Baldwin, as "presiding officer" and in contempt of the same Writ and Order, hurriedly fashioned an Order On Agency Review dated October 30, 1989, an Order which unilaterally denied Appellants' Requests in all particulars. (R. 114-118, Ex. "H", App. hereto.) It is thus undisputed that the Appellees not only violated the district court's Order and Writ of October 27, but it is further undisputed that the Appellee Baldwin unilaterally deprived the entire Securities Advisory Board, certain named-Appellees herein, from participating in Baldwin's unilateral, arbitrary and capricious decision, all of which was contemptuous of the district court's October 27, Order and Writ compelling the contrary. (Exhibit "E", App. hereto.) It is thus further undisputed that Appellee Baldwin acted, has acted and will continue to act as "presiding officer", prosecutor, investigator, judge, jury and executioner

relative to the administrative proceedings direly affecting Appellants' livelihoods. This is because Mr. Baldwin not only signed the Order on Agency Review (acting as judge) but he also personally signed the Division's Motion to Convert the administrative proceedings from informal to formal (thereby also acting as prosecutor). (See Exhibits "H" and "I" in Appendix hereto, copies of Mr. Baldwin's remarkably convenient albeit contemptuous October 30, 1989, Order on Agency Review and his own Motion to Convert filed in the administrative adjudicative proceedings, respectively.) The foregoing is also not to ignore that Division Director Baldwin will continue to act as "presiding officer" (judge) in the remaining disposition of the administrative adjudicative proceedings. (See Exhibit "O", App. hereto.)

On November 2, 1989, Appellants, as petitioners in the district court action, having had the rug surreptitiously pulled out from under them, filed a Motion to Reinstate the district court's October 27, 1989, Extraordinary Writ and Order. (R. 144-145; Exhibit "U", App. hereto.) For reasons completely unknown, such was denied by the district court on January 23, 1990. It can thus only be assumed that the district court denied Appellants' Motion to Reinstate because it subscribed to Appellees' erroneous argument that it lacks jurisdiction to have issued the October 27, Extraordinary Writ and Order in the first instance. On February 15, 1990, the district court certified its

January 23, 1990, ruling for appeal under Rule 54(b), Utah Rules of Civil Procedure, and this appeal has ensued. (R. 201-202; Exhibit "V", App. hereto.)

Based on the Appellees' intentional failure to honor the district court's Writ and Order, including Director Baldwin's obvious bias, conflict of interest, and failure to abide by his agency's own administrative rules, the administrative proceedings which pertain to this appeal have remained on-going for well over one (1) year at great and unjustified expense and damage to Appellants and their business and reputations. In fact, as a result of such unlawful and vicious proceedings, Appellant Johnson-Bowles Company, Inc. has lost substantial income and has recently filed the necessary state and federal broker-dealer withdrawal forms ("BDW Forms") to cease doing business as a securities broker-dealer. As a direct consequence of the Division's amended petitions and the endless administrative adjudicative proceedings initiated by the Division to destroy it, Johnson-Bowles is now out-of-business.

SUMMARY OF ARGUMENT

Reference is made to Appellants' Conclusion below.

DETAIL OF ARGUMENT

POINT I

THE LOWER COURT HAS POWER AND AUTHORITY TO HAVE ISSUED THE EXTRAORDINARY WRIT AND ORDER OF OCTOBER 27, 1989, AND IT FURTHER HAS POWER AND AUTHORITY TO COMPEL A STATE ADMINISTRATIVE AGENCY TO ABIDE BY ITS OWN RULES, INCLUDING THE UAPA.

The lower court erroneously determined that under Rule 65B, Utah Rules of Civil Procedure, and the UAPA, it lacks jurisdiction to have issued its Extraordinary Writ and Order on October 27, 1989. (See Exhibits "D", "O", "R", "G", and "V", App. hereto.) This is not the law: The Utah Division of Securities is clearly an inferior tribunal or board of the Third Judicial District Court. Furthermore, there can be no dispute that the Division's director or its officers exercise judicial functions as contemplated in Rule 65B. Were the Division and its officers not engaged in judicial functions, both the on-going administrative adjudicative proceedings presently undertaken against Appellants and this very appeal would not exist. The Appellees unfortunately convinced the lower court that the Securities Division is only subject to direct regulation by the Utah Court of Appeals and that a Utah court of general jurisdiction has no authority or power over it in any respect or capacity. (R. 153-161.) The Division's arrogant and brazen belief is exemplified by the fact that it admits notice of the district court's October 27, 1989, Extraordinary Writ and Order, only to have had Appellee Baldwin hurriedly "hammer out" an October 30, Order on Agency Review in complete contempt thereof and only in an effort to fraudulently and disingenuously render the district court's Extraordinary Writ and Order moot. In their lower court memorandum, the Appellees quote §16 of the UAPA and §§78-2a-3, 78-3-4(5), Utah Code Ann., for the proposition that a

district court of Utah has no jurisdiction (or authority) to order a Utah administrative agency to do what it is required to do by law. (R. 156-157.) These statutes cited by the Appellees are irrelevant to the issues in this appeal. Such statutes solely contemplate "final agency action" and judicial, not agency, "appeals" from such "final agency action". The Appellants were never "appealing" anything to a Utah district court or the Utah Court of Appeals. For instance, the statute cited below by the Appellees relative to a Utah district court's appellate jurisdiction only relates to appeals of "informal proceedings". [Emphasis added.] Appellants were not seeking "appeal" of anything, merely "agency review" under §12 of the UAPA, or, alternatively, certification of the ALJ's Rule 12(b)(1) ruling for appeal.⁴

It is noteworthy that had Appellants sought an extraordinary writ in the Court of Appeals under Rule 19 of the Rules of Appellate Procedure, the Court of Appeals would have directed Appellants to seek the same in district court. Rule 19(b)(5) of the Rules of Appellate Procedure requires an explanation of why it would be "impractical or inappropriate" to have filed a petition for any such writ in the district court. Appellants would have had no explanation for such and therefore, they acted lawfully in seeking such in the district court on

⁴This is not to ignore that the Appellees have never contested Appellants' "Statement of Material Facts" in their Supporting Memorandum before the district court. (R. 28-36, Exhibit "J", App. hereto.)

October 27, 1989. In short, since Appellants are not seeking "judicial appeal", but have merely sought to have the lower court order the Securities Division to have done that which it was required to do by law, having sought a writ from the Utah Court of Appeals would have been erroneous, embarrassing, and a waste of time and money. The case of Aluminum Company of America v. Interstate Commerce Commission, (D.C. Ct. of App. May 10, 1985) 761 F.2d 746, 245 U.S. App. D.C. 343, is directly on point. In Aluminum Company, the Court of Appeals for the District of Columbia held that the appropriate remedy for the ICC's failure to comply with its own statutory deadlines in a railroad rate case is to seek and obtain, in district court, an order directing the ICC to act. [Emphasis added.] In further referring to the federal counterpart to §12 of the UAPA, the D.C. Court of Appeals said at p. 748:

It follows from the structure of these provisions [the Administrative Procedure Act] that the remedy for the Commission's failure to comply with the statutory deadlines is the remedy which the petitioners sought and obtained in the District Court, an Order directing the Commission to act -- not the senseless remedy of cutting off the rights of a totally innocent appellant. [Emphasis added.]

No case could be more on point. Furthermore, the statutory provision at issue in Aluminum Company, 5 USC §557(b)(1982), is the federal statute expressly involving "agency review" as in this case. It is further undisputed that §12 of the Utah

Administrative Procedures Act is patterned directly after the very provision of the federal Administrative Procedure Act in issue in Aluminum Company. Based on Aluminum Company, not only was it proper for Appellants to have sought an Extraordinary Writ in the district court, but to have not reinstated such Writ and Order on the ground of lack of jurisdiction is reversible error.

POINT II

WHETHER THE ADMINISTRATIVE LAW JUDGE'S ORDER
OF AUGUST 29, 1989, WAS "INTERLOCUTORY" OR "FINAL"
IS IRRELEVANT FOR PURPOSES OF §12 OF THE UAPA.

It makes no difference under the law whether the ALJ's order from which agency review is sought is "final". The lower court, however, erroneously concluded the contrary. To be sure, Section 63-46b-12, Utah Code Ann., by its own language, does not require that orders be "final". For this reason, there can be no dispute that under §12 of the UAPA it makes no difference what kind of order is involved in a Request for Agency Review. The Appellees, in their Ex Parte Counter-Petition, misled the district court by confusing §12 of the UAPA with §14 which does contemplate "final orders". In other words, if there is some obscure or secret Division policy whereby a request for agency review only involves "final orders", such has never been so publicized nor does the express language of §12 or the corollary Department of Commerce Rules say the same. As a consequence, Appellants have been severely prejudiced by the unilateral

interpretation that Appellees have given to such statute and the corollary agency rule which expressly applies to the Division.

The Appellees have exclusively relied on the case of Sloan v. Board of Review, 781 P.2d 463, 118 Ut. Adv. Rpt. 68 (Utah Ct. App., October 2, 1989) for the proposition that under §12 of the UAPA, an agency is not required to review anything but "final orders". The argument thus follows that because the Appellees secretly, capriciously and arbitrarily deemed the August 29, 1989, Order of the ALJ not to be a "final order" (as to anything), they did not have to review such under any circumstances. This is not what Sloan holds. Sloan merely involved an appeal to the Utah Court of Appeals under §14 of the UAPA. In Sloan, the Court of Appeals only held that "an order of an agency is not final [for purposes of appeal, not agency review] so long as it reserves something to the agency for further decision". Sloan, supra at Adv. Rep. 68. On the other hand, the ALJ's Order from which Appellants seek agency review only involves whether or not the Division has jurisdiction to have brought the on-going administrative adjudicative proceedings in issue. There is nothing in such Order which reserves anything to the ALJ or anyone else for further decision on the issue of jurisdiction. Yet what could be more "final" than the conferring of jurisdiction? For this reason, Appellants submit that the Order from which review was sought was "final" under Sloan even though finality is irrelevant under both §12 of the UAPA and the

Division's own rule further interpreting the same. Simply put, the Appellees' argument by which they secretly induced the district court to err and hastily set aside its Oct. 27, Writ and Order -- as if Appellants somehow acted improperly -- is itself false and erroneous.

It is also grossly vague under the §12 of the UAPA whether or not Appellee Baldwin, the ALJ and/or the Securities Advisory Board is the "presiding officer". The statute is totally ambiguous in this regard, particularly when, in the on-going administrative proceedings, two different people, including the ALJ, in addition to Appellee Baldwin have executed pleadings as the so-called "presiding officer". Since this issue is unclear, the Court's Writ and Order of October 27, which specifically designated Appellee Baldwin and the Securities Advisory Board as the "presiding officer", at least gives all parties direction and otherwise prevents the Appellees from further capriciously and arbitrarily doing what they in fact did on October 30. For this reason, the Appellees abused their own discretion and have prejudiced Appellants in hurriedly and contemptuously appointing Director Baldwin, as late as Oct. 30, as the "presiding officer", merely for the purpose of issuing the October 30, 1989, Order on Agency Review to further render Appellants' lower court Petition moot -- an Order only designed to capriciously and arbitrarily deprive Appellants of any right

or ability they and the Securities Advisory Board might have had to get the Division's unlawful proceedings disposed of summarily.

Department of Commerce Rule R151-46b-12, D, ORDER ON REVIEW -- a rule which necessarily governs the Division

-- requires that any written order on review shall issue within 20 days after the filing of any response. (Exhibit "D", App. hereto.) In this case, the Division filed its response to Appellants' September 26, 1989, Request well after 20 days had long expired. Because the Division clearly violated its own agency rules, this Court should hold, if nothing else, that Appellees granted Appellants' Requests by default. (Exhibits "B" and "C", App. hereto.) For this reason alone, this Court should confirm the Division's legal obligation to adhere and abide by its own rules and make a determination of how and to what extent Appellants have been prejudiced by the Division's intentional failures in that regard. If an agency can violate its own rules any time it wants, what good are such rules other than to mislead and deprive those similarly situated to Appellants with due process of law.

The district court, in denying the motion to reinstate, held that §12 of the UAPA only contemplates "final agency action". As a consequence, it further erroneously ruled that there is no distinction between §12 and §14 of the UAPA. If the lower court is correct, then §12, UAPA, is a statutory superfluity and has no reason to exist. To be sure, if an agency

order is indeed "final", an aggrieved party would simply appeal under §14. Thus, if the lower court is correct and §12 and §14 are to be interpreted identically, there would never be a legitimate reason for a person to invoke or rely on §12. This is not to ignore that §12, by its own unambiguous language only contemplates an agency "order" and Department of Commerce Rule R151-46b-12, §12's corollary, similarly only contemplates an "order entered in a formal adjudicative proceeding". For these reasons, the lower court's conclusion that §12 and R151-46b-12 only contemplate "final" orders is plainly wrong. In addition, based on Sloan, which exclusively involves an interpretation of §14 of the UAPA, the order sought review of in this case may indeed be "final". This is because there is nothing further for the Securities Division or the ALJ to have decided relative to jurisdiction. In fact, it is impossible to imagine how the August 29, 1989, Order could be more "final" when its effect allows the Division to continue to proceed against Appellants unlawfully. Nonetheless, if §12 of the UAPA and Rule 151-46b-12 of the Department of Commerce only contemplate "final orders", then such statute and the corollary rule should so say. The Appellees certainly have no authority to unilaterally interpret such laws and rules for their own benefit for the "senseless remedy of cutting off the rights of a totally innocent appellant". Aluminum Company, supra at 748. Yet, this is exactly what Appellees, their counsel, and the district court

have done. Appellants spent a lot of time, energy, and attorney's fees preparing their Requests for Agency Review only to have Appellee Baldwin arbitrarily and capriciously deny their Requests on October 30, and only after his personal receipt of the district court's Extraordinary Writ and Order directing him and the Securities Advisory Board to do the opposite. [Emphasis added.] If this is also not contempt of the district court, then the word "contempt" surely has no meaning, at least in this jurisdiction.

POINT III

IT IS UNCONSTITUTIONAL FOR APPELLEE BALDWIN TO ACT AS INVESTIGATOR, PROSECUTOR, JUDGE, JURY AND EXECUTIONER AT THE SAME TIME IN THE SAME PROCEEDING, AND THEREFORE, APPELLEE BALDWIN'S ORDER ON AGENCY REVIEW DATED OCTOBER 30, 1989, SHOULD HAVE BEEN SET ASIDE AND THE ADMINISTRATIVE PROCEEDINGS SHOULD NOW BE DISMISSED. IT IS ALSO HIGHLY PREJUDICIAL FOR THE PROSECUTOR AND JUDGE(S) TO BE REPRESENTED BY THE SAME COUNSEL AT THE SAME TIME.

It is undisputed that John C. Baldwin, Director of the Division of Securities, has acted as "prosecutor" in having signed Division pleadings in the on-going administrative adjudicative proceedings. For instance, Appellee Baldwin personally executed the Division's Motion to Convert the administrative proceedings in issue from informal to formal. (Exhibit "I", App. hereto.) It is also undisputed that Director Baldwin has simultaneously acted as "judge" in drafting and signing the Order on Agency Review. (R. 114-118; Exhibit

"H", App. hereto.) In addition, during the remainder of the on-going administrative proceedings, Mr. Baldwin will continue to act as judge ("presiding officer") of Appellants under the UAPA. In this context, there is a plethora of authority in administrative law that it is unconstitutional for a person to serve as investigator, prosecutor, and judge in the same administrative proceeding. Withrow v. Larkin, supra. In Withrow, Justice White, writing for a unanimous U.S. Supreme Court, stated:

Cases in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him are situations where the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable under due process of law.

Justice White went on to say:

To carry its burden of persuasion, the contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication must overcome a presumption of honesty and integrity in those serving as adjudicators, and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. [Emphasis added.]

Withrow at L.Ed. 723-24. The on-going administrative adjudicative proceedings have been heated; harsh criticisms have

also been leveled by Appellants at the Division, including Appellee Baldwin. The Division has also sought (as a condition of settlement) to unlawfully extract a \$50,000 fine from Appellants in order to extort them into capitulation and therefore, Director Baldwin certainly has a pecuniary interest in filling his agency's own administrative pockets at Appellants' expense. (R. 35; Exhibit "J", App. hereto.) Based on Withrow and Appellee Baldwin's direct prosecutorial and adjudicative participation in the on-going administrative proceedings, it is an unconstitutional denial of due process to have permitted Appellee Baldwin to arbitrarily and capriciously deny Appellants' September 11, 1989 Requests for either Agency Review and/or for Certification. (R. 114-118; Exhibit "H", App. hereto.) From a more technical standpoint, it is unconstitutional that Appellee Baldwin could have appointed himself as "presiding officer" under §12 UAPA when he and his agency have an interest in the outcome in their favor, when they would surely relish a \$50,000 "capital contribution" to their budget, when they themselves drafted the instant administrative petitions, when they issued the order denying agency review, when they will continue to prosecute and judge Appellants, and when they have further been direct targets of harsh criticism from Appellants. Therefore, as a matter of law, the probability of actual bias on the part of Appellee Baldwin as prosecutor and judge of his own petitions against Appellants is clear and such is unconstitutional. For these

reasons, Baldwin's arbitrary and capricious Order, hastily, haphazardly, and conveniently denying Appellants' Requests on October 30, should be set aside in its entirety and the administrative adjudicative proceedings should now be dismissed as unconstitutional and unfair. (That the foregoing Constitutional issues were indeed before the lower court is evidenced by pages 186-188 of the Record.)

Furthermore, the Attorney General is in the malignantly preposterous position of representing the Division, Director Baldwin, the "presiding officer", and the entire Securities Advisory Board at the same time. It is thus evident that there is no distinction in this case between the prosecutors, the investigators, the judges, jury, and the executioners. For this reason alone, the on-going administrative adjudicative proceedings are unconstitutional and unfair on their face in that all such parties clearly have a unity of interest -- an interest quite adverse to that of Appellants. Because the adjudication of Appellants' interests in these proceedings can be neither impartial nor protected, this Court should rule that Appellees have a blatant conflict of interest and, as a consequence, none of them can lawfully sit in judgment of Appellants. It should thus dismiss the Division's amended petitions with prejudice.

POINT IV

THE DIVISION LACKS JURISDICTION TO HAVE
BROUGHT THE ADMINISTRATIVE ADJUDICATIVE
PROCEEDINGS AGAINST APPELLANTS AND THEREFORE,
THIS COURT SHOULD ISSUE A DECISION DISMISSING

SUCH PROCEEDINGS IN THEIR ENTIRETY.

The Division lacks jurisdiction to discipline Appellants in a manner regulatorily inconsistent with superseding federal law. Under the law, Appellants, as members of the NASD, have unambiguous federal obligations to honor outstanding Exchange Act contracts in securities they have traded with other NASD members. By way of background, the Division suspended exemptions in Utah for the offer and sale of U.S.A. Medical Corporation stock on March 1, 1989. (Exhibit "T", App. hereto.) In an effort to honor previous contracts for the sale of U.S.A. Medical stock entered into by Appellant Johnson-Bowles prior to March 1, 1989, Johnson-Bowles purchased sufficient U.S.A. Medical stock to consummate such federal, Exchange Act contracts. [Emphasis added.] At the same time, Appellants undertook such to comply with U.S. District Judge J. Thomas Greene's February 28, 1989, denial of their motion for preliminary injunction, a federal ruling which necessarily required Appellants to honor such outstanding Exchange Act contracts. (R. 33; ¶'s 15 and 16, Exhibit "J", App. hereto.) In this regard, it is undisputed that the Division's Summary Order of March 1, 1989, does not prohibit the "purchase" of U.S.A. Medical stock for any purpose. (R. 60-64; Exhibit "T", App. hereto). Furthermore, the SEC has clearly carved out an exception in this very situation which specifically allows the consummation of securities transactions by broker-dealers during a suspension of trading order. (R. 65;

Exhibit "Q", App. hereto.) However, as a result of how the Division ignorantly misinterprets its own power and authority vis-a-vis federal securities regulation, the Division brought the instant administrative adjudicative proceedings against Appellants. For instance, in such July 1989 amended petitions, the Division basically alleges that Appellants should have ignored their federal obligations, including U.S. District Judge Greene's ruling, and that Appellants' good faith purchases of U.S.A. Medical stock simply to deliver the same to fellow out-of-state NASD member broker-dealers and clearing corporations (not Utah residents) was a "dishonest or unethical practice" as contemplated in Utah Code Ann. §61-1-6(1)(g). (See Exhibit "S", App. hereto, a true and correct copy of the Division's Amended Petitions in issue.)

Accordingly, the Division seeks to discipline Appellants merely for complying with federal law, all as if the Utah Uniform Securities Act somehow magically preempts federal securities law, more especially the Securities Exchange Act of 1934. Because of this diametrically conflicting regulation on the part of the Division, which no respectable business person on earth should have to tolerate, Appellants so moved the ALJ under Rule 12(b)(1) of the Utah Rules of Civil Procedure for an order dismissing the Division's amended petitions on the grounds of jurisdiction and federal preemption. It is the ALJ's August 29, 1989, erroneous denial of such motion which gave rise to the Requests for Agency

Review directly in issue. Without belaboring this Brief more particularly in this regard, reference is made to pages 26-89 in the lower court record, true and correct copies of Appellants' Supporting and Reply Memorandums in support of their Requests for Agency Review. In the interests of judicial economy, this Court has an obligation to address the propriety of the Division's underlying jurisdiction, including the preemption issue, only because it is the underlying basis of this appeal. See R. 26-76; Exhibit "J", Appendix hereto, a true and correct copy of Appellants' Brief in Support of their Request for Agency Review.

CONCLUSION

When a statute establishes a specific scheme for obtaining review, courts are to assume that such set of procedures is exclusive. Central Lincoln Peoples' Utility District v. Johnson, (9th Cir. 1984) 735 F.2d 1101, 1109; Nader v. Volpe, 466 F.2d 261, 266 (D.C. Cir. 1972). Since the Division has violated its own internal agency rule, this Court must properly interpret §12 and the corollary agency rule. This Court should further decide the Constitutional issues wholly ignored by the district court -- issues ignored only because the district court erroneously held that it lacks jurisdiction to have entertained any of that which was before it. In the meantime, because the administrative adjudicative proceeding procedures in issue have already proceeded to a formal hearing on the merits, there is no reason why this Court should delay and not further

decide the merits of Appellants' Requests for Agency Review. The merits of the ALJ's August 29, 1989, Order is thus ripe for review by this Court. Such will also dispense with a second appeal of the entire administrative adjudicative proceedings which will no doubt be forthcoming in the event this Court fails to address the underlying merits of this appeal.

Appellants filed their Requests for Agency Review only because they believed that the Division lacked jurisdiction to discipline Appellants in a manner diametrically inconsistent with the mandates of the Securities Exchange Act of 1934 -- a federal Act which directly regulates Appellants in their capacities as a securities broker-dealer and agent. The Division did nothing within 20 days as required by the rule and yet on the day it received the Writ and Order of the district court directing it to grant and review Appellants' Requests, Director Baldwin hurriedly, arbitrarily and capriciously denied such Requests in contempt of the district court. As this Court can see from Appellants' Requests [R. 8-12, 19-20, 26-89; Exhibits "B" and "C", App. hereto], there are substantial grounds upon which the on-going administrative proceedings should have been dismissed in their entirety. This is so regardless of the constitutional deprivations subsequently imposed by Mr. Baldwin and the Attorney General through their blatantly conflicting and prejudicial roles.

Based on the foregoing, this Court should grant Appellants the following relief: (1) it should hold that the district court has jurisdiction to have entertained Appellants' Petition for Extraordinary Writ directing Appellees, together as "presiding officer", to either grant Appellants' Requests or certify the ALJ's order as "final"; (2) it should hold that Appellees committed contempt of the district court by ignoring the Extraordinary Writ and Order on October 30, 1989; (3) it should hold that the district court erred in not granting Appellants' Motion to Reinstate; (4) it should determine to what extent Appellants have been prejudiced (or are now damaged) by the Appellees' conduct, what relief is now available to Appellants, if any, and whether it was fair and constitutional to have allowed the Securities Advisory Board Appellees to sit in judgment of Appellants on July 16, 1990; (5) it should further decide the Constitutional issues involving Baldwin (and the entire Securities Advisory Board) that the district court wholly ignored and thus determine whether the administrative proceedings should now be dismissed as unconstitutional; (6) it should make a determination as to the effect of the Attorney General's blatant conflict of interest; (7) it should decide that Director Baldwin be prohibited from acting in the future as appellate judge relative to any forthcoming "final agency action"; (8) it should decide who is unbiased and impartial enough to rule on any forthcoming "final agency action"; and (9) it should fully

address the overall merits of Appellants' Requests and determine whether the Division does indeed have jurisdiction to discipline Appellants for reasons diametrically at odds with the mandates of the NASD Rules of Fair Practice. At a minimum, Appellants are entitled to a determination as to whether the Securities Division either lacks jurisdiction or is preempted from having brought the administrative adjudicative proceedings [Exhibit "S", App. hereto] and whether such proceedings were and have been pursued unlawfully. (See Western Capital, supra, holding that state courts have no jurisdiction to interpret NASD Rules.) Accordingly, this Court should decide whether the administrative adjudicative proceedings should have been (or should now be) dismissed in their entirety with prejudice.

The Appellees' position in this case is unfounded and unsupported by the irrelevant authority cited by them in the court below. Even 5 U.S.C. §557(b)(1982), the portion of the federal Administrative Procedure Act on which §12 of the UAPA is based, does not exclusively contemplate "final orders". This is also not to lose sight of the fact that the ALJ's Order of August 29, 1989, could not be more "final" from a procedural standpoint, a standpoint which §12, UAPA, was designed to address. Moreover, it is unconstitutional for Baldwin to wear an investigator, prosecutor, judge, jury and executioner's hat which he has done, is doing, and will continue to do throughout not only the on-going administrative proceedings, but in future administrative

adjudicative proceedings. Simply put, Director Baldwin has no business wearing every conceivable regulatory hat imaginable at the same time. In fact, how many hats is one person entitled to wear and what hat could Baldwin wear that he has not worn, is not already wearing, or will not wear in the future?⁵ Furthermore, how many persons participating in the instant administrative adjudicative proceedings is the Attorney General entitled to represent, to what extent, in what capacities, and for what purposes?


Based on the foregoing, the district court erred in concluding that it lacks jurisdiction over Appellants' Petition for Extraordinary Writ. In the interests of judicial economy and fairness, this Court should address all of these issues and even go further and determine whether the Division's amended petitions are and were constitutional and/or consistent with principles of federal preemption. Such a determination would be dispositive of the entire administrative adjudicative proceedings in that if the Division lacks jurisdiction, the amended petitions filed against Appellants should never have either been initiated or allowed to proceed to a formal hearing -- all at great and unjustified expense to the taxpayers and Appellants -- after nearly 1½ years

⁵The Court should note that because the administrative adjudicative proceedings went to a full hearing on July 16, 1990, before the Securities Advisory Board, Appellee Baldwin, as director and "presiding officer", will get but another chance to judge Appellants. This is because Appellants understand that under the UAPA, Mr. Baldwin must "sign off" or approve the Securities Advisory Board's decision with respect to Appellants' licenses. Appellants believe and assert that this is again unfair and only bolsters their argument that Mr. Baldwin's role in both prosecuting and judging them at the same time is severely prejudicial and unconstitutional.

of bitter and protracted litigation. This Court should thus reverse the district court, address issues it ignored, and dismiss the Division's amended petitions on either constitutional or jurisdictional (preemption) grounds.

Finally, the Division violated its own internal rules governing agency review and therefore, the Requests in issue, even if arguably discretionary on the part of the Division, were granted by default. Certainly, agency rules are of no value if an agency can violate them willy-nilly and with impunity. Because the law on §12 of the UAPA is unclear, Appellants are entitled to an appropriate ruling of this Court to prevent future misinterpretation and discrimination under §12, UAPA. Certainly the Division had nothing to lose by having granted Appellants' Requests and all parties clearly had something to gain if indeed the Division lacks jurisdiction to have brought the administrative adjudicative proceedings in issue.

DATED this 2nd day of August, 1990.


John Michael Coombs
Craig F. McCullough
Attorneys for Appellants

PROOF OF SERVICE

The undersigned hereby certifies that on the 2nd day of August, 1990, (s)he hand-delivered four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS to Mark J. Griffin, Attorney for Appellees, 115 State Capitol Building, Salt Lake City, Utah 84114.

EXHIBIT "A"

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	:	

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. Sparing 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.

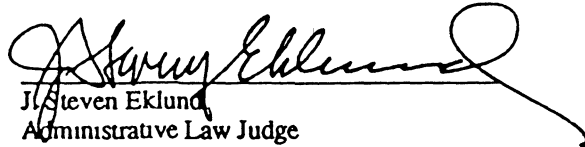
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ORDER

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

Amended Petition is denied.

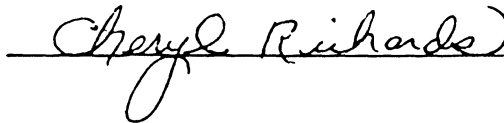
Dated this 29th day of August, 1989.


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.



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EXHIBIT "B"

9/11/89

EXHIBIT "A"

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	:	REQUEST FOR AGENCY REVIEW
OF:	:	AND REQUEST FOR HEARING
	:	
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
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	:	
	:	
	:	

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.

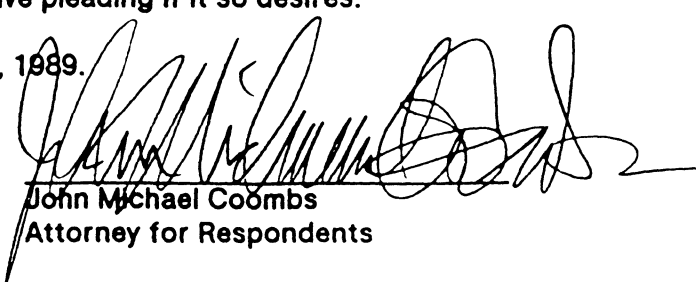
Respondents have the right to seek agency review of the August 29, Order and otherwise exhaust their administrative remedies in that if the Division lacks subject-matter jurisdiction, which it does, these entire proceedings are unlawful and a waste of all parties' time, energy, and money, particularly 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).

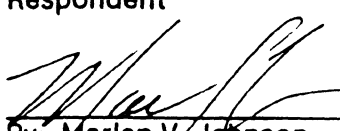
Based on the foregoing and §63-46b-12(1)(b)(ii), Utah Code Ann., Respondents pray for immediate reversal of the August 29, 1989 Order and for an Order declaring that the Division has no jurisdiction to either unilaterally interpret its March 1, 1989 Order inconsistently with federal securities law or 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 11th day of September, 1989.


John Michael Coombs
Attorney for Respondents

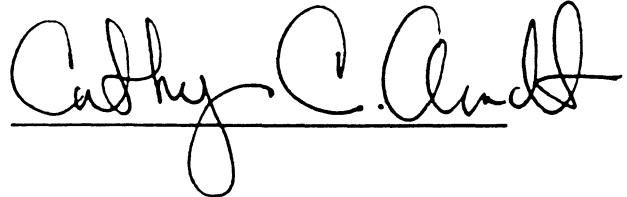
JOHNSON-BOWLES, COMPANY, INC.,
Respondent


By: Marlen V. Johnson
Its: President


Marlen V. Johnson, Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of September, 1989, (s)he hand-delivered a true and correct copy of the foregoing REQUEST FOR AGENCY REVIEW AND REQUEST FOR HEARING 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; and mailed the same to Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol, Salt Lake City, Utah 84114; and Craig F. McCullough, Esq., of Callister, Duncan & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84133.


Cathy C. Andell

J:REQUEST.2-3

EXHIBIT "C"

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 CERTIFICATION
OF AUGUST 29, ORDER AS A
"FINAL AGENCY ACTION"**

Case No. SD-89-46BD

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

MARLEN VERNON JOHNSON

CRD NO. 2598888


Case No. SD-89-47AG

In the event the Court, the Securities Advisory Board, the Executive Director, Presiding Officer, or other appellate body, denies Respondents a request for agency or superior agency review under §63-46b-12, Utah Code Ann., and/or the applicable agency rules promulgated thereunder, Respondents herewith request certification of the Administrative Law Judge's Order of August 29, 1989 as a "final agency action" as contemplated in §63-46b-14(1), Utah Code Ann. In the alternative, if the agency or superior agency denies Respondents' request for certification of such Order as a "final agency

action", Respondents pray for an order declaring that Respondents' have exhausted all of the administrative remedies available to them with respect to whether the Division has subject-matter jurisdiction as contemplated in §63-46b-14(2)(a), Utah Code Ann.

In the alternative, Respondents pray that the agency or superior agency's order with respect to this request be itself certified as a "final agency action" as contemplated in §63-46b-14(1), Utah Code Ann.

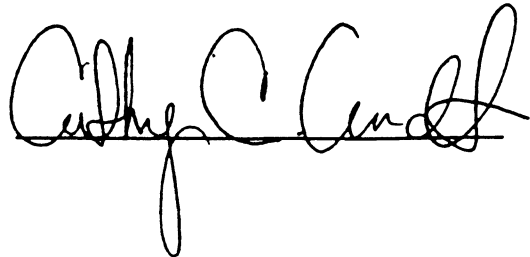
DATED this 11th day of September, 1989.



John Michael Coombs
Attorney for Respondents

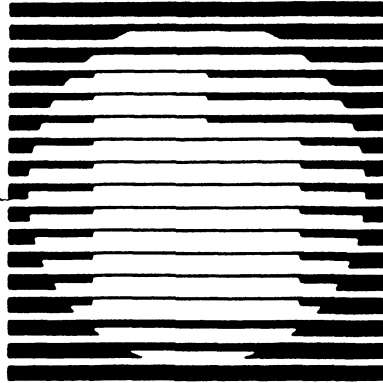
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of September, 1989, (s)he hand-delivered a true and correct copy of the foregoing REQUEST FOR CERTIFICATION OF ORDER AS A "FINAL AGENCY ACTION" 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; and mailed the same to Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol, Salt Lake City, Utah 84114; and Craig F. McCullough, Esq., Callister, Duncan, & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84132



J:REQUEST.1

EXHIBIT "D"



STATE OF UTAH
DEPARTMENT OF
BUSINESS REGULATION

**RULES OF PROCEDURE FOR
ADJUDICATIVE PROCEEDINGS
BEFORE THE
DEPARTMENT OF BUSINESS REGULATION**

EFFECTIVE JANUARY 1, 1988

PROMULGATED PURSUANT TO THE
ADMINISTRATIVE PROCEDURES ACT
(SECTION 63-46b-1 et. seq.)
AND IN ACCORDANCE WITH
THE ADMINISTRATIVE RULEMAKING ACT
(SECTION 63-46a-1 et. seq.)

EXHIBIT "B"

00193

R151-46b-12 Agency Review.

A. FILING OF REQUEST FOR AGENCY REVIEW.

A request for agency review may be filed within ten days after the issuance of findings of fact, conclusions of law and the order entered in a formal adjudicative proceeding or the issuance of the order in an informal adjudicative proceeding. Said petition shall be filed with the agency head of the division in which the matter originated. Any brief in support of the grounds for review shall be concurrently filed with the request for agency review. Any response to the request for agency review, including any brief in support thereof, shall also be filed with the agency head within fifteen days of the mailing of the request for review.

B. EFFECT OF FILING.

Upon the timely filing of a request for agency review, 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.

C. ORAL ARGUMENT.

A request for agency review and the response thereto shall set forth whether oral argument is sought as to said review. Upon request of any party, the agency head may set a time to conduct oral argument.

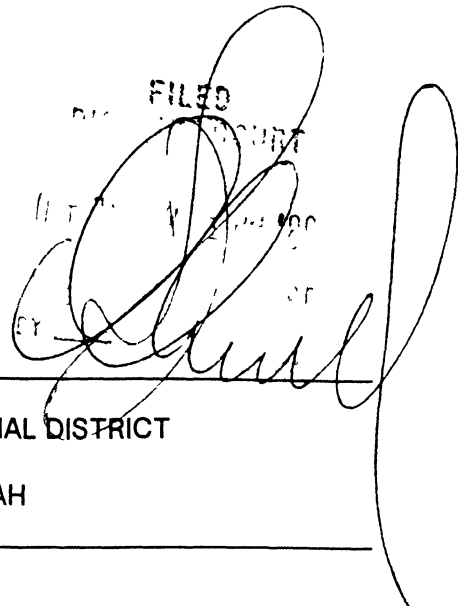
D. ORDER ON REVIEW.

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. The order on review shall provide notice to any aggrieved parties of any right to further administrative reconsideration or judicial review.

EXHIBIT "E"

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

FILED
JUL 11 1990
CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH



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. SANATA

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:

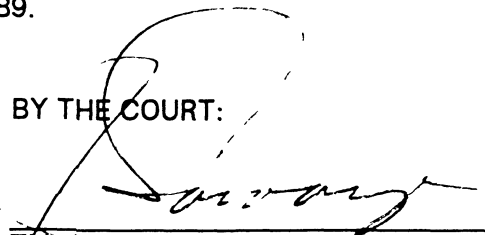
1. The Petition for Extraordinary Writ in the above-matter is hereby granted.

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

EXHIBIT "F"

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

FILED
DISTRICT COURT

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

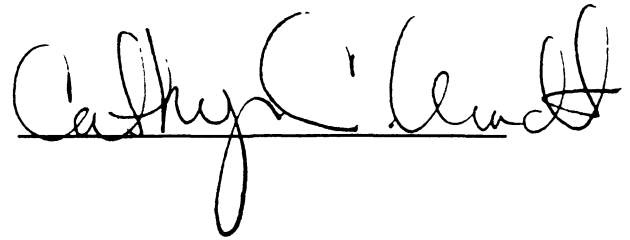
CERTIFICATE OF SERVICE

CASE NO. 890906506CV

J. Sawaya

The undersigned hereby certifies that on the 27th day of October, 1989, (s)he mailed a true and correct copy of the foregoing PETITION FOR EX PARTE EXTRAORDINARY WRIT and EX PARTE ORDER GRANTING EXTRAORDINARY WRIT AND EXTRAORDINARY WRIT by certified mail, postage prepaid to 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. The undersigned also certifies that the same documents were

hand-delivered to Securities Advisory Board Members, KENT BURGON, located at 60 East South Temple, Salt Lake City, Utah 84111; DAVID E. HARDY, located at 215 South State Street, Suite 900, Salt Lake City, Utah 84111-2309; MARGARET WICKENS, located at 376 East 400 South, Suite 200, Salt Lake City, Utah 84111; and KEITH CANNON, located at 115 South Main Street, Salt Lake City, Utah 84111.

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

SRVC.1

EXHIBIT "G"

FILED DISTRICT COURT
Third Judicial District

OCT 31 1989

SALT LAKE 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 :	Judge James S. Sawaya
CANNON, members of the :	
Securities Advisory Board :	
overseeing the Securities :	
Division, :	
Respondents. :	

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

00103

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 1ST day of November, 1989.

BY THE COURT:

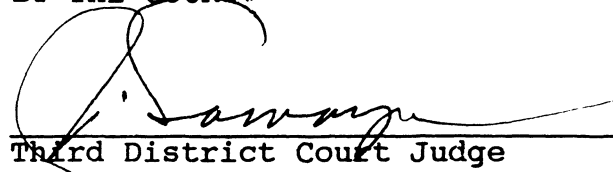

Third District Court Judge

EXHIBIT "H"

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

IN THE MATTER OF THE	:	
	:	ORDER ON AGENCY REVIEW
REGISTRATION OF:	:	
	:	
JOHNSON-BOWLES COMPANY, INC.	:	Case No. SD-89-46B
CRD No. 07678	:	
IN THE MATTER OF THE	:	
	:	
REGISTRATION OF:	:	
	:	
MARLEN VERNON JOHNSON	:	Case No. SD-89-47AG
CRD No. 259888	:	

On September 11, 1989, Respondents Johnson-Bowles Company, Inc. and Marlen Vernon Johnson, pursuant to §63-46b-12 Utah Code Ann. and R151-46-b-12A of the Rules of Procedure for Adjudicative Proceedings before the Department of Business Regulation, requested agency review of an August 29, 1989 Order, and asked for an oral hearing thereon. The August 29, 1989 Order denied Respondents Motion to Dismiss the Amended Petition of the Division of Securities (the Division).

Respondents have also requested certification of the August 29, 1989 Order as a "final agency action," or, in the alternative, asked for an order declaring that Respondents had exhausted their administrative remedies regarding the issue of subject matter

jurisdiction.

Respondents also requested that any order issued on review also be certified as a "final agency" action.

Finally, Respondents requested that the Division disclose whether the Securities Advisory Board constitutes the Appellate Body performing this review, in order to determine the existence of any conflicts of interest by David Eccles Hardy, a member of that Board.

On September 11, 1989, Respondents filed a brief in support of their request for agency review and oral hearing thereon. On September 26, 1989, the Securities Division filed a brief in reply to Respondents' request for agency review and hearing. On October 6, 1989 Respondents filed a reply brief in support of their request for agency review.

THE DIRECTOR, AS PRESIDING OFFICER, now enters the following:

Section 63-46b-12 Utah Code Ann. sets forth the procedure which governs administrative review of agency orders. That statute vests agencies with the discretion to provide, by rule, whether parties to any adjudicative proceeding may seek "review of an order by the agency or by a superior agency". R151-46b-12A of the Rules of Procedure for Adjudicative Proceedings before the Department of Business Regulation allows such requests to be made as follows:

A request for agency review may be filed...after the issuance of findings of fact, conclusions of law and the order entered in a formal adjudicative proceeding... .

Section 63-46b-13 provides that if agency review of "an order" is not available pursuant to Section 63-46b-12 "and if the order would otherwise constitute final agency action", a party may request agency reconsideration of "the order". Section 63-46b-14 also provides that an aggrieved party "may obtain judicial review of final agency action...".

Section 63-46b-12 and R151-46b-12 do not expressly limit agency review to orders which constitute final agency action. Thus, a party aggrieved by orders of an interim nature (i.e., an order denying a request for a continuance or an order denying a motion to dismiss) could arguably request agency review of such matters. However, in Sloan v. Board of Review, 118 Utah Adv. Rep 68 (October 2, 1989), the Utah Court of Appeals distinguishes orders, which are not reviewable because they are not "final", from orders which do constitute "final agency action", by stating that "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.

Given the nature of the August 29, 1989 Order, Respondents' request represents an interlocutory appeal and, following Sloan, would not be considered a final agency action. 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.

In essence, absent a rule permitting agency review pursuant to Section 63-46b-12, agency reconsideration pursuant to Section 63-46b-13 is only available as to an order which constitutes final agency action. The availability of judicial review is also limited to such orders. In light of the provisions which govern agency reconsideration and judicial review, and mindful of the rationale expressed in Sloan v. Board of Review, it is ill-advised to conduct agency review of orders which do not constitute final agency action. Although Section 63-46b-12 and R151-46b-12 do not so limit the availability of agency review, the efficient administration of agency adjudicative proceedings compels the conclusion that such interpretation be given.

ORDER

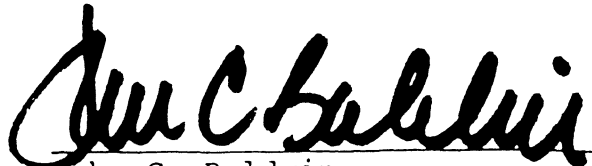
WHEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. Respondents' Request for Agency Review and oral argument thereon are denied.

2. Respondents' Requests that both the August 29, 1989 order and this Order on Review, be certified as "final agency action", are denied because it is not considered to be within the province of the Presiding Officer to so certify or declare.

3. Respondents' concerns regarding the involvement of Securities Advisory Board member David Eccles Hardy in the consideration of these requests are inapplicable, since the Director has acted as the Presiding Officer, and accordingly, Respondents' request for an order to disclose any conflicts of interest is also denied.

30th
Dated this 30th day of October, 1989.


John C. Baldwin
Director, Division of Securities
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed the foregoing Order on Agency Review 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 30th day of October, 1989.



Terri Farnsworth

EXHIBIT "I"

DIVISION OF SECURITIES
DEPARTMENT OF COMMERCE
JOHN C. BALDWIN, DIRECTOR
P.O. BOX 45802
160 East 300 South
Salt Lake City, Utah 84110
Telephone: (801) 530-6600

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

In the Matter of the Registration	:	MOTION TO
of Johnson-Bowles, Inc. to Act as	:	CONVERT TO FORMAL
Securities Broker-Dealer	:	ADMINISTRATIVE ADJUDICATIVE
	:	PROCEEDING
	:	
CRD NO. 07578	:	Case No. SD-89-46BD

The Division of Securities of the Department of Commerce of the State of Utah, by and through its Director, John C. Baldwin, hereby moves to convert administrative adjudicative proceedings from informal to formal in the above entitled matter. The basis for this Motion is that it will serve the public interest because it will prevent the duplication of this hearing process should the outcome be challenged in the future and neither party is prejudiced because no hearing date has been set and only the formality of the hearing not the presentation of the evidence is effected.

DATED this 24th day of May, 1989.

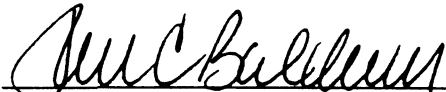

JOHN C. BALDWIN, DIRECTOR
DIVISION OF SECURITIES
DEPARTMENT OF COMMERCE

EXHIBIT "J"

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

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

JOHNSON-BOWLES COMPANY, INC.

CRD NO. 07678

**BRIEF OF RESPONDENTS IN
SUPPORT OF REQUEST FOR
AGENCY REVIEW AND HEARING
THEREON**

Case No. SD-89-46BD

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

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

Respondents Johnson-Bowles Co., Inc., and Marlen V. Johnson, by and through their counsel, hereby submit this Brief in Support of their Requests for Agency Review and a Hearing Thereon as provided in Department of Commerce Rule R151-46b-12(A). Respondents incorporate by reference their pleadings on file herein relative to their Rule 12(b)(1) Motion to Dismiss and respectfully request that the appellate body further review all such pleadings. The purpose of Respondents' Request is to seek reversal of the Administrative Law Judge's Order or Ruling of August 29, 1989, as it is

impossible that the Division could have subject–matter jurisdiction over these proceedings and to proceed when the Division lacks subject–matter jurisdiction is a waste of time, money and energy on the part of all parties, aside from being unlawful. Respondents thus have the right to exhaust all administrative remedies in regard to this jurisdictional issue.

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ISSUE ON AGENCY REVIEW	11
ARGUMENT:	
THE ADMINISTRATIVE LAW JUDGE'S RULING ON RESPONDENTS' RULE 12(b)(1) MOTION TO DISMISS DATED AUGUST 29, 1989 IS ERRONEOUS AS A SIMPLE MATTER OF LAW AND MUST BE REVERSED	11
A. Under the "Non–Delegation Doctrine" in Administrative Law, the August 29 Order or Ruling is erroneous and must be reversed.	11
B. Based on the Division's own "enabling statute", the Division lacks power and authority to regulate in a manner that conflicts with and supersedes the Securities Exchange Act of 1934, and therefore, the Order of August 29, which erroneously concludes the contrary, must be reversed.	15
C. Because the August 29, 1989 Order "conflicts" with the rules and regulations promulgated under the Securities Exchange Act, including §28(a) thereof, it is preempted by federal law and therefore, the Order of August 29 is erroneous as a matter of law and must be reversed.	19
D. The Judge's Order of August 29 is non–responsive and otherwise fails to address the specific issue before it, namely whether the Division has the kind of subject matter jurisdiction which Congress has exclusively delegated to federal courts, and therefore it must be vacated.	25

E.	The Order appealed from contains irrelevant and erroneous findings of fact and conclusions of law and otherwise tends to address the merits of the Division's case, and therefore it should be vacated.	26
F.	The August 29, Order erroneously concludes that the Division has power and authority to give extra-territorial effect to its March 1, Order, an interpretation which is not in the Order itself and which further violates the Division's enabling act, the Exchange Act, and the Supremacy and Commerce Clauses of the Constitution.	29
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STATEMENT OF MATERIAL FACTS

1. Respondents are in the securities brokerage business. They are therefore registered with the National Association of Securities Dealers, Inc., ("NASD"), a self-regulatory organization ("SRO") and national securities association. The NASD, by Congressional mandate, is exclusively governed by the Securities Exchange Commission under the Securities Exchange Act of 1934. 15 U.S.C. §78o-3. In 1983, Congress amended §15(b)(8)-(9) of the Securities Exchange Act of 1934 and completely did away with SECO, an alternative SRO to the NASD. Because of the 1983 amendment and because Respondents are not members of any national securities exchange, they must, as a matter of law, be members of the NASD. (See §15 and §15A of the Exchange Act and H.R. Rep. No. 98-106, 98th Cong., 1st Sess. (1983).) 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. §78o-3(b)(7). (This also means that the Division's argument at the hearing on Respondents' Motion to Dismiss that the NASD is a "club" of all things, an argument apparently believed by the Administrative Law Judge, is an abject misstatement of the law.)

2. It is undisputed that interpretation and enforcement of duties, liabilities, and obligations under NASD and SEC rules and regulations are preempted under the Securities Exchange Act of 1934 over which federal courts have exclusive jurisdiction.¹ (See §15, §15A, §27 and §28(a) of the Securities Exchange Act of 1934.) It is further significant that the express purpose of the Exchange Act is to regulate the "trading" of securities in interstate commerce -- the only issue subject to Respondents' Request for Agency Review.

3. Prior to March 1, 1989, Respondent Johnson-Bowles sold several thousand shares of the securities of U.S.A. Medical Corporation to several out-of-state NASD member broker-dealers and one clearing corporation. At the time of such sales, Johnson-Bowles did not physically possess such securities. This is known in the industry as "selling short" and is not only not unlawful or improper, but it is a common, every day occurrence in the industry. (See Respondents' Memorandum in Support of Its Motion to Dismiss on file herein, ¶12 thereof.) It is also undisputed that these sales by Johnson-Bowles to out-of-state NASD members and a registered clearing corporation are and were governed by the NASD. Further, none of the entities to whom Johnson-Bowles sold such stock prior to March 1, do business in the state of Utah and they are therefore not subject to the subject-matter jurisdiction of the Utah Securities Division.

4. On March 1, 1989, the Division, based solely on the outcome of a lawsuit Johnson-Bowles had previously filed in federal court, issued an Order suspending all state exemptions for the offer and sale of securities of U.S.A. Medical in the state of Utah. A true and correct copy of such Order is attached hereto as Exhibit "A".

¹ For an informative discussion of the NASD and how it is regulated by the SEC and must, as a matter of law, comply with all the provisions of the Exchange Act, its own rules, and the rules of both the SEC and the Municipal Securities Rulemaking Board (MSRB), reference is made to Austin Municipal Securities, Inc. v. NASD, 757 F.2d 676, Fed. Sec. L. Rep. ¶92,027 (5th Cir. Ct. of App. 1985.)

5. It is undisputed that the Division's Order of March 1 makes no mention of "purchases" nor does it, by its own terms, prohibit purchases by an NASD member to consummate outstanding NASD contracts entered into prior to the date of such Order.

6. It is also undisputed that an SEC Release, a true and correct copy of which is attached hereto as Exhibit "B", specifically permits a broker-dealer to consummate outstanding securities contracts during even a federal, SEC trading suspension order. As NASD members, Respondents have a right to rely on such Exchange Act Release.

7. It is further undisputed that an exemption for the "purchase" of a security is not required under any state or federal law and that therefore, the Division's Order did not and could not prohibit "purchases" by Respondents for any purpose, let alone the express purpose of fulfilling their Exchange Act obligations.

8. Article III, §1 of the NASD Rules of Fair Practice requires a broker-dealer to honor its securities transactions or it may be subject to severe penalties, including substantial fines, suspension, and even expulsion from the NASD. (See NASD Manual (CCH) ¶2151 at p.2013-3 (May, 1989). In Respondents' Reply Memorandum of Law in Support of their Motion to Dismiss on file herein, Respondents have cited authority in which NASD members have been severely fined, suspended, or expelled for failure to honor their Exchange Act trades.

9. Article III of the NASD Rules of Fair Practice further requires a broker-dealer to deliver securities to its buying broker-dealer within a fixed number of days of the date of the sale. (See, e.g., NASD Manual (CCH), ¶2181 at p. 2123-3 (May, 1988) and Appendix B thereto.)

10. Based on Respondents' obligations as NASD members to honor their pre-March 1 securities transactions with out-of-state entities and based on the fact that the Division's Order neither prohibited "purchases" nor purchases to fulfill outstanding Exchange Act obligations, Respondents "purchased" a sufficient number of U.S.A. Medical securities from certain Utah residents for this exclusive and avowed purpose of delivery. It is further undisputed that Respondents did not "solicit" the sale of U.S.A. Medical stock from Utah residents to themselves after March 1 as set forth in copies of letters from such individuals on file herein. Further, as a matter of law, a broker-dealer cannot "solicit" a "sale" but only a "purchase." (See e.g., Rule 144(g)(2) of the General Rules and Regulations of the Commission, Reg. §230.144, Fed. Sec. L. Rep. (CCH) ¶2705A at p. 2788; Lipton, Broker-Dealer Regulation, Clark Boardman Securities Law Series, Vol. 15, §3.03[3][d][i], p. 3-95, ("... the prohibition on solicitation of customers applies only to the solicitation of buy orders, rather than the solicitation of sell orders."). It is noteworthy that on the basis of the foregoing realization on the part of the Division, namely that its March 1, Order did not prohibit "purchases", the Division, in July, amended its Petitions and dropped the specific allegation that Respondents in fact violated its Order of March 1.

11. The U.S.A. Medical securities so purchased after March 1 were delivered by Respondents to the various out-of-state entities to whom Respondents owed such securities and such securities were "accepted" by them in accordance with NASD and SEC rules, including Article 8 of the Uniform Commercial Code governing Investment Securities. It is further undisputed that such entities were aware of the Division's March 1, Order and U.S. District Judge Greene's ruling discussed below and yet they each and all accepted "delivery" by Respondents after March 1, regardless. [Emphasis added.]

12. It is undisputed that "delivery" of such securities to out-of-state entities in satisfaction of Respondents' outstanding NASD and SEC obligations did not effect a "distribution" of U.S.A. Medical securities to Utahns or anyone else (as the securities had already been "sold" out-of-state prior to March 1, and delivery was but a ministerial act undertaken to "even out" Respondent Johnson-Bowles' "open" accounts with such entities.)

13. Based on the Division's unilateral interpretation of its own March 1, Order that such Order prohibited "purchases" from Utah residents for the sole purpose of completing Respondents' out-of-state, federal obligations, the Division, on April 27, brought the instant administrative proceedings against Respondents. Such Petitions were amended by the Division in July and generally allege that Respondents' "purchase" of U.S.A. Medical securities from Utah residents after March 1, is a "dishonest or unethical practice" under §61-1-6(1) and (2), Utah Code Ann. -- a "practice" which allegedly justifies revocation of Respondents' registrations with the Division as broker-dealers and agents. Saying it another way, Respondents' noble and legitimate efforts to honor and fulfill their federal NASD and SEC obligations after March 1, which neither damaged nor had any effect on Utah residents or the purpose behind the Division's Order (designed only to protect Utah residents), apparently justifies, in the Division's view, putting Respondents completely out of business through the instant proceedings.

14. After the Division's Order of March 1, Respondent Marlen V. Johnson had numerous conversations with the NASD in Denver and was informed by Kenneth Schaeffer, Assistant Director, that Respondents' failure to honor their outstanding NASD contracts by delivering U.S.A. Medical stock would be violative of the NASD Rules of Fair Practice and could subject Respondents to serious disciplinary action by the NASD. (See Exhibit "C"

attached hereto and incorporated by reference, an affidavit to this effect which is part of the record in these proceedings.)

15. It is noteworthy that on February 16, 1989, prior to the Division's March 1, Order, Respondent Johnson-Bowles brought a 10b-5 securities fraud action in federal court against U.S.A. Medical and its "control persons" for market manipulation and the orchestration of a so-called "short squeeze" which had caused Johnson-Bowles' extensive "short position" in the securities of U.S.A. Medical. Such case was assigned to U.S. District Court Judge J. Thomas Greene and is denominated by Case No. C-89-157-G. In such Complaint, Johnson-Bowles, as Plaintiff, sought declaratory and injunctive relief to the effect that the court declare Respondents' outstanding contracts in the securities of U.S.A. Medical "void" or "voidable" because of the illegal conduct of the U.S.A. Medical Co-Conspirators. After a two-day preliminary injunction hearing on February 27 and 28, Judge Greene, while ruling that the securities of U.S.A. Medical had been the subject of securities fraud and market manipulation, did not grant Johnson-Bowles a preliminary injunction and in effect ruled that Respondents had no choice whatsoever but to honor their federal NASD and SEC obligations.

16. Based on a U.S. District Judge's ruling — a ruling which has the obvious force and effect of federal law — and Respondents' unequivocal Exchange Act obligations, Respondents purchased U.S.A. Medical securities as aforesaid for the sole purpose of completing their outstanding, out-of-state contracts. For this reason and others set forth hereinbelow, the Division's Amended Petitions, based on their capricious and bizarre interpretation of their own March 1, Order are not only in conflict with NASD and SEC rules and regulations, but they are in further conflict with Judge Greene's ruling that such

contracts were neither "void" nor "voidable". It is also significant that based on the testimony adduced at the preliminary injunction hearing before Judge Greene, virtually all of the stock of U.S.A. Medical was and had been "boxed" in the state of Utah and therefore, it would have been impossible for Respondents to have purchased U.S.A. Medical stock outside of the state of Utah to fulfill their outstanding federal obligations. Further, such would have required Respondents to "solicit" out-of-state residents to sell stock to Respondents as Utah residents in arguable violation of the Division's March 1, Order -- an argument ironically presented by the Division at the hearing on Respondents' Motion to Dismiss.

17. On July 3, 1989, Respondents moved the Division, in these proceedings, for an Order under Rule 12(b)(1) of the Utah Rules of Civil Procedure that the Division lacked subject-matter jurisdiction over the instant proceedings. Respondents argued orally and in such Motion and Supporting and Reply Memoranda that the Division's Petitions and Amended Petitions were in direct conflict with NASD and SEC requirements over which federal courts have exclusive jurisdiction under the Exchange Act. Based on this diametric conflict, Respondents argued that the Division had no power or authority under its own "enabling statute" or otherwise to discipline an NASD member for obeying, complying, or attempting to comply with such exclusive federal obligations under the Securities Exchange Act of 1934. It is particularly noteworthy that §28(a) of the Securities Exchange Act of 1934 specifically prohibits a state from regulating in a manner that "conflicts" with the Exchange Act. (See discussion hereinbelow.)

18. Respondents' July 3, Motion was denied by the Administrative Law Judge by Order of August 29, 1989, a true and correct copy of which is attached hereto as Exhibit

"D". It is this Order which is the subject of the present Request for Agency Review on the various assignments of error stated therein.

19. Lastly, Respondents have been required to vigorously resist the Division's Amended Petitions in that the Division has extortively and unreasonably demanded settlement from Respondents as follows:

- a. A one month suspension for Respondent Marlen V. Johnson;**
- b. An additional six month probationary period for Respondent Marlen V. Johnson;**
- c. A six month probationary period for Respondent Johnson-Bowles; and**
- d. A \$25,000 fine from each Respondent or a total of \$50,000.**

The foregoing settlement demand has ironically been proffered by the Division even though, as a matter of law, it has no power or authority whatsoever to extract or demand "fines" from Respondents. (See §61-1-et seq.) The foregoing is further not to lose sight of the fact that Johnson-Bowles would be hard-pressed to operate for a month during a suspension of its registered principal Marlen V. Johnson and therefore, the Division's unlawful revocation actions and settlement demands are extortive and maliciously designed to put Respondents out-of-business and for no other reason or purpose. In addition, the foregoing settlement offer has been further extended by the Division when it cannot point to one single, solitary Utah resident who has been damaged in any way by the conduct of Respondents and when Respondents single-handedly took it upon themselves to uncover the entire U.S.A. Medical fraud in federal court — something that the Division itself was unable and unwilling to do in February 1989. To be sure, had it not been for Respondent Johnson-Bowles' uncovering of the U.S.A. Medical fraud in Judge Greene's court, the

Division would never have entered or been able to enter its Order of March 1 to protect Utah residents from subsequent unlawful distributions.

ISSUE ON AGENCY REVIEW

Whether the Division's ruling on August 29, 1989, is erroneous in concluding that the Division has power and authority to regulate and discipline Respondents (federal licensees and NASD members) in a manner that diametrically "conflicts" and is inconsistent with the Securities Exchange Act of 1934 over which federal courts have exclusive jurisdiction under the Supremacy and Commerce Clauses of the Constitution.

(Respondents incorporate herein by reference their items of assignment of error as set forth in their formal Request for Agency Review on file herein. Respondents, in the interests of non-duplication, further incorporate by reference their other pleadings on file herein that were before the Administrative Law Judge.)

ARGUMENT

THE ADMINISTRATIVE LAW JUDGE'S RULING ON RESPONDENTS' RULE 12(b)(1) MOTION TO DISMISS DATED AUGUST 29, 1989 IS ERRONEOUS AS A SIMPLE MATTER OF LAW AND MUST BE REVERSED

A. Under the "Non-Delegation Doctrine" in Administrative Law, the August 29 Order or Ruling is erroneous and must be reversed.

The Administrative Law Judge's Order of August 29, is violative of the Securities Exchange Act of 1934. This is because Congress has specifically delegated the power and authority to regulate interstate trading of securities to the SEC and the NASD thereunder. Section 27 of the Securities Exchange Act of 1934, 15 U.S.C.A. §77aa, provides that any suit "to enforce any liability or duty created by this Chapter [the '34 Act]" must be brought in a U.S. District Court. The present tribunal is certainly not a district court of the

United States. Section 27 broadly encompasses all suits to enforce or interpret "any . . . duty created by" the Act. [Emphasis added.] Leroy, Attorney General of the State of Idaho v. Great Western United Corp., U.S. Sup. Ct. (CCH) ['78 –'81 Transfer Binder] Blue Sky L. Rptr. (CCH) ¶171,488 at p.68,611 (Justice White). In this regard, what "duty" could be more applicable to the Exchange Act than the very Exchange Act duty and obligation to complete brokerage transactions under Act III, Sec. I of the NASD Rules of Fair Practice? Because the dispute in this case goes to the very existence and purpose of SEC and NASD rules, the Division's efforts to punish and prohibit compliance with SEC and NASD rules and regulations is a usurpation of power and authority not delegated to it.

Section 28(a) of the Act provides in part that:

Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. [Emphasis added.]

15 U.S.C.A. §78bb(a). Section 28(a) of the Exchange Act thus imposes an "affirmative duty" on states, not to regulate inconsistently with federal mandate, the violation of which must be redressed in the federal courts under §27. Leroy, supra at p.68,607. In short, the purpose of §28(a) was to leave the states with as much leeway to regulate securities transactions as the Supremacy Clause would allow them (in the absence of such a provision). Leroy, supra at p. 68,608, note 13. In this case, the several states have not been delegated authority to regulate or enforce state administrative orders contrary to Article III, §1 of the NASD Rules of Fair Practice or any other SEC or NASD rule or regulation.

That the NASD and SEC and their concomitant rules and regulations are embraced by the Act is specifically set forth in §15 and 15A of the Act. The Utah Court of Appeals has recently confirmed the exclusiveness of interpreting NASD and SEC rules and regulations in the case of Western Capital & Securities, Inc. v. Knudsving, (Ut. Ct. of App., Case No. 880198-CA, Feb. 7, 1989) [Current Transfer Binder] Fed. Sec. L. Rptr. (CCH), ¶94,337. This and other authorities, including the specific provisions of the Exchange Act as cited by Respondents in their Supporting Memoranda below, have been totally and inexcusably ignored by the Administrative Law Judge in making his August 29, ruling.

The Supremacy and Commerce Clauses of the federal Constitution, and most, if not all state Constitutions, impose limits upon the legislature's actions. (See People v. Green, 1 U. 11 (holding that the Utah legislature may not, under Article VI, Sec. 1, of Utah's constitution, encroach upon the provisions of the federal Constitution and further holding that the legislature has no power to increase or diminish powers of any federal court in this state).) Nonetheless, the Division has brazenly taken upon itself the unlawful task of regulating and disciplining Respondents for totally obeying their Exchange Act obligations as specifically required of them thereunder.

The non-delegation doctrine in administrative law provides that a legislature may not delegate full legislative powers to an agency that is repugnant to the Constitution. The source of the doctrine is in the Constitution itself. Article 1, Section 1 provides that "all legislative powers herein granted shall be vested in the Congress of the United States". Based on the non-delegation principle, state legislatures cannot confer duties and authorities on administrative agencies that are repugnant to the federal Constitution or federal enactments. To be sure, the Supremacy Clause of the Constitution, Art. IV, cl. 2,

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provides that if a state law conflicts with federal law, federal law necessarily prevails. Based on this delegation of power, the existence of the Securities Exchange Act of 1934 creates the right not to be subject to conflicting state regulation. [Emphasis added.] Leroy, supra at p. 68,611. Viewed from the perspective of state officials, the existence of the Exchange Act creates a duty in such individuals not to undertake conflicting regulation efforts. Nevertheless, the instant proceedings could not be more diametrically conflicting with SEC and NASD rules mandating a broker-dealer and NASD member to honor its trades. To be sure, it is impossible that Respondents could have complied with their NASD and SEC obligations and the Division's unilateral interpretation of its own order at the same time. [Emphasis added.]

Because the power to regulate trading of securities in interstate commerce has been expressly delegated by Congress to the federal courts and the SEC and the NASD under the Exchange Act, it is inconceivable if not ludicrous that the exact same power could be simultaneously delegated to the Utah legislature to in turn second-handedly delegate to a state administrative agency such as the Division.

The important component of non-delegation is the issue of to whom the decision-making power is given. This aspect of non-delegation recently figured in a very important decision, Bowsher v. Synar, 106 S. Ct. 3181 (1986), overturning a balanced budget statute known as the Graham-Rudman-Hollings Act. In Bowsher, the U.S. Supreme Court flatly said:

To permit an officer controlled by Congress to execute laws would be, in essence, to permit a congressional veto. Congress could simply remove or threaten to remove, an officer for executing the laws in a fashion found unsatisfactory to Congress. This kind of congressional control over the execution of the laws . . . is unconstitutionally impermissible.

By the same token, Congress has not delegated Exchange Act authority to the Utah legislature to in turn delegate the same authority to the Utah Securities Division to, in its turn, inconsistently regulate and enforce that which specifically and exclusively comes under the Exchange Act. Because the decision-making power to regulate trading in the over-the-counter securities markets in interstate commerce has been expressly delegated to the SEC and NASD under the Securities Exchange Act of 1934, the Division has no jurisdiction to regulate Respondents, inconsistently or at all, in this regard. Unfortunately, this is what the Division is doing and what the August 29, Order says it can do. Moreover, the preamble to the Securities Exchange Act of 1934 provides that it is:

An Act to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.

Based on the foregoing, it is impossible as a matter of law that the Division has jurisdiction to bring proceedings repugnant to federal law and therefore, the Administrative Law Judge's Order of August 29, is erroneous and must be reversed forthwith.²

B. Based on the Division's own "enabling statute", the Division lacks power and authority to regulate in a manner that conflicts with and supersedes the Securities Exchange Act of 1934, and therefore, the Order of August 29, which erroneously concludes the contrary, must be reversed.

2 For a detail of the Supreme Court's discussion of non-delegation, see Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935). In these cases, the Supreme Court used the non-delegation doctrine to strike down two separate portions of the National Industrial Recovery Act of 1933 (NIRA). This case, however, is a more conspicuous violation of non-delegation in that Congress has never delegated authority to the Division, through the Utah legislature, to regulate, or even regulate inconsistently, that which it has specifically delegated to the SEC and the NASD under the Securities Exchange Act of 1934. 15 U.S.C. §78.

Delegation, as discussed above, should not be confused with the ultra vires doctrine. This doctrine asks whether an agency is functioning within its statutory powers. [Emphasis added.] The easy way to distinguish these two issues is to keep in mind that the non-delegation principle involves a look the face of the agency's enabling act and does not normally inquire into subsequent actions taken by the agency's administrator. Ultra vires, by contrast, presumes that the agency's enabling act contains a proper standard (i.e., that it is constitutional on its face), and then investigates subsequent agency action to see if that action is authorized by the enabling act.

The Division's enabling statute relative to these proceedings is contained in §61-1-6(1), Utah Code Ann. Quite clearly, this enabling statute or clause does not give the Division power or authority to revoke the registration of a broker-dealer or agent for complying or attempting to comply with superseding SEC and/or NASD rules. It does not say that the Division can override or supersede the SEC and NASD rules in acting to suspend or revoke the registration of a Utah broker-dealer and NASD member. It does not say that compliance with SEC and NASD rules and regulations under the Exchange Act creates a basis on which a broker-dealer or agent can be simultaneously subject to a state revocation proceeding. The statute states but nine (9) grounds on which the Division may act to revoke a broker-dealer or agent's license, none of which are remotely applicable to the interstate conduct of Respondents. To be sure, the statute clearly does not say that unambiguous SEC and NASD rules, designed to facilitate trading of securities in interstate commerce, can be capriciously deemed by the Division as "dishonest or unethical practices". On the contrary, had Respondents deemed the Division's March 1, Order as superseding federal law and preventing consummation of their out-of-state trades, and, as a result thereof, had

Respondents ignored express Exchange Act obligations, Respondents would have been accused by the NASD and SEC of engaging in "dishonest or unethical practices." See 15 U.S.C. §78o-3(b)(7).

This point is buttressed by §61-1-24, Utah Code Ann., which requires the Division, with respect to rules, forms, and orders to cooperate with the Securities Exchange Commission with the view to achieving maximum uniformity. [Emphasis added.] Further, §61-1-27, Utah Code Ann., directly conflicts with the position of the Division in regard to these proceedings. Section 61-1-27 provides:

This Chapter may be so construed as to effectuate its general purpose as to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. [Emphasis added.]

Contrary to §61-1-27, the Division's existing actions are repugnant to any "coordinating" of its interpretation and administration of §61-1-6 "with the related federal regulation". Quite literally, it is impossible to imagine a set of circumstances under which conduct by a state would not be more conflicting with a federal regulatory scheme.

If an agency is acting outside its jurisdictional limits, it is said to be functioning in a ultra vires manner. The authority of courts to review jurisdictional questions of this kind relative to agencies like the Division was firmly established by the U.S. Supreme Court in Crowell v. Benson, 285 U.S. 22 (1932). The term ultra vires is borrowed from corporate law and must be sharply distinguished from the delegation doctrine. A delegation analysis looks at the face of the enabling act and asks whether the statute itself contains a proper standard curbing unfettered agency discretion. By contrast, the ultra vires doctrine assumes there is a proper delegation in the statute, and then analyzes a specific action taken by the agency to determine whether that action is within the limits set by its enabling

act. In this instance, the Division's petitions must be overturned and dismissed because such petitions are clearly outside the agency's boundaries. Board of Governors, Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681 (1986). As the Supreme Court in Board of Governors, put it: "If the statute is clear and unambiguous (with regard to an agency's authority), that is the end of the matter" In this case, there is no ambiguity in statutory interpretation. Even a cursory review of the express language of §61-1-6(1), Utah Code Ann., evidences that the Division cannot take action to discipline a broker-dealer or agent for obeying Exchange Act mandates. This would turn the Supremacy and Commerce Clauses on their heads which is exactly what the August 29, Order does. For this reason, the Administrative Law Judge's August 29, 1989 decision could not be more erroneous, even under the ultra vires doctrine. Going further, however, it could not be more self-evident that neither Congress nor Utah's legislature have delegated authority to the Division to unilaterally interpret its own orders inconsistently with or in a manner that overrides Exchange Act rules and obligations.³ Thus one can see the compounded error of the August 29, Order.

It is also undisputed that the Division is an agent of the Utah courts and even a Utah District Court has no jurisdiction to address the Exchange Act issues presented in this case. See Western Capital, supra, a recent Utah Court of Appeals decision embracing this point precisely. For this reason alone, the Order of August 29 is erroneous as the Division

³ It is readily arguable that the Division acted improperly by proceeding against Respondents with adjudication when it should have proceeded by rulemaking, thereby giving Respondents and those similarly situated actual notice of how it would suddenly interpret its March 1, Order. However, this due process argument goes to a Rule 12(b)(6) motion and is not germane to the jurisdictional issue on review. The Order of August 29, erroneously assumes that the Division's March 1, Order somehow proscribed "purchases" by NASD members to complete outstanding contracts and that such constitutes a violation of §61-1-6(1)(g), Utah Code Ann. Such a conclusion is not only repugnant to the Division's own enabling statute, but it is further constitutionally repugnant to the Division's own power and authority to self-servingly interpret its own orders.

has no such authority as an agent of Utah Courts. See, e.g., State v. Mechem, 316 P.2d 1069 (N. Mex. S. Ct. 1957) (holding that workers' compensation actions may only be tried in a court, not by an agency, because those actions are exclusive within the court's judicial power). Similarly, it is quite impossible that the Division could conceivably try Issues as to Exchange Act obligations when a Utah state court itself has no such authority, power, or jurisdiction.

C. Because the August 29, 1989 Order "conflicts" with the rules and regulations promulgated under the Securities Exchange Act, including §28(a) thereof, it is preempted by federal law and therefore, the Order of August 29 is erroneous as a matter of law and must be reversed.

The Pre-emption Doctrine is an additional basis on which the Order of August 29 should be reversed and the instant administrative proceedings dismissed. When Congress exercises a granted power, concurrent conflicting state legislation may be challenged via the Preemption Doctrine. The Supremacy Clause, Art. IV, cl. II, mandates that federal law overrides, i.e., preempts any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires or, the contrary thereof, which exists in this case. In this case, federal law requires an act which not even state legislation, but mere state agency order allegedly forbids. Certainly, a more concrete and offensively conspicuous example of when and where the Preemption Doctrine applies could not exist.

In a leading Supreme Court case on the Preemption Doctrine, the court stated that the test for preemption is whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Constitutional principle is simply that states and federal government should have a common end in view, namely, to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. Amalgamated Association of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). Where there is no indicia of Congressional intent (i.e., a "dormant" Commerce Clause issue), a court may have to balance the state and federal interest to achieve this end. Such is not the case here as it would be ignoring the entire Exchange Act to declare otherwise or engage in any balancing test. The August 29 Order fails to address or discuss Congressional intent in the area of interstate, over-the-counter trading of securities and had it done so, the Judge would necessarily have concluded that there is clear, concise, and unambiguous legislative intent within the Securities Exchange Act of 1934. Schneiderwind v. ANR Pipeline Company, 108 S.Ct. 1145, 485 U.S. 293 (March 22, 1988) (holding that a preemption question requires an examination of Congressional intent and striking down a state statute under the commerce clause for impinging on a federal regulatory scheme). Based merely on the preamble to the '34 Act quoted above, there can be no dispute over Congress' intent and no need for the Administrative Law Judge to balance state and federal interests in this case. Nonetheless, the Administrative Law Judge concluded, in spite of clear, unambiguous Congressional intent contained in the Exchange Act, that the Division has subject-matter jurisdiction to regulate and discipline in conflict therewith.

Subsequent Supreme Court cases have adopted a three prong inquiry to establish pre-emption. They are generally:

- (1) The prevasiveness of the federal regulatory scheme;

- (2) The federal occupation of the field as necessitated by the need for national uniformity;
- (3) The danger of conflict between states laws and the administration of the federal program.

Pennsylvania v. Nelson, 350 U.S. 497, 502–505 (1956). The progeny of Hines and Nelson have continually narrowed the scope of judicial inquiry into a determination of whether, under the particular facts of the case, the existence of the state regulatory scheme is facilitative or detrimental to the purposes and objectives of the federal statute. In fact, most preemption cases discuss state legislation as possibly being in conflict or inconsistent with the federal scheme, not, as in this case, unilateral and reckless "state action" 180 degrees in conflict with a federal regulatory scheme. For instance, the Division seeks to revoke Respondents' state registrations for allegedly engaging in "dishonest and unethical practices." At the same time, the NASD, statutorily and through the SEC, is mandated to secure compliance by its members with the federal securities laws as well as its own regulations, which are themselves designed to promote "ethical business behavior." 15 U.S.C. §78o–3(b)(7). Respondents' conduct from a purely federal standpoint was indeed "ethical". How then, can the very same conduct be deemed "unethical" from a state standpoint and yet there be no "conflict" between the regulatory schemes as the Division argues? There can thus be no question that the instant proceedings are diametrically opposed to the carrying-out of specific Congressional intent. If Congress intended states to encroach upon areas specifically delegated by it to the SEC and NASD, why have no states done such, either on their own or through their adoption of the Uniform Securities Act. To be sure, §1904, taken together with §514 of the Uniform Securities Act compels federal/state integration or harmonization and it should be noted that Utah has in fact enacted the Uniform Act.

Co-operation is also a two-way street. Thus, states may not, under the Supremacy Clause, refuse to enforce valid federal laws even though such enforcement is in state court. Testa v. Katt, 330 U.S. 368 (1947). Unfortunately, this is precisely what the Division has arrogantly done, as if both the '34 Act did not exist and it had no bearing on either the state of Utah or an administrative agency thereof. The only exception to the foregoing is if Congress expressly or impliedly excuses a state from enforcing such federal law. See e.g., Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 387-88 (1929). In this case, Congress has not excused the Division or the state of Utah from enforcing SEC and NASD mandates; Congress has never said a state can regulate in diametrical conflict with NASD and SEC rules and regulations and yet such is precisely what the Division is doing and what the Order of August 29, says the Division can do. In fact, one cannot imagine a greater, more poignant conflict between state and federal law: if Respondents comply with NASD and SEC rules they apparently engage in "dishonest or unethical practices" yet if they comply with the Division's unilateral interpretation of its own order, they violate SEC and NASD obligations, subjecting themselves to fine, suspension and expulsion from the brokerage business, let alone costly arbitration with every out-of-state entity to whom they owed stock. A more telling and flagrant example of a state agency's self-will run riot in violation of the Supremacy and Commerce Clauses of the Constitution could not exist. The August 29, Order is thus repugnant to the mandate of comity as further articulated in Art. IV, Secs. 1 and 2 of the federal Constitution. See e.g., Toomer v. Witsell, 334 U.S. 385, 395 (1948).

A discussion of preemption relative to the Exchange Act cannot be made without reference to the significant Supreme Court case of Edgar v. Mite, U.S. Sup. Ct.

[1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,728 (June 23, 1982). In Edgar, the Supreme Court was confronted with the question of whether the Illinois Business Takeover Act was unconstitutional under the Williams Act, a 1968 amendment to the Exchange Act. After analyzing the protections afforded localities versus the burden imposed by the state statute on interstate commerce, the Court concluded that the Illinois statute was unconstitutional under the Commerce Clause and therefore preempted under the Exchange Act. The Court held that the Commerce Clause precludes the application of a state law to commerce that takes place outside a state's borders regardless of whether or not such commerce has effects within the state. The state statute was thus declared unconstitutional in that it imposed a burden on interstate commerce which was excessive in light of the local interests the state statute was designed to further. Pike v. Bruce Church, Inc., 397 US 137, 90 S.Ct. 844. The Division's present actions to put Respondents out of business serve no purpose for the benefit of Utah residents when compared to the burdens such actions impose on interstate commerce. In fact, the Division's Amended Petitions in no way serve to protect Utah residents at all. If anything, Respondents have to some extent ensured that thousands of shares of U.S.A. Medical are no longer subject to being sold to Utah residents as such shares have been "exported" out of Utah. Would the Division rather have all such stock still sitting here in Utah waiting to be re-distributed at some point to Utah residents in violation of the Division's March 1, Order? If one balances the interest of this locality in disciplining Respondents as against the burden imposed on several out-of-state broker-dealers and a major clearing corporation, one must conclude that the purely speculative nature of protection afforded by the Division's disciplinary actions impose a substantial burden on interstate commerce — a burden which far outweighs any

local putative benefits. Because the Division's actions seek to affect interstate commerce and prohibit the facilitation of interstate commercial transactions -- transactions already undertaken and entered into by Respondents with out-of-state residents -- such action by the Division can hardly be said to affect interstate commerce only incidentally. Edgar v. Mite, supra. Simply put, the Edgar court held that if a state law affects interstate securities transactions, it violates the Exchange Act. The Division's actions are also clearly atypical of everyday Blue Sky regulation in that the Division is seeking to directly regulate specific interstate securities transactions that have already taken place across state lines. In fact, Respondents' transactions, for which they are now defending revocation proceedings, are interstate commerce. [Emphasis added.] Edgar, supra.

The Respondents are also being discriminated against as federal licensees and NASD members merely because they are Utah residents. This kind of discrimination characteristically invalidates a state law under the Commerce Clause because such state action is based on impermissible protectionist intent or effect. L.P. Acquisition Co. v. Tyson, [85 Transfer Binder] Fed. Sec. L. Rptr. (CCH) ¶92,271 (6th Cir. Ct. of App. 1985).

In sum, the Supreme Court has made no suggestion that §28(a), the savings provision in the Exchange Act [15 U.S.C. §78bb(a)(1982)], authorizes, in any way, state violations of the Commerce Clause. Edgar, supra. In Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 63 S.Ct. 369, 87 L. Ed. 396 (1943), the Supreme Court upheld an injunction against a state on the ground that a supplier suffered injury from enforcement of a state's order for proof itself and that existence of complying with such orders was among the contingencies against which Congress sought to guard against in creating exclusive federal jurisdiction. [Emphasis added.]

The Division's only argument is that the instant proceedings come within its legitimate police power. However, it is well settled in Utah that the mere declaration by the legislature that an act is within the exercise of its police power is not binding on courts unless the act is specifically within the scope of such power. Utah Manufacturers' Assn. v. Stewart, 82 U. 198, 23 P.2d 229. In addition, Art. I, Sec. 18 of the Utah Constitution prevents a state from "impairing the obligation of contracts". While the Division argues in this case that impairing Respondents' outstanding interstate brokerage contracts is within its police power, such is not true. No Utahns have been damaged in any respect by the conduct of Respondents and under Utah law the Division's right to impair contracts is subject to such reasonable policing regulations as may be enacted to promote the public good. Golding v. Shubach Optical Co., 93 U. 32, 70 P.2d 871. For instance, no public good is possibly served by putting Respondents out of business merely for fulfilling their obligations as NASD members. On the other hand, surely it is not the Division's position that it is compelled to discipline Respondents to protect them from themselves as in the case of jay-walking — a crime within a state's police power for that very reason.

Based on the foregoing, the August 29, Order skirts the entire issue of pre-emption and comity, ignoring the Exchange Act and Supremacy and Commerce Clauses in their entirety, and erroneously concludes that the instant proceedings are within the legitimate police power of the state of Utah when they are not. For these reasons, the August 29, Order must be reversed and vacated and Respondents' motion to dismiss should be granted without further delay.

D. The Judge's Order of August 29 is non-responsive and otherwise fails to address the specific issue before it, namely whether the Division has the kind of subject

matter jurisdiction which Congress has exclusively delegated to federal courts, and therefore it must be vacated.

Respondents' Motion to Dismiss was directed solely to the issue of whether or not the Division has subject-matter jurisdiction to override SEC and NASD rules and regulations. This issue was not properly addressed by the Administrative Law Judge in the August 29, Order, and in fact, the Judge erroneously treated Respondents' Motion as one to dismiss for failure to state a claim upon its relief can be granted. Assuming the Division has subject-matter jurisdiction, which it could not, Respondents have little dispute with the fact that the Division has the police power to revoke the registration of a broker-dealer or agent for "dishonest or unethical practices". This is clearly set forth in §61-1-6(1)(g). Contrary to Respondents' Motion, however, the August 29, Order merely concludes that the Division has stated a claim under §61-1-6(1)(g), Utah Code Ann. Such is not and never was the purpose of Respondents' Motion. Once it could be established, however, that the Division has subject-matter jurisdiction, the issue of whether or not the amended petitions state a claim, constitutionally or otherwise, can be addressed.⁴ Unfortunately, these issues are not now and never were before the Administrative Law Judge on a Rule 12(b)(6) motion and therefore the Order of August 29, is entirely non-responsive and irrelevant to the specific jurisdictional issue. Such Order should thus be reversed accordingly.

E. The Order appealed from contains irrelevant and erroneous findings of fact and conclusions of law and otherwise tends to address the merits of the Division's case, and therefore it should be vacated.

⁴ Respondents emphasize that the actual constitutionality of the Division's Amended Petitions based on equal protection, due process, void for vagueness, and privileges and immunities, etc., arguments are not at issue here and are more properly the prospective subject of a Rule 12(b)(6) motion to dismiss.

Respondents object to the August 29, Order in that it contains irrelevant and erroneous findings of fact and conclusions of law which are neither admitted, pleaded, nor in evidence. It also tends to improperly address the merits of the Division's case and because it is non-responsive as outlined in the previous argument, it should be vacated. For instance, the August 29, Order fails to find that Respondents are members of the NASD and are subject to SEC and NASD rules and regulations specifically delegated to such organizations by Congress under the Exchange Act. The Order further fails to find that disputes, obligations, liabilities, and duties contemplated in the Exchange Act can only be brought or determined in a federal court as unequivocally set forth in §27 thereof. It further fails to find that the Division can inconsistently regulate a broker-dealer under the present fact situation without violating §28(a) of the Exchange Act. The Order further erroneously holds that Respondents' "purchase" of shares of U.S.A. Medical corporation stock to complete its outstanding federal obligations is a "willful failure" to comply with the Division's March 1, 1989, Summary Order suspending exemptions for the offer and sale of such securities in Utah and only in Utah. Again, whether the March 1, Order prohibited "purchases" is irrelevant to whether or not the Division has jurisdiction to regulate or adjudicate contrary to the mandates of the Exchange Act.

The August 29, Order erroneously concludes on top of page 4 thereof that *"NASD rules of conduct [sic] should not be accorded the force and effect of federal law."* This startling conclusion is completely belied by §§15, 15A, 27, and 28(a) of the Securities Exchange Act, including Western Capital and Securities, supra. The Order further erroneously concludes that the purchase of securities after March 1, 1989 merely to effect delivery of securities previously "sold" to third parties was "squarely at odds with the

operative effect of the March 1, 1989 Summary Order." As set forth in the Statement of Material Facts above, no exemption is required to "purchase" securities and this conclusion is further erroneous, let alone irrelevant, as a matter of state or federal law. The August 29, Order thus leads one to the erroneous conclusion that Respondents had actual notice of how the Division would unilaterally interpret its March 1, Order. This is not true. Further, it assumes that the Division acted properly in proceeding against Respondents by way of its petitions as opposed to rulemaking and this again evidences that the Order treats Respondents' Motion as one to dismiss for failure to state a claim. In short, the Order is erroneous in concluding that "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." Again, if a state court lacks subject-matter jurisdiction to address Exchange Act mandates and provisions, it is malignantly preposterous to conclude that the Division, a mere agent of Utah courts, would have such subject-matter jurisdiction. See §27 of the Exchange Act. By concluding that Respondents' conduct was "squarely at odds with the operative effect of the March 1, 1989 Summary Order", the Administrative Law Judge has further made a determination which tends to go to the merits and which is beyond the scope of Respondents' Motion. In addition, the August 29, Order further compels the erroneous legal conclusion that Respondents' conduct effected an unlawful "distribution" to Utah residents as this is the only legal conclusion that would justify the Division's Amended Petitions under its police powers. That Respondents effected an unlawful distribution to Utah residents is belied by the facts as in point of fact, all stock purchased by Respondents was "exported" out-of-state. Respondents' conduct therefore had no impact or relationship to Utah or

Utah residents. Simply put, the August 29, Order fails to properly address the simple jurisdictional issue that was before such court.

F. The August 29, Order erroneously concludes that the Division has power and authority to give extra-territorial effect to its March 1, Order, an interpretation which is not in the Order itself and which further violates the Division's enabling act, the Exchange Act, and the Supremacy and Commerce Clauses of the Constitution.

One of the salient problems with the August 29, Order is that it erroneously gives the Division's March 1, Order an unlawful extra-territorial effect on other states and other state residents. The purpose of Respondents' post-March 1, purchases of U.S.A. Medical stock was merely to fulfill interstate obligations. Such purchases had nothing to do with Utah or Utah residents, nor did it harm, damage, or injure any Utah residents. Certainly those who sold their U.S.A. Medical stock to Respondents are not complaining that they now want their worthless stock back, nor would it conceivably appear that the Division is now proceeding against Respondents on such sellers' behalf so as to protect them. Clearly, the only reason Respondents had to purchase such securities from Utah residents is the simple fact that virtually all of the outstanding U.S.A. Medical stock was in the state of Utah! This is evidenced by the official record in the Judge Greene proceedings. Ironically, at the hearing on Respondents' Motion to Dismiss, the Division argued that a purchase by Respondents from an out-of-state resident would not have changed the Division's position in regard to Respondents' alleged "dishonest or unethical" conduct. For this reason, it is clear that whether Respondents purchased the stock from Utah residents or not, the August 29, Order holds that Respondents, as Utah residents, violated the Division's March 1, Order and thereby engaged in "dishonest or unethical practices". To be sure, two of the

parties from whom Respondents purchased securities who are identified in the Amended Petitions are Sheldon and Lois Flateman, New York residents. At the hearing, the Division argued that the Flatemans themselves violated the Division's March 1, Order. Such an argument evidences that the Division considers its March 1, Order to have unlawful extra-territorial effect by suspending exemptions in other states such as the state of New York. This untenable and preposterous position is antithetical to well-settled conflicts of law problems in the Blue Sky area. See Lintz v. Carey Manor, Ltd., 613 F. Supp. 543, 550-51 (D.C. Va. 1985) (holding that two separate states' Blue Sky laws cannot be interpreted as being mutually exclusive). The foregoing also compels the inevitable legal conclusion that any out-of-state entity which bought stock for the account of Johnson-Bowles after March 1, would have similarly violated the Division's March 1, Order. If this is so, then it would have been impossible for Respondents to have ever honored their Exchange Act commitments without violating the Division's March 1, Order.

The Division apparently attempts to obtain subject-matter jurisdiction over these proceedings under §61-1-26 which provides that a transaction occurs in Utah if the "buy" occurs here. Based on this contention, however, it would have been impossible for Respondents, as Utah residents, to have purchased U.S.A. Medical stock from anyone, anywhere, without having arguably violated the Division's March 1, Order and its unlawful and unilateral interpretation thereof. The foregoing results in but another necessary legal conclusion that the Division's March 1, 1989, Order has been given unlawful extra-territorial effect by the Judge's Order of August 29. Certainly, under another state's Blue Sky laws, an out-of-state resident has every right to sell his or her U.S.A. Medical stock to anybody he wants, and if not, the Division is assuming power and authority no less expansive under the

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Commerce Clause than the U.S. Securities and Exchange Commission. (See Singer v. Magnavox, cited in Respondents' Supporting Memoranda on file herein holding that it is unlawful to give extra-territorial effect to a state's Blue Sky laws). It is thus undisputed that the Division's attempt to prevent Respondents from completing interstate commerce transactions has the practical effect of regulating and controlling conduct beyond the boundaries of Utah in violation of the Commerce Clause. Southern Pacific Co. v. Arizona, 325 U.S.761, 775 (1945). The limits on a state's power to enact substantive legislation are similar to the limitation on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extra-territorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of a State's power." Schafer v. Heitner, 433 U.S. 186, 197 (1977).

The second reason, alluded to above, why the August 29, Order unlawfully gives extra-territorial effect to the Division's March 1, Order is that it would prohibit "buy-ins" by the various out-of-state broker-dealers and clearing corporations "for the account" of Johnson-Bowles. There is absolutely no difference between Johnson-Bowles' purchase of U.S.A. Medical stock to cover its "short position" or the purchase by its clearing agents of U.S.A. Medical stock "for its own account". In other words, the necessary legal conclusion that must be drawn from the August 29, Order and the Division's position in that regard is that any "buy-ins" for Johnson-Bowles' account would have just as readily resulted in a violation of the Division's March 1, Order. In other words, what difference does it make who buys the stock if it is for Johnson-Bowles? Such a violation would apparently be not only on the part of Johnson-Bowles but also on the part of each out-of-state entity which the Division has no authority or jurisdiction to regulate. This is

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again because Johnson-Bowles is a Utah resident and it makes no difference whether Johnson-Bowles purchased the stock itself or such was purchased by someone else for its own account from the state of Utah or anywhere else. It makes absolutely no difference.

The August 29, Order erroneously affirms the Division's jurisdiction to prevent out-of-state broker-dealers and clearing corporations or agents from "evening out" their accounts with Johnson-Bowles -- an obviously unlawful extra-territorial effect violative of the Commerce Clause. While the August 29, Order infers that Johnson-Bowles should have allowed such "buy-ins", the Judge forgets that the subject out-of-state entities would have had to purchase stock from the state of Utah inasmuch as virtually all of the stock of U.S.A. Medical was in the state of Utah. This is further not to ignore that had Respondents allowed the out-of-state brokers and clearing agents to purchase U.S.A. Medical stock at any price they could get it, Respondents would have been out of business as Johnson-Bowles hadn't the capital to afford open-ended "buy-ins". For this reason, the fact that Johnson-Bowles purchased the stock itself for its own account as opposed to negligently allowing someone else to purchase it for its own account is a distinction without any difference. The August 29, Order concluded the contrary and is thus further error justifying reversal and the granting of Respondents' Motion to Dismiss.

The August 29, Order confers an additional extra-territorial effect on the March 1, Order. This is because such Order is construed as permitting the halting of trading of over-the-counter securities on an exclusively interstate basis as evidenced in this case. Unfortunately for the Division, any authority to halt over-the-counter trading is exclusively reserved to the NASD in SEC Ex. Act Rel. 25, 669, 40 SEC Dock.1123 (1988). Therefore, the Division's Order is in further conflict with SEC and NASD rules and

regulations, the specific power and authority over which is exclusively delegated to federal courts, not the Division, under the Exchange Act. The Division's Order, as interpreted by it, thus encroaches upon the NASD's exclusive trading suspension authority. Again, these points mandate that the instant proceedings be dismissed and that the August 29, Order be reversed.

Based on the fact that the August 29, Order unlawfully gives extra-territorial effect to the Division's March 1, Order, such Order and the instant administrative proceedings themselves are violative of the Supremacy and Commerce Clauses of the Constitution. Thus, the Administrative Law Judge's Order must be vacated.

CONCLUSION

When Congress tells Respondents to stand, the Division is disciplining them for not sitting; when Congress tells Respondents to leap, the Division seeks to discipline them for not lying down; when Congress has told Respondents that honoring their trades is an "ethical" mandate or the NASD will subject them to severe penalties, the Division has told them such is "unethical" or "dishonest" and their licenses will be revoked. No regulation could conceivably be more conflicting or paint anyone into a greater corner from which he or she cannot extricate themselves.

If Respondents' conduct is "unethical" or "dishonest", even in light of the Exchange Act, Respondents would like to know who the mysterious person is who is the recipient of such alleged "unethical" or "dishonest" behavior. Surely, its not a Utah resident or anyone else and the Division has yet to identify any such phantom who needs the protection of its alleged "police power".

Since preemption and comity come into play as a matter of law when a state regulation or activity conflicts with a federal mandate and subjects someone like Respondents to conflicting regulation, the Administrative Law Judge's ruling on Respondents' motion to dismiss is fundamental error and must be reversed. If not, the instant proceedings will continue to subject Respondents to incurring additional irreparable damage to their business, including unwarranted attorney's fees, all of which are wholly unnecessary in law, fact, or reality.

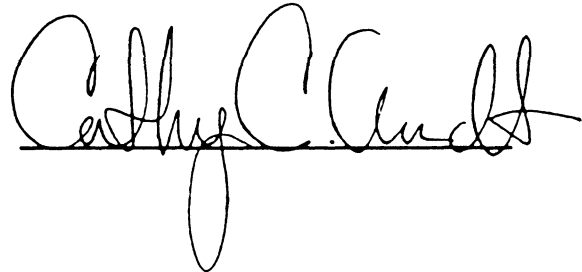
DATED this 11th day of September, 1989.



John Michael Coombs
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of September, 1989, (s)he hand-delivered a true and correct copy of the foregoing BRIEF OF RESPONDENTS IN SUPPORT OF REQUEST FOR AGENCY REVIEW AND HEARING THEREON 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; and mailed the same to Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol, Salt Lake City, Utah 84114; and 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.



J:BRIEF.1-12

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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

AFFIDAVIT OF RESPONDENTS
IN SUPPORT OF THEIR MOTION
TO DISMISS

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

STATE OF UTAH)
)ss.
SALT LAKE COUNTY)

Marlen Vernon Johnson, on his oath, deposes and says the following on behalf of respondents in the above-entitled matters and in support of their motion to dismiss on file herein:

1. That your affiant is a respondent in the above-matters and he has personal knowledge of that which is contained herein. He is also a principal of Johnson-Bowles

EXHIBIT 60066

Company, Inc., also a respondent in these matters, and he has power and authority to make this affidavit on its behalf.

2. That your affiant is a registered principal and registered representative with the National Association of Securities Dealers, Inc. ("NASD"), a self-regulatory organization governed exclusively under the express provisions of the Securities Exchange Act of 1934.

3. That respondent Johnson-Bowles Company Inc. is a broker-dealer registered, licensed with, and specifically regulated by the NASD as further exclusively governed under the express provisions of the Securities Exchange Act of 1934.

4. That after Johnson-Bowles filed a lawsuit in federal court on February 16, 1989 against U.S.A. Medical Corporation, et al., case no. C-89-157-G, in an effort to uncover the so-called "short squeeze" orchestrated by named-defendants therein, your affiant was in regular and continual contact with the NASD in Denver, specifically with one Kenneth Schaeffer, the NASD Regional Office Assistant Director.

5. That your affiant kept Mr. Schaeffer fully informed of the federal case and furnished him personally with copies of the Complaint, Judge J. Thomas Greene's formal order of February 28, 1989, and also the Utah Securities Division's Order of March 1, the latter of which is the sole subject of the instant proceedings.

6. That subsequent to March 1, 1989, your affiant had numerous conversations with Assistant Director Schaeffer about Johnson-Bowles' "short position" in the securities of U.S.A. Medical and your affiant can attest that Mr. Schaeffer was fully advised in all particulars and at all times. On nearly each occasion, Mr. Schaeffer reminded your affiant

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of respondents' obligations to fulfill and consummate their outstanding brokerage contracts as required under the NASD Rules of Fair Practice.

7. That even though Mr. Schaeffer was aware of the Division's March 1, 1989 Order, Mr. Schaeffer specifically informed your affiant in no uncertain terms that respondents must fulfill their overriding NASD obligations or face possible serious disciplinary action. That such warnings were understood by your affiant to not exclude expulsion from the NASD — the result of which would mean the end of respondents' business as being in good stead with the NASD is the lifeblood of any broker-dealer.

8. That based on your affiant's unequivocal conversations with Mr. Schaeffer and because respondents are directly and daily regulated by the NASD in all particulars, your affiant believed respondents had no choice whatsoever but to purchase U.S.A. Medical stock to consummate their outstanding Exchange Act transactions in such securities — transactions that had each and all been entered into prior to the date of the Division's March 1, Order. In other words, in light of the present state administrative proceedings, respondents have relied to their detriment on the warnings and admonitions of the NASD by and through Mr. Schaeffer. Further, your affiant was aware of the SEC Interpretative Release attached to respondents' Supporting Memorandum as Exhibit "B" and was under the obviously reasonable impression that respondents' conduct was permissible under the federal regulatory scheme without question.

9. That your affiant never interpreted the Division's March 1, Order — the exclusive subject of these proceedings — as prohibiting or even remotely relating to respondents' obligations to complete their outstanding brokerage contracts. To be sure, the Division's

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Petitions are belied by the very language of the Order itself. Further, that at no time were respondents advised by counsel, the Division, the SEC, the NASD, or anyone else that fulfilling their outstanding NASD contracts would or even could be deemed a violation of the Division's March 1, Order — an Order which relates only to sales or offers to sell. This is particularly true when the SEC, the NASD, and the Securities Division were well aware and fully apprised of all that was transpiring in the U.S.A. Medical litigation. As a matter of fact, the Division had two attorneys present on February 27 and 28 at the preliminary injunction hearing before U.S. District Judge Greene. Further, your affiant believes that Mr. Schaeffer similarly did not, by any stretch of the imagination, so misconstrue the Division's Order as the Division itself is now doing as your affiant believes that Mr. Schaeffer would have certainly communicated something in that regard to respondents, which he did not at any time.

10. That in the event that the Division has subject-matter jurisdiction over the instant administrative proceedings, your affiant can attest that respondents are and have been subject to grossly competing and conflicting regulation on the part of the NASD, the SEC, and the Utah Securities Division — contradictory regulation that no business or businessman should be required to face, let alone tolerate. In other words, the damages respondents have sustained as a result of the instant proceedings is incalculable in that respondents have been forced to amend all Form B-D and U-4 forms, they have had to notify each state securities commission or division in which they do business, they have been denied the ability to register as a broker-dealer in the State of Arizona (and as a result lost a valuable and loyal employee), and they have had to amend several offering circulars

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they are presently underwriting to disclose and reflect the instant proceedings, disclosures that make the completion of such offerings virtually impossible. All of this because the Division never bothered to determine whether it had subject-matter jurisdiction and whether the instant actions were repugnant to superseding federal law specifically enacted to exclusively regulate respondents. Based on the foregoing, including respondent's Memorandum In Support of their Motion to Dismiss, your affiant believes that the instant actions must be dismissed with prejudice.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 13th day of July, 1989.


Marlen Vernon Johnson

JOHNSON-BOWLES COMPANY, INC.

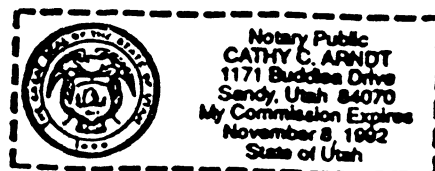
By: 
Its: PRESIDENT

SUBSCRIBED and SWORN to before me this 13th day of July, 1989.


Notary Public
Residing at Salt Lake City, UT My

Commission Expires:

November 8, 1992



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EXHIBIT "K"

"Act"

(1) The term "Act" means the Securities Exchange Act of 1934, as amended

"Fixed Price Offering"

(m) The term "fixed price offering" means the offering of securities at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act of 1933, except that the term does not include offerings of "exempted securities" or "municipal securities" as those terms are defined in Sections 3(a)(12) and 3(a)(29), respectively, of the Securities Exchange Act of 1934 or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act of 1940 which are offered at prices determined by the net asset value of the securities

¶ 2102**Definitions in By-Laws**

Sec. 2. Unless the context otherwise requires, or unless defined in this Article, terms used in the Rules and provisions hereby adopted, if defined in the By-Laws, shall have the meaning as defined in the By-Laws

ARTICLE III**Rules of Fair Practice****¶ 2151****Business Conduct of Members**

Sec. 1. A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade

● ● ● Cross References

"Filing of Misleading Information as to Membership or Registration"	¶ 1791
"Failure to Register Personnel"	¶ 1791
"Fair Dealing with Customers"	¶ 2152
"NASD Mark-Up Policy"	¶ 2154
"Manipulative and Deceptive Quotations"	¶ 2155
"Policy with Respect to Firmness of Quotations"	¶ 2156
" 'Third Market' Confirmations"	¶ 2162
"Refusal to Abide by Rulings of the Uniform Practice Committee"	¶ 3502
"Failure to Act Under Provisions of Code of Arbitration Procedure"	¶ 3744
"Prompt Payment by Members for Shares of Investment Companies"	¶ 5265
" 'Breakpoint' Sales"	¶ 5266

Annotations of selected SEC decisions**Execution and Delivery**

10 Failure to Execute Customer Orders.—
In 1977, the firm acted as managing underwriter of a registered public offering of 385,000 Jhirmack Enterprises, Inc., securities. The underwriting syndicate distributed 398,200 shares, resulting in a short position of 13,200 shares when distribution closed on March 24, 1977. Subsequently, BEHR

became Jhirmack's primary market maker and placed quotations in the NASDAQ System. On March 25, BEHR began trading the stock in the OTC market. The conduct of which NASD complained occurred in after market trading by BEHR on March 25, 28, and 29.

On March 25, BEHR had customer orders to buy 40,000 shares of Jhirmack. However, BEHR

EXHIBIT "L"

.16 AMEX was asked to correct deficiencies in proposed rule changes.—*American Stock Exchange, Inc* (SEC 1977), '77 '78 CCH Dec ¶ 81,177

[¶ 26,294] [Commission's Abrogation of Self-Regulatory Organization's Rules]

Sec. 19(c) The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title, in the following manner

.001 Historical comment.—

The Act of June 4, 1975, Sec 16, 89 Stat 150, amended Sec 19(c) which formerly read

"The Commission is authorized and directed to make a study and investigation of the rules of national securities exchanges with respect to the classification of members, the methods or election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations" CCH

.10 Commission-initiated changes in the rules of the self-regulatory organization —

This subsection embodies two principal changes in existing Section 19(b) First, the SEC would be granted the power to change the rules of a self regulatory organization in any respect, not just with respect to certain enumerated areas Second, the procedures that the SEC must follow in utilizing this power would be clearly specified —*Senate Committee Report No 94 75 (1975), page 131*

.15 Exchanges—Duty to protect investors—Reasonable diligence —See ¶ 21,310 37

[¶ 26,295]

[Notice of Proposed Rule Amendment]

Sec. 19(c)

(1) The Commission shall notify the self regulatory organization and publish notice of the proposed rulemaking in the Federal Register The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking

.001 Historical comment.—

Sec 19(c)(1) was added by Act of June 4, 1975, Sec 16, 89 Stat 150

[¶ 26,296]

[Presentations Relating to Proposed Rule Amendment]

Sec. 19(c)

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions A transcript shall be kept of any oral presentation

.001 Historical comment.—

Sec 19(c)(2) was added by Act of June 4, 1975, Sec 16, 89 Stat 150

[¶ 26,297]

[Commission Statement Concerning Rule Amendment]

Sec. 19(c)

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking

.001 Historical comment.—

Sec 19(c)(3) was added by Act of June 4, 1975, Sec 16, 89 Stat 150

EXHIBIT "M"

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am Jur 2d Securities Regulation — State § 18
C.J.S. — 79 C J S Supp Securities Regulation § 196

Key Numbers. — Licenses ⇐ 18½ (37), Securities Regulation ⇐ 272

61-1-6. Denial, suspension, or revocation of registration — Grounds — Procedure — Examination.

(1) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, 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 or investment adviser

(a) filed an application for registration that was incomplete in any material respect or contained any statement that was, in light of the circumstances under which it was made, false or misleading with respect to any material fact,

(b) willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act,

(c) was convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(d) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business,

(e) is the subject of an order of the executive director or any predecessor denying, suspending, or revoking registration as a broker-dealer, agent, or investment adviser,

(f) (1) is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, or investment adviser, or the substantial equivalent of those terms as defined in this chapter, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States Post Office fraud order

(11) The division may not institute a revocation or suspension proceeding under this Subsection (f) more than one year from the date of the order relied on, and the executive director may not enter an order under this Subsection (f) on the basis of an order under another state act unless that order was based on facts that would currently constitute a ground for an order under this section,

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

(h) is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature. However, the executive director may not enter an order against a broker-dealer or investment adviser under this Subsection (h) without a finding of insolvency as to the broker-dealer or investment adviser; or

(i) is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in Subsection (3).

(2) (a) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any registration, if he finds that the order is in the public interest and that the applicant or registrant:

(i) has failed reasonably to supervise his agents if he is a broker-dealer or his employees if he is an investment adviser; or

(ii) has failed to pay the proper filing fee.

(b) The division may enter a denial order under this subsection, but shall vacate the order when the deficiency has been corrected.

(c) The division may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to it when registration became effective unless the proceeding is instituted within the next 30 days.

(3) The following provisions govern the application of Subsection 61-1-6(1)(i):

(a) The executive director may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than the broker-dealer himself if he is an individual or an agent of the broker-dealer.

(b) The executive director may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than the investment adviser himself if he is an individual or any other person who represents the investment adviser in doing any of the acts which make him an investment adviser.

(c) The executive director may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge.

(d) The executive director shall consider that an agent who will work under the supervision of a registered broker-dealer need not have the same qualifications as a broker-dealer.

(e) The executive director shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker-dealer or agent. When he finds that an applicant for initial or renewal registration as a broker-dealer is not qualified as an investment adviser, he may by order condition the applicant's registration as a broker-dealer upon his not transacting business in this state as an investment adviser.

(f) The division shall by rule provide for examinations, which may be written or oral or both, to be taken by all applicants.

(4) The division may take emergency action with respect to registration applications according to the procedures and requirements of Chapter 46b, Title 63.

(5) If the division finds that any registrant or applicant for registration is no longer in existence, has ceased to do business as a broker-dealer, agent, or

investment adviser, is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the division may by order cancel the registration or application according to the procedures and requirements of Chapter 46b, Title 63.

(6) (a) Withdrawal from registration as a broker-dealer, agent, or investment adviser becomes effective 30 days after receipt of an application to withdraw or within such shorter period of time as the division may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after the application is filed.

(b) If a proceeding is pending or instituted, the division shall designate by order when the withdrawal becomes effective.

(c) (i) If no proceeding is pending or instituted, and withdrawal automatically becomes effective, the division may initiate a revocation or suspension proceeding under Subsection 61-1-6(1)(b) within one year after withdrawal became effective.

(ii) If the division decides to issue a revocation or suspension order, the executive director shall enter the order as of the last date on which registration was effective.

(7) The division, board, and executive director shall comply with the procedures and requirements of Chapter 46b, Title 63, before issuing any order under any part of this section.

History: C. 1953, 61-1-6, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 9; 1987, ch. 161, § 233.

Amendment Notes. — The 1987 amendment, effective January 1, 1988, rewrote Subsection (4) to such an extent as to make a detailed analysis impracticable; in Subsection (5) added "according to the procedures and requirements of Chapter 46b, Title 63"; in Subsection (6) added the internal subsection designations and in Subsection (b) substituted "the division shall designate by order when the

withdrawal becomes effective" for "withdrawal becomes effective at such time and upon such conditions as the division by order determines", rewrote Subsection (7) to such an extent as to make a detailed analysis impracticable, and made minor changes in style and phraseology throughout the section

Securities Exchange Act of 1934. — The federal Securities Exchange Act of 1934, referred to in Subsection (1)(f), appears as 15 U S C § 78a et seq.

NOTES TO DECISIONS

Scope of inquiry.

Commission had authority to inquire into applicant's or registrant's conduct with respect to unworthiness to carry on business that he or it was registered to carry on, irrespective of

fact that securities to which inquiry was specifically directed did not need to be registered *Lauren W. Gibbs, Inc. v Monson*, 102 Utah 234, 129 P 2d 887 (1942) (decided under former law)

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am Jur 2d Securities Regulation — State §§ 19 to 24

C.J.S. — 79 C J S Supp Securities Regulation §§ 223 to 226

A.L.R. — Churning stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity, 32 A L R 3d 635.

Law practice what activities of stock or se-

curity broker constitute unauthorized practice of law, 34 A L R 3d 1305

Mistake effect, as between stockbroker and customer, of broker's mistaken sale of stock or other security other than that intended by customer, 48 A L R 3d 513

Key Numbers. — Licenses ⇨ 18½ (38), 38, Securities Regulation ⇨ 270, 274, 277

EXHIBIT "N"

successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) When process is served under this section, the court, or the executive director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

History: C. 1953, 61-1-26, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 36. business in state to have resident agent, Utah Const. Art. XII, Sec 9

Cross-References. — Corporations doing

NOTES TO DECISIONS

ANALYSIS

Foreign contracts.

In personam jurisdiction.

Foreign contracts.

Act did not apply to contracts made and entered into in another state *United States Bond & Fin. Corp. v. National Bldg. & Loan Ass'n of Am.*, 80 Utah 62, 12 P.2d 758, rehearing denied, 80 Utah 70, 17 P.2d 238 (1932) (decided under former law).

In personam jurisdiction.

Subsection (7) does not provide the exclusive

method of acquiring jurisdiction over one in violation of the Securities Act, but simply gives a special means of doing so, it does not prevent the obtaining of personal jurisdiction by any other means provided by statute and, in particular, does not preclude the use of § 78-27-22, the "long-arm statute" *Piantes v. Hayden-Stone, Inc.*, 30 Utah 2d 110, 514 P.2d 529 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893, rehearing denied, 416 U.S. 963, 94 S. Ct. 1983, 40 L. Ed. 2d 314 (1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 17, 92.

C.J.S. — 79 C.J.S. Supp. Securities Regulation § 198

Key Numbers. — Licenses ⇐ 18½ (36); Securities Regulation ⇐ 271

61-1-27. Construction of chapter.

This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

History: C. 1953, 61-1-27, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 37.

EXHIBIT "O"

~~History: C. 1953, 63-46b-11, enacted by L. 1987, ch. 161, § 267; 1988, ch. 72, § 21.~~

~~Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "properly scheduled hearing after receiving proper notice" for "hearing" in Subsection (1)(b), designated the existing provisions in Subsection (3) as present Subsection (3)(a), inserting "and any order in the adjudicative proceeding issued subsequent to the default or-~~

~~der," and added Subsections (b) and (c), designated the existing provision in Subsection (4) as present Subsection (4)(a), adding "In an adjudicative proceeding begun by a party that has other parties besides the party in default," and added Subsection (b), and made minor stylistic changes~~

~~Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988~~

63-46b-12. Agency review — Procedure.

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall:

- (i) be signed by the party seeking review;
- (ii) state the grounds for review and the relief requested;
- (iii) state the date upon which it was mailed; and
- (iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(c) The order on review shall contain:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;

- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties, and
- (viii) the time limits applicable to any appeal or review

History C. 1953, 63-46b-12, enacted by L. 1987, ch. 161, § 268; 1988, ch. 72, § 22.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, designated the former introductory paragraph in Subsection (1) as present Subsection (1)(a) substituting "30 days for ten days" in that paragraph and redesignated former Subsections (1)(a) to (d) as

present Subsections (1)(b)(i) to (iv), inserted "or within the time period provided by agency rule, whichever is longer" in Subsection (2), and made minor stylistic changes

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988

63-46b-13. Agency review — Reconsideration.

- (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested
- (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order
- (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
- (3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request
- (b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied

History: C. 1953, 63-46b-13, enacted by L. 1987, ch. 161, § 269; 1988, ch. 72, § 23.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, subdivided Subsection (1) and rewrote Subsection (1)(a), which had read "Within ten days after the date that an order on review is issued, or within ten days after the date that a final order is issued for which agency review is unavailable, any party may file a written request for reconsideration

stating the specific grounds upon which relief is requested", deleted "or the order on review" at the end in Subsection (1)(b) and substituted "reconsideration" for "rehearing" in Subsection (3)(b)

Effective Dates. — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988

63-46b-14. Judicial review — Exhaustion of administrative remedies.

- (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute
- (2) A party may seek judicial review only after exhausting all administrative remedies available, except that
 - (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required,
 - (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if
 - (i) the administrative remedies are inadequate, or

EXHIBIT "P"

Correlator

SECURITIES ASSOCIATIONS

and

MUNICIPAL SECURITIES DEALERS

and

Gov't Securities Brokers and Dealers

A preliminary discussion introducing the subjects covered in this division. Use it for quick review of the high points of the detailed "compilation" of decisions, rulings and comment following

Registered Securities Associations

**Associations of
Brokers and
Dealers**

The authority and criteria for the registration of associations of brokers and dealers are set forth in Section 15A of the Exchange Act (§ 25,501 and following); the procedure for registration, however, is governed by Section 19 of the Exchange Act (§ 26,241 and following). Though Section 15A deals with registration as an affiliated securities association (§ 25,631), as well as registration as a national securities association (§ 25,501), the latter is the principal category. The National Association of Securities Dealers, Inc. (NASD) is registered with the Commission since 1939 as a registered securities association. (The NASD is the only association so registered.) Registration of an association as a national or as an affiliated securities association is effected by filing a registration statement on Form X-15AA-1 with the SEC (§ 25,502).

**Criteria for
Registration**

The statutory criteria for registration as a national securities association are, for the most part, stated in terms of what the rules of the association must or may not provide. For example, the rules must be designed to protect investors, prevent fraud and foster equitable principles of trade in accordance with specific requirements and prohibitions of the statute (§ 25,591) and they may impose no unnecessary burden on competition (§ 25,613).

The association must have compliance enforcement ability (§ 25,561) and, to the extent applicable, requirements relating to affiliated securities associations must be met (§ 25,615 and 25,621). Association rules must meet standards as to selection of directors (§ 25,589), disciplinary matters (§ 25,601), fair procedure (§ 25,611 and 25,675 and following), equitable allocation of dues (§ 25,590), membership and association with a member (§ 25,570 and 25,671—25,671F), quotations (§ 25,616) and dealings with nonmember professionals (§ 25,651—25,655).

For purposes of Section 15A—other than Section 15A(g)(3) relating to standards for membership and association with a member—municipal securities are not treated as exempted securities (§ 21,191). Broker-dealer transactions in exempted securities are within the association's rulemaking authority only to a limited extent (§ 25,661).

A registered securities association may not make rules concerning transactions by a registered broker or dealer in a municipal security (§ 25,665).

Some criteria are modified in the case of registration of affiliated associations (§ 25,631—25,645).

Sec. 15A(b)

(2) Such association is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association

001 Historical comment.—

The Act of June 4, 1975, Sec. 12(2), effective December 1, 1975, 89 Stat. 127, amended Sec. 15A(b)(2) which formerly read

"such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regula-

tions thereunder, and to carry out the purposes of this section"

Act of August 20, 1964, Sec. 7(a)(1), 78 Stat. 574, deleted the semicolon at the end of paragraph (2) of Sec. 15A(b) and inserted the period —CCH

[¶ 25,570]

[Membership in Association]

Sec. 15A(b)

(3) Subject to the provisions of subsection (g) of this section, the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof

001 Historical comment.—

The Act of June 4, 1975, Sec. 12(2), effective December 1, 1975, 89 Stat. 127, amended Sec. 15A(b)(3) which formerly read

"the rules of the association provide that any broker or dealer who makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) or (5) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to or refuse to continue in such association any broker or dealer if—

(A) such broker or dealer, whether prior or subsequent to becoming such, or

(B) any person associated with such broker or dealer, whether prior or subsequent to becoming so associated,

has been and is suspended or expelled from a national securities exchange or has been and is barred or suspended from being associated with all members of such exchange, for violation of any rule of such exchange"

Act of August 20, 1964, Sec. 7(a), 78 Stat. 574—575, amended paragraph (3) of Sec. 15A(b), which formerly read as follows.

"the rules of the association provide that any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) of this subsection. *Provided*, That the rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section,"—CCH

[¶ 25,581]

[Denial of Membership to Certain Persons]

[The provisions relating to denial of membership in a securities association which were formerly contained in Section 15A(b)(4) prior to December 1, 1975 are now contained in Section 15A(g). See ¶ 25,671—25,671K CCH.]

● **Regulations**¶ 25,570 **Law § 15A(b)(2)**

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.001 Historical comment.—

For text of Sec 15A(b)(5) in effect prior to December 1, 1975, see ¶ 25,671D 001

The provisions relating to allocation of dues were formerly contained in Sec 15A(b)(7). Prior to amendment by the Act of June 4, 1975, Sec 12(2), effective December 1, 1975, 89 Stat 127, paragraph (7) of Sec 15A(b) read

"the rules of the association provide for the equitable allocation of dues among its members to defray reasonable expenses of administration

Act of August 20, 1964, Sec 7(a)(4), 78 Stat 574, 575 redesignated paragraph (6) of Section

15A(b) as paragraph (7) and replaced the semicolon at the end of the paragraph with a period — CCH

10 Dues not to exceed reasonable expenses and to be fairly allocated — This paragraph has a dual purpose. First, to provide that the total of dues assessed against the members of an association shall not exceed an amount necessary to defray reasonable expenses of administration; second, to provide that such dues shall be fairly allocated among the members of the association. — *House Committee Report No 2307* (1938), 75th Cong 3d Sess

[¶ 25,591]

[Rules to Promote Just and Equitable Principles of Trade]

Sec 15A(b)

(6) The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association

.001 Historical comment —

For text of Sec 15A(b)(6) in effect prior to December 1, 1975, see ¶ 25,589 001

The provisions relating to the prevention of fraudulent acts and practices were formerly contained in Sec 15A(b)(8). Prior to amendment by the Act of June 4, 1975, Sec 12(2), effective December 1, 1975, 89 Stat 127, paragraph (8) of Sec 15A(b) read

"the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or

other charges, and, in general, to protect investors and the public interest and to remove impediments to and perfect the mechanism of a free and open market and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealer, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances discounts, or other charges '

Act of August 20, 1964, Sec 7(a)(4), 78 Stat 574, 575, redesignated paragraph (7) of Section 15A(b) as paragraph (8), and replaced the semicolon at the end of the paragraph with a period — CCH

• • • Annotations by Topic

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.09 Scope of self-regulatory authority—1975 amendments.—

Under the bill the scope of the rule making authority and responsibility of all self regulatory organizations would be defined in terms of pur

¶ 25,590.10 Law § 15A(b)(6)

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[¶ 25,601]

[Discipline of Members]

Sec 15A(b)

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this title, the rules or regulations thereunder the rules of the Municipal Securities Rulemaking Board, or the rules of the association by expulsion suspension limitation of activities, functions, and operations fine censure being suspended or barred from being associated with a member, or any other fitting sanction

001 Historical comment —

For text of Sec 15A(b)(7) in effect prior to December 1, 1975, see ¶ 25 590 001

The provisions relating to discipline of members were formerly contained in Sec 15A(b)(9) Prior to amendment by the Act of June 4, 1975, Sec 12(2), effective December 1, 1975, 89 Stat 128, paragraph (9) of Sec 15A(b) read

"the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members or any other fitting penalty, for any violation of its rules "

Act of August 20, 1964, Sec 7(a), 78 Stat 575 576, amended redesignated paragraph (9) of Sec 15A(b), which formerly read as follows

"the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension fine, censure, or any other fitting penalty, for any violation of its rules " — CCH

10 Expulsion from NASD—Revocation of registration—Free riding—The expulsion of a broker-dealer from the NASD membership, and the revocation of the registration of the member's president as a registered representative for violation of NASD rules (Article III, Section 1, NASD Manual G 23-4) against free riding was upheld by the SEC The president sold 500 shares of common stock, out of a 2,000 share participation in an underwriting of a public offering of such stock, to his wife—*A J Gabriel Co, Inc , and Aaron J Gabriel* (1965), 42 S E C 755, '64 '66 CCH Dec ¶ 77,283

15 Contractual plans—"In-and-out" privilege—NASD interpretation.—See ¶ 25,591 122

20 NASD Disciplinary hearings—Due process requirements—Sanctions and costs—Imposition on successor member—Cotzin (1974), Release No 34-10850, June 12, 45 S E C 575, 4 SEC Docket No 12, p 420, '73-'74 CCH Dec ¶ 79,827

50 Members engaged in municipal securities business—1975 amendments.—

Further changes in section 15A are necessitated by section 12 [now 13] of the bill establishing the Municipal Securities Rulemaking Board and providing for regulation of the municipal securities industry As the only securities association registered pursuant to section 15A, the National Association of Securities Dealers would be delegated

inspection enforcement and other responsibilities by the bill Accordingly, this section of the bill would effect the changes in section 15A necessary to implement the purposes of the bill

To broaden the NASD's responsibility and authority with respect to its members which are engaged in a municipal securities business this section of the bill would amend various provisions of section 15A Specifically, paragraph (7) of section 15A(b) would be further amended to require that members and persons associated with its members shall be appropriately disciplined for violations of the rules promulgated by the Municipal Securities Rulemaking Board

Similarly, the traditional requirement that the association provide fair and orderly procedures for the discipline of members and persons associated with members referred to in section 15A(b) would be amended to extend these due process requirements in instances of violation of the rules of the Municipal Securities Rulemaking Board Further any final disciplinary action taken by the association for such violations would be subject to review by the Commission in accordance with the procedures prescribed in section 15A(h)

The bill would also further amend subsection 15A(e) of the Act to change the definition of the term non member for purposes of the authority granted to registered securities [association] to prohibit members by rule, from dealing with non members except at the same prices and on the same terms and conditions as are accorded to the general public Since the self regulatory organization created for the municipal securities industry by the bill the Municipal Securities Rulemaking Board, would not be a membership organization the revision to this important provision of the Act would effectively require all nonbank municipal securities dealers which participate in underwriting syndicates to join the NASD In this connection, syndicate and underwriting practices and the granting of any discounts, allowances or concessions would be the subject of direct rulemaking by the Municipal Securities Rulemaking Board

—*Senate Committee Report No 94 75 (1975), page 112*

60 Burden of proof—The NASD's imposition of sanctions against a broker did not require reversal simply because the NASD did not apply a "clear and convincing" standard of proof since a preponderance of the evidence test was sufficient

EXHIBIT "Q"

[¶ 25,139]

**Consummation of Securities Transactions by
Broker-Dealers When Trading Is Suspended**

Release No. 34-7920, July 19, 1966, 31 F. R. 10076.

~~30~~ → The release below is based on the law in effect prior to the Securities Acts Amendments of 1975. Sec. 12(k) at ¶ 23,371 consolidates former Sections 15(c)(5) and 19(a)(4). See ¶ 23,371.10. CCH

17 CFR 241.7920.

The Securities and Exchange Commission today made public a policy statement of its Division of Trading and Markets relating to the post-suspension consummation of securities transactions entered into by brokers and dealers before the Commission suspended trading in the security pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act of 1934, as amended.

The text of the statement, issued by Irving M. Pollack, Director of the Division, follows:

"A number of questions have been presented recently as to whether, during the period when trading is suspended by order of the Commission pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act of 1934, a broker or dealer may complete (e.g., by payment or delivery) an agency or principal contract entered into prior to the suspension.

"It is the position of the Division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension pursuant to Section 15(c)(5) or Section 19(a)(4), and where he has no reason to believe that his customer is so connected, no objection need be raised under such sections because the broker-dealer completes his contractual obligations in the particular transaction (e.g., by payment or delivery) while the suspension is still in effect. The Division believes that in each such case, however, he should inform his customer, prior to consummating the transaction, that trading in the security is suspended and of the reasons announced by the Commission for suspending trading.

"A broker-dealer, in deciding whether to consummate such a transaction, must of course consider not only the provisions of Sections 15(c)(5) and 19(a)(4) but also all other applicable provisions of the Federal securities laws."

[Release No. 34-7920, July 19, 1966, 31 F. R. 10076.]

Federal Securities Law Reports

17 CFR 241.7920 ¶ 25,139

EXHIBIT " B " 00065

EXHIBIT "R"

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am Jur 2d Injunctions §§ 10, 14, 48 to 52, 69 et seq, 265, 296 to 303, 310 to 316

C.J.S. — 43 C J S Injunctions §§ 8, 16, 22 to 24, 36 et seq; 43A C J S Injunctions §§ 165, 166, 180, 206, 208

A.L.R. — Infant's employment contract, enforceability of covenant not to compete in, 17 A L R 3d 863.

Appealability of contempt adjudication or conviction, 33 A L R 3d 448

Review other than by appeal or writ of error, contempt adjudication or conviction as subject to, 33 A L R 3d 589

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A L R 3d 572

Propriety of injunctive relief against diver-

sion of water by municipal corporation or public utility, 42 A L R 3d 426

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices, 49 A L R 3d 1239

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1), (2), 25 A L R 4th 239

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A L R 4th 273

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace, 37 A L R 4th 480

Propriety of federal court injunction against suit in foreign country, 78 A L R Fed 831

Key Numbers. — Injunction ⇨ 9 et seq, 143, 148, 150, 189, 190, 204, 213.

Rule 65B. Extraordinary writs.

(a) **Special forms of writs abolished.** Special forms of pleadings and of writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules, on any one of the grounds set forth in Subdivisions (b) and (f) of this rule.

(b) **Grounds for relief.** Appropriate relief may be granted:

(1) where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in a corporation created by the authority of this state; or any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office; or an association of persons act as a corporation within this state without being legally incorporated; or any corporation has offended against any provision of the law, as it may have been amended, by or under which law such corporation was created, altered or renewed; or any corporation has forfeited its privileges and franchises by nonuser or has committed an act amounting to a surrender or a forfeiture of its corporate rights, privileges and franchises or has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred; or

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

(3) where 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; or

(4) where the relief sought is to arrest the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or

ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

(c) Action by attorney general under Subdivision (b)(1) of this rule. The attorney general may, and when directed so to do by the governor shall, commence any action authorized by the provisions of Subdivision (b)(1) of this rule. Such action shall be brought in the name of the state of Utah.

(d) Action by private person under Subdivision (b)(1) of this rule. A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in Subdivision (b)(1) of this rule, only if the attorney general fails to do so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties, in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.

(e) Nature and extent of relief under Subdivision (b)(2) of this rule. Upon the filing of a complaint seeking relief under Subdivision (b)(2) of this rule, the court may require notice to be given to the adverse party before issuance of the writ, or may grant an order to show cause why such writ should not be issued, or may grant the writ without notice. If the writ is granted, it shall be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the court issuing the writ, within a specified time, a transcript of the record and proceedings, describing or referring to them with sufficient certainty; and if a stay of proceedings is intended, requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. The review by the court issuing the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

(f) Habeas corpus. Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the state of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

(1) The complaint seeking relief shall, among other things, state that the person designated is illegally restrained of his liberty by the defendant and the place where he is so restrained, if known (stating wherein and the cause or pretense thereof, according to the best information of the plaintiff, annexing a copy of any legal process or giving a satisfactory explanation for failing so to do); that the legality of the imprisonment or restraint has not already been adjudged upon a prior proceeding; whether another complaint for the same relief has been filed and relief thereunder denied by any court, and if so attaching a copy of such complaint and stating the reasons for the denial of relief or giving satisfactory reasons for the failure to do so.

(2) The complaint shall be filed in the court most convenient to the plaintiff.

(3) Upon the filing of the complaint the court shall, unless it appears from such complaint or the showing of the plaintiff that he is not entitled to any relief, issue a writ directed to the defendant commanding him to bring the person alleged to be restrained before the court at a time and place therein specified, at which time the court shall proceed in a summary manner to hear the matter and render judgment accordingly. If the writ is not issued the court shall state its reasons therefor in writing and file the same with the complaint, and shall deliver a copy thereof to the plaintiff.

(4) If the defendant cannot be found, or if he does not have such person in custody, the writ (and any other process issued) may be served upon any one having such person in custody, in the manner and with the same effect as if he had been made defendant in the action.

(5) If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant, or other person so resisting, and bring him, together with the person designated in the writ, forthwith before the court before which the writ is made returnable.

(6) At the time of the issuance of the writ, the court may, if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts, and directing the sheriff to take such person and forthwith bring him before the court to be dealt with according to law.

(7) The defendant shall appear at the proper time and place with the person designated or show good cause for not doing so and must answer the complaint within the time allowed. The answer must state plainly and unequivocally whether he then has, or at any time has had, the person designated under his control and restraint, and if so, the cause thereof. If such person has been transferred, the defendant must state that fact, and to whom, when the transfer was made, and the reason or authority therefor. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or defendant, if enough is stated to show the meaning and intent thereof.

(8) The person restrained may waive his right to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter the court may place such person in the custody of such individual or individuals as may be deemed proper.

(g) **When counsel appointed for petitioner.** Any person filing a petition for habeas corpus may be appointed counsel whenever the district court, upon examination of the petition, determines that the petition is not frivolous and that such person is financially unable to obtain representation. If the petition for habeas corpus is frivolous, the district court shall, without further action, dismiss the petition.

(h) **When writ returnable.** Any alternative writ issued by a court or a judge thereof, may be made returnable, and a hearing thereon may be had, at any time as such court may in its discretion determine.

(i) **Postconviction hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.

(5) [Deleted.]

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case, shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to arraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases. (Amended effective Jan. 1, 1985; March 1, 1988.)

Amendment Notes. — Former Subdivision (g), relating to proceedings where extraordinary writs are sought in the Supreme Court, was repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. For present provisions, see Rules 19 and 20, Utah R. App. P.

The 1988 amendment added present Subdivision (g) and deleted former Subdivision (1)(5).

Compiler's Notes. — There is no federal rule covering the subject matter contained in this rule, except for Rule 81(a)(2), F.R.C.P.,

which applies the federal rules to proceedings for habeas corpus

The federal statute governing remedies on motion attacking sentence appears at 28 U.S.C. § 2255.

Cross-References. — Corporations, Title 16

Statute of limitations for habeas corpus action, § 78-12-31.1

Statute of limitations for postconviction relief action, § 78-12-31.2

EXHIBIT "S"

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

IN THE MATTER OF	:	
THE REGISTRATION OF	:	A M E N D E D P E T I T I O N
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
CRD NUMBER 7578	:	CASE NUMBER SD-89-46BD

IN THE MATTER OF	:	
THE REGISTRATION OF	:	A M E N D E D P E T I T I O N
MARLEN JOHNSON	:	
	:	
CRD NUMBER 259888	:	CASE NUMBER SD-89-47AG

The Securities Division of the Department of Commerce of the State of Utah ("the Division"), by and through its Director, John C. Baldwin, upon knowledge and belief, hereby complains and alleges as follows:

PRELIMINARY STATEMENT

The cause of action was investigated by the Division upon complaints that Marlen Johnson and Johnson Bowles Company, Inc.

("Johnson Bowles") have engaged in acts and practices which constitute violations of the Utah Uniform Securities Act (Title 61, Chapter 1, et seq., Utah Code Annotated, 1953, as amended) ("the Act").

JURISDICTION

1. Jurisdiction is vested in the Executive Director and the Securities Advisory Board of the Department of Commerce pursuant to § 61-1-6(1) of the Act.

2. Section 61-1-6(1) of the Act provides that the Executive Director, upon approval of a majority of the Securities Advisory Board, may by order deny, suspend, or revoke any agent or broker-dealer registration if he finds that such order is in the public interest and the agent or broker-dealer:

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

3. Johnson Bowles is a securities broker dealer duly registered by the state of Utah under CRD registration 7578.

4. Marlen Vernon Johnson ("Johnson"), CRD registration 259888, is a registered securities agent by the state of Utah and principal of Johnson Bowles and acted as such at all times relevant to this action.

STATEMENT OF FACTS

5. On or about January 1988, Johnson, acting as an agent and principal for Johnson Bowles began effecting and attempting to effect transactions in the securities of USA Medical Corporation, a Wyoming corporation ("USA Medical"), whose securities were

offered and sold in the state of Utah.

6. On or about February 16, 1989, Johnson Bowles, by and through its agent Johnson, filed suit in federal district court to obtain an injunction to prevent trading of in the securities of USA Medical.

7. On March 1, 1989, in the matter of Johnson-Bowles Company, Inc. v. USA Medical Corporation, et al, Case No. C89-157, (U.S. District Court, Central Division) the Court found:

. . . that the stock of USA 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.

Further, that the stock of USA 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.

8. On March 1, 1989, the Division issued a Summary Order, (Case Number SD-89-030) denying the availability of all transactional exemptions from registration for the securities of USA Medical pursuant to the authority granted to the Division in § 61-1-14(3) of the Act. A copy of the Summary Order was hand delivered to Johnson Bowles on March 1, 1989. The Order is and has been in effect continuously since its issuance on March 1, 1989. The Summary Order is attached hereto and made a part of these proceedings (Exhibit A).

9. On March 1, 1989, the Division commenced an administrative action to deny the availability of all transactional exemptions from registration pursuant to § 61-1-14(3) of the Act for the

securities of USA Medical (Case Number SD-89-031). A copy of the Notice of Agency Action and Petition was mailed to Johnson Bowles on March 2, 1989.

10. Upon approval of the Securities Advisory Board, the Executive Director of the Department of Commerce accepted, confirmed and approved the Findings of Fact, Conclusions of Law and Default Order on March 27, 1989. The Default Order denied the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Act for the securities of USA Medical, any affiliate or successor to USA Medical or any entity subsequently organized by or on behalf of USA Medical. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Johnson Bowles on March 27, 1989.

11. On March 31, 1989, the Division caused a letter to be mailed to Johnson Bowles restating the findings of the federal district court and the Division's Summary Order and Default Order.

12. On or about April 3, 1989 through April 18, 1989, Johnson, acting in his capacity as an agent and principal for Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical as follows:

a. On or about April 3, 1989 and April 13, 1989, Johnson contacted Mr. John Dawson, a shareholder of USA Medical, to purchase shares of USA Medical owned by Mr. Dawson. Johnson informed Mr. Dawson that such arrangement would be a handwritten agreement between Mr. Dawson and a New York firm. Johnson offered Mr. Dawson \$.10 per share and instructed Mr.

Dawson to deliver his stock certificate to Johnson Bowles whereupon a check for the shares of USA Medical would be given to him.

b. On or about April 6, 1989, Johnson purchased 12,000 shares of USA Medical for the sum of \$1,200.00 from Sheldon and Lois Flateman in Salt Lake County, State of Utah.

c. On or about April 14, 1989, Johnson purchased 18,000 shares of USA Medical for the sum of \$1,800.00 from Richard Sax in Salt Lake County, State of Utah.

d. On or about April 18, 1989, Johnson purchased 80,000 shares of USA Medical for the sum of \$8,000.00 from Paul Jones in Salt Lake County, State of Utah.

e. On or about April 18, 1989, Johnson purchased 69,500 shares of USA Medical for the sum of \$6,950.00 from Nick Julian in Salt Lake County, State of Utah.

f. On information and belief, the Division believes Johnson has purchased approximately 226,500 additional shares of USA Medical since March 1, 1989.

COUNT I

13. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 12 as specifically set out herein.

14. Section 61-1-6(1) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and the broker-dealer:

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

15. The above described sales of USA Medical shares were sales effected without registration or exemption in violation of Section 61-1-7 of the Act.

16. The actions of Johnson, 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.

17. The above actions of Johnson, acting on behalf of Johnson-Bowles, in soliciting, encouraging or aiding the violation of the Division's Order constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act.

COUNT II

23. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 22 as specifically set out herein.

24. Section 61-1-6(1)(g) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and that the broker-dealer "has engaged in dishonest or unethical practices in the securities business."

25. Rule R177-6-1g(a)(3) of the Division, promulgated under the authority of § 61-1-6(1)(g) of the Act, establishes that the

following acts and practices by broker-dealers constitute grounds for suspension or revocation of registration:

"(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer."

26. Johnson and Johnson-Bowles, as described above, recommended, solicited or effected for customers the sales of securities of USA Medical which sales would necessarily involve a violation of Section 61-1-7 of the Act.

27. The above actions by Johnson Bowles constitute dishonest and unethical practices within the meaning of Section 61-1-6(1)(g) of the Act and Division Rule R177-6-1g in that transactions which involve a violation of the Act are not suitable.

REQUEST FOR RELIEF

WHEREFORE, the Division requests the following relief:

1. A finding that Johnson Bowles Company, Inc., engaged in the acts and practices alleged above;

2. A finding that Marlen Johnson engaged in the acts and practices alleged above;

3. That by engaging in the above acts and practices, Johnson Bowles Company, Inc. be adjudged and decreed to be found in violation of § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;

4. That by engaging in the above acts and practices, Marlen Johnson be adjudged and decreed to be found in violation of § 61-

1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;

5. That the registration of Johnson Bowles Company, Inc. to act as a securities broker-dealer be suspended or revoked accordingly.

6. That the registration of Johnson Bowles Company, Inc. to act as a securities broker-dealer be suspended or revoked accordingly.

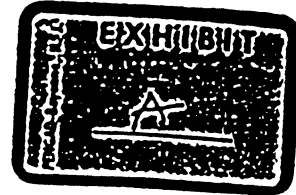
Dated this 19th day of July, 1989.

**R. Paul Van Dam
Attorney General**



**Mark J. Griffin
Assistant Attorney General**

EXHIBIT "T"



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BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF UTAH

IN THE MATTER OF	:	SUMMARY ORDER DENYING
USA MEDICAL CORPORATION	:	AVAILABILITY OF EXEMPTIONS
	:	FROM REGISTRATION
FILE NUMBER ST 1619	:	CASE NUMBER SD-89-030

Pursuant to § 61-1-14(3) of the Utah Uniform Securities Act (Title 61, Chapter 1, Utah Code Annotated, as amended, 1983) ("the Act"), the Utah Securities Division ("the Division") has found that this Summary Order is in the public interest. It appears to the Division that:

FINDINGS OF FACT

1. S.M.I., Inc. was incorporated under the laws of the state of Wyoming on January 12, 1979. On or about December 8, 1987, S.M.I., Inc. merged with USA Medical Corporation, a Utah corporation. The surviving company is domiciled in the state of Wyoming under the name USA Medical Corporation ("USA").

EXHIBIT

"A"

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2. The anti-fraud provisions contained in § 61-1-1 of the Act prohibits (1) employment of any device, scheme or artifice to defraud, (2) the making of any untrue statement of a material fact, or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading and (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

3. Section 61-1-7 of the Act states that it is unlawful for any person to offer or sell any security in Utah unless it is registered or exempt from registration under § 61-1-14 of the Act.

4. Offers and sales of the securities of USA have been made in the state of Utah during the period June 1, 1988 through this date.

A. Failure to Register Securities

5. A search of the Division's records indicates that a registration statement pursuant to § 61-1-8, § 61-1-9 or § 61-1-10 of the Act has never been filed by USA with the Division.

B. Failure to Qualify for Exemptions from Registration

6. Section 61-1-14(2) of the Act contains several transactional exemptions from registration, including the exemptions commonly referred to as the "manual listing" exemption contained in § 61-1-14(2)(b) and the "secondary trading" exemption contained in § 61-1-14(2)(m) of the Act.

7. On or about February 17, 1989, USA filed with the Division an application for confirmation of the availability of the manual listing exemption pursuant to § 61-1-14(2)(b) of the Act and Rule 177-14-2b of the Division. However, the listing for USA contained in Moody's OTC Industrial did not contain the minimal information required by § 61-1-14(2)(b) of the Act and Rule 177-14-2b of the Division. Specifically, the listing did not contain a profit and loss statement for either the fiscal year preceding the date of the balance sheet, or the most recent year of operations. By letter dated February 21, 1989, the Division notified USA that the filing was incomplete and that additional information was required.

8. Section 61-1-14(2)(m) of the Act provides a transactional exemption for "[a]ny nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer maintains in his records, and makes reasonably available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules and regulations."

9. Rule 177-14-2m of the Division sets forth the exclusive method of claiming the transactional exemption contained in § 61-1-14(2)(m) of the Act. In particular, the rule requires that specific information, i.e., a "due diligence package" be filed with the Division. A search of the Division's records does not reflect that USA has ever made a "due diligence" filing with the Division pursuant to Rule 177-14-2m of the Division.

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C. Fraudulent Scheme to Defraud

10. In the matter of Johnson Bowles Company, Inc. v. USA Medical Corporation, et al., Case No. C89-157, (U.S. District Court, Central Division) (March 1, 1989), the court found, after having heard testimony on the matter, that:

. . . that the stock of USA 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.

Further that the stock of USA 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.

Based upon the foregoing Findings of Fact, the Division hereby issues the following

CONCLUSIONS OF LAW

11. Failure of USA Medical Corporation to register its securities, or claim an appropriate exemption from registration as provided in § 61-1-14 of the Act, is a violation of § 61-1-7 of the Act;

12. Offers and sales of the securities of USA Medical Corporation have been made as part of a device, scheme or artifice to defraud in violation of § 61-1-1(1) of the Act;

13. Untrue statements of material facts and omission to state material facts have been made in the offer and sale of the securities of USA Medical Corporation in violation of § 61-1-1(2) of the Act; and

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14. Persons engaged in the offer and sale of the securities of USA Medical Corporation have engaged in acts, practices and/or a course of business which has operated as a fraud or deceit in violation of § 61-1-1(3) of the Act.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is in the public interest to issue the following

SUMMARY ORDER

IT IS HEREBY ORDERED, in accordance with the provisions set forth in § 61-1-14(3) of the Act, that the availability of any and all transactional exemptions contained in § 61-1-14(2) of the Act, be and hereby are, summarily denied.

Pursuant to § 61-1-14(3) of the Act, notice is hereby given, that within fifteen (15) days after receipt of a written request, this matter will be set down for hearing.

DONE AND ORDERED this 1st day of March, 1989.

SECURITIES DIVISION
DEPARTMENT OF BUSINESS REGULATION


JOHN C. BALDWIN
DIRECTOR

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EXHIBIT "U"

FILED
DISTRICT COURT

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

Nov 2 1989

11. 2. 1989
CLERK OF DISTRICT COURT
Anta-Henry

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

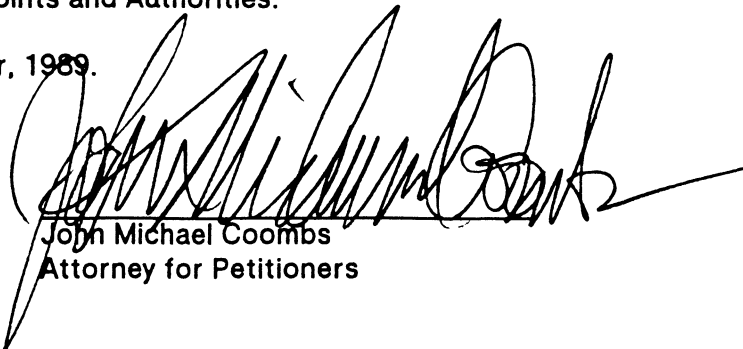
CASE NO. 890906506CV

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.

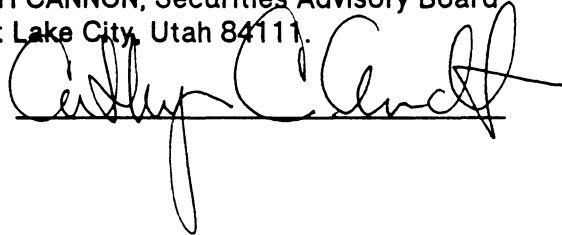
DATED this 2nd day of November, 1989.



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

EXHIBIT "V"

FEB 15 1990

Susan Gray
Clerk

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Attorney for Petitioners

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

ORDER

CASE NO. 890906506CV

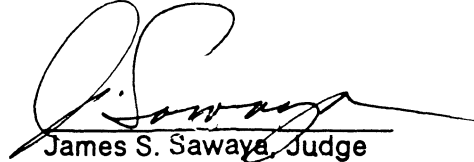
The petitioner's motion to reinstate the extraordinary writ and order of this Court of October 27, 1989, and having been submitted to the Court pursuant to Rule 4-501 of the Utah Code of Judicial Administration; the Court having reviewed the memorandums of the petitioner and the respondents and having considered the same and being fully advised in the premises and good cause further appearing, hereby orders that:

1. Petitioner's motion to reinstate the extraordinary writ and order of this Court of October 27, 1989, is hereby denied.

2. There is no just reason for delay and this order is hereby entered as final pursuant to the provisions of Rule 54(d) of the Utah Rules of Civil Procedure.

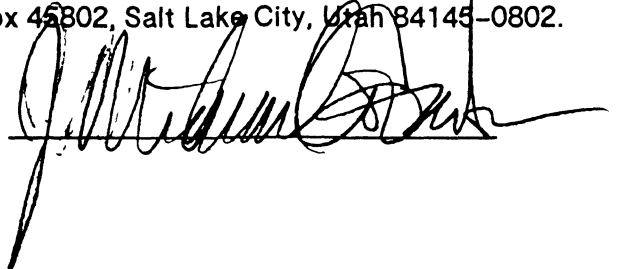
DATED this 5 day of February, 1990.

THIRD DISTRICT COURT


James S. Sawaya, Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of February, 1990, (s)he mailed, postage pre-paid, a true and correct copy of the foregoing ORDER to Mark J. Griffin, Esq., Assistant Attorney General, counsel to the Respondents, located at 115 State Capitol, Salt Lake City, Utah 84114; and Kathleen C. McGinley, Esq., Director of Broker-Dealer Section, Division of Securities, Department of Commerce, Heber M. Wells Building, located at 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802.



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