

1990

Johnson-Bowles Company, INC., and marlen  
Vernon Johnson v. The Division of Securities and  
the Utah Department of Commerce, State of Utah :  
Brief of Petitioner

Utah Court of Appeals

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Mark J. Griffin; Attorney for Appellees.

John Michael Coombs; Craig F. McCullough; Attorneys for the Appellants.

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UTAH COURT OF APPEALS  
BRIEF

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900558-CA

ORIGINAL PROCEEDING

IN AND BEFORE THE UTAH

COURT OF THE APPEALS

JOHNSON-BOWLES COMPANY, INC., and  
MARLEN VERNON JOHNSON,

Petitioners,

v.

The DIVISION OF SECURITIES and  
the UTAH DEPARTMENT OF COMMERCE,  
STATE OF UTAH,

Respondents.

PETITIONERS' ADDENDUM  
TO BRIEF

Case No. 900558-CA

Appeal from Final Agency Action of the Division of Securities,  
Utah Department of Commerce, State of Utah  
(Division of Securities Case Nos. SD-89-46BD and SD-89-47AG)

John Michael Coombs #3639  
72 East 400 South, Suite 220  
Salt Lake City, Utah 84111  
Telephone: 359-0833

Craig F. McCullough #2166  
10 East South Temple, Suite 800  
Salt Lake City, Utah 84133  
Telephone: 530-7307

ATTORNEYS FOR APPELLANTS

Mark J. Griffin #4329  
115 State Capitol Bldg.  
Salt Lake City, Utah 84114  
Telephone: 538-1551

ATTORNEY FOR APPELLEES

**FILED**

**FEB 12 1991**

**COURT OF APPEALS**

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Telephone: 538-1551

ATTORNEY FOR APPELLEES

EXHIBITS COMPRISING PETITIONERS' ADDENDUM

The following consist of the various exhibits Petitioners have referred to in their January 23, 1991, Brief. Such are attached hereto for the convenience of the Court. They consist of applicable state and federal statutes, rules, SEC releases, NASD rules, NASAA Guidelines, and significant portions of the record below.

|   |           |
|---|-----------|
| <u>Utah Code Ann.</u> §61-1-6(1)(g), as in effect, 1989                                     | Exhibit A |
| Division R177-1-6g, as in effect, 1989  | Exhibit B |
| <u>Utah Code Ann.</u> §61-1-14(2) and (3), as in effect<br>1989                             | Exhibit C |
| <u>Utah Code Ann.</u> §61-1-22(1)(a) and (b), as in<br>effect, 1989                         | Exhibit D |
| Securities Act of 1933, Section 4   | Exhibit E |
| Securities Act of 1933, Sections 12(1) and 12(2)<br>(corollaries to §61-1-22(1)(a) and (b)) | Exhibit F |
| Securities Exchange Act of 1934, Sections 12(j)<br>and 12(k)                                | Exhibit G |
| NASD Rules of Fair Practice, Art. III, §1   | Exhibit H |
| SEC Exch. Act Release No. 34-7920   | Exhibit I |
| March 1, 1989, Summary Order  | Exhibit J |
| March 27, 1989, Default Order   | Exhibit K |
| Amended Petitions dated July 19, 1989   | Exhibit L |
| ALJ's Order Granting Motion to Convert  | Exhibit M |
| ALJ's Order Denying 12(b)(1) Motion   | Exhibit N |
| NASAA Guidelines (April 1983)   | Exhibit O |



|  |            |
|--|------------|
| SEC Suspension of Trading Order  | Exhibit P  |
| Order on Agency Review (Oct. 30, 1989)   | Exhibit Q  |
| Amended Answer   | Exhibit R  |
| Division's No--Action Letter to Slattery   | Exhibit S  |
| ALJ's Order Denying 12(b)(6) Motion  | Exhibit T  |
| Affidavit of Johnson--Bowles and Johnson<br>in Support of Summary Judgment   | Exhibit U  |
| Affidavit of Karl Smith  | Exhibit V  |
| Affidavit of Bruce Eatchel   | Exhibit W  |
| Division's September 1, 1989 Press Release   | Exhibit X  |
| The Division's "affidavits" filed in opposition<br>to summary judgment   | Exhibit Y  |
| Petitioners' Objection and Motion to Strike  | Exhibit Z  |
| ALJ's Order Denying Summary Judgment   | Exhibit AA |
| Baldwin's Order on Agency Review (April 1990)  | Exhibit BB |
| Stipulation of Facts for Purposes of Hearing<br>(Including Affidavits of Petitioners' Sellers<br>Filed in Support of Summary Judgment) | Exhibit CC |
| Expert Testimony of David R. King, Esq.  | Exhibit DD |
| August 13, 1990, Findings of Fact, Conclusions<br>of Law and Order   | Exhibit EE |
| Petitioners' Objection to Form and Content<br>of August 13, 1990, Order  | Exhibit FF |
| Demand for Disclosure of How and By Whom<br>August 13, Findings, Conclusions and<br>Order Were Prepared                                | Exhibit GG |
| Affidavit of Petitioners' Counsel in<br>Support of Demand for Disclosure   | Exhibit HH |

Buhler's Order on Agency Review (Oct. 29, 1990)

Exhibit II

Certified Copy of Averett Felony Information,  
Criminal Judgment, and Conditions of  
Probation and Release

Exhibit JJ

Certified Copies of Disciplinary Actions  
Brought by Division Against Others Licensees

Exhibit KK

EXHIBIT "A"

## 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) (i) 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.

(ii) 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 "B"

be prepared and filed in accordance with the following requirements:

(A) The financial statements shall be certified by an independent certified public accountant or an independent public accountant.

(B) The audit shall be made in accordance with generally accepted auditing standards; the examination shall include a review of the accounting system, the internal accounting controls and procedures for the safeguarding of securities and funds including appropriate tests thereof since the prior examination.

(C) The audit shall be accompanied by an unqualified opinion of the accountant as to the financial condition. In addition, the accountant shall submit as a supplementary opinion any comments, based upon the audit, as to any material inadequacies found to exist in the accounting system, the internal accounting controls and procedures for safeguarding securities and shall indicate any corrective action taken or proposed.

(3) The financial statements required by this section shall be filed within 90 days following the end of the broker-dealer's fiscal year.

(b) *Investment Adviser Required Financial Reports.* (1) Every investment adviser who has custody or possession of client's funds or securities or requires payment of advisory fees six months or more in advance and in excess of \$500 per client shall file with the Division audited financial statements as of the end of the investment adviser's fiscal year.

(2) Each financial statement filed pursuant to this section shall be prepared and filed in accordance with the following requirements:

(A) The audit shall be certified by an independent certified public accountant or independent public accountant.

(B) The audit shall be made in accordance with generally accepted auditing standards; the examination shall include a review of the accounting system, the internal accounting controls and procedures for the safeguarding of securities and funds including appropriate tests thereof since the prior examination.

(C) The audit shall be accompanied by an unqualified opinion of the accountant as to the report of financial condition. In addition, the accountant shall submit as a supplementary opinion any comments based upon audit, as to any material inadequacies found to exist in the accounting system, the

internal accounting controls and procedures for safeguarding securities and funds, and shall indicate any corrective action taken or proposed.

(3) The financial statements required by this section shall be filed with the Division within 90 days following the end of the investment adviser's fiscal year.

[Adopted eff. 2-15-86.]

#### ¶ 57,403]

### **R177-6-1g. Rules of conduct for broker-dealers, investment advisers and agents.**

*Preliminary Notes:* 1. R177-6-1g is intended to define certain acts and practices which the Utah Securities Division (the "Division") deems violative of Section 6(1)(g) of the Utah Uniform Securities Act (the "Act"). The list contained herein should not be considered to be all-inclusive of acts and practices which violate that section, but rather is intended to act as a guide to broker-dealers and agents as to the types of conduct which are prohibited.

2. Broker-dealers and agents are reminded that conduct which violated Section 1 of the Act may also be considered to violate Section 6(1)(g) under certain circumstances.

3. This Rule is patterned after well-established standards in the industry which have been adopted by the Securities and Exchange Commission, the NASD, NASAA, the national exchanges and various courts. It represents one of the purposes of the securities laws: to create viable securities markets in which those persons involved are held to a high standard of fairness with respect to their dealings with the public.

(a) *Broker-Dealers.* The following acts and practices, when performed by a broker-dealer or a person over whom the broker-dealer has supervisory authority, are considered contrary to Section 6(1)(g) of the Utah Uniform Securities Act and may constitute grounds for denial, suspension or revocation of registration.

(1) Engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers and/or in the payment, upon request, of free credit balances reflecting completed transactions of any of its customers.

(2) Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

(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 rea-



sonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

(4) Executing a transaction on behalf of a customer without prior authorization to do so.

(5) Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders.

(6) Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

(7) Failing to segregate customers' free securities or securities held in safekeeping.

(8) Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by the rules and regulations of the United States Securities and Exchange Commission.

(9) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

(10) Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus.

(11) Charging fees for services without prior notification to a customer as to the nature and amount of the fees.

(12) Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business.

(13) Offering to buy from or sell to any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.

(14) Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless such broker-dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created or controlled by such broker-dealer, or by any person for whom he is acting or with whom he is associated in such distribution, or any person controlled by, controlling or under common control with such broker-dealer.

(15) Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

(A) Effecting any transaction in a security which involves no change in the beneficial ownership thereof;

(B) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this subsection (B) shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers; or

(C) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(16) Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer.

(17) Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which: (A) purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or (B) purports to quote the bid price or asked price for any security, unless such broker-

dealer believes that such quotation represents a bona fide bid for, or offer of, such security.

(18) Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure.

(19) Failing to disclose to a customer that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

(20) Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member.

(21) Failure or refusal to furnish a customer, upon reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

(22) Permitting a person to open an account for another person or transact business in such account unless there is on file written authorization for such action from the person in whose name the account is carried.

(23) Permitting a person to open or transact business in a fictitious account.

(24) Permitting an agent to open or transact business in an account other than his own, unless disclosed in writing (to include the reason therefor) to the broker-dealer or issuer he represents.

(b) *Agents.* The following acts and practices, when performed by agents of broker-dealers or agents of issuers, are considered contrary to Section 6(1)(g) of the Utah Uniform Securities Act and may constitute grounds for denial, suspension or revocation of registration.

(1) Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer.

(2) Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, in the case of agents of broker-dealers, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction.

(3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

(4) Sharing directly or indirectly in profits or losses in the account of any customer without the prior written authorization of the customer and the broker-dealer which the agent represents.

(5) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

(6) Engaging in conduct specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(9), (a)(10), (a)(15), (a)(16), (a)(17), or (a)(18).

#### [¶ 57,404]

**R177-9-1. Registration by coordination.** (a) *Who May File.* Any security for which a registration statement or a notification under Regulation A has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination pursuant to Section 9 of the Utah Uniform Securities Act (the "Act").

(b) *Documents to Be Filed.* Applicant shall file one copy each of the following and the appropriate fee pursuant to R177-18-4:

(1) Uniform consent to service of process;

(2) One copy of the disclosure statement, including exhibits, together with all amendments as filed with the Securities and Exchange Commission under the Securities Act of 1933;

(3) An application on Form U-1 which contains the undertaking required by Section 9(1)(d) of the Act.

(c) *Additional Documents.* The applicant shall provide to the Division any additional

EXHIBIT "C"

such stock. *Guaranty Mtg. Co. v. Wilcox*, 62 Utah 184, 218 P. 133, 30 A.L.R. 1324 (1923).

"Sale" did not include a gift of stock because of use of words "for value." Therefore an agreement with a statistician to promote the disposition of such stock was not in violation of the Blue Sky Law. Fact that it was understood at

time of gift that there would be an assessment did not transform transaction into sale, where donees were not liable to pay the assessment. *Andrews v. Chase*, 89 Utah 51, 49 P.2d 938 (1935), *aff'd on rehearing* in 89 Utah 73, 57 P.2d 702 (1936).

#### COLLATERAL REFERENCES

**Utah Law Review.** — Securities Law and the Franchise Agreement, 1980 Utah L. Rev. 311.

**Am. Jur. 2d.** — 69 Am. Jur. 2d Securities Regulation — State §§ 16, 26 to 29, 31, 69 to 85, 102.

**C.J.S.** — 79 C.J.S. Supp. Securities Regulation §§ 201 to 221.

**A.L.R.** — Sales as "isolated" or "successive" or the like under state securities acts, 1 A.L.R.3d 614.

**Dealer:** who is "dealer" under state securities acts exempting sales by owners other than

issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

**Investment contract:** what constitutes an "investment contract" within the meaning of state Blue Sky Laws, 47 A.L.R.3d 1375.

"Common enterprise" element of Howey test to determine existence of investment contract regulable as "security" within meaning of federal Securities Act of 1933 (15 USCS §§ 77a et seq.) and Securities Exchange Act of 1934 (15 USCS §§ 78a et seq.), 90 A.L.R. Fed. 825.

**Key Numbers.** — Licenses ⇌ 18½ (5) to (30); Securities Regulation ⇌ 248 to 269.

#### 61-1-14. Exemptions.

(1) The following securities are exempted from Sections 61-1-7 and 61-1-15:

(a) any security, including a revenue obligation, issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;

(b) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(c) any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company supervised under the laws of any state;

(d) any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this state;

(e) any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this state;

(f) any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is subject to the jurisdiction of the Interstate Commerce Commission; a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; regulated in respect of its rates or in its issuance by a governmental authority of the United States, any state, Canada, or any Canadian province;

(g) any security listed on the National Association of Securities Dealers Automated Quotation System, the New York Stock Exchange, the American Stock Exchange, or on any other stock exchange or medium approved by the division, provided that the division may at any time suspend or revoke this exemption for any particular stock exchange, medium, security, or securities under Subsection 61-1-14(3); any other security of the same issuer which is of senior or substantially equal rank to any security so listed and approved by the division; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of the foregoing;

(h) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association; and any security issued by a corporation organized under Chapter 1, Title 3 and any security issued by a corporation to which the provisions of such chapter are made applicable by compliance with the requirements of Section 3-1-21;

(i) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal, guarantee, or guarantee of renewal of the paper which is likewise limited;

(j) any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan;

(k) any security as to which the division, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(2) The following transactions are exempted from Sections 61-1-7 and 61-1-15:

(a) any isolated transaction, whether effected through a broker-dealer or not;

(b) any nonissuer transaction in an outstanding security if: (i) it is listed in a recognized securities manual such as Moody's and Standard & Poor's securities manuals where the listing contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; or (ii) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security. The division may by rule or order approve certain manuals as recognized within the meaning of this subsection;

(c) any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy;

(d) any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(e) any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(f) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(g) any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(h) any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(i) any offer or sale of a preorganization certificate or subscription if: (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (ii) the number of subscribers acquiring any legal or beneficial interest therein does not exceed ten; and (iii) there is no general advertising or solicitation in connection with the offer or sale;

(j) (i) any transaction pursuant to an offer by an issuer of its securities to its existing securities holders, if no commission or other remuneration, other than a standby commission is paid or given directly or indirectly for soliciting any security holders in this state, if the transaction constitutes: (A) the conversion of convertible securities; (B) the exercise of nontransferable rights or warrants; (C) the exercise of transferable rights or warrants if the rights or warrants are exercisable not more than 90 days after their issuance; or (D) the purchase of securities under a preemptive right;

(ii) the exemption created by Subsection (2)(j)(i) is not available for an offer or sale of securities to existing securities holders who have acquired their securities from the issuer in a transaction in violation of Section 61-1-7;

(k) any offer, but not a sale, of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending;

(l) a distribution of securities as a dividend if the person distributing the dividend is the issuer of the securities distributed;

(m) any nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer or issuer files with the division, and 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;

(n) any transactions not involving a public offering;

(o) any offer or sale of "condominium units" or "time period units" as those terms are defined in the Utah Condominium Ownership Act, whether or not to be sold by installment contract, if the provisions of the Utah Condominium Ownership Act, or if the units are located in another state, the condominium act of that state, the Utah Uniform Land and Timeshare Sales Practices Act, and the Utah Uniform Consumer Credit Code are complied with;

(p) any transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets,

if the consideration for which, in whole or in part, is the issuance of securities of a person or persons, and if:

(i) the transaction or series of transactions is incident to a vote of the securities holders of each person involved or by written consent or resolution of some or all of the securities holders of each person involved;

(ii) the vote, consent, or resolution is given under a provision in: (A) the applicable corporate statute or other controlling statute; (B) the controlling articles of incorporation, trust indenture, deed of trust, or partnership agreement; or (C) the controlling agreement among securities holders;

(iii) (A) one person involved in the transaction is required to file proxy or informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 or Section 20 of the Investment Company Act of 1940 and has so filed; (B) one person involved in the transaction is an insurance company which is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or informational materials with the appropriate regulatory agency or official of its domiciliary state; or (C) all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or informational material as the division requires by rule;

(iv) the proxy or informational material is filed with the division and distributed to all securities holders entitled to vote in the transaction or series of transactions at least ten business days prior to any necessary vote by the securities holders or action on any necessary consent or resolution; and

(v) the division does not, by order, deny or revoke the exemption within ten business days after filing of the proxy or informational materials;

(q) any transaction as to which the division, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(3) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may by order deny or revoke any exemption specified in Subsection (1)(h) or (1)(j) or in Subsection (2) with respect to: (a) a specific security, transaction, or series of transactions; or (b) any person or issuer, any affiliate or successor to a person or issuer, or any entity subsequently organized by or on behalf of a person or issuer generally. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the division may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this subsection. Upon the entry of a summary order, the division shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 business days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the executive director or division, the order will remain in effect until it is modified or vacated by the executive director. If a hearing is requested or ordered, upon approval by the executive director and a majority of the Securities Advisory Board the executive director, after notice of and

opportunity for hearing to all interested persons, may affirm, modify, or vacate the order or extend it until final determination. The executive director may not extend any summary order for more than ten business days. No order under this subsection may operate retroactively. No person may be considered to have violated Section 61-1-7 or 61-1-15 by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

**History:** C. 1953, 61-1-14, enacted by L. 1963, ch. 145, § 1; 1979, ch. 218, § 5; 1983, ch. 284, § 17; 1987, ch. 92, § 106.

**Amendment Notes.** — The 1987 amendment corrected the statutory reference in Subsection (2)(j)(iii), substituted "Utah Uniform Land and Timeshare Sales Practices Act" for "Utah Uniform Land Sale Practices Act" in Subsection (2)(o), and made minor stylistic changes.

**Federal law.** — The federal acts cited in this section are codified as:

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq. For provisions regarding registration of holding companies, see 15 U.S.C. § 79e.

Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. For definition of investment

company, see 15 U.S.C. § 80a-3. Section 20 of that act, referred to in Subsection (2)(p)(iii), appears as 15 U.S.C. § 80a-20.

Securities Act of 1933, 15 U.S.C. § 77a et seq.

Section 12(g)(1) of the Securities Exchange Act of 1934, referred to in Subsection (2)(p)(iii), appears as 15 U.S.C. § 78l(g)(1). Section 12(g)(2)(G) of that act appears as 15 U.S.C. § 78l(g)(2)(G). Sections 14(a) and (c) of that act appear as 15 U.S.C. §§ 78n(a) and (c).

**Cross-References.** — Condominium Ownership Act, § 57-8-1 et seq.

Utah Consumer Credit Code, § 70C-1-101 et seq.

Utah Uniform Land Sales Practices Act, § 57-11-1 et seq.

## NOTES TO DECISIONS

### ANALYSIS

Debentures of cemetery association

Isolated transaction

Stock dividends or distribution out of earnings

#### Debentures of cemetery association.

Debentures of an incorporated cemetery association were not exempt from registration where the articles of incorporation did not contain language reasonably interpretable to categorize the corporation as one whose purpose was exclusively for educational, benevolent, fraternal, charitable, or reformatory pursuits. *State ex rel. Securities Comm'n v. Lake Hills*, 14 Utah 2d 14, 376 P.2d 540 (1962).

#### Isolated transaction.

The exchange by the incorporators of a min-

ing company of shares of stock for mining claims, where the transaction involved the simultaneous issuance of shares to the plaintiff and a third person, did not involve a transaction requiring registration because it was exempt as an isolated transaction. *Johnson v. Crail*, 11 Utah 2d 392, 360 P.2d 485 (1961).

#### Stock dividends or distribution out of earnings.

To claim exemption, it had to be shown that corporation was distributing shares to its shareholders as a stock dividend out of earnings or surplus, or that it was increasing its capital stock. *Harper v. Tri-State Motors, Inc.*, 90 Utah 212, 58 P.2d 18 (1936), rehearing denied, 90 Utah 226, 63 P.2d 1056 (1937) (decided under former law).

## COLLATERAL REFERENCES

**Brigham Young Law Review.** — The Elusive Limited Offering Exemption of the Utah Uniform Securities Act, 1976 B.Y.U.L. Rev. 825.

**Am. Jur. 2d.** — 69 Am. Jur. 2d Securities Regulation — State §§ 69 to 85.

**C.J.S.** — 79 C.J.S. Supp. Securities Regulation §§ 201 to 221.

**A.L.R.** — Sales as "isolated" or "successive" or the like under state securities acts, 1 A.L.R.3d 614.

Dealer who is "dealer" under state securities acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

Who may exercise voting power of corporate



EXHIBIT "D"

**61-1-22. Sales and purchases in violation — Remedies —  
Limitation of actions.**

(1) Any person who:

(a) offers or sells a security in violation of Section 61-1-3(1), 61-1-7, or 61-1-17(2) or of any rule or order under Section 61-1-15 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under Subsection 61-1-10(4) or 61-1-11(7); or

(b) offers, sells, or purchases a security by means of any untrue statement of a material fact or any 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, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.

The court in a suit brought under Subsection (1)(b) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts, all as specified in Subsection (1)(b) upon a showing that the violation was reckless or intentional.

(2) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) Any tender specified in this section may be made at any time before entry of judgment.

(4) Every cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(5) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first. No person may sue under this section: (a) if the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he

failed to accept the offer within 30 days of its receipt; or (b) if the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

(6) No person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(7) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with this chapter or any rule or order hereunder is void.

(8) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity, but this chapter does not create any cause of action not specified in this section or Subsection 61-1-4(5).

**History:** C. 1953, 61-1-22, enacted by L. 1963, ch. 145, § 1; 1979, ch. 218, § 7; 1983, ch. 284, § 32; 1986, ch. 107, § 2.

**Amendment Notes.** — The 1986 amendment, in Subsection (1)(b), added the last paragraph; in Subsection (5), substituted the present first sentence for the former first sen-

tence which read: "No person may sue under this section more than two years after the contract of sale"; and made minor stylistic changes.

**Cross-References.** — Limitation of actions generally, § 78-12-1 et seq.

## NOTES TO DECISIONS

### ANALYSIS

Assignability of cause of action.

Attorney fees.

Bond of dealer.

Evidence.

Foreign contracts.

Laches and estoppel.

Participating or aiding in sale.

Proof of misconduct.

Statute of limitations.

Cited.

### Assignability of cause of action.

Causes of action for return of money paid to securities dealer on sale of stock, claimed to have been fraudulent, were assignable. *Mayer v. Rankin*, 91 Utah 193, 63 P.2d 611, 110 A.L.R. 837 (1936).

### Attorney fees.

Recovery of attorney fees pursuant to a state securities law claim is not limited to the time reasonably spent prosecuting only that claim. *City Consumer Servs. Inc. v. Horne*, 631 F. Supp. 1050 (D. Utah 1986).

A court is not bound by agreements as to attorney fees between the parties, though it may consider them. *City Consumer Servs., Inc. v. Horne*, 631 F. Supp. 1050 (D. Utah 1986).

### Bond of dealer.

Blue Sky Law and bond therein required were for protection of purchasers of securities

against fraud perpetrated in violation of act, and not solely for protection of state, and assignee of purchaser of securities could maintain action on bond. *Mayer v. Rankin*, 91 Utah 193, 63 P.2d 611, 110 A.L.R. 837 (1936).

In suit against securities dealer and surety on his bond for fraud of dealer in sale of stock, where complaint alleged sufficient facts to support judgment against dealer independent of Securities Act, surety was a proper party to the proceedings. *Mayer v. Rankin*, 91 Utah 193, 63 P.2d 611, 110 A.L.R. 837 (1936).

### Evidence.

In action to rescind sale of corporate stock on ground of fraudulent representations as to condition of company, report of state auditor or audit made by state banking department was not admissible in evidence on theory that it was a public record. *Wilson v. Guaranteed Sec. Co.*, 82 Utah 224, 23 P.2d 921 (1933).

In action to recover purchase price of shares, in which defendant corporation defended on ground that stock sold was owned by secretary of corporation, evidence held to make prima facie case that shares sold belonged to corporation so that court erred in nonsuiting plaintiff, and fact that notes in payment for stock were payable to secretary held not to show conclusively that shares belonged to secretary. *Hansen v. Abraham Irrigation Co.*, 82 Utah 361, 25 P.2d 76 (1933).

EXHIBIT "E"

## [¶ 551]

**EXEMPTED TRANSACTIONS**

**Sec. 4.** The provisions of section 5 shall not apply to—

[As amended by Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

## [¶ 552]

**[Transactions by Persons Other than Issuers, Underwriters and Dealers]**

(1) transactions by any person other than an issuer, underwriter, or dealer.

[As amended by Act of June 6, 1934, 48 Stat. 906; Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683; Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

## [¶ 553]

**[Private Offerings]**

(2) transactions by an issuer not involving any public offering.

[As amended by Act of June 6, 1934, 48 Stat. 906; Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683; Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

## [¶ 554]

**[Dealers Transactions]**

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 8 is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

[As amended by Act of June 6, 1934, 48 Stat. 906; Act of August 10, 1954, effective October 9, 1954, 68 Stat. 683; Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

## [¶ 555]

**[Brokers' Transactions]**

(4) brokers' transactions, executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

[As amended by Act of August 20, 1964, Sec. 12, 78 Stat. 580.]

## [¶ 556]

**[Securities Originated by Certain Mortgagees]**

(5) (A) Transactions involving offers or sales of one or more promissory notes directly secured by a first lien on a single parcel of real estate upon which is located a dwelling or other residential or commercial structure, and participation interests in such notes—

(i) where such securities are originated by a savings and loan association, savings bank, commercial bank, or similar banking institution which is supervised and examined by a Federal or State authority, and are offered and sold subject to the following conditions:

(a) the minimum aggregate sales price per purchaser shall not be less than \$250,000;

(b) the purchaser shall pay cash either at the time of the sale or within sixty days thereof; and

(c) each purchaser shall buy for his own account only; or

(ii) where such securities are originated by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211 of

the National Housing Act and are offered or sold subject to the three conditions specified in subparagraph (A)(i) to any institution described in such subparagraph or to any insurance company subject to the supervision of the insurance commissioner, or any agency or officer performing like function, of any State or territory of the United States or the District of Columbia, or the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Association

(B) Transactions between any of the entities described in subparagraph (A)(i) or (A)(ii) hereof involving non-assignable contracts to buy or sell the foregoing securities which are to be completed within two years, where the seller of the foregoing securities pursuant to any such contract is one of the parties described in subparagraph (A)(i) or (A)(ii) who may originate such securities and the purchaser of such securities pursuant to any such contract in any institution described in subparagraph (A)(i) or any insurance company described in subparagraph (A)(ii), the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, or the Government National Mortgage Association and where the foregoing securities are subject to the three conditions for sale set forth in subparagraphs (A)(i)(a) through (c)

(C) The exemption provided by subparagraphs (A) and (B) hereof shall not apply to resales of the securities acquired pursuant thereto, unless each of the conditions for sale contained in subparagraphs (A)(i)(a) through (c) are satisfied.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 30, 89 Stat. 169.]

## [¶ 557]

## [Offers or Sales to Accredited Investors]

(6) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 3(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

[As added by Act of October 21, 1980 (Small Business Issuers' Simplification Act of 1980), Sec. 602, Pub. Law 96-477, 94 Stat. 2294.]

## [¶ 561]

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE  
MAILS

**Sec. 5. (a)** Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to **make** use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

[As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 7, 68 Stat. 684.]

(2) to **carry** or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

## [¶ 564]

## [Prospectus Requirements]

(b) It shall be unlawful for any person, directly or indirectly—

(1) to **make** use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10, or

[As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 7, 68 Stat. 684.]

(2) to **carry** or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

[As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 7, 68 Stat. 684.]

EXHIBIT "F"

underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

## [¶ 668]

## [Joint and Several Liability]

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

## [¶ 669]

## [Limitation on Amount of Damages]

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

[Sec. 11 was amended generally by Act of June 6, 1934, 48 Stat. 907.]

[¶ 681] CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES  
AND COMMUNICATIONS

Sec. 12 Any person who—

(1) offers or sells a security in violation of section 5 or

[As amended by Act of August 10, 1954, effective October 9, 1954, Sec. 8, 68 Stat. 685.]

## [¶ 683]

## Offers or Sells by Use of Interstate Communications or Transportation

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

## [¶ 691]

## LIMITATION OF ACTIONS

Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.

[As amended by Act of June 6, 1934, 48 Stat. 908.]



EXHIBIT "G"

## [¶ 23,361] [Denial, Suspension, or Revocation of Registration of Security]

**Sec. 12(j)** The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make 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 the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

**.001 Historical comment.—**

The Act of June 4, 1975, Sec. 9, 89 Stat. 118, added Sec. 12(j) CCH

**.10 Failure of issuer to comply with registration requirements—1975 amendments.—**

Subsection (j) would provide a more logical placement of the authority the SEC already has under present section 19(a)(2) to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw the registration of any security if it finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security

by any broker or dealer. With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.—*Senate Committee Report No. 94-75 (1975), page 106*

**20 Tacking of suspension orders.—**The SEC may not utilize successive ten day suspension orders to order the suspension of trading in a security for more than ten days.—*Sloan v. SEC* (CA-2 1976), 547 F.2d 152, '76-'77 CCH Dec. ¶ 95,757 *mod'g* (CA-2 1975), 527 F.2d 11

**Rehearing.—**Upon rehearing, the portion of the opinion dealing with the 90-day suspension provision were excised.—See '76-'77 CCH Dec. ¶ 95,783

## [¶ 23,371]

## [Suspension of Trading]

**Sec. 12(k) TRADING SUSPENSIONS, EMERGENCY AUTHORITY —**

(1) **TRADING SUSPENSIONS**—If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order—

(A) summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days, and

(B) summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding 90 calendar days

The action described in subparagraph (B) shall not take effect unless the Commission notifies the President of its decision and the President notifies the Commission that the President does not disapprove of such decision

**.001 Historical comment.—**

Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Pub. Law 101-432, 104 Stat. 963, amended Sec. 12(k) which formerly read

"If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make 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 in which trading is so suspended."

The Act of June 4, 1975, Sec. 9, 89 Stat. 118, added Sec. 12(k) CCH

**.10 Suspension of trading—1975 amendments.—**Subsection (k) would consolidate in one place the power the SEC presently has under sections 15(c)(5) and 19(a)(4) of the Exchange Act to suspend summarily trading in any security (other than an exempted security) for a period not exceeding ten days. The SEC's power, with the approval of the President, to suspend summarily all trading on a national securities exchange would be continued and extended to include the power to prohibit trading in all securities, other than exempted securities, otherwise than on an exchange.—*Senate Committee Report No. 94-75 (1975), page 106*

**.15 Transactions effected by broker-dealer.—**A broker-dealer's purchase of attached shares of a Canadian company, subject to a suspension of all trading in the U.S., at a public auction held to satisfy a judgment of the broker-dealer, and the subsequent sale of the purchased shares in Canada would be a broker-dealer within

the meaning of Section 12(k) However, the SEC Staff would not recommend enforcement action if the transaction were carried out, provided that the broker-dealer acts in good faith and has no connection with the activities surrounding the suspension—*Canadian Javelin, Ltd* (SEC 1975), '75-'76 CCH Dec ¶ 80,417

**.16 Suspension of trading—Broker-dealers—Purchase of warrants.**—The private purchase of warrants of a suspended security through newspaper advertisements by a person who is not a broker or dealer is not prohibited by Section 12(k)—*Equity Funding Corp of America* (SEC 1975), '75-'76 CCH Dec ¶ 80,420

**.20 Persons affected by trading suspension—Procedure adopted.**—Any person adversely affected by a summary suspension of trading brought about by the SEC pursuant to Section 12(k) may petition the Commission to show that such a suspension is not in the public interest or for the protection of investors—*Procedure For Persons Affected by Summary Suspension* (SEC 1976), Release No 34-12361, Apr 23, '75-'76 CCH Dec ¶ 80,480

**.21 Tacking of suspension orders.**—See ¶ 23,361 20

## [¶ 23,372]

## [Emergency Orders]

## Sec. 12(k)

(2) EMERGENCY ORDERS—(A) The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under this title, as the Commission determines is necessary in the public interest and for the protection of investors—

(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities), or

(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities)

(B) An order of the Commission under this paragraph (2) shall continue in effect for the period specified by the Commission, and may be extended, except that in no event shall the Commission's action continue in effect for more than 10 business days, including extensions. In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code, or with the provisions of section 19(c) of this title

**Historical comment.—**

Sec 12(k)(2) was added by Act of October 16, 1990 (Market Reform Act of 1990), Sec 2, Pub Law 101-432, 104 Stat 963

## [¶ 23,373]

## [Termination of Emergency Actions]

## Sec. 12(k)

(3) TERMINATION OF EMERGENCY ACTIONS BY PRESIDENT—The President may direct that action taken by the Commission under paragraph (1)(B) or paragraph (2) of this subsection shall not continue in effect

**Historical comment.—**

Sec 12(k)(3) was added by Act of October 16, 1990 (Market Reform Act of 1990), Sec 2, Pub Law 101-432, 104 Stat 963

## [¶ 23,374]

## [Compliance]

## Sec. 12(k)

(4) COMPLIANCE WITH ORDERS—No member of a national securities exchange, broker, or dealer shall make 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 in contravention of an order of the Commission under this subsection unless such order has been stayed, modified, or set aside as provided in paragraph (5) of this subsection or has ceased to be effective upon direction of the President as provided in paragraph (3)

**Historical comment.—**

Sec 12(k)(4) was added by Act of October 16, 1990 (Market Reform Act of 1990), Sec 2, Pub Law 101-432, 104 Stat 963

EXHIBIT "H"

**"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

**¶ 2102.10 Art. 11, Sec. 2**

EXHIBIT "I"

of the NYSE's conduct in cancelling a sale of Equity Funding bonds. The bondholder had directed his broker to effectuate such sale which direction had been carried out. Since trading of Equity Funding securities had been suspended prior to the opening of the market on the day said order was given, however, the Exchange had deemed the sale improper and cancelled it — *Equity Funding Corporation of America* (SEC 1973), 1973 CCH Dec ¶ 79,537.

**40 Transactions in suspended securities —** While it is possible for a broker-dealer transacting all its business on a national securities exchange to sell securities for which trading has been suspended, the practical problems are considerable. In that respect, the prohibition against the use of any instrument of interstate commerce includes the transfer of the securities, telephone discus-

sions during negotiations for the sale, and the mailing of confirmations of sale — *Sprague & Nammack* (SEC 1973), 1973 CCH Dec ¶ 79,434.

**47 Suspension of trading—Private sales—Broker-dealer involvement —** Although Section 15(c)(5) of the Exchange Act prohibits a broker-dealer from taking any action in arranging or consummating a transaction involving a security for which trading has been suspended, a holder of such securities may make a private disposition of his shares — *McVeigh* (SEC 1972), 72-73 CCH Dec ¶ 79,275.

See also

*Douglas R. Graham* (SEC 1975), 75-76 CCH Dec ¶ 80,232 (private individual could cover his short position in warrants even though suspension of trading in security was still in force).

### [¶ 25,139] Consummation of Securities Transactions by Broker-Dealers When Trading Is Suspended

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

➡ 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]

Exhibit R-7

EXHIBIT "J"



John C. Baldwin, Director  
Patricia Louie, Director of  
Registration  
Securities Division  
Utah Department of Business Regulation  
160 East 300 South  
Post Office Box 45802  
Salt Lake City, Utah 84145-45802  
Telephone: (801) 530-6600

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

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

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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").

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.

**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

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

EXHIBIT "K"

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

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|                         |   |                        |
|-------------------------|---|------------------------|
| IN THE MATTER OF        | : | FINDINGS OF FACT,      |
| USA MEDICAL CORPORATION | : | CONCLUSIONS OF LAW AND |
|                         | : | DEFAULT ORDER          |
|                         | : |                        |
| Respondent.             | : | CASE NUMBER SD-89-031  |

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By the Presiding Officer:

The instant proceeding was initiated via a Petition for Order Denying Availability of Transactional Exemptions from Registration dated March 1, 1989. A Notice of Agency Action was sent, certified mail, return receipt requested to Respondent and Respondent's authorized representative on March 2, 1989. The Notice of Agency Action and Petition was also sent, postage prepaid, regular mail, to the parties listed on Exhibit A, attached hereto and made a part hereof. A hearing has not been requested by Respondent or any other interested party within twenty (20) days of the date of the Notice of Agency Action as required pursuant to the provisions of the Utah Administrative Procedures Act.

EN00432.21

0001164

|        |           |
|--------|-----------|
| Entity | 3334-17   |
| Person |           |
| File   | A02166-17 |

Section 63-46b-11 of the Utah Administrative Procedures Act provides that failure of a party to participate in an adjudicative proceeding may result in an order of default against such party.

The Presiding Officer, being fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law and Default Order:

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"). Offers and sales of the securities of USA have been made in the state of Utah.

2. 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:

2. [T]he 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.

3. 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.

Such findings of fact are adopted herein. A copy of the Findings of Fact, Conclusions of Law and Order Denying Motion for



Preliminary Injunction and Granting Motion to Stay Action and Compel Arbitration is attached hereto as Exhibit B and made a part hereof.

3. The securities of USA, or its predecessor S.M.I., Inc., have never been registered in Utah pursuant to the provisions of § 61-1-8, § 61-1-9 or § 61-1-10 of the Act.

4. The exemption from registration contained in § 61-1-14(2)(b) of the Act is unavailable for nonissuer transactions of the securities of USA inasmuch as the listing in Moody's OTC Industrial manual for USA did not contain the 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.

5. USA did not file an application for any other transactional exemption from registration contained in 61-1-14(2) of the Act with the Division.

#### CONCLUSIONS OF LAW

6. Offers and sales of the securities of USA Medical Corporation have been made in violation of § 61-1-7 of the Act;

7. 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;

8. Untrue statements of material facts and omissions 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

9. 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.

**DEFAULT ORDER**


WHEREFORE, IT IS HEREBY ORDERED that the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Utah Uniform Securities Act be, and hereby are, denied for the securities of USA Medical Corporation, any affiliate or successor to USA Medical Corporation, or any entity subsequently organized by or on behalf of USA Medical Corporation.

**AGENCY REVIEW**

A defaulted party may seek to set aside the Default Order by filing a request for agency review within ten (10) days after the issuance of the order in accordance with the procedure set forth in Rule 151-46b-12 of the Utah Administrative Procedures Act rules.

DATED this 24<sup>th</sup> day of March, 1989.

SECURITIES DIVISION  
DEPARTMENT OF COMMERCE

  
\_\_\_\_\_  
JOHN C. BALDWIN  
PRESIDING OFFICER

**BY THE EXECUTIVE DIRECTOR:**

The foregoing Findings of Fact, Conclusions of Law and Default Order are hereby accepted, confirmed and approved by the Executive Director of the Department of Commerce.

DATED this 27 th day of March, 1989.

DEPARTMENT OF COMMERCE



DAVID L. BUHLER  
EXECUTIVE DIRECTOR

**BY THE SECURITIES ADVISORY BOARD:**

The foregoing Default Order is hereby accepted, confirmed and approved by the Utah Securities Advisory Board.

DATED this 27<sup>th</sup> day of March, 1989.

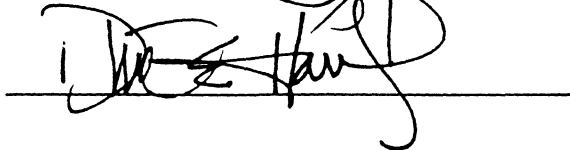
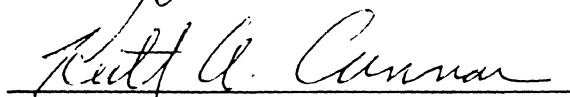
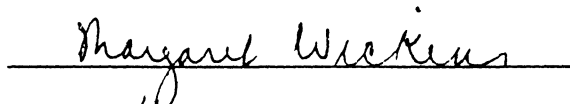


EXHIBIT "L"

R. Paul Van Dam  
Attorney General  
Mark J. Griffin 4329  
Assistant Attorney General  
115 State Capital  
Salt Lake City, Utah 84114  
(801) 538-1331  
KAYCEE MCGINLEY 2187  
Securities Division  
160 East 300 South  
Salt Lake City, Utah 84110

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

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|                              |   |                               |
|------------------------------|---|-------------------------------|
| IN THE MATTER OF             | : |                               |
| THE 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        |

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|                     |   |                               |
|---------------------|---|-------------------------------|
| 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        |

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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 19<sup>th</sup> day of July, 1989.

R. Paul Van Dam  
Attorney General

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

EXHIBIT "M"

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

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

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Appearances:

Mark J. Griffin for the Division of Securities

John Michael Coombs and Craig F. McCullough for Respondents

By the Administrative Law Judge:

Pursuant to motion, dated May 24, 1989, the division seeks to convert the above-referenced cases to formal adjudicative proceedings. On May 31, 1989, Respondents filed an objection to the pending motion. Said objection was further supplemented by a June 2, 1989 letter.

Oral argument was conducted on June 19, 1989 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce.

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

CONCLUSIONS OF LAW

The division contends these proceedings should be converted because it appears that Respondents will vigorously contest any adverse ruling issued on the merits in this forum. Given that informal adjudicative proceedings are subject to judicial review by trial de novo, the division urges it would then be necessary to conduct another evidentiary proceeding and asserts that expertise by the fact finder in the interpretation of securities laws and the regulation of the securities industry would be lost if the instant adjudicative proceedings are not conducted on a formal basis and, thereby, subject to judicial review on the

record. The division thus contends that conversion of these proceedings is in the public interest and, since the pending motion has been made in the early stages of these proceedings, the division also urges that neither party would be unfairly prejudiced if the motion is granted.

Section 63-46b-4(3), Utah Code Ann. (1953), provides as follows:

Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert . . . an informal adjudicative proceeding to a formal adjudicative proceeding if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

The Utah Administrative Procedures Act (Section 63-46b-1 et. seq.) provides for three kinds of adjudicative proceedings: formal, informal and emergency. Pursuant to Section 63-46b-4(1), agencies may designate, by rule, those categories of adjudicative proceedings which are to be conducted informally. Section 63-46b-4(2) provides that all agency adjudicative proceedings which are not designated as informal are to be conducted on a formal basis.

The division has engaged in the rulemaking process authorized by Section 63-46b-4(1).

Specifically, R177-46b-6B provides as follows:

All adjudicative proceedings under the Act, enumerated in this Rule, are designated as informal adjudicative proceedings.

R177-46b-6E sets forth when hearings will be conducted in adjudicative proceedings. Specifically, the just-stated rule provides as follows:

- 2. In the following proceedings, a hearing will be held only if timely requested:
  - (a) 61-1-6(1) or (2) Denial, suspension, revocation of registration of broker-dealer, agent, investment advisor;

Although it has designated the instant proceedings to be conducted on an informal basis, the division argues that all of its adjudicative proceedings were so designated on the assumption that the vast majority of such proceedings would be perfunctory in nature and that the proposed agency action in those matters would not be contested. However, the division urges that if there is a dispute as to proposed agency action and the party toward whom that action is directed determines to actively defend its interests, a motion to convert the proceeding is appropriate.

The Utah Administrative Procedures Act became effective January 1, 1988. State agency rulemaking is a necessary prerequisite to effectively implement various provisions of that Act, the most significant of which involves the matter now under review. Given its recent origin, the Act has not yet been the subject of judicial review as to the issue now presented. Nevertheless, comments of the Utah Administrative Law Advisory Committee, pertinent to Section 63-46b-4, are instructive. Those comments provide as follows:

If a party moves to convert an adjudicative proceeding from informal to formal . . . , the burden is on the moving party to demonstrate that the requirements of Section 63-46b-4(3) have been satisfied. *The intent of the Advisory Committee is that these requirements be narrowly construed to encourage agencies to decide which classes of adjudicative proceedings will be formal and which will be informal and to designate in advance the classes of adjudicative proceedings that will be informal. The propriety of conversion is decided by the presiding officer.*

The Committee has further stated as follows:

There may be cases where a party moves to convert an adjudicative proceeding from formal to informal and the category of adjudicative proceedings involved has not been designated as a category for informal adjudication by the agency in advance through rulemaking. Conversion is possible under these circumstances. Each case, however, is fact sensitive. The decision of the presiding officer in such a case to convert the adjudicative proceeding from formal to informal should not be used as precedent for subsequent cases in the same category of adjudicative proceedings. *An ad hoc approach to the formal/informal question is not a substitute for rulemaking. Agencies should regularly reassess the classes of cases that they intend to conduct informally in light of their own experience.*

Many of the agency actions which could be taken by the Division, as evidenced throughout the rules which have been promulgated, are matters of a mundane and noncontroversial nature. However, the suspension or revocation of registration for a broker/dealer, agent or investment advisor would impact an existing right to practice in that capacity. Under such circumstances, it is not surprising that any given registrant would actively and aggressively defend against an interruption of their livelihood. Nevertheless, the designation as to whether any proceeding should be conducted on a formal or informal basis should not turn on whether individuals to whom a notice of agency action have been directed are inclined to respond actively or passively. Granting a motion to convert simply because there is active resistance by the party to whom the notice of agency action has been issued would be capricious and not justified.

000 J 172



Despite the foregoing, the pending motion has serious merit in an important respect. Given the relative complexity of securities regulation, expertise in the application and interpretation of the statutes and rules which govern the securities industry could prove to be invaluable to any fact finder charged with the responsibility to determine whether certain conduct is violative of the governing statutes and rules in that regard. In fact, the existence and effectiveness of agency adjudicative proceedings is primarily predicated upon the exercise of such specialized skills by boards and commissions similar to the Securities Advisory Board. In light of the proposed agency action incident to these proceedings, it is in the public interest to conduct these cases on a formal basis.

Respondent urges that greater attorney's fees and costs would be incurred in defending formal proceedings. Respondent further asserts that conversion of these proceedings would take away a "significant right" to judicial review by trial de novo and suggests that the pending motion has been made because the Division desires that any evidentiary proceedings in this forum be subject to judicial review on the record. Respondent thus contends that the "forced and unreasonable swap of rights would be inherently unfair" and that the motion under review is "designed merely to 'unfairly prejudice' " its' interests in all respects.

Respondent's concern with costs which could be incurred on appeal and the nature of judicial review from any order entered in this forum implies that Respondents may believe the outcome of these proceedings is a foregone conclusion. Although the division has undertaken proceedings which could prompt entry of a disciplinary sanction against Respondents, there is no basis to conclude that Respondents will not be fully accorded due process in these proceedings, whether conducted on a formal or informal basis. The "unfair prejudice" referenced in Section 63-46b-4(3)(b) particularly relates to the requirement that adjudicative proceedings be conducted as to afford all parties due process. Simply put, the costs incurred by Respondent as a litigant in these proceedings are a matter of choice. Neither said costs nor the nature of judicial review and associated costs in that regard are relevant to the issue of "unfair prejudice". Given the early stage of these proceedings, a favorable ruling on the pending motion would not adversely affect the substantial rights of either party. Thus, the Division's motion is well taken and should be granted.

Nevertheless, two further matters should be addressed. Nothing herein should be construed to suggest that subsequent motions of this nature will be customarily granted, on an ad hoc basis, upon the

urgence that the Division desires to avoid evidentiary proceedings in both the administrative and judicial forum and the concomitant loss of agency expertise during de novo review in the latter instance. The Division should re-evaluate the nature of the various agency actions it can take and assess those cases where expertise by the fact finder in adjudicative proceedings is necessary and/or desirable. Thereafter, the Division should modify its rules to accordingly differentiate the manner in which adjudicative proceedings will be conducted.

Respondent has requested that any order granting the pending motion be certified as "final", so that any necessary review of that order can be sought. Section 63-46b-12, which provides that parties to any adjudicative proceeding may seek review "of an order by the agency", sets forth the procedure to obtain any such review. R151-46b-12(A) is further applicable in that respect. Presumably, Respondents' request is 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).

Whether the order set forth below is "final", as to allow for subsequent judicial review, is not for this Court to decide. However, the order herein is subject to agency review, as set forth above.

#### ORDER

WHEREFORE, IT IS ORDERED that the May 24, 1989 motion to convert these proceedings is granted.

Dated this 14th day of July, 1989.

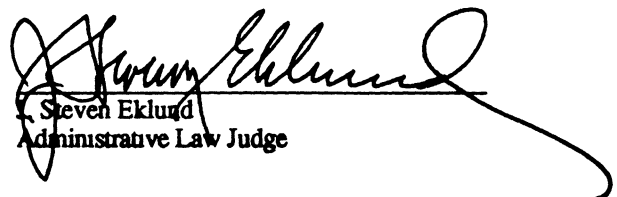
  
Steven Eklund  
Administrative Law Judge

EXHIBIT "N"

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

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

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**Appearances:**

John Michael Coombs and Craig F. McCullough for Respondents

Mark J. Griffin for the Division of Securities

**By the Administrative Law Judge:**

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

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

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

**FINDINGS OF FACT**

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

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

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

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

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

#### CONCLUSIONS OF LAW

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

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.

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.

00000002

ORDER

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

Amended Petition is denied.

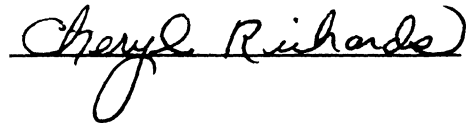
Dated this 29<sup>th</sup> day of August, 1989.

  
J. Steven Eklund  
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Dated this 29 day of August, 1989.

  
Cheryl Richards

000-153



EXHIBIT "O"

## DISHONEST OR UNETHICAL BUSINESS PRACTICES

*Adopted on April 23, 1983*

[¶ 1401]

**UNETHICAL OR DISHONEST BUSINESS PRACTICES.** Acts and practices, including but not limited to the following, are considered contrary to such standards and may constitute grounds for denial, suspension or revocation of registration or such other action authorized by statute.

[¶ 1402]

### 1. BROKER-DEALERS

- a. Engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers and/or in the payment upon request of free credit balances reflecting completed transactions of any of its customers;
- b. Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;
- c. 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;
- d. Executing a transaction on behalf of a customer without authorization to do so;
- e. Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders;
- f. Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account;
- g. Failing to segregate customers' free securities or securities held in safekeeping;
- h. Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by Rules of the Securities and Exchange Commission,
- i. Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit;
- j. Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus;
- k. Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals,

safekeeping, or custody of securities and other services related to its securities business;

- l. Offering to buy from or sell to any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell;
- m. Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless such broker-dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created or controlled by such broker-dealer, or by any person for whom he is acting or with whom he is associated in such distribution, or any person controlled by, controlling or under common control with such broker-dealer;
- n. Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:
  - (1) Effecting any transaction in a security which involves no change in the beneficial ownership thereof;
  - (2) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this subsection shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers;
  - (3) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others;
- o. Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer;
- p. Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such broker-dealer believes that such quotation represents a bona fide bid for, or offer of, such security;
- q. Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement,

detract from, supersede or defeat the purpose or effect of any prospectus or disclosure; or

- r. Failing to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, the existence of such control to such customer, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;
- s. Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member; or
- t. Failure or refusal to furnish a customer, upon reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

[¶ 1403]

## 2. AGENTS

- a. Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer;
- b. Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction;
- c. Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited;
- d. Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;
- e. Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control; or
- f. Engaging in conduct specified in Subsection 1.b, c, d, e, f, i, j, n, o, p, or q.

[¶ 1404]

**[CONDUCT NOT INCLUSIVE.]** The conduct set forth above is not inclusive. Engaging in other conduct such as forgery, embezzlement, non-disclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices shall also be grounds for denial, suspension or revocation of registration.

[The next page is 1001.]

EXHIBIT "P"

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

March 6, 1989

|                            |   |                     |
|----------------------------|---|---------------------|
| U.S.A. Medical Corporation | : | ORDER OF SUSPENSION |
|                            | : | OF TRADING          |
| File No. 500-1             | : |                     |
|                            | : |                     |

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of USA Medical Inc., and that questions have been raised about recent market activity in USA Medical, and about the adequacy and accuracy of publicly disseminated information concerning, among other things, the financial condition of the company, the identities of its shareholders, and the beneficial ownership and control of the company's shares. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company, over-the-counter or otherwise, is suspended for the period from 9:30 a.m. EST, March 6, 1989 through 11:59 p.m. EST, on March 15, 1989.

By the Commission.

Jonathan G. Katz  
Secretary

SECURITIES AND EXCHANGE COMMISSION  
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934  
RELEASE NO. 26574 / March 6, 1989

The Securities and Exchange Commission announced pursuant to Section 12(k) of the Securities Exchange Act of 1934 ("Exchange Act") the temporary suspension of over-the-counter trading of the securities of USA Medical Corp. for a ten day period commencing at 9:30 a.m. (EST), March 6, 1989 and terminating at 11:59 p.m. (EST) on March 15, 1989.

The Commission temporarily suspended trading in the securities of USA Medical in view of questions that have been raised about recent market activity in the securities of USA Medical, and about the adequacy and accuracy of publicly disseminated information concerning, among other things, the financial condition of the company, the identities of its shareholders, and the beneficial ownership and control of the company's shares.

The Commission cautions broker-dealers, shareholders, and prospective purchasers that they should carefully consider the foregoing information along with all other current available information and any information subsequently issued by the company.

Further, brokers and dealers should be alert to the fact that, pursuant to Rule 15c2-11 under the Exchange Act, at the termination of the trading suspensions, no quotation may be entered unless and until they have strictly complied with all of the provisions of said rule. If any broker or dealer has any questions as to whether or not he has complied with said rule, he should not enter any quotation but immediately contact the staff of the Securities and Exchange Commission in Salt Lake City, Utah. If any broker or dealer is uncertain as to what is required by Rule 15c2-11, he should refrain from entering quotations relating to the securities in question until such time as he has familiarized himself with said rule and is certain that all of its provisions have been met. If any broker or dealer enters any quotation which is in violation of said rule, the Commission will consider the need for prompt enforcement action.

If any broker-dealer or other person has any information which may relate to this matter, the Salt Lake Branch Office of the Securities and Exchange Commission should be telephoned at (801) 524-5796.

33-1270

EXHIBIT "Q"



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

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|                              |   |                        |
|------------------------------|---|------------------------|
| 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               | : |                        |

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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...

63-46b-12A  
63-46b-12A

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.

35th  
Dated this 35th 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 "R"

**RECEIVED**  
NOV 22 1989

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

DEPARTMENT OF  
COMMERCE

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

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|                                   |   |                     |
|-----------------------------------|---|---------------------|
| IN THE MATTER OF THE REGISTRATION | : |                     |
| OF:                               | : |                     |
|                                   | : | AMENDED ANSWER AND  |
|                                   | : | COUNTERCLAIM        |
| JOHNSON-BOWLES COMPANY, INC.      | : |                     |
|                                   | : |                     |
| CRD NO. 07678                     | : | Case No. SD-89-46BD |
|                                   | : |                     |
| <hr/>                             |   |                     |
| IN THE MATTER OF THE REGISTRATION | : |                     |
| OF:                               | : |                     |
|                                   | : |                     |
| MARLEN VERNON JOHNSON             | : | Case No. SD-89-47AG |
|                                   | : |                     |
| CRD NO. 2598888                   | : |                     |
|                                   | : |                     |

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Respondents herewith respond to the amended petitions in the above matters,  
affirmatively allege, and counterclaim against the Division as follows.

ANSWER

1. Respondents deny ¶1 of the amended petitions in that the Division does not have any jurisdiction over these proceedings.
2. Respondents admit ¶2 as a blanket statement of the law taken out of context but allege that §61-1-6(1)(g), Utah Code Ann., and the rules promulgated

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thereunder based on NASD rules and NASAA Guidelines, are inapplicable to these proceedings and the conduct of Respondents.

3. Respondents admit ¶13 of the amended petitions. Respondents deny ¶14 to the extent that Respondent Marlen V. Johnson was acting at all times relevant to this action as an individual and not as either a securities principal or agent.

4. Respondents deny ¶15 in that Respondent Johnson-Bowles was effecting transactions in the securities of U.S.A. Medical in January, 1989, not 1988.

5. Respondents deny ¶16 of the amended petitions to the extent that such was the sole purpose of Respondents' filing of a federal lawsuit ultimately assigned to Judge J. Thomas Greene. On the contrary, the primary reason Respondent Johnson-Bowles filed the federal action was to have a U.S. District Court declare Respondents' outstanding Exchange Act contracts void for illegality -- something the Court ultimately declined to do on February 28, 1989.

6. Respondents admit ¶17 of the amended petitions but allege that such is not the full extent of Judge Greene's ruling in Case No. C-89-157-G and ¶17 is thus misleading to the extent that it is taken out of context. What Judge Greene essentially ruled relative to these proceedings was that Respondents' outstanding Exchange Act contracts were neither "void" nor "voidable" and therefore, Respondents would be required by law to purchase enough U.S.A. Medical stock, as they ultimately did, to complete such interstate contracts previously entered into in the course of their Exchange Act business.

7. Respondents admit ¶18 of the amended petitions to the extent that the Division's Order of March 1, 1989, revoked the availability of exemptions in Utah only for the offer and sale of U.S.A. Medical stock. The Order, however, either legally, or by its own



terms, is irrelevant to and otherwise has no effect whatsoever on purchases of U.S.A. Medical stock by anyone as a matter of law. Respondents do not recall whether the Order was "hand-delivered" to them or not on March 1, and whether it was or not, such Order, by its own unambiguous terms, does not and did not put Respondents on either actual or constructive notice that their subsequent purchase of U.S.A. Medical stock to fulfill Exchange Act obligations would, or could, result in the instant proceedings. As to whether the March 1, Order has been in effect continuously since its issuance, this is debatable and therefore denied.

8. Respondents have no personal knowledge of that contained in ¶9 of the amended petitions and therefore, they deny the same. They also have no recollection of whether a Notice of Agency Action and Petition was mailed to them by the Division on either March 2, 1989, or at all.

9. Respondents have no personal knowledge of that contained in ¶'s 10 and 11 and therefore, on that ground, deny the same.

10. Relative to ¶12a, Respondent Johnson admits that he called John Dawson but such only occurred after he was informed by one Karl Smith that Dawson was anxious to sell his "worthless" U.S.A. Medical stock to anyone who wanted to buy it. The remainder of ¶12a is inaccurate and irrelevant to these proceedings as a matter of law and therefore, the same is denied.

11. Respondents deny ¶'s 12b-12f of the amended petitions insofar as they are inconsistent with various Representation Letters furnished Respondents by each of their sellers, true and correct copies of which were similarly furnished the Division and the Administrative Law Judge at the hearing on Respondents' Rule 12(b)(1) Motion to Dismiss.

Such Representation Letters and their respective contents are incorporated herein by reference. In particular, however, Respondents deny the applicability and relevance of all of ¶12 to these proceedings.

12. Paragraphs 13 and 23 of the amended petitions do not call for a response.

13. Respondents admit ¶14 of the amended petitions to the extent such an order would be "in the public interest" but deny that any part or portion of these proceedings are either "in the public interest" or in the interests of public policy. Respondents thus deny this allegation and allege that these entire proceedings are against both "the public interest" and public policy.

14. Respondents deny ¶15 of the amended petitions in that it is an inaccurate and misleading statement of the law relative to the facts of this case. Whether the "sales" to Respondents were unlawful or not in and of themselves is irrelevant to whether or not Respondents, as purchasers, have any legal liability or otherwise did anything wrong or remotely improper in their capacities as broker-dealers and agents.

15. Respondents deny ¶'s 16 and 17 of the amended petitions.

16. There are no ¶'s 18–22, inclusive, in the amended petitions calling for an answer or response.

17. Respondents admit ¶'s 24 and 25 of the amended petitions as blanket statements of the law taken out of context, but deny their applicability in any respect to the instant proceedings.

18. Respondents deny ¶'s 26 and 27 of the amended petitions.

WHEREFORE, Respondents pray for an "adversary adjudication" as contemplated in the Equal Access to Justice Act and an order of no cause in their favor on

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both Counts I and II of the amended petitions. Respondents further pray for an award of all costs, expenses, and attorney's fees in accordance with Rule 11, §78-27-56, Utah Code Ann., as amended, and as otherwise fully contemplated in the Equal Access to Justice Act.

#### AFFIRMATIVE DEFENSES

1. The Division lacks subject-matter jurisdiction over these proceedings and as otherwise contemplated in Rule 12(b)(1), Utah Rules of Civil Procedure.
2. The amended petitions fail to state any claim on which relief may be granted and as otherwise contemplated in Rule 12(b)(6), Utah Rules of Civil Procedure.
3. The amended petitions fail to state a claim and are otherwise barred for each and every reason conceivably contemplated in and by any and all pleadings heretofore filed by Respondents in these proceedings, the contents of which are each and all incorporated herein by reference.
4. The amended petitions are barred by the doctrines of waiver and estoppel.
5. The amended petitions are barred by their own unlawfulness and illegality.
6. The amended petitions are barred by the illegal conduct, bad faith, and overall malicious and improper motives of employees of the Division.
7. The amended petitions are barred in that they have unlawfully damaged Respondents in their business and reputations. Such amended petitions have further deprived Respondents of liberty and property by individuals acting under color and power of state law based upon powers granted to them as a result of their employment by the state.
8. The amended petitions fail to state a claim and are otherwise barred by virtue of a No-Action Letter of the Division relative to U.S.A. Medical addressed to Utah securities agent Susan Slattery and Utah broker-dealer P.B. Jameson dated August 9, 1989,

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a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "A". Such Letter completely undermines the Division's March 1989, Orders in that it creates an "unsolicited order" or trading exemption in the securities of U.S.A. Medical for a Utah broker-dealer and agent. Such Letter is further inconsistent as a matter of law with the instant amended petitions in that such Letter authorizes the very same conduct that is proscribed and attributed to Respondents in the amended petitions. Such Letter -- a policy statement of the Division directed solely to certain privileged individuals -- is thus further evidence that the amended petitions violate various constitutional rights guaranteed Respondents and as otherwise set forth in their Memorandum in Support of their Rule 12(b)(6) Motion to Dismiss on file herein.

In addition, the foregoing No-Action Letter, Exhibit "A" hereto, ironically puts the Division in the untenable and precarious position of aiding and abetting the so-called "U.S.A. Medical Co-Conspirators" identified in the Judge Greene litigation. This is because Susan Slattery has been named as a co-defendant in the class action securities fraud, racketeering, and insider trading case identified as Arena Land & Investment Co., Inc., et al. v. Petty, Strand, Global Oil, Slattery, et al., U.S. District Court Case No. 89-C-144-S, a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "B". In such case, Susan Slattery is an alleged co-conspirator in the U.S.A. Medical stock fraud and market manipulation. See ¶48, page 23 and ¶280, page 85 of Exhibit "B" hereto. Reference is also made to Respondents' Memorandum of Law in Support of their Rule 12(b)(6) Motion dated September 27, 1989, pages 16 and 17 thereof, which makes reference to P.B. Jameson and its alleged participation in the U.S.A. Medical fraud, even after March 1. Thanks to the Division's secret No-Action Letter (which Respondents only discovered on

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September 29, by accident), Slattery, P.B. Jameson, convicted felon Michael William Strand, and any and all other U.S.A. Medical Co-Conspirators have been given a state license to engage in "dishonest and unethical practices" by distributing its "unsuitable" stock out-of-state in obvious furtherance of the U.S.A. Medical fraudulent scheme. The foregoing is significant in that it demonstrates not only that the Division does not know what "in the public interest" means but that it is otherwise discriminating against Respondents in violation of 42 U.S.C. §1983 and otherwise.

9. The amended petitions fail to state a claim and are otherwise barred in that Respondents have now completed their Exchange Act contracts and there is no showing that the conduct complained of will or may occur in the future or, that it is otherwise capable of being repeated by Respondents. Therefore, the entire case is moot. This defense is consistent with the weight of authority which holds that the SEC cannot obtain an injunction or issue a cease and desist order without an adequate showing of not only irreparable harm but a substantial showing that the conduct complained of is highly likely to occur in the future. Since revocation is on the nature of an injunction, the same principles apply in these proceedings.

10. The amended petitions fail to state a claim and are otherwise barred in that Respondents did not need the protection of the securities laws in purchasing U.S.A. Medical stock from certain individuals who arguably lacked exemptions. SEC v. Ralston Purina Co., 346 U.S. 119 (1953)(holding that securities laws are inapplicable to a person who does not need the protection afforded by them).

11. The amended petitions are violative of or otherwise invoke Rule 11 of the Utah Rules of Civil Procedure, Section §78-27-56, Utah Code Ann., and the Equal Access to

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Justice Act ("EAJA"), 5 U.S.C. §504, "Costs and Fees of Parties", Fed. Sec. L. Rep., Vol. 5, ¶60,104, as amended, effective August 5, 1985, Sec. 1, Public Law 99-80, 99 Stat. 183. Based on the violation or applicability of the authority referred to in this paragraph, Respondents are entitled to reimbursement of all costs, expenses, and attorney's fees incurred in connection with these unlawful proceedings.

12. The Division's amended petitions fail to state a claim upon which relief may be granted because the Division has no power or authority to summarily suspend all exemptions from registration under §61-1-14(2), Utah Code Ann., particularly when not even the U.S. Securities and Exchange Commission has such power or authority to suspend all exemptions under the Securities Act of 1933. In the alternative, it is an abuse of agency discretion under the circumstances for the Division to have suspended all §14(2) exemptions, even if the Division had such power or authority, which it does not. Further, the Division's findings of fact relative to their March, 1989 Orders do not support the wholesale and ruthless suspension of all §14(2) exemptions from registration under the Utah Uniform Securities Act.

13. The Division's amended petitions fail to state a claim because Respondents' sellers had "exemptions" regardless of the Division's March, 1989, Orders. This is because such sellers were "bona fide purchasers" who acquired their U.S.A. Medical stock in good faith, without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and otherwise, they paid value. The Division thus cannot prohibit the sale of such stock to Respondents and this exemplifies the Division's regulatory overreaching with respect to its March 1989 Orders. The burden is also on the Division in these proceedings to prove that Respondents' sellers were not "bona fide purchasers" of

the U.S.A. Medical stock in issue or that Respondents themselves were not "bona fide purchasers".

#### COUNTERCLAIM

1. Respondents incorporate each and every allegation hereinabove as if each were set forth more fully hereafter verbatim.
2. The original and amended petitions have been brought and filed in violation of Rule 11 of the Utah Rules of Civil Procedure and §78-27-56, Utah Code Ann.
3. These proceedings have been brought for an improper purpose and are based on personal, malicious, vindictive, and retaliatory motives on the part of Division employees and personnel.
4. Respondents have been deprived of liberty and property as a result of the instant proceedings.
5. Respondents have been substantially damaged in their business and reputations by the initiation of the instant proceedings.
6. Respondents have incurred substantial unwarranted and unnecessary attorney's fees, expenses, and costs in being required to defend the instant proceedings.
7. As a direct and proximate result of these proceedings, Respondents have been substantially damaged as aforesaid.
8. Neither the Division nor any of its personnel, including the Utah Attorney General, has statutory immunity or any lawful exemption from the operation of either Rule 11, §78-27-56, Utah Code Ann., or the spirit of the Equal Access to Justice Act.
9. The equity and other powers and authorities of this court enable it to make the type of award to Respondents, if warranted, as specifically contemplated in the Equal

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Access to Justice Act, regardless of whether said Act directly applies to these particular proceedings. The spirit of such Act therefore does and should apply to these proceedings regardless.

10. The amended petitions have not been brought with a reasonable investigation of the facts or the law, nor have they been brought after a reasonable inquiry into whether the allegations contained therein are well grounded in fact or whether they are otherwise warranted by existing law or a good faith argument for the modification or reversal of existing law.

11. These proceedings have been brought by the Division and its personnel in bad faith.

WHEREFORE, Respondents pray for an award of all costs, expenses, and attorney's fees incurred by them in any respect in connection with the existing proceedings.

DATED this 21<sup>st</sup> day of November, 1989.

  
John Michael Coombs  
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21<sup>st</sup> day of November, 1989, (s)he mailed a true and correct copy of the foregoing AMENDED ANSWER AND COUNTERCLAIM with attendant Exhibits by regular mail, postage prepaid to John C. Baldwin, Director and Kathleen C. McGinley, Director of Broker-Dealer Section, Securities Division, Utah Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Administrative Law Judge and Presiding Officer J. Stephen Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Mark J. Griffin, Esq., Assistant Attorney General, 115 South State Capitol, Salt Lake City, Utah 84114; and to Craig F. McCullough, Esq., Callister, Duncan, & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84133.

J:ANSWER.1-3

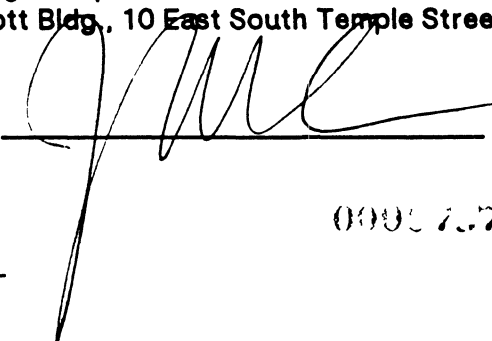
  
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EXHIBIT "S"



State of Utah  
DEPARTMENT OF COMMERCE  
Division of Securities

Norman H. Bangerter  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

160 East 300 South  
P.O. Box 45802  
Salt Lake City, Utah 84145-0802  
(801) 530-6600

August 9, 1989

Ms. Susan Slattery  
P.B. Jameson, Inc.  
175 South Main Street  
Suite 1500  
Salt Lake City, Utah 84111

Re: U.S.A. Medical Corporation

Dear Ms. Slattery:

John Baldwin asked me to respond to your letter regarding trading in U.S.A. Medical. The division's position is that if a Utah agent, also licensed in other states, causes the firm to execute unsolicited orders on an agency basis with customers from any of those other states, and the transaction is executed outside the state of Utah, then the division probably has no jurisdiction over the trades.

Please be aware, however, of several caveats: First, if any transaction is conducted with a customer in any state in which the agent is not licensed, that state may have grounds to take action against the agent and firm. That other state's order, as well as the fact of unlicensed activity in another state, may be the basis of an action by this division against the agent and firm. Second, virtually every state (and federal) law applicable requires that there be no active trading in a stock until there is full disclosure of all material facts. We believe that adequate disclosure would at a minimum include discussion of the federal temporary restraining order in the U.S.A. Medical case and the reasons therefor. Before executing many transactions you may want to ensure that an amended Form 15c-2(11) is on file.

This letter is not an official opinion of the division and is based on the facts as presented in your letter. Should any facts change, or should the transaction occur differently than described in your letter and this response, then this letter will not be binding upon the division.

If you have any questions, please contact the division.

Sincerely,

Constance B. White  
Assistant Director

6/11/89

"A"

EXHIBIT

EXHIBIT "T"

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

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

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Appearances:

John Michael Coombs and Craig F. McCullough for Respondents

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

By the Administrative Law Judge:

By Motion, dated September 27, 1989, Respondents seek a dismissal of the instant adjudicative proceedings. A memorandum in opposition thereto was filed by the Division on October 13, 1989. Respondents filed a reply to that memorandum on October 25, 1989. On October 27, 1989, the Court advised respective counsel that the pending motion would be addressed on the basis of the filed memoranda and that no oral argument was deemed necessary.

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

CONCLUSIONS OF LAW

Respondents contend that the July 19, 1989 Amended Petition fails to state a claim upon which relief can be granted. Sparing detail, Respondents urge that the amended petition should be dismissed because: (1) it violates numerous constitutional provisions; (2) Respondents' conduct was not a dishonest or unethical practice as a matter of law; (3) the Division has no authority to prohibit purchases of stock for any reason; (4) the Division has no statutory authority to revoke a license based on Respondents'

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participation in a securities transaction occurring in interstate commerce and undertaken to complete obligations imposed by federal law; (5) issuance of the amended petition serves no public interest and, thus, is not within the Division's police power; (6) a person cannot aid and abet or solicit a sale of securities to himself, as alleged in Count I; (7) Respondents' purchase of USA Medical Corporation securities was suitable and the concept of suitability, as alleged in Count II, is irrelevant because that concept is only applicable to a purchase of securities from a broker; (8) this proceeding is barred by reason of an August 9, 1989 no-action letter issued by the Division; (9) there is no evidence that Respondents are capable of repeating the alleged improper conduct and, thus, this case is moot; (10) Respondents did not need the protection afforded by the securities law relative to their purchase of the above-stated securities.

The July 19, 1989 Amended Petition sets forth various factual allegations. For the purpose of addressing the pending motion, all of the factual allegations contained in the amended petition are incorporated herein by reference. To generalize, the amended petition contains allegations that: (1) Respondents purchased USA Medical Corporation securities during such time that all transactional exemptions from registration of those securities were unavailable; (2) the unavailability of transactional exemptions from registration as to the securities in question was based on a Summary Order, issued March 1, 1989, and a Default Order, issued March 27, 1989; (3) Respondents' purchase of the securities occurred within the State of Utah; and (4) Respondents contacted an existing shareholder of USA Medical Corporation securities in an attempt to purchase said securities, actually purchased USA Medical Corporation securities from five other named individuals and may have also purchased USA Medical Corporation securities from other unnamed sources after the March 1, 1989 Order. Based on the factual allegations set forth in the amended petition, the Division asserts that a disciplinary sanction should enter as to Respondents' registration because such an order is in the public interest and Respondents have engaged in dishonest or unethical practices in the securities business, violative of Section 61-1-6(1) and R177-6-1(g).

Prior to a review of the pending motion, a preliminary matter should be noted. No beneficial purpose would be served by addressing this motion in any manner similar to either of the extremes reflected in the memoranda which has been submitted by the parties in this case. Simply put, an attempt will be

made to rule on the pending motion without recourse to either legal puffery and/or baldfaced conclusions. The filing of any subsequent matters for consideration during these proceedings by counsel for either party should adhere to the same standard.

Section 63-46b-1(4), Utah Code Ann. (1953), as amended, provides as follows:

This chapter does not preclude . . . the presiding officer during an adjudicative proceeding from:

(b) granting a timely motion to dismiss . . . if the requirements of Rule 12(b) . . . of the Utah Rules of Civil Procedure are met by the moving party . . .

Comments of the Utah Administrative Law Advisory Committee on the drafting and interpretation of the Utah Administrative Procedures Act further provide as follows:

A presiding officer is . . . authorized to grant a timely motion either to dismiss or for summary judgment, if the requirements of Rule 12(b) or 56 of the Utah Rules of Civil Procedure and the UAPA are met. The well-developed caselaw concerning Rules 12(b) and 56 should assist presiding officers in deciding [such] motions . . .

In *Christensen v. Lelis Automatic Transmission Service Inc.*, 24 Utah 2d 165, 467 P.2d 605 (1970), the Utah Supreme Court noted the standard which governs the consideration of a motion to dismiss made pursuant to Rule 12(b), to wit:

A complaint does not fail to state a claim *unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.* Id at 168. (Emphasis added.)

With one exception, Respondents' assertions that issuance of the amended petition violates various constitutional provisions are wholly lacking in any merit. The March 27, 1989 Default Order was issued to prohibit *any* subsequent trading of USA Medical Corporation securities *within this state*. The regulation of securities transactions conducted within the confines of this state, as well as the regulation of conduct undertaken by registered agents and broker-dealers in that respect, is a proper exercise of the police power authorized by the provisions of Section 61-1-1 et. seq. As generally stated in 79 C.J.S. *Securities Regulation*, Section 188:

A state has the power to regulate and control the traffic in securities which is conducted within the borders of the state, the regulation and control of such traffic being regarded as a proper exercise of the police power of the state . . .

Therein, it is further stated as follows:

The Federal Securities Act of 1933 specifically provides that the Act shall not affect the jurisdiction of the states where the regulation is not in conflict with the Act. This indicates the clear intention of Congress to leave the states free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the federal Act, and, in the absence of such a conflict, it is contemplated that the states and the federal government shall exercise concurrent jurisdiction in this field.

In *Hall vs. Geiger-Jones Co.*, 242 U.S. 539 (1917), the United States Supreme Court held that a state statute regulating the disposition of securities within the borders of a state which only incidentally affects interstate commerce is not violative of the Commerce Clause of the U.S. Constitution. Therein, the Court stated as follows:

The provisions of the law, it will be observed, apply to dispositions of securities *within* the state. . . this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *Id.* at 557-558. (Emphasis in original.)

A considered review of the amended petition clearly reflects two matters which must be recognized. First, the factual allegation of critical relevance in the amended petition is that Respondents purchased USA Medical Corporation securities. It is that conduct which potentially subjects Respondents to disciplinary sanction in these proceedings. Respondents' subsequent disposition of those securities and the satisfaction of Respondents' outstanding contractual obligations to third parties, while matters potentially affecting Respondents' NASD membership, are *not* relevant to whether the amended petition states a cause of action. Simply put, there is no rationally discernible conflict between the initiation of these proceedings and existing federal securities law or most of the various constitutional provisions referenced in Respondents' memorandum in support of the pending motion.

Further, if the facts alleged in the amended petition were proved, it could be concluded that Respondents participation as a *purchaser* of the securities facilitated the violation of an March 27, 1989 Order issued by the division to suspend the *trading* (both buying and selling) of securities which had been the subject of market manipulation and securities fraud. Limiting the operative effect of that order to one which precludes only the sale of USA Medical Corporation securities, as Respondents have repeatedly

urged, would be patently unreasonable. Thus, the amended petition properly raises the issue whether Respondents' purchase of the securities in question constituted dishonest or unethical practices in the securities business.

For the record, the Court notes Respondent's contention that the division has not sought to discipline others who may have engaged in conduct violative of the March 27, 1989 Order. The Court also notes the division's response in that regard. Whether the division has engaged in arbitrary and capricious enforcement of that order and whether entry of a disciplinary sanction as to Respondents could thus violate their right to equal protection are matters which cannot be adequately addressed at this time upon review of the pending motion. On its face, the amended petition states a claim upon which relief could be granted. Nevertheless, any relevant and substantial evidence of arbitrary or capricious enforcement of the March 27, 1989 Order, if offered as a defense during the hearing on the merits of this case, could be properly addressed at that time.

Respondents assert that the amended petition serves no public benefit because there is no evidence that any Utah resident "has been or can be in the least damaged or injured by the conduct of Respondents". The simple rejoinder to that contention is as follows:

There are numerous grounds for denying, suspending or revoking the registration of persons engaged in the securities business. Under the Uniform Securities Act, and most blue sky laws, an order depriving a person of the registration can only be entered if it is in the "public interest" to do so. This requirement is intended to insure that minor or technical violations will not be the subject of disciplinary actions by administrators. When a denial, suspension or revocation is in the public interest, it has been said to mean that it is necessary to protect the investing public. *However, this does not mean that just because no member of the public has been injured that the loss of privilege is not warranted.* The distinction seems to be whether the violation was insubstantially technical and inadvertent or whether it was willful. 11C-Part 2, *Business Organizations*, Section 8.09, Sowards & Hirsch Blue Sky Regulation. (Emphasis added.)

If no damage was occasioned by Respondents' conduct, such would be a relevant mitigating factor with respect to any disciplinary sanction which may be imposed. However, whether entry of such a sanction "is in the public interest" is not dependent upon proof of injury to the public and it is not necessary to allege damage in order to state a cause of action in these proceedings.

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Paragraph 12(a) of the amended petition contains allegations as to Respondents' actions regarding the possible purchase of USA Medical Corporation securities from a John Dawson. Paragraphs 16 and 17 contain allegations that : (1) Respondent Johnson solicited and/or purchased USA Medical Corporation securities; (2) Respondent Johnson thus encouraged or otherwise aided in the violation of Section 61-1-7; and (3) Respondents solicited, encouraged or aided the violation of the March 27, 1989 Order.

Notwithstanding Respondents' assertions, Count I is not based on an allegation that Respondents aided and abetted or solicited a sale of the securities to themselves. Rather, the essence of Count I is that Respondents' purchase of the securities resulted in the violation of the March 27, 1989 Default Order and, as a corollary, Section 61-1-7. Whether Respondents urged USA Medical Corporation shareholders to sell their securities is a matter adequately and properly pled in the amended petition and relevant as an aggravating factor with respect to whatever disciplinary sanction should enter if it is found that Respondents engaged in dishonest or unethical practices in the securities business.

R177-6-1(g)(B) provides as follows:

The following acts and practices, when performed by a broker-dealer . . . are considered contrary to Section 6(1)(g) of the Act and may constitute grounds for denial, suspension or revocation of registration.

(3) Recommending to a customer the . . . sale . . . 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.

With reference to Count II, the allegations of the amended petition are not sufficient to state a cause of action. Concededly, Paragraph 26 contains a general allegation that a broker-dealer and customer relationship existed between Respondents and those individuals who sold USA Medical Corporation securities to Respondents. However, there is no allegation that Respondents recommended to any individuals that they sell the securities in question. Paragraph 12(a) only alleges that Respondent Johnson contacted a shareholder with the intent to purchase USA Medical Corporation securities owned by that individual and then informed that shareholder as to the amount offered for the securities and the manner in

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which a sale could be finalized. Paragraphs 12(b) through 12(f) only allege Respondents' purchase of USA Medical Corporation securities from other various shareholders.

Of greater concern is the assertion in the Division's memorandum that recommending "to a customer that he engage in conduct violative of law is unsuitable per se". Taken at face value, it may be true that such a recommendation would not be a "suitable" or a "proper" practice in a generic sense. However, a fair reading of R177-6-1(g)(B)(3) suggests that the rule in question is one directed to whether a securities transaction is advisable, given particular reference to a customer's financial circumstances, investment objectives and the likelihood that either a purchase or sale of the security would be beneficial to the customer under those circumstances. As used in the rule, the word "suitable" has a more specialized and technical meaning than that implied by the Division in its' memorandum. An unlawful securities transaction is not, ipso facto, unsuitable within the meaning of R177-6-1(g)(B)(3). Given the foregoing, there is a proper basis to dismiss Count II of the amended petition.

Respondents' final three assertions can be summarily addressed. The August 9, 1989 no-action letter was issued with respect to an inquiry concerning securities transactions "executed outside the state of Utah". Under such circumstances, the letter correctly notes that "the division probably has no jurisdiction over the trades". In the instant case, Respondents' purchase of USA Medical Corporation securities was a matter wholly executed within this state. Thus, the August 9, 1989 no-action letter is not relevant to whether the amended petition states a cause of action.

The possible entry of a disciplinary sanction in these proceedings is based on allegations of prior misconduct and the amended petition adequately states a claim in that respect. Allegations of continuing misconduct could have been necessary if injunctive relief were being sought. However, entry of a disciplinary sanction is a matter completely distinct from such relief and Respondents' assertion that this case is moot because the conduct in question is not likely to recur is without merit.

Finally, whether Respondents required the protection afforded by securities laws relative to their role as a purchaser of USA Medical Corporation securities is not at issue in these proceedings. Rather, it is

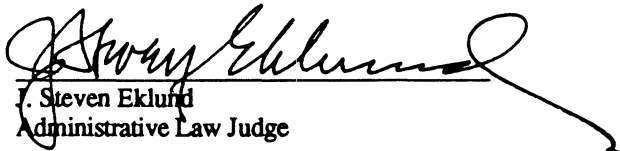
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whether Respondents' alleged conduct properly subjects them to potential disciplinary sanction by reason of the statute and rules which govern their status as registrants of the division.

ORDER

WHEREFORE, IT IS ORDERED that the July 19, 1989 Amended Petition fails to state a claim upon which relief can be granted with regard to Count II set forth therein and, thus, that count is hereby dismissed. In all other respects, Respondents' motion is denied.


Dated this 18<sup>th</sup> day of December, 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: Mark J. Griffin, assistant attorney general for the Division of Securities at Tax & Business Regulation Division, 130 State Capitol, Salt Lake City, Utah 84114; to John Michael Coombs, 72 East 400 South, Suite 220, Salt Lake City, Utah 84111; and 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. A copy of the Motion to Dismiss and Accompanying Order was also hand delivered to Kathleen C. McGinley, Director, Broker/Dealer Section, Division of Securities, Department of Commerce.

Dated this 18<sup>th</sup> day of December, 1989.

  
Linda Farnsworth

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EXHIBIT "U"

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DEPARTMENT OF  
COMMERCE

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Company, Inc., also a respondent in these matters, and he has personal knowledge, power and authority to make this affidavit on its behalf as well as on his own behalf.

2. That in order to consummate various out-of-state Exchange Act contracts entered into by Respondent Johnson-Bowles in interstate commerce prior to March 1, 1989, your affiant purchased U.S.A. Medical stock from certain individuals. [Emphasis added.]

3. That based on the lawsuit Respondent Johnson-Bowles filed in federal court in February 1989, it became well known in the local brokerage community that Respondent Johnson-Bowles was "short" securities of U.S.A. Medical. As a result of this litigation and the fact that a market for the stock of U.S.A. Medical ceased to exist, your affiant was contacted by several individuals in March and April 1989, each expressing a desire to sell U.S.A. Medical stock that they owned and held.

4. Because Respondent Johnson-Bowles believed that it had no choice but to honor its outstanding Exchange Act contracts entered into prior to March 1, 1989, your affiant agreed to purchase U.S.A. Medical stock for the exclusive purpose of consummating such contracts previously entered into in interstate commerce.

5. Prior to effecting any purchases of such stock, however, your affiant made certain that each such seller was well aware of the Division's March 1989 Orders and that the Division could contend that such prospective sellers lacked Utah exemptions from registration, and further, your affiant made certain that each was aware of Judge J. Thomas Greene's ruling on February 28, 1989. At such time, each prospective seller conveyed his personal knowledge of the immediately foregoing as further confirmed in the additional supporting affidavits filed contemporaneously herewith.

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6. At no time did either Respondent, or any one of their agents or employees, ever "solicit", "aid", "counsel", "command", "induce", "recommend", or otherwise "encourage", in any respect, any of such sellers to sell or otherwise part with any portion of their U.S.A. Medical stock to or for the benefit of either Respondent. In fact, to the very best of your affiant's recollection, each such seller contacted your affiant first and offered to sell or otherwise, each "solicited" him to purchase stock of U.S.A. Medical. At one point, your affiant did initiate a call to one John Dawson but such was only after your affiant was informed independently from one Karl Smith that Mr. Dawson was anxious to sell his U.S.A. Medical stock. However, such conversation with Mr. Dawson did not result in the purchase or sale of any U.S.A. Medical stock and your affiant believes that under the First Amendment to the Constitution he certainly has the right to talk to anyone he desires, including John Dawson. Your affiant can further attest that everyone from whom he ultimately purchased U.S.A. Medical stock contacted him first, either directly or indirectly, offering to sell him such person's U.S.A. Medical stock as each knew that Johnson-Bowles had a federal requirement for it. In addition, those from whom your affiant ultimately purchased U.S.A. Medical stock after March 1, 1989, were not only anxious to sell their U.S.A. Medical stock, but each (with the exception of Sheldon Flateman, a New York resident) personally and voluntarily ventured into the office of Respondent Johnson-Bowles for the express purpose of selling their U.S.A. Medical stock. Further, at the time of the purchases, each such person, with the exception of Paul Jones and Sheldon Flateman (both licensed securities brokers registered with the NASD), executed Representation Letters, true and correct copies of which are on file herein and which are further attached to the supporting affidavits of Richard Sax, Leo Pavich, Philip Tanzini, Nick Julian, and Jim Coleman.

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7. That two of those individuals from whom your affiant purchased U.S.A. Medical stock, namely Paul Jones and Sheldon Flateman, were and are licensed securities brokers with the States of Utah and New York, respectively, and each are NASD registered representatives and therefore, your affiant did not think it necessary to obtain Representation Letters from them. This is because your affiant understands that as a matter of law, including Utah law, and, on advice of counsel, a broker cannot "solicit" another broker to do anything. Moreover, both Messrs. Jones and Flateman informed your affiant that they were well aware of the Division's March 1989 Orders, including Judge Greene's ruling, and, because both are licensed and knowledgeable securities brokers, each was naturally aware of the effect of such.

8. That of those from whom your affiant purchased U.S.A. Medical stock after March 1, 1989, each seller informed your affiant that he was fully aware of what had gone on and what was going on with respect to U.S.A. Medical and its stock and each represented that the prospective sales to your affiant were "suitable" to each one's financial or investment needs or objectives, particularly when each knew and acknowledged to your affiant that the stock of U.S.A. Medical was virtually worthless, there being no market for it. That each such seller also informed your affiant that he was a "bona fide purchaser" of the stock and that he was and had been unaffiliated in any respect with U.S.A. Medical or the so-called "U.S.A. Medical Conspirators". Thus, your affiant believed and was informed that he was purchasing stock from "bona fide purchasers" for mere transfer or delivery as fully contemplated in Article 8, U.U.C.C. -- stock which was in no way "tainted" by the U.S.A. Medical fraud.

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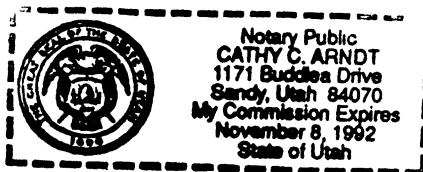


9. That none of the purchases that occurred after March 1, 1989, for the exclusive purpose of consummating outstanding Exchange Act contracts, involved a "commission" or a stock purchase confirmation from Respondent Johnson-Bowles. Your affiant thus believes that such transactions were entirely private and between consenting adults and such did not involve any such sellers as "customers" of either Respondent. Based on the foregoing and the fact that anyone could have undertaken such purchases, your affiant, in making such purchases, does not believe that he was acting in either his capacity as a securities agent or otherwise as a principal of Johnson-Bowles.

10. That because your affiant purchased the U.S.A. Medical stock in issue from "bona fide purchasers", he believes that he was also a "bona fide purchaser" in that such transactions were undertaken in good faith, without notice of any "adverse claims" as contemplated in Article 8 of the Utah Uniform Commercial Code, and your affiant paid valuable consideration. Lastly, the purchases in issue were merely to effect "delivery" or "transfer" as contemplated in Article 8 of the federal Uniform Commercial Code -- ministerial acts -- and your affiant does not believe, in his professional experience, that the Division's March 1989, Orders impaired or otherwise had an effect (or were designed to have an effect) on Article 8 of the Uniform Commercial Code.

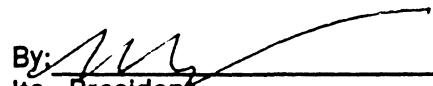
FURTHER SAITH AFFIANT NAUGHT.

DATED this 27 day of November, 1989.



  
Marlen Vernon Johnson

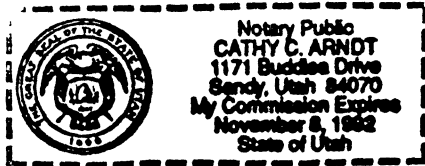
JOHNSON-BOWLES COMPANY, INC.

By:   
Its: President

0000724

In re: Johnson-Bowles Company, Inc., and Marlen V. Johnson  
Case Nos. SD-89-46BD and SD-89-47AG  
AFFIDAVIT OF RESPONDENTS IN SUPPORT OF THEIR MOTION FOR SUMMARY  
JUDGMENT

SUBSCRIBED and SWORN to before me this 27 day of November, 1989.



Cathy C. Arndt  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

11/8/92

J:AFDVT.20-21

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EXHIBIT "V"

**RECEIVED**  
NOV 29 1989

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

**DEPARTMENT OF  
COMMERCE**

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

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|                                   |   |                         |
|-----------------------------------|---|-------------------------|
| IN THE MATTER OF THE REGISTRATION | : | AFFIDAVIT OF KARL SMITH |
| OF:                               | : |                         |
|                                   | : |                         |
| JOHNSON-BOWLES COMPANY, INC.      | : |                         |
|                                   | : |                         |
| CRD NO. 07678                     | : | Case No. SD-89-46BD     |
|                                   | : |                         |

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

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STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

Karl Smith, on his oath, deposes and says as follows:


1. That your affiant has personal knowledge of that which is contained herein.
2. That sometime on or after April 1, 1989, your affiant learned that Respondent Johnson-Bowles was "short" the securities of U.S.A. Medical.

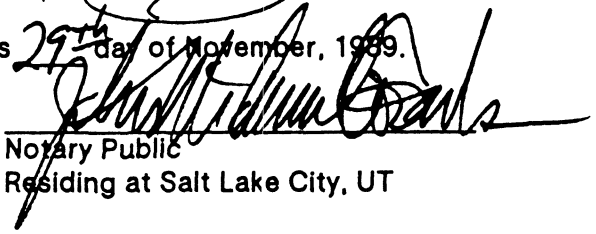
3. That as a result of the foregoing, your affiant, who knew Marlen V. Johnson, gave Mr. Johnson, a Mr. John Dawson's telephone number because your affiant was informed or under the impression that Mr. Dawson owned stock of U.S.A. Medical and might be interested in selling the same.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 29<sup>th</sup> day of November, 1989.

SUBSCRIBED and SWORN to before me this 29<sup>th</sup> day of November, 1989.

  
Karl Smith

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.7

0005095

EXHIBIT "W"

DEPARTMENT OF  
COMMERCE

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

Case No. SD-89-46BD

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

- 1 -

experience and training. That I am also a registered representative with the NASD and licensed as an agent with the Utah Securities Division though I am no longer employed in the securities business.

2. That during the beginning of 1989, up to and until, June thereof, I was employed as a securities trader with Respondent Johnson-Bowles Co., Inc. That I was terminated by Johnson-Bowles in June, 1989, and I am now employed with a company that distributes art posters on a national basis.

3. That as a securities trader, I had discussions with traders from other brokerage firms all day long and, during the time that I was employed by Johnson-Bowles, I often conversed several times a day with Mr. Paul Jones, a trader with broker-dealer Wasatch Stock Trading.

4. That I have read Exhibit "A" to the Division's Memorandum in Opposition to Respondent's [sic] Motion for Summary Judgment and in Support of Petitioner's Cross Motion for Partial Summary Judgment and I can attest, of my own personal knowledge, that its contents are wrong, misleading, and incorrect in several respects.

5. First, after March 1, 1989, I had several discussions with Mr. Paul Jones about the stock of U.S.A. Medical and I can attest that he knew of the Division's Order and Judge Greene's ruling and their effect and was perhaps more aware of such than I was. That Mr. Jones also knew that Johnson-Bowles was "short" stock of U.S.A. Medical and during typical trading-related conversations we discussed his selling stock at 12¢ per share. I can honestly say that I did not ever intentionally, deliberately, or continually "offer" to buy such stock and to the extent we did discuss it, we only discussed prices at which he might have been interested in selling it. These kinds of discussions are typical of traders in



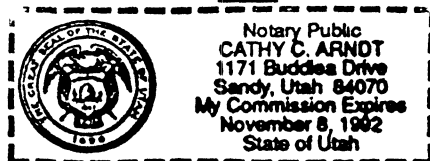
the securities industry. In other words, I certainly did not call Mr. Jones "hundreds" of times to "solicit" him to sell his U.S.A. Medical stock as set forth in Exhibit "A". This is because as a trader, I conversed with Mr. Jones regularly about lots and lots of stocks, including what was happening with various issuers. I might add that any conversations I engaged in with Mr. Jones after March 1, 1989, wherein the subject of U.S.A. Medical came up, I can attest that I was not acting under the direction of Marlen V. Johnson or Johnson-Bowles when I engaged in such conversations with Mr. Jones or anyone else about U.S.A. Medical; such were just ordinary, every day conversations which included "small talk". Mr. Jones and I had both been trading the stock of U.S.A. Medical prior to March 1, and so it was quite natural to discuss it after that date as it was a highly unusual situation -- one that had not occurred in my several years of experience in the brokerage industry.

6. That sometime during April, 1989, I received a call from Paul Jones who asked me if I thought Johnson-Bowles was interested in buying U.S.A. Medical stock or whether it had in fact covered all of its "short" positions. I informed Mr. Jones that I thought Mr. Johnson had purchased some stock at 5¢ per share and that Johnson-Bowles may have already completed its outstanding pre-March 1, Exchange Act contracts. Hearing this, Mr. Jones became anxious and expressed a great interest in selling his U.S.A. Medical stock. This is because I gathered that he then realized that he would not be able to sell his stock at 12¢ or at any other price once Marlen Johnson was able to consummate Johnson-Bowles' open and outstanding, out-of-state Exchange Act contracts. Mr. Jones then offered to sell his U.S.A. Medical stock for 8¢ per share at which point either he asked me or I simply put him in contact with Mr. Marlen V. Johnson as I had nothing to do with the situation and "covering" Johnson-Bowles' "short" positions was not my responsibility.

7. Lastly, having been a securities trader, I can attest that in the industry, a broker cannot "solicit" another broker or trader to buy or sell anything. This is because in my experience -- and because of my previous employment and experience I believe I may be deemed an expert -- the "unsolicited order exemption", by its own language, applies only to a broker's "customers" (i.e., to the general public); it does not apply to another broker, trader, or dealer, including Mr. Jones. Furthermore, I am aware of the allegations in the Division's amended petitions and I do not see how either "solicitation", "encouragement", or "aiding", the crux of Count I to the amended petitions, applies to Respondents' conduct in even the most remote of senses. For what it's worth, I also do not believe that what Respondents did in order to honor their Exchange Act contracts is "dishonest or unethical" from a broker's standpoint as I do not see who such conduct is "dishonest or unethical" towards and it would seem to me that there must be an object or recipient of such adjectives.

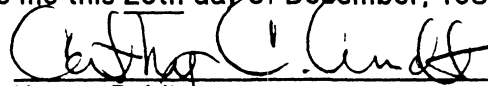
FURTHER SAITH AFFIANT NAUGHT.

DATED this 20th day of December, 1989.



  
BRUCE EATCHEL

SUBSCRIBED and SWORN to before me this 20th day of December, 1989.

  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

November 8, 1992

J:AFDVT.17-18

EXHIBIT "X"

**DRAFT**  
DRA6E

## PRESS RELEASE

## UTAH SECURITIES DIVISION

September 1, 1989

The Utah Securities Division and USA Medical Company have reached an agreement pursuant to which shares of the company may resume trading at some future date, provided the Company files a registration statement with the Division. USA Medical stock was the subject of an Order of the Division on March 1, 1989, denying the availability of all exemptions from registration and, in effect, shutting down trading of the stock on the Utah market. The Division's Order remains in effect and shares of USA Medical cannot be traded in Utah until the Division approves an as yet to be filed registration statement for USA Medical and the Utah Securities Advisory Board has rescinds the Order.

In February, 1989, USA Medical stock was the subject of a civil action filed in U. S. District Court for the Central Division of Utah by Johnson-Bowles Company, Inc., a local broker-dealer. In that action, Johnson-Bowles made a Motion for a Preliminary Injunction against further trading of USA Medical stock on the basis that it had been illegally traded. Although Judge J. Thomas Greene denied the Motion, he found that the stock

"...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."

As the basis for denying Johnson-Bowles Motion, the Court noted that

" Johnson-Bowles knew or should have known about...irregularities as to non-registration, non-exempt

000-714

EXHIBIT

**"A"**

status and illegal trading of USA Medical stock, and that Johnson-Bowles participated in trading in the stock after it became a market maker, and is charged with knowledge of these irregularities."

Based upon the Court's findings, the Utah Securities Division issued its March 1, 1989 Order and initiated an investigation, which continues, into the irregularities with respect to trading of USA Medical stock. The Division's investigation of USA Medical focuses on the use of nominees to make a public distribution of the shares without registration, excessive markups by brokers trading the shares, illegal price manipulation and possible fraudulent statements and non-disclosures of material facts to some previous purchasers of USA Medical stock.

In addition, in April, the Division of Securities filed an administrative proceeding against Marlen V. Johnson and his firm, Johnson-Bowles and Paul Jones, a sales representative of another firm, seeking to revoke the securities licenses of each for engaging in securities transactions involving USA Medical stock while the Division's Order is in effect.

Before the Division will rescind its Order, allowing shares to trade, USA Medical must file a registration statement with the Division, including filing audited financial statements and other disclosures concerning USA Medical's history. In addition, certain requirements will be imposed on brokers with respect to future sales of USA Medical stock. Such requirements will include disclosures to and obtaining representations from purchasers concerning their status as purchasers. Following completion of the registration process, the matter will be presented to the

Securities Advisory Board with the request that the Division's Order be rescinded. The Division cautioned brokers and the investing public that until the registration statement is effective and the Advisory Board has approved the action, the March 1 Order is still in effect prohibiting transactions involving USA Medical stock in Utah.

EXHIBIT "Y"

MEMORANDUM TO FILE

FROM: Dorothy Akins

DATE: May 8, 1989 @ 2:30 P.M.

RE: USA MEDICAL CORPORATION

FILE #: 89-02-15-01

TELEPHONE / OFFICE CONFERENCE WITH WHOM: Paul Jones 272-2700

Jones a registered rep with Wasatch Stock Trading. He has been a broker for approximately 3 years. He passed the Series 63 & 7. Took the Series 24, however did not pass it.

Myself and Scott Frost talked with Paul Jones at his attorney's office, Mark Van Wagoner 215 South State Street Salt Lake City, Utah on May 8, 1989, at 2:30 p.m. Jones stated the following:

1. He was a broker at Wasatch Stock Trading.
2. That Wasatch had a meeting with the agents, which he attended, stating that the State Securities had suspended the trading on USA Medical Corp. Jones could not remember the date of the meeting, however it was soon after the Order was served on the firm.
3. That sometime prior to the suspension order issued by the State, he had purchased 100,000 shares of USA Medical Corporation at 30 cents a share for his own account.
4. That he was good friends with Bruce Eatchel, a trader at Johnson-Bowles. He had worked with Bruce numerous times with good results.



5. That Bruce Eatchel contacted Jones numerous times and wanted him to sell his USA Medical Corporation stock.

6. That on April 18, 1989, Bruce Eatchel again contacted Jones and stated that other people had sold their USA Medical Stock and that Johnson-Bowles shorts were being covered and didn't he want to sell his shares? Jones stated that he was tired of Eatchel contacting him, that he had contacted him hundreds of times to sell his shares, so finally he agreed to sell for 8 cents a share.

7. On April 18, 1989, Jones went to Johnson-Bowles, handed Marlen Johnson his four or five certificates, which were in street names, and Marlen handed him an \$8000.00 check, written on a Johnson-Bowles' firm account.

8. Jones stated that he knew of the suspension on USA Medical, however he didn't think there was anything wrong with doing a private transaction.

Jones stated he would provide a copy of the check and would also get the certificate numbers.

BEFORE THE  
D E P A R T M E N T O F C O M M E R C E  
SECURITIES DIVISION  
OF THE  
STATE OF UTAH

---

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IN THE MATTER OF  
JOHNSON-BOWLES

:  
:  
:  
:  
:

AFFIDAVIT  
OF  
DOROTHY A. AKINS

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STATE OF UTAH           )  
COUNTY OF SALT LAKE   )

Having been duly sworn, Dorothy A. Akins, hereby deposes and states the following:

1. That I am an investigator for the Securities Division of the Utah Department of Commerce.
2. That I am investigating alleged violations of the Utah Uniform Securities Act.
3. The investigation involves USA Medical Corporation, Johnson-Bowles and others.
4. That on or about July 12, 1989, I contacted by telephone John Dawson. Mr. Dawson stated that at the time Marlen Johnson had contacted him to purchase his stock, he did not have a customer account at Johnson-Bowles, however, he did have one several years ago.
5. That on or about July 12, 1989, I contacted by telephone

Nick Julian. Mr. Julian stated that he has and had an account at Johnson-Bowles.

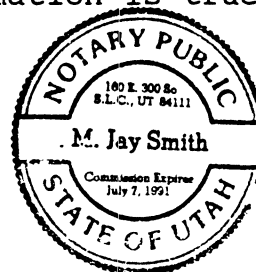
6. That the above statements, to the best of my knowledge, information and belief are true.

DATED this 14<sup>th</sup> day of December, 1989.

Dorothy Akins  
Signature

DOROTHY A. AKINS appeared before me this 14<sup>th</sup> day of December 1989, and attested that the foregoing information is true to the best of her knowledge and belief.

NOTARY PUBLIC: M. Jay Smith  
My commission expires: July 7, 1991  
Residing in: Tooele County



My commission expires:  
Residing in:

EXHIBIT "Z"

**RECEIVED**  
DEC 21 1989

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

DEPARTMENT OF  
COMMERCE

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

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|                                   |   |                          |
|-----------------------------------|---|--------------------------|
| IN THE MATTER OF THE REGISTRATION | : | OBJECTION AND MOTION     |
| OF:                               | : | TO STRIKE AND MEMORANDUM |
|                                   | : |                          |
| JOHNSON-BOWLES COMPANY, INC.      | : |                          |
|                                   | : |                          |
| CRD NO. 07678                     | : | Case No. SD-89-46BD      |
|                                   | : |                          |
| <hr/>                             |   |                          |
| IN THE MATTER OF THE REGISTRATION | : |                          |
| OF:                               | : |                          |
|                                   | : |                          |
| MARLEN VERNON JOHNSON             | : | Case No. SD-89-47AG      |
|                                   | : |                          |
| CRD NO. 2598888                   | : |                          |
|                                   | : |                          |

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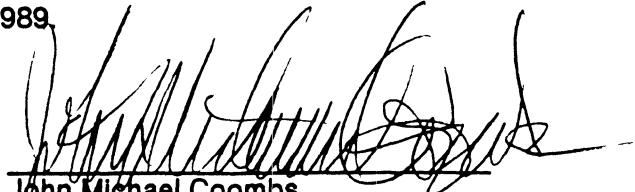
Respondents, by and through their counsel, hereby lodge their objection to and otherwise move the Court for an order striking Exhibits "A" and "C" to the Division's Memorandum in Opposition to Respondent's [sic] Motion for Summary Judgment and in Support of Petitioner's Cross Motion for Partial Summary Judgment, together dated December 14, 1989.

The basis for this formal objection and motion to strike is that Exhibits "A" and "C" to such memorandums are gross hearsay and are otherwise not legally acceptable,

proper, or in valid format under the express provisions of Rule 56(e) of the Utah Rules of Civil Procedure. Such exhibits are further totally irrelevant to the simple legal issues before this tribunal and should be further stricken based on their attempted prejudicial value. Respondents thus pray for an order striking such exhibits in their entirety in that they should not become part of the record in this case and should otherwise not be considered in any respect by the Court in ruling on Respondents' Rule 56 motion. D & L Supply v. Saurini 775 P.2d 420, 110 Utah Adv. Rep. 10, (Sup. Ct. 06/08/89); Bruno v. Plateau Mining Company, 747 P.2d 1055, 73 Utah Adv. Rep 89, (Ct. App. 12/22/87); Guardian State Bank v. Humpherys, 762 P.2d 1084, 92 Utah Adv. Rep. 11 (Sup. Ct. 09/28/88); Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 100 Utah Adv. Rep. 17, (Ct. App. 01/12/89); Creekview Apartments v. State Farm Ins. Co., 105 Utah Adv. Rep.18, (Ct. App. 03/28/89); Webster v. Sill, 675 P.2d 1170, (12/13/83); Hall v. Fitzgerald, 671 P.2d 224, (10/07/83); Norton v. Blackham, 669 P.2d 857, (08/23/83); Bangerter v. Poulton, 663 P.2d 100, (04/27/83).

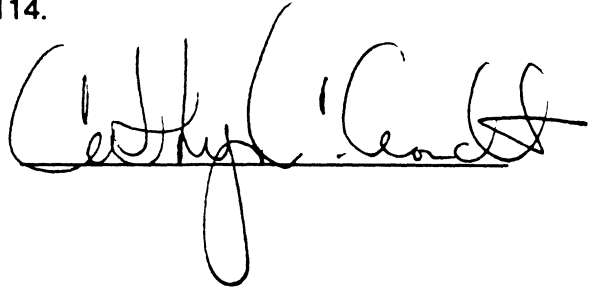
Since this objection and motion are merely procedural in nature, no opposing or reply memorandum will be necessary or expected to further perfect or address that which is set forth herein. Oral argument is further waived, however, Respondents do respectfully ask for a decision in this regard.

DATED this 19<sup>th</sup> day of December, 1989.

  
John Michael Coombs  
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21<sup>st</sup> day of December, 1989, (s)he hand-delivered a true and correct copy of the foregoing OBJECTION AND MOTION TO STRIKE 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 J. Steven Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; and mailed the same to Craig F. McCullough, Esq., Callister, Duncan, & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84133 and Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol Building, Salt Lake City, Utah 84114.

A handwritten signature in black ink, appearing to read "Craig F. McCullough", written over a horizontal line.

J obj.5

EXHIBIT "AA"



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

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|---|---|---|
| In the Matter of the Registration of<br>Johnson-Bowles Company, Inc.<br>CRD No. 07678 | : | MOTION FOR SUMMARY JUDGMENT,<br>CROSS-MOTION FOR PARTIAL SUMMARY<br>JUDGMENT, OTHER RELATED MOTIONS<br>AND ACCOMPANYING ORDER |
|   | : |   |
| In the Matter of the Registration of<br>Marlen Vernon Johnson<br>CRD No. 2598888      | : | Case No. SD-89-46BD   |
|   | : |   |
|   | : | Case No. SD-89-47AG   |
|   | : |   |

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Appearances:

John Michael Coombs and Craig F. McCullough for Respondents

Mark J. Griffin for the Division of Securities

By the Administrative Law Judge:

By Motion, dated November 28, 1989, Respondents seek entry of summary judgment in the instant adjudicative proceedings. On December 14, 1989, the Division filed a cross-motion for partial summary judgment. Respondents' reply memorandum was filed on December 21, 1989, as was Respondents' objection and motion to strike with a supporting memorandum. On December 22, 1989, Respondents filed a Rule 56(f) affidavit in opposition to the Division's cross-motion for partial summary judgment.

On January 5, 1990, the Division filed replies to Respondents' objection and motion to strike and memorandum, and also to Respondents' opposition to the Division's cross-motion for partial summary judgment. The Division also requested a hearing a Respondents' motion for summary judgment. On January 9, 1990, Respondents filed a reply regarding the December 21, 1989 objection and motion to strike and also filed an objection and motion to strike with respect to the Division's January 5, 1990 pleadings and supporting memorandum.

A conference call was conducted with respective counsel on January 11, 1990. At that time, Respondents' January 9, 1990 motion to strike matters which had already been filed by the Division on January 5, 1990 was denied. Further, the Court advised respective

counsel that oral argument would not be necessary as to either of the pending motions and the parties agreed that no oral argument would be warranted in that regard. The Court further advised respective counsel that Respondents' December 21, 1989 petition for permission to take depositions would be taken under advisement and thus subsequently addressed during a discovery conference to be conducted, if necessary, after issuance of a ruling on the pending motions.

The Administrative Law Judge, being fully advised in the premises, now enters the following:

### CONCLUSIONS OF LAW

Respondents contend that no genuine issue of material fact exists as to whether they "solicited", "encouraged" or "aided" the sale of USA Medical Corporation securities by third parties to Respondent Johnson. Respondents thus contend that Count I of the July 19, 1989 Amended Petition should be dismissed. Respondent further asserts that the Division does not have the authority, pursuant to Section 61-1-14(3) Utah Code Ann. (1953), as amended, to summarily suspend all exemptions from registration. Respondents thus urge that: (1) the March 1, 1989 Summary Order did not, as a matter of law, prohibit Respondents from purchasing the above-named securities; and (2) such conduct does not constitute a "dishonest or unethical practice" as to subject Respondents to possible disciplinary sanction in these proceedings.

In response, the Division initially asserts that there is a disputed issue of fact as to whether Respondents solicited the sale of USA Medical Corporation securities. The Division also contends that it has the authority to suspend all possible exemptions from registration in this case. In support of its' cross-motion for partial summary judgment, the Division urges that: (1) Respondents' mere participation in the sale of USA Medical Corporation securities, during the pendency of the March 1, 1989 Order, was a dishonest or unethical practice; (2) Respondents' admission of having purchased the securities after entry of the just-stated order provides an undisputed basis upon which to conclude that Respondents thus engaged in dishonest and unethical conduct; and (3) a determination as to the disciplinary sanction to be entered is the only remaining issue to be addressed.

Section 63-46b-1(4) provides that, during an adjudicative proceeding, a presiding officer may grant "a timely motion . . . for summary judgment if the requirements of . . .

Rule 56 . . . of the Utah Rules of Civil Procedure are met by the moving party". Comments of the Utah Administrative Law Advisory Committee on the drafting and interpretation of the Utah Administrative Procedures Act further provide as follows:

A presiding officer is . . . authorized to grant a timely motion either to dismiss or for summary judgment, if the requirements of Rule 12(b) or 56 of the Utah Rules of Civil Procedure and the UAPA are met. The well-developed caselaw concerning Rules 12(b) and 56 should assist presiding officers in deciding [such] motions . . . .

Rule 56(c) of the Utah Rules of Civil Procedure provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The standards which govern the disposition of a motion for summary judgment are well-established. In *Bowen v. Riverton City*, 565 P.2d 434 (Utah 1982), the Utah Supreme Court stated as follows:

If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. *Id.* at 436.

It has also been stated that a motion for summary judgment:

. . . should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail.

*Frisbee v. K. & K. Construction Co.*, 676 P.2d 387, 389 (Utah 1984). Further, the Court has recognized that a genuine issue of material fact exists if "reasonable minds could differ on whether . . . conduct measures up to the required standard". *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982).

The July 19, 1989 Amended Petition sets forth various factual allegations. For the purpose of addressing the pending motion, all of the factual allegations contained in the amended petition are incorporated herein by reference. To generalize, the amended petition

contains allegations that: (1) Respondents purchased USA Medical Corporation securities during such time that all transactional exemptions from registration of those securities were unavailable; (2) the unavailability of transactional exemptions from registration as to the securities in question was based on a March 1, 1989 Summary Order and a March 27, 1989 Default Order; (3) Respondents' purchase of the securities occurred within the State of Utah; and (4) Respondents contacted an existing shareholder of USA Medical Corporation securities in an attempt to purchase said securities, actually purchased USA Medical Corporation securities from five other named individuals and may have also purchased USA Medical Corporation securities from other unnamed sources after the March 27, 1989 Order.

Based on the factual allegations set forth in the amended petition, Paragraphs 16 and 17 of that petition reflect the Division's assertions that Respondent Johnson, "in soliciting *and/or* purchasing" the securities during the pendency of the Division's Order, encouraged or otherwise aided in the violation of Section 61-1-7 and that Respondent Johnson, acting on behalf of Respondent Johnson-Bowles, "in soliciting, encouraging, or aiding the violation of the Division's Order" engaged in dishonest or unethical practices in the securities business, violative of Section 61-1-6(1)(g).

In an Amended Answer, dated November 21, 1989, Respondents admit that the March 1, 1989 Order revoked the availability of exemptions in Utah for the offer and sale of USA Medical Corporation securities, but deny the just-stated order had any effect whatsoever on purchases of those securities by anyone as a matter of law. Relative to Paragraph 12(a) of the amended petition, Respondent Johnson has admitted that he called a John Dawson, but that such only occurred after he was informed by one Karl Smith that Mr. Dawson was anxious to sell his "worthless" USA Medical Corporation stock to anyone who wanted to buy it. Respondents have otherwise denied any remaining allegations as set forth in Paragraph 12(a). Respondents have also denied the applicability and relevance of all allegations otherwise set forth in Paragraph 12 of the amended petition. Respondents further denied allegations set forth in Paragraphs 16 and 17 of the amended petition.

Respondents have submitted seven (7) affidavits in support of their pending motion. Five of those affidavits are from the individuals who sold USA Medical Corporation securities to Respondent Johnson. In each affidavit, the affiant states that he was not "encouraged", "aided", "commanded", "counseled", or "solicited" by either Respondent

Johnson or anyone else to sell the securities in question. In his affidavit, Respondent Johnson has stated that he was contacted by several individuals in March and April 1989, who each expressed a desire to sell the USA Medical Corporation stock which they held. Respondent Johnson has also averred that none of his agents or employees ever engaged in any conduct to "solicit", "aid", "counsel", "command", "induce", "recommend", or otherwise "encourage" any of the owners of USA Medical Corporation securities to sell those securities to, or for the benefit of, either Respondent.

The Division has filed a May 8, 1989 memorandum from a Dorothy Akins and Ms Akins' December 14, 1989 affidavit with its' cross-motion for partial summary judgment. Ms. Akins' memorandum references a May 8, 1989 conversation she and a Scott Frost had with a Mr. Paul Jones, wherein the latter stated he was contacted by a Bruce Eatchel on April 18, 1989, Mr. Eatchel inquired if he (Mr. Jones) wanted to sell his USA Medical Corporation securities and Mr. Jones met with Respondent Johnson later that day and sold such securities at that time. In her affidavit, Ms. Akins has stated that she was told by Mr. Dawson that Respondent Johnson "had contacted him to purchase his stock." In support of its' motion, the Division urges that Respondent Johnson has admitted that he purchased USA Medical Corporation securities from seven (7) individuals in April 1989.

Respondents have also filed two additional affidavits with respect to the Division's cross-motion for summary judgment. Specifically, Respondents have filed an affidavit from Mr. Eatchel, who has stated that any conversation he had with Mr. Jones after March 1, 1989 were not undertaken pursuant to the direction of Respondent Johnson or Respondent Johnson-Bowles, that Mr. Jones contacted the affiant in April 1989 and expressed an interest in selling his USA Medical Corporation securities and that Mr. Jones either asked the affiant to put him in contact with Respondent Johnson as to the possible sale of said securities or that the affiant simply did so. Mr. Eatchel also stated that he was not acting under Respondents' directions when he discussed the above-stated matters with Mr. Jones.

Counsel for Respondent has also filed an affidavit, where he has stated that discovery is not complete as to potential defenses which Respondents may have in the instant proceeding and, thus, any favorable ruling on the Division's cross-motion for summary judgment would effectively preclude Respondents from continuing in discovery as to present whatever defenses may be applicable in this proceeding.

Prior to addressing the respective motions filed by the parties, various preliminary issues must be resolved. In their December 19, 1989 motion to strike, Respondents urge that the May 8, 1989 memorandum from Ms. Akins and her December 14, 1989 affidavit are gross hearsay, not otherwise proper or legally acceptable and do not conform to the provisions of Rule 56(e) of the Utah Rules of Civil Procedure. The just-stated rule provides as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . .

In *Western States Thrift & Loan Co. v. Blomquist*, 29 Utah 2d 58, 504 P.2d 1019 (1972), the Utah Supreme Court stated:

An affidavit, supporting or opposing a motion for summary judgment is an evidentiary affidavit, whose form and content is governed by Rule 56(e), U.R.C.P. Such an affidavit must be made on personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein.

Affidavits containing statements made merely "on information and belief" will be disregarded. Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit. *Id.* at 506.

See also *Walker v. Rocky Mountain Recreation Corp.*, 29 Utah 2d 274, 508 P.2d 538 (1973).

Concededly, the statements contained in the May 8, 1989 memorandum have not been presented by a document identified as an affidavit and there is no indication that Ms. Akins was duly sworn as to those matters. With respect to a motion for summary judgment, the proper practice in administrative adjudicative proceedings would be to present evidentiary affidavits in typical format. More importantly, the Court notes that the truth of the statements attributed by Ms. Akins to Mr. Jones in the May 8, 1989 memorandum is not based on Ms. Akins' personal knowledge and her December 14, 1989 affidavit contains a recital that the statements therein are true "to the best of my knowledge, *information and belief.*"

However, Section 63-46b-8(1)(c) provides that the presiding officer in a formal adjudicative proceeding "may not exclude evidence solely because it is hearsay". Further,

while Section 63-46b-10(3) provides that no finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence, hearsay testimony is admissible in formal adjudicative proceedings. Thus, such testimony may be considered with respect to the pending motions and Respondents' assertion to the contrary is not persuasive. While such testimony is cognizable for the just-stated purpose, the Court acknowledges that a question remains whether proper and sufficient evidence will be presented during any subsequent hearing on the merits to sustain the Division's burden of proof at that time.

In support of their pending motions, both parties have referenced language set forth by this Court as to other motions previously addressed during the course of these proceedings. Respondents contend that it cannot be established that they participated in the sales of USA Medical Corporation securities unless they have "solicited", "encouraged", "aided" or, as the Court purportedly indicated in its' December 18, 1989 Conclusions of Law, "urged" existing shareholders to sell their securities. The pertinent language from the just-referenced order is as follows:

Notwithstanding Respondents' assertions, Count I is not based on an allegation that Respondents aided and abetted or solicited a sale of the securities to themselves. Rather, *the essence of Count I is that Respondents' purchase of the securities resulted in the violation of the March 27, 1989 Default Order and, as a corollary, Section 61-1-7.* Whether Respondents urged USA Medical shareholders to sell their securities is a matter adequately and properly pled in the amended petition and relevant as an aggravating factor with respect to whatever disciplinary sanction should enter *if it is found* that Respondents engaged in dishonest or unethical practices in the securities business.

The amended petition sets forth a number of factual questions, to wit:

- (1) Did Respondent Johnson solicit the sale of USA Medical Corporation securities during the pendency of the Division's March 1, 1989 and March 27, 1989 orders;
- (2) Did Respondent Johnson purchase USA Medical Corporation securities during the pendency of the just-referenced orders;
- (3) If Respondent Johnson solicited the sale of USA Medical Corporation securities, did that conduct encourage or otherwise aid in the violation of Section 61-1-7;
- (4) If Respondent Johnson purchased the securities in question, did such conduct encourage or otherwise aid in the violation of Section 61-1-7; and
- (5) If Respondent Johnson, acting on behalf of Respondent Johnson-Bowles, either solicited a possible sale of USA Medical Corporation securities or

purchased such securities and such conduct encouraged or otherwise aided in the violation of the above-referenced orders, does such conduct constitute a dishonest or unethical practice within the meaning of Section 61-1-6(1)(g).

The Division correctly asserts that a disciplinary sanction could enter in these proceedings, absent any finding that Respondents solicited the sale of USA Medical Corporation securities. As indicated in the December 18, 1989 Conclusions of Law, whether Respondents urged existing shareholders to sell their securities would be relevant as an aggravating factor with respect to whatever disciplinary action may be warranted, should it be found that Respondents engaged in dishonest or unethical practices in the securities business.

In support of its' cross-motion for summary judgment, the Division references language of this Court in its' August 29, 1989 Conclusions of Law:

Whether Respondents solicited the sale of USA 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.

In its' December 18, 1989 Order, this Court stated as follows:

A considered review of the amended petition clearly reflects two matters which must be recognized. First, the factual allegation of critical relevance in the amended petition is that Respondents purchased USA Medical Corporation securities. It is that conduct which *potentially* subjects Respondents to disciplinary sanction in these proceedings.

. . . .

Further, if the facts alleged in the amended petition were proved, it *could* be concluded that Respondents' participation as a purchaser of the securities facilitated the violation of a March 27, 1989 Order issued by the Division to suspend the trading (both buying and selling) of securities which had been the subject of market manipulation and securities fraud.

As further reflected in the December 18, 1989 Conclusions of Law, the amended petition properly raises the issue "whether Respondents' purchase of the securities in question constituted dishonest or unethical practices in the securities business".

At various times during these proceedings, the Court has attempted to articulate the factual and legal basis underlying the amended petition. However, nothing contained in either the August 29, 1989 or December 18, 1989 Conclusions of Law should be construed to



suggest that this Court has concluded, as a matter of law, that Respondents have engaged in conduct constituting a dishonest or unethical practice which necessarily subjects them to the entry of a disciplinary sanction in these proceedings. Simply put, there has been no determination of facts, or of the law applicable thereto, which would warrant such a conclusion at this point in these proceedings.

A review of the pleadings, admissions and affidavits on file reveals a dispute as to whether Respondents solicited the sale of the securities in question, whether any such alleged conduct thus encouraged or aided a violation of Section 61-1-7, whether any such alleged conduct encouraged or aided a violation of the March 1, 1989 and March 27, 1989 Orders and whether any such alleged conduct constitutes a dishonest and unethical practice, within the meaning of Section 61-1-6(1)(g). Given the case law set forth below, the Court concludes that the foregoing matters reflect mixed questions of law and fact to be addressed by the Securities Advisory Board and there is no proper basis to grant Respondents' motion.

Consistent with the foregoing, and upon further review of the pleadings, admissions, affidavits and the May 8, 1989 memorandum on file, there is no genuine issue as to the material fact that Respondent Johnson purchased USA Medical Corporation securities during the pendency of the Division's March 1, 1989 and March 27, 1989 Orders. However, it is inappropriate for this Court to conclude, as a matter of law, that the purchase of those securities constituted a dishonest or unethical practice and, thus, that the Division is entitled to summary relief. In *Vance v. Fordham*, 671 P.2d 124 (Utah 1983), the Utah Supreme Court addressed whether an osteopath could be held to a general statutory standard of "unprofessional conduct," as to invoke a disciplinary sanction regarding treatment he had rendered to various patients. The Court stated as follows:

Once a professional is certified, however, the public's interest in his or her professional performance in the treatment of patients (or in services to clients) is paramount. *It is therefore appropriate for the public to place great reliance on the self-governing functions and standards of the profession.* As applied to the treatment of patients (or services to clients), a general statutory standard like "unprofessional conduct" is acceptable for three reasons: (1) The subject of professional performance is too comprehensive to codified in detail. (2) Members of a profession can properly be held to understand its' standards of performance. (3) *Standards of performance will be interpreted by members of the same profession in the process of administrative adjudication.* Id. at 129.

The Court further stated that whether a licensee has engaged in unprofessional conduct is a determination to be made by the members of the licensing committee "on a case-by-case basis by drawing on the statutory standards . . . and on its own knowledge of the patient-care standards of the profession." *Id.*

In a subsequent case, the Utah Court of Appeals addressed whether a real estate broker could be held to a general statutory standard of being "unworthy or incompetent" as to justify entry of a disciplinary sanction. *In re Topik*, 761 P.2d 32 (Utah App. 1988). The Court stated as follows:

We find that the general standard found in section 61-2-11(8), "being unworthy or incompetent," meets the three justifications required by *Vance* and is not vague and indefinite *so long as the Commission carefully considers the A.L.J.'s recommendation and reviews the evidence and filings prior to rendering its final decision*. Of course, as in this case, the final decision maker's review is enhanced by detailed factual findings. The findings in this case described each fact situation with such particularity that *the Commission could readily understand the circumstances of each alleged violation in evaluating whether the conduct was consistent with the general professionalism standard*. *Id.* at 36.

Importantly, the Court then stated as follows:

*The Commission's application of section 61-2-11 to a particular fact situation, including the meaning of "unworthy or incompetent," is a mixed question of law and fact*. On appeal, an appellate court must inquire whether the Commission's determination was within the limits of reasonableness and rationality . . . . So long as there is evidence of substance to support the Commission's factual findings, we defer to the Commission's factual findings. *Id.* (Citations omitted)

Consistent with the rationale set forth in the above-cited cases, this Court concludes that whether Respondents' conduct constitutes "dishonest and unethical practices in the securities business" is a mixed question of law and fact which should be properly addressed to, and resolved by, the Securities Advisory Board. Without the application of the Board's expertise (i.e., its' understanding of the securities industry) to the questions which must be addressed in this adjudicative proceeding, this Court cannot rule, as a matter of law, that Respondents' purchase of the securities in question properly justifies entry of the summary relief now sought by the Division.

Respondents also assert that the Division has no authority to summarily suspend all

exemptions from registration. However, in *Capitol General Corp. v. Utah Dept. of Business Regulation*, 777 P.2d 494 (Utah App.1989), the Court reviewed an order suspending "all possible secondary trading exemptions" for certain stock. The Court characterized the nature of such an order as follows:

The primary effect of such an order is to force each party holding the affected shares to register with the division prior to any further trading. Absent such an order, holders of shares may avoid registration and trade their shares freely if a secondary exemption can be claimed. See Utah Code Ann. Section 61-1-14 (1986). Id. at 496.

Importantly, the Court further stated:

The [Utah Securities Advisory] Board has the power to remedy a violation of Section 61-1-7 under Section 61-1-20, *which includes the power to issue an order of similar legal effect to the order involved here*. Id. at 498. (All emphasis herein added.)

Concededly, the instant proceedings were not initiated on the basis that Respondents sold or offered to sell an unregistered or non-exempt security. Further, the relief sought by the Division in these proceedings concerns the possible entry of a disciplinary sanction regarding Respondents' registration, not the issuance of an order to prevent the sale of unregistered securities. Thus, *Capitol General Corp. v. Utah Dept. of Business Regulation*, supra, is not directly on point.

Nevertheless, the Division clearly had the authority to enter the March 1, 1989 and March 27, 1989 Orders in this case and the remaining pivotal issue is whether Respondents engaged in "dishonest or unethical practices in the securities business" by reason of either admitted purchases of USA Medical Corporation securities or, upon sufficient proof, that Respondents solicited a sale of those securities.

One further matter should be addressed. The Court notes the Rule 56(f) affidavit filed by counsel for Respondents, wherein it is stated that Respondents' discovery is not complete and further discovery may disclose the applicability of various defenses set forth in Respondents' amended answer. In *Downtown Athletic Club v. Horman*, 740 P.2d 275 (Utah App. 1987), the Court generally stated that summary judgment should not be granted if discovery is incomplete, "since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion." Id. at 278. In the instant proceeding, this Court notes that little, if any, discovery, has been completed. Under such circumstances, it

would be premature to grant the Division's cross-motion for partial summary judgment and the Court thus declines to enter any such relief at this time. See *Cox v. Winters*, 678 P.2d 311, 315 (Utah 1984), quoting *Strand v. Associated Students of University of Utah*, 561 P.2d 191 (Utah 1977).

ORDER

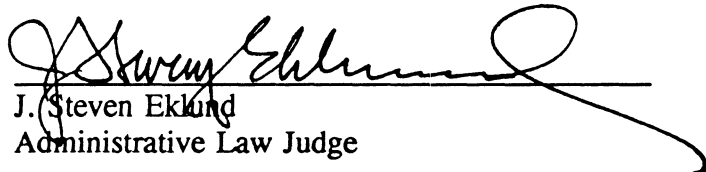
WHEREFORE, IT IS ORDERED that Respondents' motion for summary judgment, dated November 28, 1989, is hereby denied.

It is further ordered that the Division's cross-motion for partial summary judgment, dated December 14, 1989, is also denied.

It is further ordered that Respondents' December 21, 1989 motion to strike is also denied.

It is further ordered that Respondents' December 21, 1989 petition for permission to take depositions is taken under advisement. Within five (5) days from the date of this Order, the Court will contact respective counsel to schedule a discovery conference. Said conference shall be conducted as soon as practicable thereafter as the means to address the appropriate scope of allowable discovery and to prompt the subsequent disposition of this case in an expeditious manner.

Dated this 23<sup>rd</sup> day of March, 1990.

  
J. Steven Eklund  
Administrative Law Judge

Certificate of Service

I hereby certify that I have this day mailed the foregoing Motion for Summary Judgment, Cross-Motion for Summary Judgment, other related motions and Accompanying Order, properly addressed, postage prepaid to: John Michael Coombs, 72 East 400 South, Suite 220, Salt Lake City, Utah 84111; 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. A copy of the foregoing was also hand delivered to Kathleen C. McGinley, Director, Broker/Dealer Section, Division of Securities, Department of Commerce.

Dated this 23 day of March, 1990

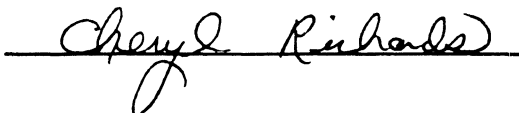
  
Cheryl Richards

EXHIBIT "BB"

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

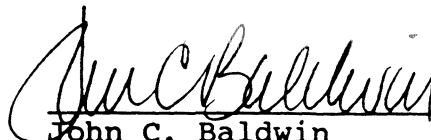
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|                              |   |                        |
|------------------------------|---|------------------------|
| IN THE MATTER OF THE         | : | ORDER ON AGENCY REVIEW |
|                              | : |                        |
| 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               | : |                        |

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Respondents' Request for Agency Review dated April 5, 1990 is hereby denied because the Order dated March 23, 1990 does not constitute final agency action according to positions previously stated in Orders dated October 30, 1989 and November 22, 1989 in the above-captioned matter.

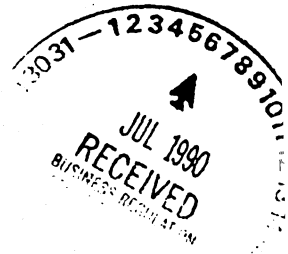
Dated this 9th day of April, 1990.



John C. Baldwin  
Director, Division of Securities  
Presiding Officer

EXHIBIT "CC"

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

STIPULATION OF FACTS FOR  
PURPOSES OF HEARING

Case No. SD-89-46BD

---

IN THE MATTER OF THE REGISTRATION  
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

---

The petitioner and respondents, by and through their respective and mutual counsel, hereby stipulate to the following facts for purposes of expediting the prospective hearing in the above-matter before the Securities Advisory Board.

STIPULATION OF FACTS

1. Respondents Johnson-Bowles Company, Inc., and Marlen V. Johnson are registered with the Utah Division of Securities as a securities broker-dealer and agent, respectively.

0001154



2. As of January 22, 1989, respondent Johnson-Bowles was "short" exactly 53,500 shares of the securities of U.S.A. Medical Corporation, a Wyoming Corporation ("U.S.A. Medical" or "Company").

3. Effective January 23, 1989, U.S.A. Medical effected a 10 for 1 forward split which automatically increased Johnson-Bowles' "short" position tenfold. For example, instead of being "short" only 53,500 shares, Johnson-Bowles suddenly was "short" 535,000 shares.

4. Following the January 23, forward split, the price of U.S.A. Medical stock rapidly increased to approximately \$1 per share.

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

6. The U.S. District Court granted Johnson-Bowles' Motion for Temporary Restraining Order on February 17, 1989 as against Midwest Clearing, thereby preventing Midwest Clearing from effecting any "buy-ins" for ten (10) days as against Johnson-Bowles.

7. Following a hearing for Preliminary Injunction held on February 27 and 28, 1989, the Court denied Johnson-Bowles' Motion for Preliminary Injunction. However, U.S. District Judge J. Thomas Greene did rule that the securities of U.S.A. Medical were and had been the subject of market manipulation and securities fraud.

8. During February, 1989, Marlen Johnson furnished information to the Division relative to the problems associated with U.S.A. Medical and its securities.

0001155

9. On March 1, 1989, the Division issued a Summary Order suspending all §14(2) exemptions from registration under the Utah Uniform Securities Act relative to U.S.A. Medical's securities. On March 29, 1989, the Division's March 1, 1989 Order was made permanent by default. True and correct copies of the petitioner's March, 1989, Orders are attached hereto and incorporated by reference as Exhibits "A" and "B" respectively.

10. On March 6, 1989, the U.S. Securities and Exchange Commission suspended trading in the securities of U.S.A. Medical for ten (10) days. A true and correct copy of such Order is attached hereto and incorporated by reference as Exhibit "C".

11. The respondents received copies of the Division's March 1 and 29, 1989 Orders (Exhibits "A" and "B" hereto) on or about the date of their respective issuance.

12. As of March 1, 1989, Johnson-Bowles' owed several hundred thousand shares of U.S.A. Medical stock to several broker-dealers and clearing corporations. During March, 1989, respondents purchased a total of 397,900 shares of U.S.A. Medical securities from six (6) Utah residents and one (1) New York resident.

13. Of the seven (7) individuals from whom respondents purchased U.S.A. Medical stock after March 1, 1989, five (5) have submitted affidavits that they were not "solicited" by respondents or any of their agents and such individuals have further attested that they were aware of not only Judge Greene's February 28, 1989 ruling, but that they were also aware of the Division's March 1989 orders. True and correct copies of such affidavits, including their respective exhibits, are attached hereto as Exhibits "D", "E", "F", "G", and "H".

14. The remaining two (2) individuals from whom respondents purchased U.S.A. Medical stock after March 1, 1989, are New York resident Sheldon Flateman and Utah

0001156

resident Paul Jones. Such individuals were also aware of Judge Greene's ruling and the Division's March 1989 Orders. Further, both individuals are registered representatives with the National Association of Securities Dealers, Inc., ("NASD") and prior to the Division's March 1, 1989, order, Paul Jones, a licensed securities agent with Wasatch Stock Trading, was involved in the trading of the securities of U.S.A. Medical. Because Flateman is a New York resident, and, in an effort to expedite these proceedings, whether respondents "solicited" him or not will not be an issue in these proceedings.


15. During April, 1989, respondent Marlen V. Johnson was informed by one Karl Smith that a Mr. John Dawson had stock of U.S.A. Medical that Smith thought Dawson was desirous of selling. Based on Mr. Johnson's conversation with Mr. Smith, Mr. Johnson contacted Mr. Dawson to determine if he was interested in selling his U.S.A. Medical stock. Such conversation never resulted in either a sale of U.S.A. Medical stock or a violation of the Division's March 1989 orders.

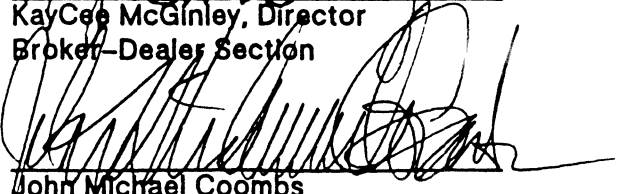
16. The purchases undertaken by the respondents in U.S.A. Medical stock during the pendency of the Division's order from six (6) Utah residents and one (1) New York resident are as follows in the amounts indicated:

| <u>SELLER</u>                            | <u>AMOUNT OF SHARES</u> |
|--|-------------------------|
| Paul Jones                               | 180,900                 |
| Richard Sax                              | 18,000                  |
| Philip Tanzini                           | 20,000                  |
| Jim Coleman                              | 30,000                  |
| Nick Julian                              | 69,500                  |
| Leo Pavich                               | 67,500                  |
| Sheldon Flateman,<br>a New York resident | 12,000                  |
| TOTAL                                    | <u>397,900</u>          |

0001157

DATED this 8 th day of July, 1990.

  
Kaycee McGinley, Director  
Broker-Dealer Section

  
John Michael Coombs  
Attorney for Respondent

In re: Johnson-Bowles Company, Inc. and Marlene V. Johnson  
Case No. SD-89-45BD  
STIPULATION OF FACTS FOR PURPOSES OF HEARING

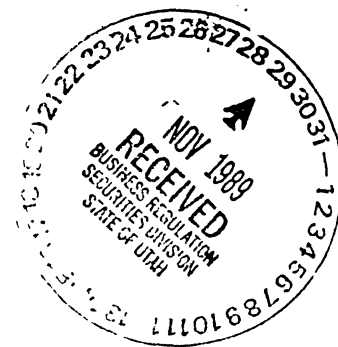
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the \_\_\_\_ day of July, 1990, (s)he mailed a true and correct copy of the foregoing STIPULATION OF FACTS FOR PURPOSES OF HEARING by regular mail, postage prepaid 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 J. Steven Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; 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; and Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol Building, Salt Lake City, Utah 84114.

J.S11P.3-4

0001108

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

AFFIDAVIT OF JIM COLEMAN

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    )

Jim Coleman on his oath deposes and says as follows:

1. That the representation letter I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical, is attached hereto and incorporated by reference and it is true and correct.

000-171

2. That I did not "encourage", "advise", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

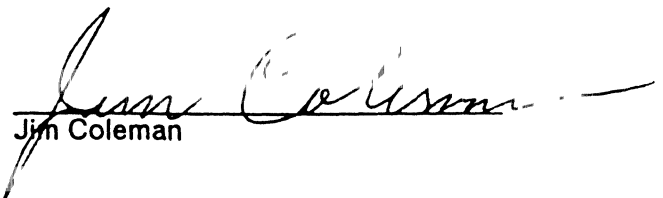
3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted and to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

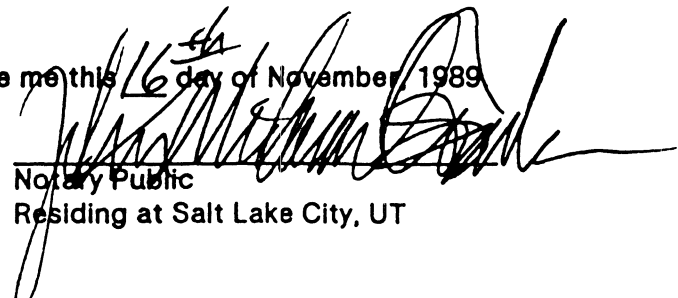
FURTHER SAITH AFFIANT NAUGHT.

DATED this 16 day of November, 1989.

  
Jim Coleman

In re:        In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson, Case  
              Nos. SD-89-46BD and SD-89-47AG  
              AFFIDAVIT OF JIM COLEMAN

SUBSCRIBED and SWORN to before me this 16<sup>th</sup> day of November, 1989

  
\_\_\_\_\_  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.12

0001173

May 16, 1989

To Whom It May Concern:

RE: 30,000 shares U.S.A. Medical Corp/\$3,000.00

I, James Coleman, sold U.S.A. Medical Corp shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning U.S.A. Medical dated February 29, 1989 as well as being aware of the State of Utah's action dated March 1, 1989.

Marlen Johnson did not solicit me for shares. I contacted him and asked him if there was interest to buy shares of U.S.A. Medical stock to close open contracts with other broker-dealers.

Sincerely,

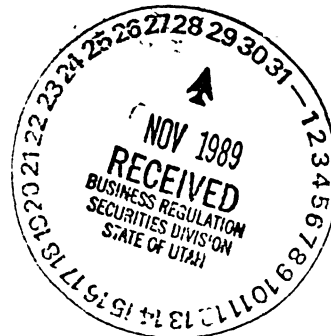


James Coleman

0001171



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

AFFIDAVIT OF PHILLIP TANZINI

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        )

Phillip Tanzini on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

0001175

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

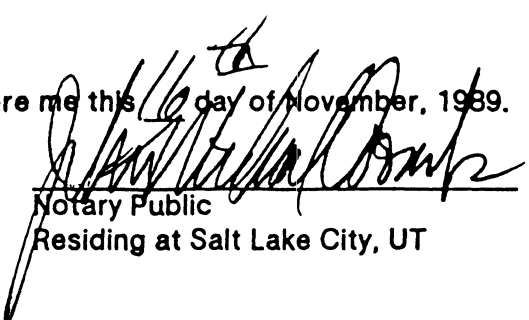
DATED this 16 day of November, 1989.

  
Phillip Tanzini

1176

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson,  
Case Nos. SD-89-46BD and SD-89-47AG  
AFFIDAVIT OF PHILLIP TANZINI

SUBSCRIBED and SWORN to before me this 16<sup>th</sup> day of November, 1989.

  
\_\_\_\_\_  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.11

0001177

7 June 1989

To Whom It May Concern:

RE: 20,000 shares U.S.A. Medical Corp. .30¢ per share

I, Phillip Tanzini, sold U.S.A. Medical Corp. shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning USA Medical dated February 28, 1989; as well as being aware of the State of Utah's action dated March 1, 1989.

Marlen Johnson did not solicit me for shares. I contacted him and asked him if there was interest to buy shares of U.S.A. Medical stock to close open contracts with other broker-dealers.

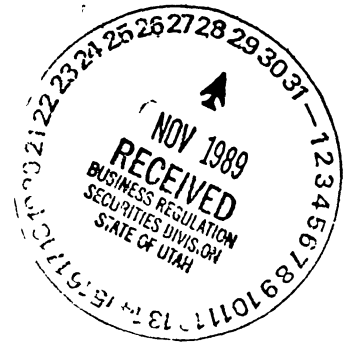
Sincerely yours,

A handwritten signature in cursive script, appearing to read "Phillip Tanzini", with a long horizontal flourish extending to the right.

Phillip Tanzini

0001178

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

AFFIDAVIT OF NICK JULIAN

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        )

Nick Julian on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

0001179

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

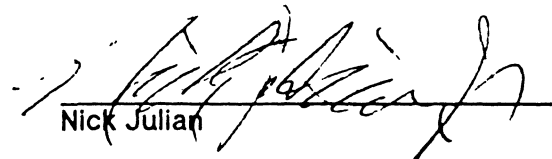
3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 16 day of November, 1989.

  
Nick Julian

000-189

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson  
Case Nos. SD-89-46BD and SD-89-47AG  
AFFIDAVIT OF NICK JULIAN

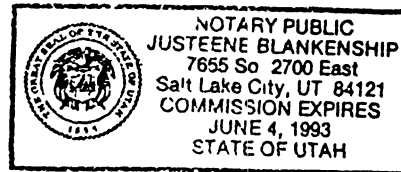
SUBSCRIBED and SWORN to before me this 16<sup>th</sup> day of November, 1989.

Justeene Blankenship  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

\_\_\_\_\_

J:AFDVT.9



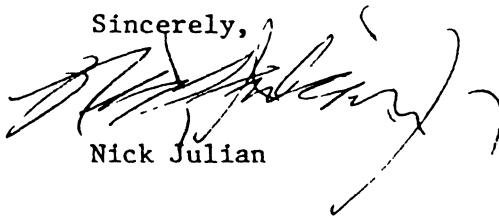
0001181

May 16, 1989

To Whom It May Concern:

I, Nick Julian, called Marlen Johnson to ask him if he would be interested in buying my USA Medical stock. I told him I wanted to sell 69,500 shares at .10¢ per share or \$6,950.00. I also told him that I was aware of the rulings of the State of Utah and Judge Greene's findings.

Sincerely,

  
Nick Julian

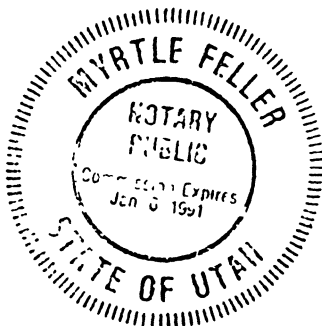
Jana Garsen  
Witnessed by

5/23/89  
Dated

Subscribed and sworn to before me \_\_\_\_\_

on this 23 day of May 1989.

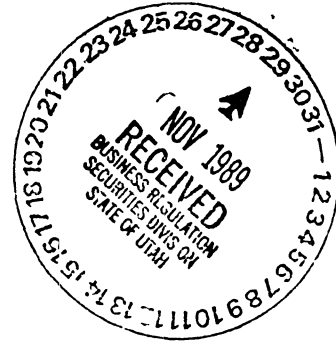
By Myrtle Feller



0001182



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

AFFIDAVIT OF RICHARD SAX

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        )

Richard Sax on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.
2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

0001103

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.


3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

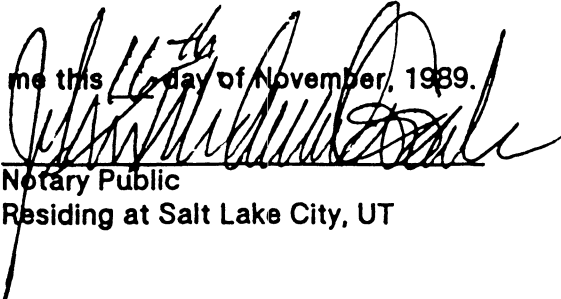
DATED this 16<sup>th</sup> day of November, 1989.

  
\_\_\_\_\_  
Richard Sax

0001184

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson  
Case Nos. SD-89-46BD and SD-89-47AG  
AFFIDAVIT OF RICHARD SAX

SUBSCRIBED and SWORN to before me this 16<sup>th</sup> day of November, 1989.

  
\_\_\_\_\_  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.8

990-185

May 16, 1989

To Whom It May Concern:

I, Richard Sax, offered to sell my U.S.A. Medical stock to Marlen Johnson. At no time, did Marlen Johnson solicit me to sell him my stock.

Very truly yours,

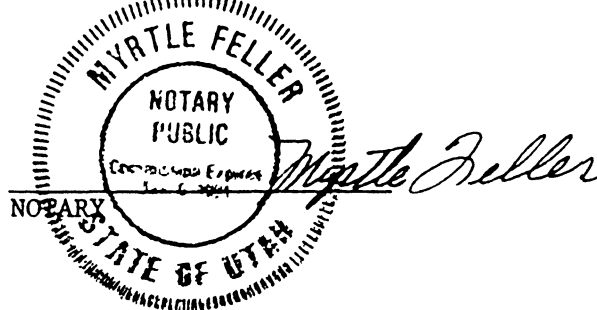
*Richard Sax*

Richard Sax

*Blaine Jeltsas*  
Witness

5/23/89  
Date

Subscribed and sworn before me this 23 day of May 1989.



PTD 186

6/18/89

TO WHOM IT MAY CONCERN:

RE U.S.A. MEDICAL CORP.

5000 SHARES @ 12¢ \$600.00

I RICHARD SAX SOLD U.S.A. MEDICAL CORP. SHARES TO  
MARLEN JOHNSON.

I WAS AWARE OF JUDGE J. THOMAS GREEN'S COURT  
RULING CONCERNING U.S.A. MEDICAL DATED FEB 28, 1989,  
AS WELL AS BEING AWARE OF THE STATE OF UTAH'S  
PENDING ACTIONS AGAINST MARLEN JOHNSON & JOHNSON-  
BOWLES COMPANY, INC.

Sincerely yours

Richard Sax

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 | : | AFFIDAVIT OF LEO PAVICH |
| OF:                               | : |                         |
|                                   | : |                         |
| JOHNSON-BOWLES COMPANY, INC.      | : |                         |
|                                   | : |                         |
| CRD NO. 07678                     | : | Case No. SD-89-46BD     |
|                                   | : |                         |
| <hr/>                             |   |                         |
| IN THE MATTER OF THE REGISTRATION | : |                         |
| OF:                               | : |                         |
|                                   | : |                         |
| MARLEN VERNON JOHNSON             | : | Case No. SD-89-47AG     |
|                                   | : |                         |
| CRD NO. 2598888                   | : |                         |
|                                   | : |                         |

STATE OF UTAH            )  
                                  )ss.  
SALT LAKE COUNTY        )

Leo Pavich on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.
2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

0001188

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve involve the payment of a commission to anyone.

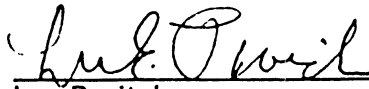
3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

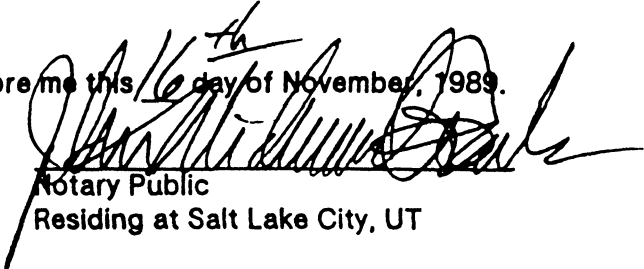
DATED this 16 day of November, 1989.

  
Leo Pavitch

000-189

In re:            In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson, Case  
Nos. SD-89-46BD and SD-89-47AG  
AFFIDAVIT OF LEO PAVICH

SUBSCRIBED and SWORN to before me this 16<sup>th</sup> day of November, 1989.

  
\_\_\_\_\_  
Notary Public  
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91  
\_\_\_\_\_  
D. A. S.

J:AFDVT.10

00101190



20 June 1989

To Whom It May Concern:

RE: 67,500 shares U.S.A. Medical Corp., .145¢ per share, \$9,787.50

my /  
LEO PAVICH

I, , sold U.S.A. Medical Corp. shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning U.S.A. Medical dated February 28, 1989; as well as being aware of the State of Utah's pending actions against Marlen Johnson and Johnson-Bowles Co., Inc.

Sincerely yours,

my /  
Leo Pavich

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EXHIBIT "DD"

(KING - Direct by Coombs)

1 satisfied.

2 MR. GRIFFIN: Your witness. Thank you.

3 MR. COOMBS: We have nothing further.

4 THE COURT: Any questions by the board of this  
5 witness; Ms. Wickens?

6 MS. WICKENS: No.

7 THE COURT: Mr. Cannon?

8 MR. CANNON: No.

9 THE COURT: Mr. Burgon?

10 MR. BURGON: No.

11 THE COURT: Mr. Bowler?

12 MR. BOWLER: No.

13 THE COURT: You're excused, Mr. Sorensen.  
14 Thank you.

15 MR. COOMBS: Respondants call David King.

16 DAVID KING

17 called as a witness by and on behalf of the Respondants,  
18 having first been duly sworn, was examined and testified  
19 as follows:

20 THE COURT: Mr. Coombs?

21 DIRECT EXAMINATION

22 BY MR. COOMBS:

23 Q. Mr. King, would you state your full name and  
24 address for the record?

25 A. My name is David King. My home address is

(KING - Direct by Coombs)

1 3388 East Enchanted View Drive, Salt Lake City, Utah.  
2 My business address is 50 West Broadway; that's the  
3 Valley Tower. And the firm that I work for, Kruse,  
4 Landa and Maycock is on the eighth floor of that  
5 building.

6 Q. So I take it you're in private practice as an  
7 attorney?

8 A. That's correct.

9 Q. Do you have a specialty?

10 A. Yes.

11 Q. What is that specialty please?

12 A. I specialize --

13 Q. First of all, let's do this: Are you a member  
14 of the bar?

15 A. Yes, I am. I'm a member of the Utah bar, and  
16 I'm an associate member of the Washington D.C. bar and  
17 the Idaho bar.

18 Q. Let's start from the beginning. What was your  
19 first employment out of law school?

20 A. I left law school in 1970 -- graduated from  
21 law school in 1970 with a juris doctorate degree and  
22 went to work for the Securities and Exchange Commission  
23 in Washington D.C. as a trial attorney. I was in  
24 Washington D.C. for five years, transferred to the Salt  
25 Lake branch office of the commission as a trial attorney

(KING - Direct by Coombs)

1 and spent seven years there. I left the Salt Lake  
2 branch office in February of 1983.

3 Q. Okay, so how many years total did you work for  
4 the Securities and Exchange Commission?

5 A. A little over <sup>twelve</sup>~~two~~ years.

6 Q. What did you do then when you left the  
7 S.E.C?

8 A. I went directly to Kruse, Landa and Maycock,  
9 the firm that I'm with now. Our firm does a  
10 considerable amount of securities work. I am more on  
11 the litigation side of that. Our firm represents  
12 broker/dealers in litigation, principally defensive  
13 litigation; defense of arbitration proceedings in which  
14 broker/dealers are named as respondents; defense of  
15 S.E.C. enforcement actions; and defense of state and  
16 NASD enforcement actions.

17 Q. Are you familiar with the NASD Rules of Fair  
18 Practice?

19 A. I'm familiar with both the NASD Rules of Fair  
20 Practice, which is the basis for most of the NASD  
21 disciplinary actions, and also the corresponding state  
22 provision, Unethical and Dishonest Business Practices,  
23 which is often the basis of a state enforcement action.

24 Q. Are you also familiar with the Uniform  
25 Practice Code?

(KING - Direct by Coombs)

1           A.    I have some familiarity with the Uniform  
2 Practice Code, inasmuch as from time to time our  
3 broker/dealer clients will call me and ask me questions,  
4 particularly related to buy-in procedures, which is a  
5 subject that is covered by the Uniform Practice Code.

6           Q.    And I assume you're also familiar with Article  
7 3, Section 1 of the NASD Rules of Fair Practice  
8 requiring brokers to observe high standards of  
9 commercial honor?

10          A.    High standards of commercial honesty, and fair  
11 and equitable <sup>principles</sup> ~~principals~~ of trade.

12          Q.    Now, have you sat through this hearing today?

13          A.    Yes I have, beginning to this point.

14          Q.    So you are familiar with the facts of this  
15 case?

16          A.    Yes, I am.

17          Q.    And you're familiar with what the respondents  
18 are charged with?

19          A.    Yes, I am. It's my understanding that the  
20 basis for this action by the state -- or the factual  
21 basis is a purchase by Marlen Johnson and Johnson-Bowles  
22 of securities from a Utah resident. The securities were  
23 of a company with respect to which all exemptions from  
24 registrations have been suspended by the State of  
25 Utah.

(KING - Direct by Coombs)

1           The State of Utah contends in this proceeding that  
2           that set of circumstances constitutes dishonest and  
3           unethical business practices on the part of  
4           Johnson-Bowles and Marlen Johnson.

5           Q.    And you understand that they are contending  
6           that, even though the purchases were made to fulfill  
7           NASD contracts?

8           A.    Yes, I understand that to be the case.

9           Q.    So knowing that that's the fact of this case,  
10          and knowing that -- or at least understanding the  
11          division's theory of liability, do you have an opinion  
12          as to whether or not Johnson-Bowles and Marlen Johnson  
13          engaged in dishonest or unethical practice under section  
14          6(g) of the Uniform Securities Act?

15          A.    I do have an opinion.

16          Q.    Would you tell us that opinion, and tell us  
17          the basis of that opinion?

18          A.    My opinion is that they did not engage in  
19          unethical or dishonest business practices as a result of  
20          those circumstances. The basis for my opinion starts  
21          with an analysis of the provisions that we're dealing  
22          with and their origins.

23          The Utah Uniform Securities Act, section 6(g) has  
24          been <sup>e</sup>flushed out by the Utah Securities Division in rule  
25          6-1(g), which is a rule that prohibits particular

(KING - Direct by Coombs)

1 conduct that is considered to be dishonest and  
2 unethical. That provision states unequivocally that it  
3 doesn't cover the field, that other things can in fact  
4 be considered to be dishonest and unethical business  
5 practices as well.

6 The Utah rule setting forth dishonest and unethical  
7 business practices states that it is drawn from similar  
8 provisions of the NASD, the Securities and Exchange  
9 Commission and the organization called NASA; that's the  
10 North American Securities Administrators Association.

11 If you look at the 1983 NASA policy statement that  
12 is entitled Dishonest and Unethical Business Practices,  
13 you will see that they state at the outset that the  
14 purpose is to prescribe certain conduct the  
15 broker/dealer should not engage in.

16 And when saying that, they use the exact language  
17 of Article 3 section 1 of the NASD's Rules of Fair  
18 Practice. So it's clear that the NASD's Rules of Fair  
19 Practice, the state rules, the NASA policy guidelines,  
20 and also as a result of reading those provisions, the  
21 S.E.C. rules series under section 15(c) all give a  
22 person an idea of what is dishonest and unethical  
23 business practices.

24 If you line those up side by side, you come out  
25 with about four -- if I'm allowed to generalize, and I



(KING - Direct by Coombs)

1 don't know that all persons with my experience would  
2 generalize in the same way. But if I can generalize the  
3 categories of conduct that are generally provided by  
4 these sets of regulations, they fall into approximately  
5 four areas.

6 One is a prescription against activities that  
7 impeach the integrity, if I can say that, of the  
8 broker/dealer in a registration process. Another is  
9 harm to the integrity of the securities market or the  
10 securities industry itself. Another area is harm to  
11 customers. And the fourth area is any time someone  
12 violates a particular statutory provision, rule  
13 provision, or the like, then that too will constitute  
14 unethical and dishonest business practices.

15 In analyzing the facts of this case in the terms of  
16 these four generally prescribed areas, I first looked at  
17 and I eliminated the harm to the broker/dealer and agent  
18 registration process, because that's really not what  
19 we're dealing with here.

20 I secondly looked at the area of harm to the  
21 securities industry and the securities market in  
22 general. And in that category, you have to look at both  
23 sides of the picture. You can't concentrate on one  
24 aspect of a transaction or a set of circumstances, you  
25 have to look at the whole impact.

(KING - Direct by Coombs)

1       When you look at the whole impact here, you have on  
2 one side of the spectrum that the seller of the  
3 securities in the transaction is a person who can be  
4 considered to be violating state law. On the other  
5 side, you have the specter of a SIPC liquidation, which  
6 is generally understood in the industry to be avoided at  
7 all cost because of the length of time and the black eye  
8 that it gives the securities industry.

9       In addition, you also have the integrity of the  
10 contractual process at stake. And there are cases under  
11 the NASD Rules of Fair Practice where a broker can be  
12 held to be in violation of Article 3 section 1 by  
13 failing to honor his contractual obligations.

14       I arrive at the conclusion, and in my opinion there  
15 has not been harm given these facts and circumstances to  
16 the securities industry and the integrity of the  
17 securities market in general. Next, you look at harm to  
18 customers.

19       Here I have looked at the stipulations entered into  
20 between the state and Johnson-Bowles and Marlen  
21 Johnson. And that stipulation indicates that the  
22 customers were fully knowledgeable of all the facts and  
23 circumstances. They knew that there was a court  
24 proceeding; many of them attended that court  
25 proceeding.

(KING - Direct by Coombs)

1           They knew that the state had entered orders; they  
2           knew what those orders were all about. And if we  
3           believe Ms. McGinley's statement of facts, Marlen  
4           Johnson even possibly advised participants in the  
5           transaction that they might be violating state law in  
6           connection with the trades.

7           So you have customers that are walking into the  
8           transaction with their eyes wide open, arms length  
9           negotiations, and it doesn't appear that there is any  
10          possibility for Johnson-Bowles to take advantage of  
11          them. So I don't see any harm to customers.

12          The last area: Where there is a violation of a  
13          law, or a statute, or regulation, or even an order  
14          entered by a securities division. There's been some  
15          talk about violating the state order in this  
16          proceeding. In my judgment, you don't have a violation  
17          of the state order, because the state's order suspended  
18          exemptions.

19          If the state's order had prevented trading, then of  
20          course a trade would have been in violation of the  
21          order. But the order simply says there are no  
22          exemptions available to you who are a seller and engaged  
23          in this traction, and therefore you have to find an  
24          exemption -- or <sup>you</sup> ~~to~~ have <sup>to</sup> ~~you~~ register the stock in order  
25          to sell it.

(KING - Direct by Coombs)

1 I don't see a violation of a statutory provision or  
2 a rule. And I draw principally upon a Utah Supreme  
3 Court case decided in 1959. It's called Schvanavelt vs.  
4 Noy-Burn. In that particular case the court was asked  
5 to decide whether or not a purchaser of stock was able  
6 to successfully contest the contract that he had entered  
7 into.

8 Here is a purchaser who bought stock of a  
9 corporation, knowing that the transaction had not been  
10 registered by the seller, and was also a participant in  
11 similar transactions himself as a seller. He's trying  
12 to set aside his contract, and the court is asked to  
13 decide whether he is in pari delicto with the seller,  
14 who has violated the law.

15 In other words, is he a co-participant in the  
16 illegality and therefore unable to take advantage of the  
17 law to set aside that contract? The court held that the  
18 Utah Securities Registration Provision was designed to  
19 protect purchasers, and it was designed to require  
20 performance on the part of sellers.

21 And they indicated in the decision that a purchaser  
22 who has knowledge of the illegality of the transaction  
23 is still not in pari delicto with the seller. This is  
24 very much -- well, they cite Fletcher's Encyclopedia of  
25 Corporations, which indicates that there are

(KING - Direct by Coombs)

1 circumstances where the buyer will be considered to be a  
2 culpable party in the transaction; in other words, in  
3 pari delicto. And that is in instances where the buyer  
4 actively participated in some aspect of the transaction,  
5 causing it to be illegal.

6 For instance, if a buyer signs a document that is  
7 committed by the seller to a state securities division  
8 for the purpose of qualifying for an exemption from  
9 registration, then that is active participation in  
10 making the transaction illegal. But the cases are very  
11 clear that mere knowledge that the seller is violating  
12 the law does not make a buyer a co-participant.

13 This is very akin to your concept developed in  
14 particularly in abortion cases in Utah, where you have  
15 State vs. Fetig and State vs. Craig; State vs. Fetig,  
16 1951, and State vs. Craig in 1934. They say that the  
17 woman seeking an abortion cannot be considered to be an  
18 aider and abettor or a principal violator in the act,  
19 as much as --

20 MR. GRIFFIN: Objection. At this point we're  
21 off on a narration and we're into abortion and  
22 everything else, and I simply don't think it's  
23 relevant. And I think Mr. King is going into some  
24 criminal actions here and we're far afield from  
25 administrative action.

(KING - Direct by Coombs)

1 THE COURT: He's expressing his opinion and  
2 the basis for it, and I think if he has anything else he  
3 may proceed.

4 Q. (BY MR. COOMBS) Well?

5 A. The Fifth Circuit in 1981 decided the G.A.  
6 Thompson and Company vs. Partridge case. And in dicta  
7 that case indicated that if a purchaser was a victim of  
8 a 33 act or 34 act violation, that he could not be  
9 considered to have violated section 7(c) -- I'm sorry,  
10 section 5(c) of the 33 act registration provision, by  
11 virtue of an offer to purchase. And section 5(c) of the  
12 33 act proscribes not only offers to sell when a  
13 registration statement is not in effect or is subject of  
14 a stop order, but also orders to buy.

15 And the court said in dicta again that if the  
16 purchaser is a victim of a 33 act or a 34 act violation  
17 in that context, he cannot be considered to be in  
18 violation of the 5(c) provision. On that basis I have  
19 reached the conclusion that, and in my opinion, there  
20 have been no dishonest or unethical business practices  
21 as a result of the facts and circumstances that gave  
22 rise to this action.

23 Q. Let me ask you two more questions. I assume  
24 you heard Ms. McGinley testify that the thrust of the  
25 division's action was that the respondents were aiding

(KING - Direct by Coombs)

1 and abetting the sellers; do you recall her saying  
2 that?

3 A. I heard her saying that.

4 Q. So then is it your opinion that as a matter of  
5 law the respondents could not aid and abet their  
6 sellers?

7 A. It's my opinion that the case law supports the  
8 position that there is no aiding and abetting violation  
9 by a purchaser, as much as he is in a protected  
10 category.

11 Q. Now, drawing your attention to Article 3  
12 section 1 of the NASD Rules of Fair Practice; are you  
13 familiar with any cases whereby an NASD member was  
14 disciplined as a result of not honoring trades?

15 A. Yes. In the matter of Shaskan and Company,  
16 1976 case, it's reported in Securities and Exchange.

17 Q. So it's possible if Johnson-Bowles and Marlen  
18 Johnson had been bought in and didn't honor those  
19 contracts, that they could have faced disciplinary  
20 action by the NASD?

21 A. The case law under section -- Article 3  
22 section 1 indicates that under certain circumstances a  
23 buyer or a seller -- broker/dealer who is either a buyer  
24 or seller -- who doesn't honor his contracts can be  
25 considered to be in violation of that provision.

(KING - Cross by Griffin)

1 Q. So one last question, and this goes to  
2 inconsistent regulation. Do you see in this case a  
3 conflict between the NASD Rules of Fair Practice and how  
4 the division is attempting to enforce its own  
5 interpretation of what is dishonest and ethical?

6 A. I don't know if I can render an expert opinion  
7 on that. But there certainly is clear to have been a  
8 conflict where on one side it is considered to be  
9 unethical or dishonest to make a purchase and you are  
10 subject to a disciplinary action, and on the other side  
11 there was not only the possibility of going out of  
12 business, but also the possibility of failing to honor  
13 those contracts being the subject a disciplinary  
14 proceeding.

15 MR. COOMBS: I have nothing further.

16 THE COURT: Mr. Griffin, cross?

17 CROSS EXAMINATION

18 BY MR. GRIFFIN:

19 Q. Mr. King, good afternoon.

20 A. Afternoon.

21 Q. Is the NASD a sovereign entity?

22 A. No.

23 Q. Is the State of Utah a sovereign entity?

24 A. There are legal concepts that give state  
25 action immunity that are based upon sovereign immunity



EXHIBIT "EE"

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

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

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**Appearances:**

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

John Michael Coombs and Craig F. McCullough for Respondents

**BY THE SECURITIES ADVISORY BOARD:**

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

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

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **CONCLUSIONS OF LAW**

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**ORDER**


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

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

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

Dated this 10th day of August, 1990.

  
\_\_\_\_\_  
Keith Cannon

  
\_\_\_\_\_  
Kent Burgon

  
\_\_\_\_\_  
Margaret Wickens

  
\_\_\_\_\_  
Truman Bowler

BY THE DIRECTOR:

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

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



John C. Baldwin  
Director

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

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

EXHIBIT "FF"

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 | : | OBJECTION TO FORM AND         |
| OF:                               | : | CONTENT OF AUGUST 13, 1990    |
|                                   | : | FINDINGS OF FACT, CONCLUSIONS |
| JOHNSON-BOWLES COMPANY, INC.      | : | OF LAW, AND ORDER             |
|                                   | : |                               |
| CRD NO. 07678                     | : | Case No. SD-89-46BD           |
|                                   | : |                               |
| <hr/>                             |   |                               |
| IN THE MATTER OF THE REGISTRATION | : |                               |
| OF:                               | : |                               |
|                                   | : |                               |
| MARLEN VERNON JOHNSON             | : | Case No. SD-89-47AG           |
|                                   | : |                               |
| CRD NO. 2598888                   | : |                               |
|                                   | : |                               |

Respondents, by and through counsel, hereby lodge their strenuous objection to the unconstitutional and prejudicial means or manner by which the August 13, 1990, Findings of Fact, Conclusions of Law, and Order (hereinafter "Order") was unilaterally prepared without their knowledge, input, or participation — a prejudicial ruling that Respondents will no doubt be saddled with on appeal to the Utah Court of Appeals. Respondents further object to the form and content of such Order. In support of this objection, Respondents file an affidavit of their counsel. The basis for this objection is as follows.



Respondents believe, after having studied the August 13, 1990, Findings of Fact, Conclusions of Law, and Order, that it was not prepared solely by the Administrative Law Judge ("ALJ") and the Securities Advisory Board as Respondents and their counsel were repeatedly told in these proceedings. For instance, the document embraces the Division's closing argument at the July 16, 1990, hearing, virtually verbatim (even as if its counsel, Mr. Griffin, drafted it) and wholly ignores not only Respondents' best arguments put forth at the hearing, but even goes further to dismiss Mr. David R. King's entire expert testimony as "specious". [See page 9, second full sentence.] This is ironic in that Mr. King is undoubtedly the foremost authority in Utah in this area of the law. This is even more peculiar when one considers that Ms. McGinley testified that the Division's entire case rested on the theory of "aiding and abetting" — a legal theory never even alluded to in passing in the August 13, 1990, Order. The Order thus miserably fails to address the core legal issues present in this case.

Furthermore, in a conference call that the ALJ, Respondents' counsel, and Mr. Griffin engaged in on or about July 17, 1990, concerning the March 1990, purchase from Richard Sax, the ALJ informed counsel that the Board never even discussed such purchase. Since the Board admittedly never took such into consideration in determining that there was indeed a violation, Respondents find it peculiar that such is not just referred to in the Findings of Fact but that the "Board" went further and determined that such ultimately resulted in an unlawful "sale" to Sorensen, Chido & May — an argument never presented at trial by the Division to even, in turn, legitimately support such a finding. To be sure, no one of sane mind would purchase something for \$4,000, only to sell it for \$30, and Respondents submit that Mr. Johnson's pension and profit sharing plan, January

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Corporation, neither needed nor was quite that desperate for a \$3,970, out-of-pocket, tax "write-off" for 1990. This is also not to ignore that Respondents fail to see the relevance of quoting, among other things, Mr. Johnson's letter to the NASD concerning the OTRA "buy-in", especially when it and numerous other "findings" were never, in the least, tied in to the Conclusions of Law. Respondents thus find it difficult to believe that either the ALJ and/or the "Board" would find it necessary to "pad" the findings with such gratuitous and admittedly irrelevant "facts." This is also not to further ignore that Respondents and their counsel have become familiar with the ALJ's own personal style of drafting the same kinds of orders, a style or practice that is far more thorough, impartial, logical, and judicious — adjectives which Respondents are unable to sincerely ascribe to the August 13, Order.

The purpose of this formal Objection is that Respondents believe the August 13, 1990, Findings of Fact, Conclusions of Law, and Order, is grossly one-sided and because they were unable to participate in it to the same degree that they believe Messrs. Baldwin, Griffin and Ms. McGinley did, they are, without question, enormously and intentionally prejudiced on appeal. For instance, the way the Order is plugged with irrelevant "findings" and otherwise skirts the real legal issues involved, Respondents' prospects of prevailing on appeal are strictly predicated on the luck of drawing an intelligent and thorough enough appellate judge who will read the transcript and discover that the August 13, 1990, document is far afield from reflecting what either the law is as applied to this case or what actually transpired at the trial. By way of example and to put it another way, Respondents are horrified at the prospect of a judge, jury and prosecutor secretly meeting behind closed doors after a district court trial and scheming on how to front-end load or doctor the findings and conclusions — behind the defendant's back — so


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that the prosecution can prevail on appeal. In this context, Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), is entirely on point. In Withrow, a unanimous U.S. Supreme Court held that in the administrative adjudicative arena, it is unconstitutional for any person (i.e., Baldwin, McGinley, and/or Griffin) to act as investigator, prosecutor and judge in the same proceeding. The short point is that if the Division cannot allow itself to prevail fairly, it should not be entitled to prevail at all.

In sum, Humpty Dumpty said that words are what he said they meant, and by the same token, the Division has been no more eloquent in the August 13, Order, than stating that the law is similarly nothing more than what they say it is. In fact, it is clear that the Division was hell bent on getting to the August 13, Order, no matter what. Knowing that there was never a prospect of prevailing on anything, and looking back objectively on the last 1½ years, what Respondents should have done on April 27, 1989, is stipulate to the August 13, 1990, Order, and simply have appealed it to the Court of Appeals at that time. Unfortunately for Respondents, this approach would be too honest for a government agency.

Based on the foregoing, Respondents request that the Order be set aside, that the Division fully disclose who participated, directly or indirectly, in the drafting of such Order — and to what extent — and that the Division declare that the proceedings have continued against Respondents in an unconstitutional manner, thereby meriting either dismissal, arrest of judgment, or a new trial.

DATED this 20th day of August, 1990.

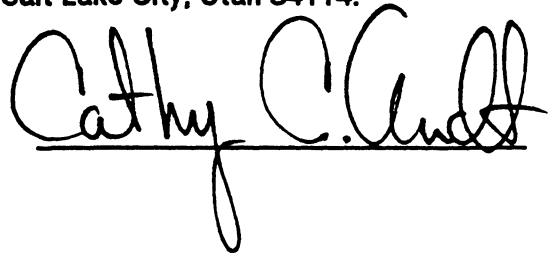


John Michael Coombs  
Craig F. McCullough  
Attorney for Respondents

In re: Johnson-Bowles Company, Inc., and Marlen V. Johnson, Case Nos.  
SD-89-45BD and SD-89-47AG  
Objection to Form and Content of August 13, 1990 Findings of Fact,  
Conclusions of Law, and Order

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of August, 1990, (s)he hand-delivered a true and correct copy of the foregoing OBJECTION TO ORDER 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 J. Stephen Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; 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, and Mark J. Griffin, located at 115 State Capitol Building, Salt Lake City, Utah 84114.

A handwritten signature in black ink, reading "Cathy C. Gault", written over a horizontal line.

J:OBJ.10-11

0001120

EXHIBIT "GG"

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



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

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IN THE MATTER OF THE REGISTRATION  
OF:

JOHNSON-BOWLES COMPANY, INC.

CRD NO. 07678

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DEMAND FOR DISCLOSURE  
OF HOW AND BY WHOM THE  
AUGUST 13, 1990, FINDINGS  
OF FACT, CONCLUSIONS OF  
LAW, AND ORDER, WAS PREPARED

Case No. SD-89-46BD

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IN THE MATTER OF THE REGISTRATION  
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

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Case No. SD-89-47AG

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Respondents, by and through counsel, hereby demand immediate disclosure of how and by whom the Division's August 13, 1990, Findings of Fact, Conclusions of Law, and Order ("Order"), was prepared and the extent of participation by each. In support of this demand, Respondents incorporate by reference their contemporaneous Objection and a Supporting Affidavit of their counsel. Respondents further request that this demand be ruled upon regardless of whether Respondents will be shortly filing a Request for Agency Review. In other words, under Department of Commerce Rules, Respondents are required

to file a Request for Agency Review no later than August 23, 1990, and in so doing, Respondents have no intention of making this Demand moot.

Respondents were informed in no uncertain terms that only the Securities Advisory Board would be ruling at the July 16, 1990, trial of this matter. They were subsequently told by the ALJ on the afternoon of July 16, that the ALJ had been asked by the Board to assist it in the preparation of the Findings of Fact, Conclusions of Law, and Order. The ALJ further indicated in a conversation with respective counsel on July 17, 1990, that if counsel were consulted on the form of the Order, it would be counsel to both parties. However, Respondents and their counsel were never consulted relative to such Order. On Monday, August 13, 1990, Respondents received a copy of the Order in issue. Such was the first time they had seen such Order. In addition, the Order has not been prepared on the same word processor that the ALJ has previously used and the tone and content of such Order is not consistent, by any means, with the ALJ's logical, thorough, and judicial style to which Respondents are, by now, well familiar. (In this regard, reference is made to Respondents' Objection filed contemporaneously herewith.)

On August 16, 1990, Respondents' counsel had a telephone conversation with Mark J. Griffin, counsel to the Division. When asked, point blank, whether he prepared the Order, Mr. Griffin dodged the question and joked about the fact that Respondents wouldn't be able to discover whether he did or didn't unless his deposition was taken — which he said it could not. The only thing that Mr. Griffin stated of significance is that he claimed he had no advance knowledge of what the sanction imposed on Respondents was until the Order was ultimately issued last Monday. This obviously does not mean that Mr. Griffin did not participate and have a direct or indirect hand in drafting pages 1-11 of the Order. In

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fact, Respondents believe and assert that Mr. Griffin, in conjunction with Ms. McGinley, who in turn may have consulted directly with Mr. Baldwin, actually drafted and determined what would be in the Order and that it was then shoved before the Board members for their respective signatures. Respondents believe this is unfair and unconstitutional as the Order, in its present inaccurate state, will significantly prejudice them on appeal. The Order has further been prepared contrary to the spirit of Rule 4-504 of the Code of Judicial Administration, a rule which has every reason to apply in administrative adjudicative proceedings. Respondents further assert that this behind-the-back, surreptitious conduct, designed solely to insulate and guarantee the Division against losing on appeal, is repugnant to all notions of fair play and substantial justice. It is also violative of the Rules of Professional Conduct governing attorneys, aside from being unconstitutional, all as set forth in Respondents' Objection. The foregoing is not to ignore that the Board may have shirked its duties in allowing Division personnel to put words in their mouths and simply present an Order to them for their signatures that Respondents believe they were "railroaded" into signing.


In light of the above, Respondents respectfully demand disclosure of how the August 13, 1990, document was prepared, by whom, and what input was given, directly or indirectly, by anyone other than the ALJ and the Board. Respondents think it is absolutely necessary that this itself become an issue on appeal because if not, the identified abuse in issue will surely prejudice Respondents and similarly prejudice others in the future — others who will, no doubt, be unwitting victims of the same underhanded, covert abuse and prejudice. This information is also necessary for the Respondents to determine whether a Request for Agency Review, while procedurally necessary, would be a meaningless exercise.



There should also be no objection to making this disclosure unless the Division does indeed have something to hide in this respect and unless the Order was in fact crammed down the Board's throat.

*Based on the foregoing, unless the requisite disclosure is made and further made part of the record, Respondents should be given the opportunity to immediately take the depositions of Mr. Griffin, Mr. Baldwin, Ms. McGinley, the ALJ, and each of the Securities Advisory Board members.*

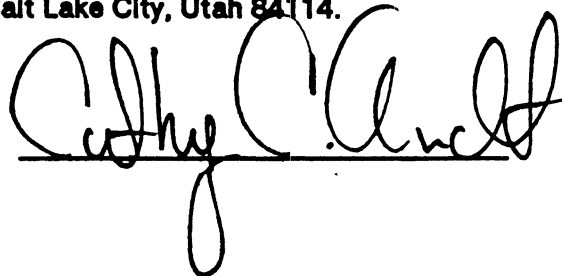
DATED this 20th day of August, 1990.



John Michael Coombs  
Craig F. McCullough  
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of August, 1990, (s)he hand-delivered a true and correct copy of the foregoing OBJECTION TO ORDER 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 J. Stephen Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; 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, and Mark J. Griffin, located at 115 State Capitol Building, Salt Lake City, Utah 84114.

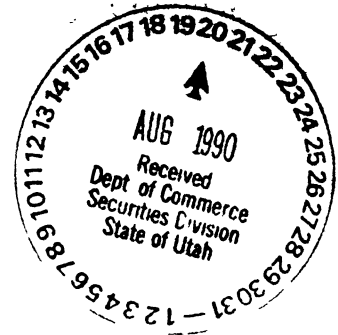


J: DEMAND. 2-3

0001135

EXHIBIT "HH"

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



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

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|                                   |   |                           |
|-----------------------------------|---|---------------------------|
| IN THE MATTER OF THE REGISTRATION | : | AFFIDAVIT OF RESPONDENTS' |
| OF:                               | : | COUNSEL IN SUPPORT OF     |
|                                   | : | DEMAND FOR DISCLOSURE     |
| JOHNSON-BOWLES COMPANY, INC.      | : |                           |
|                                   | : |                           |
| CRD NO. 07678                     | : | Case No. SD-89-46BD       |
|                                   | : |                           |

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

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STATE OF UTAH           )  
                              )ss.  
SALT LAKE COUNTY    )

John Michael Coombs, on his oath, deposes and says the following on behalf of Respondents in the above-entitled matters and in support of their demand for disclosure of how and by whom the August 13, 1990, Order was prepared and otherwise came about. The following is also submitted in support of Respondents' formal Objection to the same:

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1. That your affiant is Respondents' counsel in the above-matters and he has personal knowledge and experience as to the matters contained herein and he is otherwise competent to make this affidavit on their behalf in these proceedings.

2. That Respondents were informed in no uncertain terms that only the Securities Advisory Board would be ruling on the matters tried before them on July 16, 1990. That the only exception to this was that Respondents were informed that Division Director Baldwin would probably be required to "sign off" on their exclusive decision. That Mr. Baldwin would only be required to "sign off" on the Order is understandable in that he was not present at the hearing and for this reason, he would obviously be incompetent to participate any further.

3. That after the hearing on July 16, 1990, the ALJ informed respective counsel that the Board had requested that he prepare the formal form of the Order.

4. On or about July 17, 1990, your affiant, the ALJ and Mr. Griffin had a phone conversation in which the ALJ stated that the Board had not taken the March 1990, purchase from Richard Sax into consideration in determining whether or not there was violation. It thus comes as a surprise that the Findings of Fact do not stop short at such a finding but that they go several steps further to "find" that Respondents subsequently "sold" the same stock to Sorensen, Chido & May. This is not to ignore other incongruities in the Order that Respondents have articulated in their formal Objection filed herewith.

5. That in the same conversation that Mr. Griffin and your affiant engaged in with the ALJ, your affiant recalls the ALJ saying that if any counsel participated in drafting the Order, both counsel would have that opportunity.

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6. That Respondents received the "Board"'s alleged Findings of Fact, Conclusions of Law, and Order on August 13, 1990, and your affiant can attest that it is not prepared on the same word processor as previously used by the ALJ in drafting each and every one of his previous orders and rulings in this case. He can also attest that neither he nor Respondents ever saw such Order, or a draft thereof, until August 13, 1990.

7. That, in addition, based on your affiant having read and reviewed numerous other orders of the ALJ during the last 1½ years of this case, your affiant is of the opinion that the ALJ did not prepare the Order in issue and he may well not have participated in it at all. (See Respondents' Objection filed herewith.)

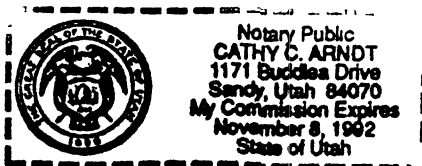
8. That on August 16, 1990, your affiant had a telephone conversation with Mark J. Griffin, the co-prosecutor with Ms. McGinley, in this case. Your affiant asked him point blank whether he participated in drafting the Order in issue. Mr. Griffin was unable and unwilling to give a straight answer. In fact, Mr. Griffin joked about Respondents not being able to find out whether he did or not and after asking why your affiant wanted to know, he informed your affiant that Respondents would have to take his deposition — something which, under the circumstances, they would not be able to do. After having a moment to collect himself from a question that took him by surprise, Mr. Griffin did state that he was unaware of what the sanction was that was to be imposed on Respondents. However, this certainly does not mean that Ms. McGinley and/or Mr. Baldwin did not seek and utilize his assistance, directly or indirectly, in drafting pages 1–11 of the Order — the pages which exclude any reference to a sanction.


9. That your affiant believes that if Messrs. Baldwin, Griffin and/or Ms. McGinley unilaterally drafted the Order and submitted it to the Board for their signatures,

Respondents are tremendously prejudiced on appeal. This is because your affiant believes that the Order does not reflect what actually transpired at the July 16, 1990, hearing. Your affiant can further attest that in his opinion — If it is indeed true that the Division and its counsel unilaterally drafted the Order — these entire proceedings have been unconstitutional and unfair and Respondents should have been told at the outset that the Division was hell bent on obtaining the August 13, Order, no matter what. Your affiant also believes that Respondents have been damaged as a result of such Constitutional deprivations.

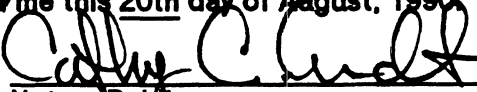
FURTHER SAITH AFFIANT NAUGHT.

DATED this 20th day of August, 1990



  
John Michael Coombs

SUBSCRIBED and SWORN to before me this 20th day of August, 1990

  
Notary Public  
Residing at Salt Lake City, UT

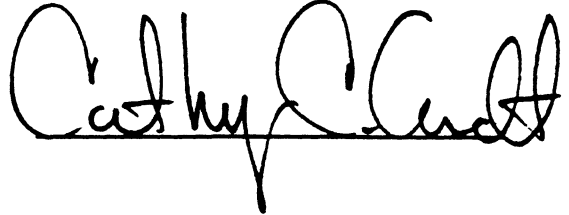
My Commission Expires:

Nov. 8, 1992

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of August, 1990, (s)he hand-delivered a true and correct copy of the foregoing AFFIDAVIT OF RESPONDENTS' COUNSEL IN SUPPORT OF DEMAND FOR DISCLOSURE 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 J. Stephen Eklund, Esq., Department of Commerce,

160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; 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; and Mark J. Griffin, 115 State Capitol Building, Salt Lake City, Utah 84114.

A handwritten signature in black ink, appearing to read "Craig F. McCullough". The signature is written in a cursive, flowing style with a horizontal line underneath the main body of the text.

J:AFDVT.19-20

0001125

EXHIBIT "II"



---

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

---

---

IN THE MATTER OF  
THE REGISTRATION OF:  
JOHNSON-BOWLES COMPANY, INC.

---

:  
:  
: ORDER ON REVIEW  
:  
: CASE NO. SD-89-46BD  
:

IN THE MATTER OF  
THE REGISTRATION  
OF: MARLEN VERNON JOHNSON

:  
:  
: CASE NO. SD-89-47AG  
:

---

**INTRODUCTION**

1. Orders for Which this Review is Sought

a. Final Order

By order of the Securities Advisory Board dated August 10, 1990, and approved by the Director of the Securities Division (the "Division") on August 13, 1990, the registration of Respondent Johnson-Bowles Company, Inc. ("Johnson Bowles") and the registration of Respondent Marlen Vernon Johnson ("Johnson") were suspended for one year. (This order is hereinafter referred to as the "Final Order".) Both Respondents also were ordered placed on probation for two years following the suspension, with certain conditions.

In summary, Respondents were sanctioned for violating the terms of a Division order, dated March 1, 1989, and made permanent on March 29, 1989 (the "March 1 Order"). This March 1 Order suspended all exemptions available under Section 14(2) of the Utah

Uniform Securities Act relative to trading in the stock of a company known as U.S.A. Medical Corporation.

b. Other Orders

The following interim orders were entered during the pendency of this matter:

- i. Order Granting Division's Motion to Convert;
- ii. Order Denying Respondents' Rule 12(b)(1) Motion (lack of jurisdiction);
- iii. Order Denying Respondents' 12(b)(6) Motion (failure to state a claim);
- iv. Order Granting the Division's Motion to Dismiss Respondents' Counterclaim; and
- v. Order Denying Respondents' Motion for Summary Judgement.

2. Request for Agency Review

Respondents filed a "Request for Agency Review of Entire Record and Supporting Brief" (hereinafter, the "Request for Review") on August 23, 1990. This Request for Review requests agency review (or, in this case, review by a superior agency) of the Final Order and the interim orders described above.

Counsel for Respondents submitted a letter dated September 10, 1990, to the Executive Director of the Department of Commerce, who is issuing this Order on Review. This letter has been treated as a memo supplementing the Request for Review. The Division did not file a written response to the letter.

In support of its request that each of the above-named orders

be reversed and that the proceedings be dismissed and vacated, Respondents have referenced the various motions, memoranda, and affidavits which support each particular order. The Request for Review requests in general fashion that the reviewing officer review all of these pleadings, as well as the audio tapes of oral argument and the hearing transcript, to determine grounds for reversal. The reviewing officer also is requested to address all issues presented in all of the documents.

Counsel for Respondents was invited by letter dated October 9, 1990, to supplement the Request for Review with a statement more particularly stating the grounds for review. Counsel requested and received permission to file such a statement within thirty days; he thereafter declined the invitation and filed no more memoranda. The attachments to the Request for Review and the documents incorporated by reference were reviewed in connection with this Order on Review for purposes of clarification and explanation but were not extensively mined to supply arguments or issues or grounds which Respondents declined to specify in the Request for Review.

### 3. Statutes or Rules Permitting or Requiring Review

The review of this matter is being conducted by the Executive Director of the Department of Commerce pursuant to Section 61-1-23 of the Utah Uniform Securities Act (the "Act"). Rule 151-46b-12 of the Department also allows for filing a request for agency review. By letter dated August 29, 1990, counsel was advised that no oral argument would be heard. The Division did not file any written

response to Respondent's Request for Review.

**STATEMENT OF THE ISSUES REVIEWED**

As previously noted, Respondents' Request for Review did not clearly enumerate each separate issue on appeal, but appeared to be an attempt re-argue all motions previously made. Where particular grounds for review were alleged in the Request for Review, they are set forth below. The relief requested is assumed to be a reversal of each contested order.

1. **The Final Order:**

a. Whether the Order is supported by the evidence, the record, and the Findings of Fact and the Conclusions of Law;

b. Whether the Conclusions of Law follow from the Findings of Fact;

c. Whether there should be no findings of fact nor conclusions of law, simply a verdict and sanction;

2. **Order Granting Division's Motion to Convert:**

a. Whether the Division waived any right or ability to convert the proceeding from an informal proceeding to a formal one;

b. Whether the order granting the Division's motion to convert to formal proceedings is erroneous;

3. **Order Denying Respondents' Rule 12(b)(1) Motion:**

Whether the 12(b)(1) order was supported by the Findings of Fact and the Conclusions of Law;

4. Order Denying Respondents' 12(b)(6) Motion:

Whether denial of the 12(b)(6) motion was supported by the Findings of Fact and the Conclusions of Law;

5. Order Granting the Division's Motion to Dismiss Respondents' Counterclaim:

Whether the order dismissing Respondents' Counterclaim was supported by the Findings of Fact and the Conclusions of Law;

6. Order Denying Respondents' Motion for Summary Judgement:

Whether the order denying Respondent's Motion for Summary Judgement was supported by the Findings of Fact and Conclusions of law.

The Final Order

FINDINGS OF FACT

1. The Division presented evidence in the hearing through the testimony of Kathleen McGinley, Director of Licensing for the Division. For Respondents, Respondent Marlen Johnson testified; as did Don Sorenson, a Certified Public Accountant who performed some accounting services for Respondent; and David King, who offered testimony as an expert regarding "dishonest or unethical practices" under the Utah Uniform Securities Act. Also entered into evidence were certain stipulations of fact; an order issued by the Federal District Court for the District of Utah which went to some of the issues herein; correspondence regarding the USA Medical stock; and other documents reflecting the transactions complained of herein.

2. All of the Findings of Fact in the Final Order were supported by sufficient and credible testimony and evidence presented at the hearing.

#### CONCLUSIONS OF LAW

3. It appears that there is no basis to modify or overturn the Conclusions of Law in the Final Order, for the following reasons: the findings are supported by substantial and credible evidence; no evidence supporting a contrary finding was presented by Respondents' counsel; the Board and the Director did not misinterpret applicable law or rules, and the conclusions do not reflect an abuse of discretion by the Board and the Director.

#### Order Granting Division's Motion to Convert to Formal Proceedings:

#### FINDINGS OF FACT

4. Division rules designate all proceedings as informal. Although Respondents argue that the Division waived any right it had to convert the proceedings from informal to formal, nothing in the record indicates that the Division waived this right. In their original objection to the Division's motion to convert, Respondents argue that simply by the act of filing the petition, the Division waived its right to convert. However, this act by itself does not indicate that the Division wished to waive conversion, especially since there is no way for an agency to convert proceedings before they have even commenced. Both Division and Department rules are silent as to the ability to convert proceedings from formal to informal; the Utah Administrative Procedures Act does allow

conversion where it is in the public interest and does not unfairly prejudice a party's rights.

#### CONCLUSIONS OF LAW

5. The order allowing the proceedings to be converted from formal to informal did not constitute an abuse of discretion.

6. The Administrative Law Judge's ruling that conversion was in the public interest was not improper because the significant and complicated issues in this case could be more fully and competently disposed of with the expertise of the Board, pursuant to the greater discovery and other rights granted under formal proceedings, and because conversion would allow for this matter to be disposed of with one full and fair hearing at the administrative level. One of the most important issues in this case was whether Respondents' behavior constituted unethical and dishonest conduct. These issues could better and more properly be explored within the context of a formal proceeding.

7. Conversion did not unfairly prejudice Respondents' rights. Respondents are not harmed merely because they receive only one full hearing, at the administrative level, rather than two hearings -- one in the administrative forum, one in the judicial.

8. Respondents argue that the order granting conversion was erroneous but assigned no grounds for error. Based on a review of the record, and for the reasons noted above, I find that conversion was not erroneous.

**Order Denying Respondents' Rule 12(b)(1) Motion:**

**FINDINGS OF FACT**

9. Respondents' Request for Review assigns no grounds for error or issues on appeal of the Administrative Law Judge's denial of Respondent's motion to dismiss based on the Division's lack of jurisdiction.

10. Respondents were licensed by the Division at all times relevant to these proceedings. As are most other licensees licensed by the Division, Respondents are subject to additional regulation by the federal Securities and Exchange Commission, and self-regulatory organizations such as the NASD which are under SEC oversight.

11. Respondents were charged in the Amended Petition with violating Utah law and Division rules.

**CONCLUSIONS OF LAW**

12. Concurrent regulation in these circumstances is not improper or illegal and any applicable federal law or rules did not supersede Utah law and rules.

13. The Administrative Law Judge could reasonably conclude, based on the facts before him at the time, that the Division had subject matter jurisdiction over Respondents based on their license and their alleged violation of Utah law and rules, and therefore did not improperly decline to dismiss the Petition.



Order Denying Respondents' Rule 12 (b)(6) Motion:

FINDINGS OF FACT

14. Respondents' Motion to Dismiss based on failure to state a claim was denied. Respondents' Request for Review alleges no particular grounds for error or issues on appeal.

15. The Amended Petition indicated that Respondents purchased securities of USA Medical Corporation during a time when all transactional exemptions from registration for that stock were suspended; that Respondents purchased the securities within Utah, from Utah residents; that Respondents knew of the order suspending exemptions; and that Respondents knew that the USA stock in fact had been unlawfully issued, had never been registered and had no exemption from registration and was traded illegally; and that Respondents may have solicited shareholders of USA Medical to sell their stock to Respondents.

CONCLUSIONS OF LAW

16. The Amended Petition and other documents in the record at the time Respondents filed their motion to dismiss based on failure to state a claim indicated that there were disputed issues of material fact. Specifically, Respondent denied soliciting any of the sales, and disputed the amount of profits from the sales; also, questions of fact remained to be resolved regarding whether the transactions by Respondents' customers were "unsuitable". Finally, based on the pleadings, it did not appear as a matter of law that the Division could not recover under the theories alleged (aiding and abetting and unsuitability).

**Order Granting Division's Motion to Dismiss Counterclaim:**

**FINDINGS OF FACT**

17. Respondents' Counterclaim alleges various wrongdoings by the Division and concludes with a request for an award of costs, attorney's fees and expenses, alleging in support of the request that the Division's petition is in violation of Rule 11 of the Utah Rules of Civil Procedure and Section 78-27-56 of the Utah Code Ann.; and that an award is proper under the federal Equal Access to Justice Act (no citation given).

18. The Administrative Law Judge granted the Division's motion to dismiss the counterclaim, holding that Section 63-46b-7(1) does not authorize filing of a counterclaim in these proceedings, hence that there was no subject matter jurisdiction over Respondents' counterclaim. Thus, the Administrative Law Judge did not address whether Section 78-27-56 or Rule 11 applied.

**CONCLUSIONS OF LAW**

19. Section 63-46b-7(1) does not clearly bar Respondents' counterclaim. It refers to the "claims or defenses" of parties and read expansively, could be meant to refer to counterclaims. Moreover, Section 63-46b-6 requires that a response be filed, which must include a statement of the relief sought. Again, read expansively, "response" and "relief" could be extended to cover a request for costs and attorney's fees. However, it is noted that nowhere does the Utah Administrative Procedures Act incorporate Rule 11 or the Rules of Civil Procedure, except those relating to discovery.

20. Furthermore, Section 63-46b-6 states that the presiding officer or the agency by rule "may" permit pleadings in addition to the notice and response. Nowhere does the record reflect that the presiding officer permitted this counterclaim. Neither Department nor Division rules permit the counterclaim. Department Rules do not "expressly" adopt Rule 11; Respondents' assertion in its counterclaim that it did is patently incorrect. Department Rule 151-46b-7 only partially quotes a passage from Rule 11 (that signing pleadings constitutes certification that good grounds exist) and does not quote the portion regarding award of fees, costs or expenses. Therefore, Respondents' counterclaim was not permitted Department rules.

21. The proper forum for raising a Rule 11 claim, if at all, would be upon motion, not through a counterclaim. Regardless, Respondents did not prevail below and therefore a Rule 11 claim is moot. Finally, the Division's actions -- the signing of any pleadings by its employees or by the Assistant Attorney General -- did not violate Rule 11 because each allegation was substantiated through documentary evidence or testimony of witnesses, or by stipulation.

**Order Denying Respondents' Motion for Summary Judgement:**

**FINDINGS OF FACT**

22. The Administrative Law Judge denied Respondents' Motion for Summary Judgement, finding that sufficient factual issues remained for resolution.

23. The various motions filed -- both before and after disposition of the Motion for Summary Judgement -- as well as testimony at the hearing bear this out. Several important factual issues were in dispute. Specifically, the parties did not agree on whether Respondents knew of the precise terms of the Division's March 1 order when they purchased the USA Medical Securities; or, if they did, on whether the order extended to Respondents and the transactions complained of in the Petition; and on whether Respondents may have solicited shareholders of USA Medical to sell their stock to Respondents. In addition, although some of the unresolved issues perhaps may be better characterized as legal issues rather than factual disputes, refusal to grant summary judgement was not improper where the Administrative Law Judge wished to allow the Board to hear the evidence and lend their expertise in determining whether Respondents' actions did constitute violations of the Division's law and rules.

#### CONCLUSIONS OF LAW

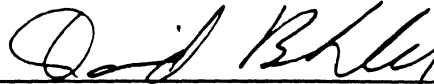
24. A review of the record indicates that there were sufficient disputed issues that denial of the motion for summary judgement was not erroneous.

0000841

ORDER

IT IS ORDERED THAT the Final Order dated August 13, 1990, be affirmed in its entirety.

Dated this 29 day of October, 1990



David L. Buhler, Executive Director  
Department of Commerce

NOTICE OF RIGHT OF JUDICIAL REVIEW

Judicial review of this Order may be obtained by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any Petition for such Review shall comply with the requirements set forth in Section 63-46b-14 and Section 63-46b-16.

CERTIFICATE OF MAILING

I certify that on the 29th day of October, 1990, I caused to be mailed (except as otherwise noted) a true and correct copy of the foregoing Order on Review, properly addressed, postage prepaid, to:

Marlen Johnson  
Johnson-Bowles Co., Inc.  
430 East 400 South  
Salt Lake City, Utah 84111

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

Earl S. Maeser, Director  
Utah Securities Division  
P.O. Box 45802  
Salt Lake City, Utah 84145  
(HAND DELIVERED)

Mark Griffin, Assistant A.G.  
115 State Capitol  
Salt Lake City, Utah 84114  
(BUILDING MAIL)

Craig S. McCullough  
Callister, Duncan & Nebeker  
Kennecott Building  
8th Floor  
10 East South Temple  
Salt Lake City, Utah 84133



EXHIBIT "JJ"

OK  
FILED  
JUL 2 4 00 PM '90

DEE BENSON, United States Attorney (#0289)  
STEWART C. WALZ, Assistant United States Attorney (#3374)  
Securities and Commodities Fraud Task Force  
Chief, Criminal Division  
MARY BETH WALZ, Special Assistant United States Attorney (#3373)  
Attorneys for the United States of America  
476 United States Courthouse  
350 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 524-5682

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

|                           |   |                       |
|---------------------------|---|-----------------------|
| _____                     | ) |                       |
| UNITED STATES OF AMERICA, | ) | 90-CR-129S            |
|                           | ) |                       |
| Plaintiff,                | ) | A M E N D E D         |
|                           | ) | FELONY INFORMATION    |
| v.                        | ) |                       |
|                           | ) |                       |
| JAMES LYNN AVERETT,       | ) | VIO. 18 U.S.C. § 371  |
|                           | ) | (Conspiracy to Commit |
| Defendant.                | ) | Securities Fraud)     |
| _____                     | ) |                       |

The United States Attorney charges:

COUNT ONE

Conspiracy to Commit Securities Fraud

INTRODUCTION

1. Defendant JAMES LYNN AVERETT, at times material to this felony information, was an attorney working and residing in Salt Lake City, Utah.
2. U.S.A. Medical Corporation, at times material to this felony information, was a private Utah corporation.

3. S.M.I., Inc., at times material to this felony information, was a Wyoming corporation that purportedly was a public company.

4. At times material to this felony information, S.M.I., Inc. acquired U.S.A. Medical Corporation and changed its name from S.M.I., Inc. to U.S.A. Medical Corporation.

THE CONSPIRACY

5. From on or about an unknown date in November, 1987, until the date of this felony information, in the Central Division of the District of Utah and elsewhere,

JAMES LYNN AVERETT,  
defendant herein, together with others, did conspire, combine, confederate, and agree together, with each other and with other persons unknown to the United States, to commit offenses against the United States of America in violation of one (1) or more of the following groups of statutes:

a. 15 U.S.C. § 77q(a) and 15 U.S.C. § 77x (fraud in the offer and sale of securities);

b. 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5, and 15 U.S.C. § 78ff (fraud in the purchase and sale of any security);  
and

c. 15 U.S.C. § 77e(c) and 15 U.S.C. § 77x (securities registration violation).



### FURTHERANCE OF THE CONSPIRACY

1. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT agreed with other co-conspirators to obtain three hundred thousand dollars (\$300,000.00) to develop a public company to manufacture and sell aspirators.

2. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT agreed with other co-conspirators to purchase all of the stock of a corporation.

3. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT agreed with other co-conspirators that defendant JAMES LYNN AVERETT would contribute an asset (the aspirator), would prepare merger documents for a corporate acquisition and name change (for S.M.I., Inc. to acquire U.S.A. Medical Corporation and for S.M.I., Inc. to change its name to U.S.A. Medical Corporation), would secure a legal tradeability opinion letter, and would arrange for a company to be listed in the "pink sheets" published by the National Quotation Bureau, Inc.

4. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT agreed with other co-conspirators that the other co-conspirators would promote the company and its stock so as to raise the above-mentioned three hundred thousand dollars (\$300,000.00).

5. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT and other co-conspirators agreed that a controlled market

manipulation would take place to artificially raise the price of the stock of the company.

6. In furtherance of the conspiracy, defendant JAMES LYNN AVERETT agreed with other co-conspirators that the three of them would obtain one million (1,000,000) shares of the stock of the company and would equally divide the one million (1,000,000) shares of stock among themselves.

#### OVERT ACTS

The United States Attorney further charges that in furtherance of said conspiracy and to effect the means and objectives of the conspiracy, defendant JAMES LYNN AVERETT and his co-conspirators committed and caused to be committed within the Central Division of the District of Utah and elsewhere the following overt acts:

1. On or about an unknown date in November, 1987, at Salt Lake City, Utah, defendant JAMES LYNN AVERETT observed the delivery of one hundred percent (100%) of the stock of S.M.I., Inc. (the box). This delivery took place between two co-conspirators in the office of Efficient Transfer, Inc., a stock transfer agency located in Salt Lake City, Utah.

2. On or about some unknown date or dates in November, 1987, defendant JAMES LYNN AVERETT prepared the acquisition and name change documents for S.M.I., Inc. (purportedly a public corporation) to acquire U.S.A. Medical Corporation (a private corporation) and for S.M.I., Inc. to change its name to U.S.A.

Medical Corporation. The "Agreement and Plan of Reorganization" is dated December 7, 1987.

3. On or about an unknown date in November, 1987, defendant JAMES LYNN AVERETT requested another attorney to prepare the legal tradeability opinion letter for U.S.A. Medical Corporation. The legal tradeability opinion letter is dated December 7, 1987.

4. On or about some unknown date or dates in November, 1987, defendant JAMES LYNN AVERETT prepared the N.Q.B. Form 211 and prepared the bulk of the S.E.C. Rule 15c2-11 package to submit to the National Quotation Bureau, Inc. to get U.S.A. Medical Corporation listed in the "pink sheets." The N.Q.B. Form 211 is dated December 17, 1987.


5. On or about an unknown date in November, 1987, defendant JAMES LYNN AVERETT prepared and sent from Salt Lake City, Utah, to Cheyenne, Wyoming a letter requesting a certificate of good standing from the corporations authorities in Wyoming.

6. On or about an unknown date in November, 1987, defendant JAMES LYNN AVERETT conducted a meeting in defendant JAMES LYNN AVERETT's office in Salt Lake City, Utah. At this meeting, defendant JAMES LYNN AVERETT informed the individuals in attendance, some of whom are co-conspirators, that the initial stock transactions for U.S.A. Medical Corporation would be illegal;

all in violation of 18 U.S.C. § 371.

This amended felony information is submitted on this             
day of July, 1990.

DEE BENSON  
United States Attorney

  
STEWART C. WALZ  
Assistant United States Attorney  
Securities and Commodities Fraud  
Task Force  
Chief, Criminal Division

I hereby certify that the annexed document is a true  
and correct copy of the original on file in this office.

ATTEST MARKUS B ZIMMER  
Clerk, U S District Court  
District of Utah

By   
Deputy Clerk

Date 12/28/90

  
MARY BETH WALZ  
Special Assistant U.S. Attorney

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

SEP 19 1990

JUDGMENT IN A CRIMINAL CASE

MARKUS B. ZIMMER, CLERK  
BY \_\_\_\_\_  
DEPUTY CLERK

UNITED STATES OF AMERICA

v.  
James Lynn Averett

Defendant

230 East Broadway #1005

Salt Lake City, Utah 84111

Defendant's Mailing Address

90-CR-129S

Case No. \_\_\_\_\_

Stephen R. McCaughey

Defendant's Attorney

528 / 48 / 0162

Defendant's SSN

unavailable

Defendant's Residence Address

THE DEFENDANT ENTERED A PLEA OF: I of the Felony Information

[ ☒ guilty ☐ nolo contendere ] as to count(s) \_\_\_\_\_, and  
[ ☐ not guilty as to count(s) \_\_\_\_\_.

THERE WAS A:

[ ☒ finding ☐ verdict ] of guilty as to count(s) I of the Felony Information

THERE WAS A:

[ ☐ finding ☐ verdict ] of not guilty as to count(s) \_\_\_\_\_.  
[ ☐ judgment of acquittal as to count(s) \_\_\_\_\_.  
The defendant is acquitted and discharged as to this/these counts(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:  
Conspiracy to Commit Securities Fraud in violation of 18 U.S.C. § 371

IT IS THE JUDGMENT OF THIS COURT THAT:

Defendant is placed on two (2) years probation with special conditions  
(listed on back).

I hereby certify that the annexed document is a true  
and correct copy of the original on file in this office.

ATTEST:

CR  
Court

By \_\_\_\_\_  
Deputy Clerk

Date: 12/28/90

In addition to any conditions imposed above, IT IS ORDERED that the conditions of supervised release or probation set forth in PROBATION FORM 7A are imposed. In addition, IT IS ORDERED that the special conditions of supervised release set out on the reverse of this judgment are imposed.

(1) Do not commit crimes, federal, state or local. (2) Obey standard conditions of probation (3) No fine is imposed due to defendant's inability to pay. (4) Defendant must complete five hundred (500) hours of community service as directed by the United States Probation Office. (5) Do not possess firearms or dangerous weapons.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of \$ \$50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) I of the Felony Information as follows:

**IT IS FURTHER ORDERED** that the defendant shall pay to the United States attorney for this district any amount imposed as restitution. The defendant shall pay to the clerk of the court any amount imposed as a fine, special assessment, or cost of prosecution. Until all fines, restitutions, special assessments, and costs are fully paid, the defendant shall notify the United States attorney for the District of Utah of any change in name immediately and any change of address within 30 days of the change.

**\_\_\_\_\_ The Court orders commitment to the custody of the Attorney General and recommends:**

Name and Title of Judicial Officer

**I have executed this Judgment as follows:**

\_\_\_\_\_, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

By \_\_\_\_\_  
Deputy Marshal

I hereby certify that the annexed document is a true and correct copy of the original on file in this office.

ATTEST MARKUS B. ZIMMER  
Clerk, U.S. District Court  
District of Utah

Conditions of Probation and Supervised Release

# UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF UTAH - NORTHERN DIVISION

Name James L. Averett

Docket No. 90-CR-00129-S

Address 230 East Broadway, Salt Lake City, UT 84111

Under the terms of your sentence, you have been placed on probation ~~supervised release~~ (strike one) by the Honorable David Sam, United States District Judge for the District of Utah. Your term of supervision is for a period of two (2) years, commencing September 7, 1990.

While on probation ~~supervised release~~ (strike one), you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

## CHECK IF APPROPRIATE:

- ☐ As a condition of supervision, you are instructed to pay a fine in the amount of \_\_\_\_\_; it shall be paid in the following manner \_\_\_\_\_.
- ☐ As a condition of supervision, you are instructed to pay restitution in the amount of \_\_\_\_\_ to \_\_\_\_\_; it shall be paid in the following manner \_\_\_\_\_.
- ☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.
- ☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall report in person to the probation office in the district of release within 72 hours of release from the custody of the Bureau of Prisons.

## It is the order of the Court that you shall comply with the following standard conditions:

- (1) You shall not leave the judicial district without permission of the court or probation officer;
- (2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;
- (3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

- (4) You shall support your dependents and meet other family responsibilities;
- (5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) You shall notify the probation officer within seventy-two hours of any change in residence or employment;
- (7) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- (9) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) You shall permit a probation officer to visit you at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) You shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (12) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm your compliance with such notification requirement.

**The special conditions ordered by the court are as follows:**

1. Do not commit crimes, federal, state or local.
2. Obey standard conditions of probation.
3. No fine is imposed due to defendant's inability to pay.
4. Defendant must complete 500 (five hundred) hours of community service as directed by the United States Probation Office.
5. Do not possess firearms or dangerous weapons.
6. Defendant shall pay a total special assessment of \$50.00.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

I hereby  
and c  
ATTE

Document is a true  
file in this office.

(Signed)

Defendant

9/25/90  
Date

By -

Date

U.S. Probation Officer/Designated Witness

9/25/90  
Date



EXHIBIT "KK"



Norman H. Bangerter  
Governor  
David L. Buhler  
Executive Director  
John C. Baldwin  
Director

S  
DEPARTMENT OF COMMERCE  
Division of Securities

160 East 300 South  
P.O. Box 45802  
Salt Lake City, Utah 84145-0802  
(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of the Stipulation and Order of Gregg Cannon found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

)

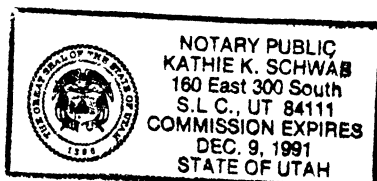
ss

COUNTY OF SALT LAKE

)

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah



DIVISION OF SECURITIES  
DEPARTMENT OF COMMERCE  
JOHN C. BALDWIN, DIRECTOR  
KATHLEEN C. MCGINLEY, DIRECTOR  
BROKER-DEALER SECTION  
P.O. BOX 45802  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84145-0802  
TELEPHONE: (801) 530-6600

---

BEFORE THE DIVISION OF SECURITIES

FOR THE

STATE OF UTAH

---

|                                   |   |                     |
|-----------------------------------|---|---------------------|
| In the Matter of the Registration | : | STIPULATION & ORDER |
| of Cregg Cannon                   | : |                     |
| to Act as a Securities Agent      | : | CASE NO. SD-042-AG  |

---

The Securities Division of the Department of Commerce of the State of Utah (the division), by and through its Director, John C. Baldwin, and Cregg Cannon a registered securities agent hereby stipulate and agree as follows:

STIPULATION

1. Cannon is and has been a registrant of the Division at all times relevant to this case, holding Registration NO. 1031203.
2. A complaint in the matter has been brought and properly filed pursuant to the provisions of Utah Code Annotated Section 61-1-1, et seq., (1953, as amended).
3. Cannon admits the jurisdiction of the Division over him and over the subject matter of this action.
4. Cannon specifically waives the right to confront adverse witnesses and the right to a hearing pursuant to Utah Code Annotated Section 61-1-1, et seq., (1953, as amended), and the

rules and regulations promulgated thereunder.

5. The Division and Cannon recognize and agree that this Stipulation alone shall not be binding upon the Advisory Board. If the Advisory Board and the Executive Director of the Department of Commerce do not concur in the disciplinary action proposed herein, this Stipulation shall be of no further force or effect and a formal hearing shall be scheduled for this licensure action.

6. Cannon acknowledges that upon approval by the Advisory Board and the Executive Director, this Stipulation shall be made a part of the attached final Order, and shall be the final compromise and settlement of this registration action.

7. Cannon acknowledges that he enters into this Stipulation voluntarily, and that no promise or threat whatsoever has been made by the Division, or any member, officer, agent, or representative of the Division to induce him to enter into this Stipulation.

**Cannon, without admitting or denying the allegations, consents to the following Findings of Fact and Conclusions of Law:**

**FINDINGS OF FACT**

8. On March 15, 1989, the Division served a Subpoena Duces Tecum on Cannon requesting a complete list of all the investors in two limited partnerships in which Cannon was a general partner.

9. The Subpoena required that Cannon provide the information to the Division by March 24, 1989. The information has not been provided to the Division.

10. Cannon served as a general partner of a limited partnership known as ATC-Stanfield Limited Partnership (hereinafter referred to as ATC.) Cannon knew, prior to soliciting investors,

that annual payments would be required from individual investors.

11. During the time relevant to the facts of this stipulation, Cannon was associated with Private Ledger as a securities agent. Cannon did not inform Private Ledger that he was selling interests in ATC. Cannon had no written or verbal authorization from Private Ledger to sell interests in ATC.

12. Cannon solicited Mr. and Mrs. Robert Cox to invest in ATC. The Coxes were unaware that an annual payment was required and Cannon did not inform the Coxes of the required annual payment.

13. Cannon knew that the required annual payments made the investment unsuitable for the Coxes. Cannon knew the Coxes would not have purchased the securities if they had known about the annual payments.

#### CONCLUSIONS OF LAW

14. The above acts and practices constitute violations of the following sections of Utah Code Annotated (1953, as amended):

a. 61-6-6 (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." The sections willfully violated under this chapter are:

1. 61-1-1 (2) which states that it is unlawful for a person to make an untrue statement of a material fact or omit to state a material fact that would make the statements made misleading.

2. 61-1-1 (3) which states that it is unlawful for


a person to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

b. 61-1-6 (g) "engaged in dishonest or unethical practices in the securities business." The rule violated was:

1. Rule 177-6-1 (g) (b) (2) which states that it is dishonest or unethical conduct to effect transactions not recorded on the regular books or records of the broker-dealer which the agent represents unless the transactions are authorized in writing by the broker-dealer.

15. The Division and Cannon propose that Cannon's registration to act as a securities agent be suspended for a period of two years and immediately at the end of the suspension period, Cannon's registration be on probation for 1 year, for a total of three years of sanctions. The sanction is to begin on the date set by the Utah Securities Advisory Board and the Executive Director of the Department.

16. This Stipulation constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representations, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or affect this agreement.

  
JOHN C. BALDWIN, Director  
Utah Securities Division

6/14/89  
DATED

  
GREGG B. CANNON

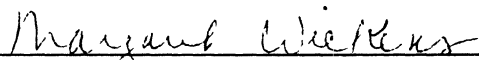
6/14/89  
DATED


**ORDER**

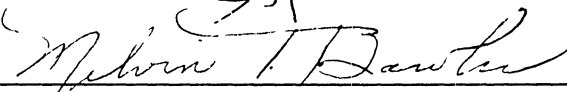
Based upon the foregoing stipulation and for good cause appearing therefore:

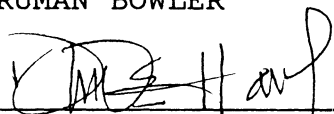
**IT IS HEREBY ORDERED** that effective Aug. 17, 1989, Cregg Cannon's registration to act as a securities agent be suspended for two years and placed on probation for one year immediately following the end of the suspension period.

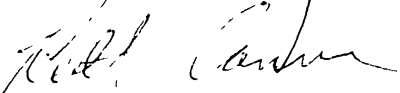
**UTAH SECURITIES ADVISORY BOARD**

  
MARGARET WICKENS

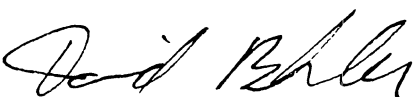
  
KENT BURGON

  
TRUMAN BOWLER

  
DAVID HARDY

  
KEITH CANNON

**EXECUTIVE DIRECTOR, DEPT. OF COMMERCE**

  
DAVID BUHLER



State of Utah  
DEPARTMENT OF COMMERCE  
Division of Securities

Norman H. Bangerter  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

160 East 300 South  
P.O. Box 45802  
Salt Lake City, Utah 84145-0802  
(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of the Notice of Agency Action, Petition, Exhibit A of Paul W. Jones found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

)

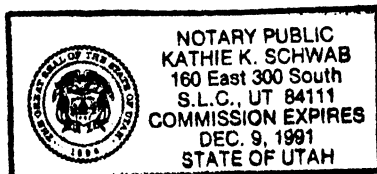
SS

COUNTY OF SALT LAKE

)

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah





# COPY

R. PAUL VAN DAM #3312  
Attorney General  
MARK J. GRIFFIN #2773  
Assistant Attorney General  
115 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1331

---

BEFORE THE UTAH SECURITIES DIVISION

---

|                                   |   |                      |
|-----------------------------------|---|----------------------|
| In the Matter of the Registration | ) |                      |
| of Paul W. Jones, to Act as       | ) |                      |
| Securities Agent.                 | ) |                      |
|                                   | ) | PETITION             |
| CRD NO. 1494831                   | ) | Case No. EN-00059-17 |

---

The Securities Division of the Department of Commerce of the State of Utah ("the Division"), hereby complains and alleges as follows:

**PRELIMINARY STATEMENT**

Facts supporting this cause of action were investigated by the Division pursuant to §61-1-5 and §61-1-19 of the Utah Uniform Securities Act ("the Act"), following complaints regarding the sale of U.S.A Medical stock to Johnson-Bowles Company, Inc., in violation of §61-1-7 of the Act.

**JURISDICTION**

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

2. Paul W. Jones is a Securities Agent registered with the State of Utah under §61-1-4 of the Act and Rule R177-4-1 of the Division, CRD registration number 1494831.

3. Paul W. Jones ("Jones") is an agent of Wasatch Stock Trading Company, broker-dealer registered with the Division.

#### **STATEMENT OF FACTS**

4. Prior to March 1, 1989, Jones, as an agent for Wasatch Stock Trading, was actively trading in the stock of U.S.A. Medical Corporation.

5. On or about March 1, 1989, the Division issued a Summary Order (Case No. SD-89-030) denying the availability of all transactional exemptions from registration for the securities of U.S.A. Medical Corporation, pursuant to the authority granted to the Division in §61-1-14(3) of the Act. A copy of the Summary Order was delivered to Wasatch Stock Trading Company on or about 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. (Exhibit A)

6. On or about March 3, 1989, a compliance meeting was held at Wasatch Stock Trading Company at which Mr. Jones was present. At that meeting, were present several agents who had traded U.S.A. Medical stock. In that meeting, the compliance officers of Wasatch Stock Trading Company notified the agents of the existence of the Division's Order of March 1, 1989 and made available a copy of that Order for the agents' examination.

7. 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 U.S.A. Medical (Case No. SD-89-031). A copy of the Notice Agency Action and Petition was mailed to Wasatch Stock Trading Company on March 2, 1989.

8. 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 U.S.A. Medical Corporation, any affiliate or successor to U.S.A. Medical organized by or on behalf of U.S.A. Medical. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Wasatch Stock Trading Company on March 27, 1989.

9. On or about April 18, 1989, Jones sold to Johnson-Bowles Company through Marlen Vernon Johnson 100,000 shares of U.S.A. Medical at \$.08 per share.

10. The sale of 100,000 shares of U.S.A. Medical stock on April 18, 1989 was not recorded on the regular books and records of Wasatch Stock Trading Company. Jones did not secure before the sale the written permission of Wasatch Stock Trading to

engage in the sale of U.S.A. Medical stock and the Wasatch Stock Trading Company did not know at the time of Jones' sale of U.S.A. Medical stock.

#### COUNT I

11. The Division realleges and incorporates by reference the Facts set forth in paragraphs 1-10 above.

12. §61-1-6(1) of the Act provides that the Division may issue an Order suspending or revoking the registration of an agent if it finds that such Order is in public interest and the agent:

(b) Has willfully violated or willfully failed to comply with any provision of this chapter or predecessor act or any Rule or Order under this chapter of predecessor act; . . .

13. The above-described sales of U.S.A. Medical were sales effected in willful violation of §61-1-7 of the Act which provides as follows:

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

14. The actions of Jones in selling the 100,000 shares of U.S.A. Medical during the pendency of the Division's Order amounts to a willful violation of §61-1-7, and is grounds for revocation under §61-1-6(1)(b).

#### COUNT II

15. The petitioner realleges and incorporates by reference the allegations set forth in paragraphs 1 through 10 above.

16. §61-1-6(1)(g) provides that the Division may issue and Order suspending or revoking the Registration of an agent if it finds that such Order is in the public interest and the agent has engaged in dishonest or unethical practices in the Securities business.

17. Rule R117-6-1g(b)(2) of the Division, promulgated under the authority of §61-1-24 and §61-1-6(1)(g) of the Act establishes that the following acts and practices by agents constitute grounds for suspension or revocation of registration:

(2) Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, in the case of agents of broker-dealers, unless the transactions are authorized in writing by the broker-dealer prior to the execution of the transaction.

18. Jones, in selling the 100,000 share of U.S.A. Medical stock to Johnson-Bowles, effected securities transactions not recorded on the regular books or records of the broker-dealer which the agent represented. In addition, the broker-dealer did not supply, prior to the execution of the transaction, permission in writing to effect those transactions.


19. The above action by Jones constitutes dishonest and unethical practices within the meaning of §61-1-6(1)(g) of the Act and Division Rule R177-6-1g and is grounds for revocation.

### COUNT III

20. The Division realleges and incorporates by reference its allegation set forth in paragraphs 1 through 20 as specifically set out herein.

4. For such other relief as the Division deems appropriate.  
DATED this 31<sup>st</sup> of July, 1989.

R. PAUL VAN DAM  
Attorney General

  
\_\_\_\_\_  
MARK J. GRIFFIN  
Assistant Attorney General



S

DEPARTMENT OF COMMERCE  
Division of Securities

Norman H. Bangerter  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

160 East 300 South

P.O. Box 45802

Salt Lake City, Utah 84145-0802

(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of Finding of Fact, Conclusions of Law and Undertakings of Respondent William R. Lambert found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

)

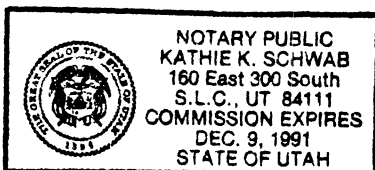
ss

COUNTY OF SALT LAKE

)

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah



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

|                     |   |                            |
|---------------------|---|----------------------------|
| IN RE:              | ) |                            |
| WILLIAM R. LAMBERT, | ) |                            |
| an individual,      | ) | FINDINGS OF FACT,          |
|                     | ) | CONCLUSIONS OF LAW AND     |
|                     | ) | UNDERTAKINGS OF RESPONDENT |
| RESPONDENT          | ) |                            |
|                     | ) | CASE NO. 88-01-06-01       |
|                     | ) |                            |
|                     | ) |                            |

The Utah Division of Securities having received a written complaint against the above named Respondent, having investigated the facts thereof and determined thereby that Respondent has engaged in conduct which violates the Utah Uniform Securities Act and has so advised Respondent. Respondent is desirous of resolving the charges against him without a formal hearing and the Utah Securities Division is agreeable to such resolution, provided Respondent agrees to certain sanctions and to undertake certain corrective action with respect to the violations which have been committed.

NOW, THEREFORE,

The Utah Division of Securities and the Respondent above named, do hereby agree to the following Findings of Fact and Conclusions of Law, and Respondent does hereby agree to the following Undertakings:



### FINDINGS OF FACT

1. William R. Lambert is a resident of Provo, Utah, engaged in the business of providing financial advice and receiving fees therefor. Lambert has never registered as an investment advisor with the Utah Division of Securities as required by Section 61-1-3, Utah Uniform Securities Act.

2. Commencing on or about October 16, 1985, Respondent, William R. Lambert, undertook to provide financial advice to Evelyn H. Lofgran of Springville, Utah for which Lofgran paid him a fee. Lambert engaged in market activity involving margin purchases of options which were beyond the experience, understanding and financial capacity of, and therefore, unsuitable for, Lofgran who invested approximately \$70,000 through Lambert.

3. As a result of the actions of the Respondent herein described, by October 30, 1987, the Lofgran had lost approximately \$38,500, a loss which she, an elderly widow, could not afford.

### CONCLUSIONS OF LAW

1. That the conduct of Respondent William R. Lambert was a violation of Section 61-1-3(3) of the Utah Uniform Securities Act in that Lambert did engage in the business of acting as an investment advisor, as defined in Section 61-1-13(10) of the Act, without being duly registered.

### UNDERTAKING OF RESPONDENTS

Respondent William R. Lambert agrees as follows:

a. to refrain from engaging in the sale of securities, providing investment advice or acting as a broker dealer until

properly and duly licensed with the appropriate authorities, and

b. to refrain from future violations of the Utah Uniform Securities Act.

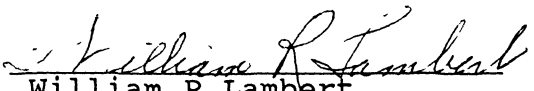
c. to contribute to the public education fund of the Securities Division of the State of Utah the amount of \$500.00

DATED this 17 day of April, 1989.

UTAH DIVISION OF SECURITIES

RESPONDENT

By:   
John C. Baldwin  
Director

  
William R. Lambert

- 1) I am now in the process of becoming registered
- 2) I assume (C) can be complied with some time in the reasonable future.



Norman H Bangerter  
Governor

David L Buhler  
Executive Director

John C Baldwin  
Director

St.

DEPARTMENT OF COMMERCE  
Division of Securities

160 East 300 South

P O Box 45802

Salt Lake City Utah 84145 0802

801) 530 6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of the Order and Stipulation of Brahman Financial Corp. found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

)

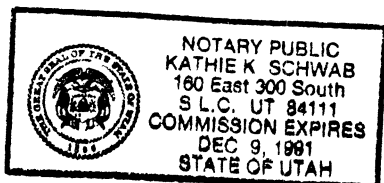
ss

COUNTY OF SALT LAKE

)

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah



1 RICHARD C. CAHOON - #A535  
2 MARSDEN, ORTON & CAHOON  
3 ATTORNEYS FOR PLAINTIFF  
4 68 SOUTH MAIN, SUITE 500  
5 SALT LAKE CITY, UTAH 84101  
6 TELEPHONE: (801) 521-3800

---

7  
8 IN THE THIRD JUDICIAL DISTRICT COURT  
9 OF SALT LAKE COUNTY, STATE OF UTAH  
10 -----

11 STATE OF UTAH, by and through )  
12 the UTAH SECURITIES DIVISION )  
13 OF THE DEPARTMENT OF BUSINESS ) ORDER  
14 REGULATION, )  
15 )  
16 Plaintiff, )  
17 vs. ) Civil No. 890901303AA  
18 )  
19 BRAHAM FINANCIAL CORPORATION, )  
20 a Nevada corporation, dba ) Judge Scott Daniels  
21 BRAHMAN SECURITIES, MARK )  
22 EAMES, MICHAEL COOPER, GARTH )  
23 POTTS, DAN W. PULLEY, LARRY )  
24 R. SIMMONS, ROBERT EAMES, and )  
GEORGE B. STARKS, )  
Defendants. )

---

18  
19 Upon Stipulation of the parties hereto and good cause  
20 appearing it is hereby

21 ORDERED, ADJUDGED AND DECREED that if the Defendants  
22 substantially comply with the terms of the Stipulation  
23 attached hereto as Exhibit "A" and made a part hereof by  
24 reference this case shall be dismissed with prejudice

1 pursuant to the terms of the Stipulation.  
2  
3

4 DATED this 13 day of March, 1989.  
5

6 BY THE COURT:

7 /s/ Scott Daniels  
8 DISTRICT COURT JUDGE  
9  
10  
11  
12  
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24

1 RICHARD C. CAHOON - #A535  
2 MARSDEN, ORTON & CAHOON  
3 ATTORNEYS FOR PLAINTIFF  
4 68 SOUTH MAIN, SUITE 500  
5 SALT LAKE CITY, UTAH 84101  
6 TELEPHONE: (801) 521-3800

7 -----  
8  
9 IN THE THIRD JUDICIAL DISTRICT COURT  
10  
11 OF SALT LAKE COUNTY, STATE OF UTAH  
12 -----

13 STATE OF UTAH, by and through )  
14 the UTAH SECURITIES DIVISION )  
15 OF THE DEPARTMENT OF BUSINESS ) STIPULATION  
16 REGULATION, )  
17 )  
18 Plaintiff, ) Civil No. 890901303AA  
19 )  
20 vs. )  
21 ) Judge Scott Daniels  
22 BRAHMAN FINANCIAL CORPORATION, )  
23 a Nevada corporation, dba )  
24 BRAHMAN SECURITIES, MARK )  
EAMES, MICHAEL COOPER, GARTH )  
POTTS, DAN W. PULLEY, LARRY R. )  
SIMMONS, ROBERT EAMES, and )  
GEORGE B. STARKS, )  
Defendants. )

25 -----  
26  
27 The State of Utah by and through the Utah Security Division  
28 of the Department of Business Regulations, hereinafter referred  
29 to as the "Plaintiff," and the Defendants, Brahman Financial  
30 Corporation, a Nevada corporation, Mark Eames, Michael Cooper,  
31 Garth Potts, Dan W. Pulley, Larry R. Simmons, Robert Eames and  
32 George B. Starks, hereby stipulate, so long as the Defendants are

*Exhibit A*

1 employed as independent contractors of the Investment Center,  
2 Inc., as follows:

3 1. All of the business forms, business cards and stationary  
4 will clearly indicate that the Investment Center, Inc. is the  
5 Broker-Dealer.

6 2. All new account forms for Brahman, the Investment  
7 Center, Inc. will be signed by a duly authorized principal of the  
8 Investment Center, Inc. and a copy bearing the principals'  
9 signature will be maintained in the Brahman office of the  
10 Investment Center.

11 3. There will be kept in the Brahman office of the Invest-  
12 ment Center, Inc. in a central location for the inspection of the  
13 Utah Securities Commission the following:

14 (a) Daily Trade Blotter of all trades;

15 (b) An alphabetical listing of all new accounts;

16 (c) Check ledger;

17 (d) Copies of all checks received and forwarded to the  
18 Investment Center, Inc.; and

19 (e) Copies of all stock certificates received and  
20 forwarded to the Investment Center, Inc.

21 4. Each individual Defendant will keep his own personal  
22 copy of the new account form and a record of all trades which he  
23 has made with regard to each of his clients.

24 5. All monies received from the sale of stock will be

1 forwarded to the Investment Center, Inc.

2 6. The Investment Center, Inc. will issue a check to  
3 Brahman, the Investment Center, Inc. and Brahman will issue  
4 checks to the other Defendants for services rendered pursuant to  
5 an assignment of commission form executed with the Investment  
6 Center, Inc. by each of the Defendants after deducting a propor-  
7 tionate share of the cost of the operations of the branch office.  
8 No additional compensation shall be received for supervisory  
9 activities unless the individual assuming those responsibilities  
10 meets N.A.S.D. requirements to act in that capacity.

11 7. The Defendants agree that the Investment Center, Inc. is  
12 the Broker-Dealer having supervisory responsibility over security  
13 transactions made by Brahman, the Investment Center, Inc. The  
14 Defendants shall have the right to sell all securities which the  
15 Investment Center, Inc. has approved for sale.

16 8. The Defendants agree that in all solicitations for the  
17 sale or purchase of securities they will inform their clients of  
18 the bid and ask prices and indicate to their customer that the  
19 Investment Center, Inc. will not repurchase the securities at a  
20 price greater than the bid price.

21 9. The Defendants agree that they will not use any informa-  
22 tion in connection with the purchase or sale of any securities  
23 which is not in writing and contained in their due diligence  
24 files.




1           10. The Defendant, Michael Cooper, shall not work at the  
2 Investment Center branch office until such time as he has been  
3 duly registered by the N.A.S.D. and the Utah Securities Division.

4           11. Brahman, the Investment Center, Inc., shall not allow  
5 any individual to work as a broker until such time as he or she  
6 is duly registered with the N.A.S.D. and the Utah Securities  
7 Division.

8           12. The parties acknowledge and agree that this Stipulation  
9 has been made for the purpose of compromising the disputed  
10 allegations set forth in the Plaintiff's Complaint and shall not  
11 be construed as an admission by any party of the allegations set  
12 forth in the Plaintiff's Complaint.

13           13. This Stipulation shall be in effect for a period of  
14 twelve (12) months or so long as the Defendants are independent  
15 contractors employed by the Investment Center, Inc., whichever is  
16 longer. Unless the Plaintiff files an objection with the Court  
17 within three (3) days after a Defendant delivers to the Plaintiff  
18 and the Court an Affidavit stating the Defendant is no longer  
19 employed as an independent for the Investment Center, Inc., the  
20 Plaintiff's Complaint against the Defendants shall be dismissed  
21 with prejudice. At the end of the twelve (12) month period, if  
22 the Defendants have substantially complied with the terms of this  
23 Stipulation, this action shall be dismissed with prejudice upon  
24 motion of the Defendants.

1 DATED this 10 day of March, 1989.

2   
3 Richard C. Cahoon  
4 Attorney for Defendants

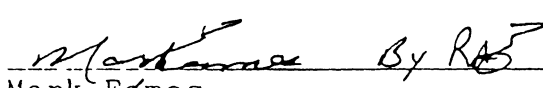
5   
6 Mark J. Griffin  
7 Attorney for Plaintiff

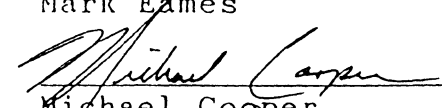
8 STATE OF UTAH, UTAH SECURITIES  
9 DIVISION OF THE DEPARTMENT OF  
10 BUSINESS REGULATION

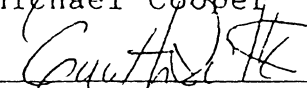
11 By: 

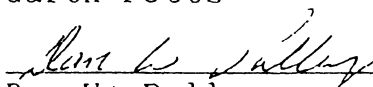
12 BRAHMAN FINANCIAL CORPORATION

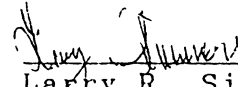
13 By: 

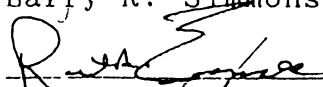
14  By RAB  
15 Mark Eames

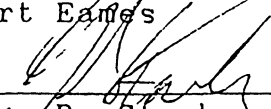
16   
17 Michael Cooper

18   
19 Garth Potts

20   
21 Dan W. Pulley

22   
23 Larry R. Simmons

24   
Robert Eames

  
George B. Starks



Norman H. Bangertter  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

St

DEPARTMENT OF COMMERCE  
Division of Securities

160 East 300 South

P.O. Box 45802

Salt Lake City, Utah 84145-0802

(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of the Settlement Agreement of Mark K. Hesterman found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

)

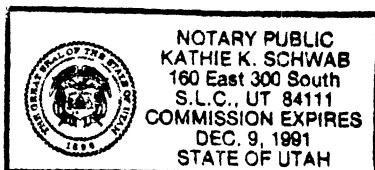
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COUNTY OF SALT LAKE

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah



DIVISION OF SECURITIES  
DEPARTMENT OF COMMERCE  
JOHN C. BALDWIN, DIRECTOR  
KATHLEEN C. MCGINLEY, DIRECTOR  
BROKER-DEALER SECTION  
P.O. BOX 45802  
160 EAST 300 SOUTH  
SALT LAKE CITY, UTAH 84145-0802  
TELEPHONE: (801) 530-6600



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BEFORE THE DIVISION OF SECURITIES

FOR THE

STATE OF UTAH

---

|                                   |   |                      |
|-----------------------------------|---|----------------------|
| In the Matter of the Registration | : |                      |
| of Mark K. Hesterman              | : |                      |
| to Act as a Securities Agent      | : | SETTLEMENT AGREEMENT |
|                                   | : |                      |
| CRD No. 1537637                   | : | CASE NO. EN-00549-16 |

---

The Securities Division of the Department of Commerce of the State of Utah (the Division), by and through its Director, John C. Baldwin, and Mark K. Hesterman, a registered securities agent, hereby stipulate and agree as follows:

STIPULATION

1. Hesterman is and has been a registrant of the Division at all times relevant to this case, holding CRD No. 1537637.
2. Hesterman admits the jurisdiction of the Division over him and over the subject matter of this action.
3. Hesterman specifically waives the right to confront adverse witnesses and the right to a hearing pursuant to Utah Code Annotated Section 61-1-1, et seq. (1953, as amended), and the rules and regulations promulgated thereunder.
4. Hesterman acknowledges that upon approval by the Division Director, this Stipulation shall be the final compromise and

settlement of this registration action.

5. Hesterman acknowledges that he enters into this Stipulation voluntarily, and that no promise or threat whatsoever has been made by the Division, or any member, officer, agent, or representative of the Division to induce him to enter into this Stipulation.

Hesterman, without admitting or denying the allegations, consents to the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

6. At all times relevant to the facts of this case, Hesterman was a registered representative at Main Street Securities or Covey & Co.

7. On or about June 26, 1987, Hesterman sold Paul Stephan (purchaser) 8,000 shares of Peanuts, Inc. at \$1.25 per share. Peanuts later became Covest, Inc.

8. During the first quarter of 1988, Hesterman told purchaser that Covest shares were trading at approximately \$1.60 per share. The actual trading price at this time was between .46¢ and .87½¢ per share.

9. Also during the first quarter of 1988, Hesterman told purchaser that Covest shares had gone through a 2 for 1 forward stock split causing purchaser to own 16,000 rather than 8,000 shares. The stock split never occurred.

10. In January 1989, Hesterman told purchaser that Covest, Inc. shares were trading for approximately \$1.00 per share. The actual trading price of Covest, Inc. at this time was approximately .12½¢. At this time, purchaser requested that Hesterman sell 2,500

shares of Covest. Hesterman attempted to make the trade but could find no buyers for more than  $.12\frac{1}{2}\text{¢}$  per share. The trade was never executed, but Hesterman verbally confirmed to purchaser that the trade had been executed and that purchaser would receive payment in approximately one week.

11. On March 15, 1989, Hesterman sent purchaser \$948 from Hesterman's personal funds. Hesterman told purchaser the funds were from the sale of a portion of purchaser's Covest, Inc. shares.

#### CONCLUSIONS OF LAW

12. The above acts and practices constitute violations of the following sections of Utah Code Annotated (1953, as amended):

a. 61-1-6 (g) "engaged in dishonest or unethical practices in the securities business."

13. The Division and Hesterman agree:

a. that Hesterman's registration to act as a securities agent be suspended for ten (10) days from June 27, 1990 through July 6, 1990; preventing Hesterman from engaging in any activity in any capacity as a securities agent during that time: and

b. that Hesterman's registration to act as a securities agent be placed on probation for a period of one (1) year beginning July 7, 1990 through July 7, 1991; and

c. that during the time of the probation, Hesterman will receive daily supervision of all trades as follows: Mark Hesterman, while associated with any broker-dealer registered in the state of Utah, shall have all trade tickets he has written that day reviewed and initialed on a daily basis by the firm's principle or the Head Trader so that such review is completed prior to the

time confirmations of sale are mailed to the customers; and

d. that failure to comply with the provisions of Paragraph 14 (c), above, shall constitute a separate violation of Hesterman's probation and this Settlement Agreement; and

e. that Hesterman shall pay a \$500 fine, by July 6, 1990 to the Division. The fine will be placed in the Securities Investor Training and Education Fund.

14. This Stipulation constitutes the entire agreement between the parties herein and supersedes and cancels any and all prior negotiations, representation, understandings, or agreements between the parties. There are no verbal agreements which modify, interpret, construe, or affect this agreement.

June 18, 1990  
DATED

John C. Baldwin  
JOHN C. BALDWIN, Director  
Utah Securities Division

I, Mark K. Hesterman, swear under oath that I have not knowingly participated in the practice of trading in nominee accounts for the purpose of unfairly manipulating market prices or to hide or disguise the beneficial ownership of stock or for any other purpose not acceptable under the law.

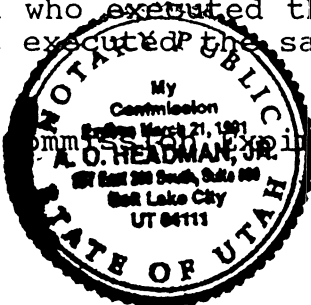
June 15, 1990

Mark K. Hesterman  
MARK K. HESTERMAN

County of Salt Lake )  
                                  )  
State of Utah                ) ss.

On this 15th day of June, 1990, before me personally appeared Mark K. Hesterman, to me known to the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

My Comm. Expires: March 21, 1991



A.O. Headman, Jr.  
Notary Public



State  
DEPARTMENT OF COMMERCE  
Division of Securities

Norman H. Bangerter  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

160 East 300 South

P.O. Box 45802

Salt Lake City, Utah 84145-0802

(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct statement of the order suspending the license of Paul Ira Nixon as a registered securities agent found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

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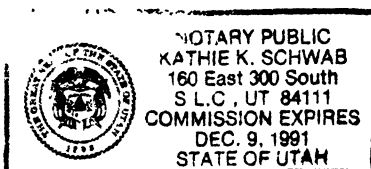
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COUNTY OF SALT LAKE

)

On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

\_\_\_\_\_  
Notary Public  
Residing in Salt Lake County  
State of Utah





SECURITIES AGENT SUSPENDED...  
SOLD SECURITIES TO INVESTORS AT UNFAIR MARKUPS

The Securities Division in the Utah Department of Commerce issued an Order suspending the license of Paul Ira Nixon as a registered securities agent for eighteen (18) months and placing him on probation for two years. The Order was part of a Stipulation agreement wherein Mr. Nixon admitted the allegations and consented to a finding that he had engaged in dishonest or unethical practices in the securities business.

The Division's Stipulation and Order was based on a previous action taken by the National Association of Securities Dealers (NASD) against Mr. Nixon.

The NASD complaint alleged Mr. Nixon effected 78 principle sale transactions in the securities of Rimrock Industries, Inc. with retail customers at prices that included unfair markups. The complaint also alleged that 77 of those transactions were executed at prices that reflected markups exceeding 10 percent. A markup is the profit earned by the brokerage firm and the agent on the sale of securities.

In a stipulation with the NASD, Mr. Nixon, without admitting or denying the charges, agreed to pay a fine and to the suspension of his securities license by the NASD. In order to act as a securities agent in this state, an individual must be licensed with both the state of Utah and the NASD, a self-regulatory organization of the securities industry.

Nixon was a securities agent with Western Capital & Securities, now out of business, at the time the alleged acts took place. 6



DEPARTMENT OF COMMERCE  
Division of Securities

Norman H. Bangert  
Governor

David L. Buhler  
Executive Director

John C. Baldwin  
Director

160 East 300 South  
P O Box 45802  
Salt Lake City Utah 84145-0802  
(801) 530-6600

CERTIFICATE OF CUSTODIAN OF RECORDS

I CERTIFY that I am custodian of all records pertaining to the Utah Securities Division and that I am a public officer of the State of Utah by virtue of Title 61-1-18 U.C.A. 1953, as amended.

I HEREBY CERTIFY that the attached is a true and correct copy of the Stipulation and Order, Petition for Suspension of Warren & Brown Associates found in the records of the Utah Securities Division.

IN WITNESS WHEREOF, I have attached my seal of office this 28 day of December, 1990.

DEPARTMENT OF COMMERCE  
UTAH SECURITIES DIVISION

EARL S. MAESER  
DIRECTOR

STATE OF UTAH

)

COUNTY OF SALT LAKE

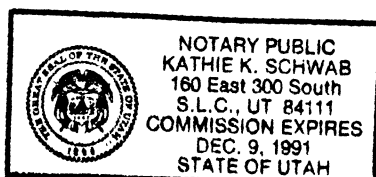
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On the 28 day of December, 1990, personally appeared before me Earl S. Maeser, the signer of the foregoing certificate, who duly acknowledged to me that he executed the same.

Notary Public  
Residing in Salt Lake County  
State of Utah



SECURITIES DIVISION  
UTAH DEPARTMENT OF BUSINESS REGULATION  
Heber M. Wells Building, Second Floor  
160 East 300 South  
P.O. Box 45802  
Salt Lake City, Utah 84145  
Telephone: (801) 530-6600

---

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

---

---

|                     |   |                          |
|---------------------|---|--------------------------|
| IN THE MATTER OF    | : |                          |
|                     | : |                          |
| the Registration of | : | STIPULATION AND ORDER    |
| Warren & Brown      | : |                          |
| Associates Inc. and | : | Case No. <i>SD-87-14</i> |
| Thomas R. Warren    | : |                          |

---

STIPULATION

Come now the parties in this proceeding and stipulate and agree as follows:

1. The petitioner is a division of the Department of Business Regulation established by Utah Code Ann. § 61-1-13 (1983), as amended, of the Act and is empowered under the Act to investigate violations of the Act and to bring actions to enforce the Act by administrative and civil actions. Utah Code Ann. § 61-1-1 (1983), as amended, et seq.

2. Respondent Brown is a Utah corporation registered with the petitioner as a broker-dealer. Formerly, respondent Brown was known as Edward Brown Securities.

3. Respondent Warren is an individual registered with the petitioner as agent. Warren also acts as a principal and is president of respondent Brown.

4. On or about February 11, 1986, Robin Hales applied with the petitioner to become a registered agent of respondent Brown.

5. On or about February 19, 1986, and continuing until July 1986, while her application for registration was pending with the petitioner, Robin Hales represented Warren & Brown in effecting or attempting to effect purchases or sales of securities for certain existing Warren & Brown customers and for certain customers which Robin hales introduced to the firm.

6. During the period of February 1986 through August 1986, Robin Hales took the required practice knowledge examination and passed said examination on the eighth attempt.

7. On or about September 20, 1986, Robin hales passed the required practice knowledge examination, and October 1, 1986, she was registered with the petitioner as an agent of respondent Brown.

8. During the period of February 1986 through June 1986, respondent Warren was aware of and supervised Hales' activity at the firm.


9. By allowing Hales to represent Warren & Brown in effecting or attempting to effect purchases or sales of securities for certain existing Warren & Brown customers and for

certain customers which Robin Hales introduced to the firm, respondents violated Utah Code Ann. § 61-1-3 (1983), as amended.

10. The parties consent to the entry of the following order.

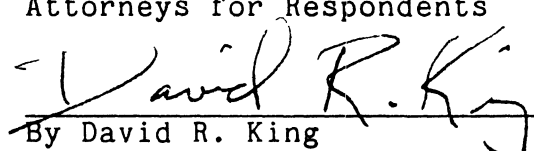
DATED this 21<sup>ST</sup> day of May, 1987.

WARREN & BROWN ASSOCIATES, INC.

  
By Thomas R. Warren, President

  
THOMAS R. WARREN, Individually

KRUSE, LANDA & MAYCOCK  
A Professional Corporation  
Attorneys for Respondents

  
By David R. King

UTAH SECURITIES DIVISION

  
MARK C. MOENCH  
Assistant Attorney General

ORDER

Pursuant to the above stipulation, which is incorporated herein by reference, and for good cause appearing therefore:

IT IS HEREBY ORDERED THAT the licenses of Warren & Brown Associates, Inc. and Thomas R. Warren are suspended for a period of one day, which suspension shall take place on May 25, 1987, and;

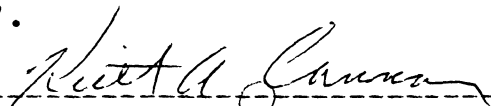

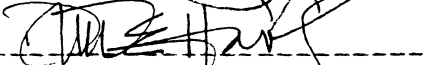
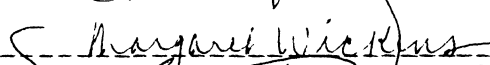
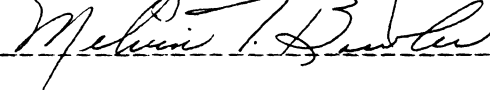
Warren & Brown will pay an amount of \$1,000 to the State of Utah, \$250 of which will reimburse the Utah Securities Division for the cost of its investigation and \$750 to which will go the Department of Business Regulation Consumer Education Fund.

DATED this 16<sup>th</sup> day of ~~May~~<sup>June</sup>, 1987.



J. STEVEN EKLUND  
Administrative Law Judge

Confirmed, approved, and adopted by the Advisory Board  
this 16<sup>th</sup> day of June, 1987.

Confirmed, approved, and adopted by the Executive  
Director.

  
WILLIAM E. DUNN