

1990

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark J. Griffin; Attorney for Appellees.

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

Recommended Citation

Legal Brief, *Johnson-Bowles Company v. The Division of Securities and the Utah Department of Commerce*, No. 900558 (Utah Court of Appeals, 1990).

https://digitalcommons.law.byu.edu/byu_ca1/2983

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

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.

BRIEF OF PETITIONERS

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 So. 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

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

 Petitioners,

 v.

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

 Respondents.

BRIEF OF PETITIONERS

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 So. 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

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
(a) Standard of Review	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	3
(a) Nature of the Proceedings.	3
(b) Course of Proceedings and Disposition Below . . .	4
RELEVANT FACTS	7
Additional Facts Relevant to this Appeal.	18
SUMMARY OF ARGUMENT	19
DETAIL OF ARGUMENT	22
ORDERS AND AGENCY ACTION FROM WHICH APPEAL IS SOUGHT AND REASONS WHY SUCH ARE ERRONEOUS AND THE ENTIRE PROCEEDINGS SHOULD BE REVERSED AND VACATED	22
1. THE ALJ'S JULY 14, 1989, ORDER GRANTING THE DIVISION'S MOTION TO CONVERT THE PROCEEDINGS FROM INFORMAL TO FORMAL IS ERRONEOUS AND HAS PREJUDICED PETITIONERS. ACCORDINGLY, THE PROCEEDINGS SHOULD BE REVERSED.	23
2. THE ALJ'S AUGUST 29, 1989, ORDER DENYING PETITIONERS' MOTION TO DISMISS THE DIVISION'S AMENDED PETITIONS UNDER RULE 12(b)(1), UTAH RULES OF CIVIL PROCEDURE, FOR LACK OF SUBJECT- MATTER JURISDICTION IS ERRONEOUS. BECAUSE THE DIVISION LACKED SUBJECT-MATTER JURISDICTION UNDER THE PECULIAR FACTS OF THIS CASE, THE PROCEEDINGS BELOW SHOULD HAVE BEEN DISMISSED.	25
A. Under the facts of this case, the Division's disciplinary actions are regulation inconsistent with the preemptive SEC and NASD regulatory scheme and Petitioners' obligations thereunder. Because such state action is repugnant to the Securities	

Exchange Act of 1934 over which federal courts have exclusive jurisdiction and it is otherwise an illogical attempt to frustrate a federal purpose, the proceedings below should have been dismissed.	25
B. The Division's amended petitions give unlawful extra-territorial effect to its March 1, 1989, Summary Order.	27
C. Under the "Non-Delegation Doctrine" in administrative law, the August 29, Order or Ruling is erroneous and must be reversed.	30
D. Based on the Division's own "enabling statute", the Division lacks power and authority to regulate in a manner that conflicts with and supersedes the Securities Exchange Act of 1934, and therefore, the Order of August 29, which erroneously concludes the contrary, must be reversed	33
E. Because the August 29, 1989 Order "conflicts" with the rules and regulations promulgated under the Securities Exchange Act, including §28(a) thereof, it is preempted by federal law. Therefore, the Order of August 29 is erroneous and must be reversed.	36
3. FORMER DIVISION DIRECTOR JOHN C. BALDWIN'S OCTOBER 30, 1989, ORDER ON AGENCY REVIEW DENYING ANY ADMINISTRATIVE AND JUDICIAL REVIEW OF THE ALJ'S AUGUST 29, 1989, ORDER IS ERRONEOUS AND HAS PREJUDICED PETITIONERS.	43
4. THE ALJ'S DECEMBER 18, 1989, ORDER DENYING PETITIONERS' MOTION TO DISMISS THE DIVISION'S AMENDED PETITIONS UNDER RULE 12(b)(6), UTAH RULES OF CIVIL PROCEDURE, FOR FAILURE TO STATE A CLAIM IS ERRONEOUS AND MUST BE REVERSED	43
A. The amended petitions are unconstitutional under the due process clauses of the Fifth and Fourteenth Amendments	43
B. The amended petitions violate Petitioners' equal protection guarantees	45
C. The amended petitions violate the privileges and immunities of Petitioners as United States citizens and federal licensees.	46

D. The amended petitions violate the mandate of comity in both the Constitution and the Utah Uniform Securities Act.	47
E. The amended petitions are unconstitutional because they have the effect of an <u>ex post facto</u> law	47
F. The amended petitions violate Petitioners' Constitution right to be free from contractual interference by a State	48
G. <u>Utah Code Ann.</u> §61-1-6(1)(g), and R177-1-6g as applied in this case are constitutionally "void for vagueness".	48
H. The amended petitions fail to state a claim because Petitioners' conduct was neither "dishonest or unethical" nor a "dishonest or unethical practice" as a matter of law	51
I. The amended petitions fail to state a claim because the Division failed to comply with <u>Utah Code Ann.</u> §61-1-14(3), as effective 1989.	54
J. The amended petitions fail to state a claim because the Division misinterpreted the statute and its own Summary Order	54
K. As a matter of law, allegations that Petitioners, as mere purchasers, "aided [and abetted]" or "participated" in the alleged non-exempt sale thereof is not actionable, and therefore, Count I of the amended petitions fails to state a claim.	55
L. The Division has no power or statutory authority to summarily suspend all §14(2) exemptions for more than 10 days. Further, to suspend exemptions in perpetuity is an unconstitutional "taking" without due process. Thus, after March 10, 1989, whatever Petitioners (or their sellers) did was not actionable.	59
M. The Division's regulatory posture relative to the securities of U.S.A. Medical after the date of its amended petitions is inconsistent with such petitions. Thus, they fail to state a claim by the Division's own subsequent policy and conduct	60

N. There must be damage or even the prospect or potential of damage to the public before a broker-dealer or agent's registration with the Division can be revoked at all, let alone for one year. Because Petitioners acted at all times in good faith and their conduct lacked any possibility of ever damaging anyone (and, on the contrary, both frustrated the fraud and protected those to whom Petitioners owed stock), the amended petitions do not achieve a legitimate state governmental purpose. Because they are not in the "public interest", they fail to state a claim.	62
5. THE ALJ'S MARCH 23, 1990, ORDER DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT UNDER RULE 56, UTAH RULES OF CIVIL PROCEDURE, IS REVERSIBLE ERROR. THIS IS BECAUSE THERE WAS NO ISSUE OF FACT AS TO WHETHER PETITIONERS ENGAGED IN SO-CALLED "DISHONEST OR UNETHICAL PRACTICES" AND SUMMARY JUDGMENT DISMISSING THE AMENDED PETITIONS SHOULD HAVE BEEN GRANTED.	63
6. FORMER DIVISION DIRECTOR JOHN C. BALDWIN'S APRIL 9, 1990, ORDER ON AGENCY REVIEW DENYING ANY ADMINISTRATIVE AND JUDICIAL REVIEW OF THE ALJ'S MARCH 23, 1990, ORDER (DENYING SUMMARY JUDGMENT) WAS ERRONEOUS AND HAS OTHERWISE PREJUDICED PETITIONERS.	66
7. THE SECURITIES ADVISORY BOARD AND DIVISION DIRECTOR JOHN C. BALDWIN'S AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON ARE PATENTLY ERRONEOUS AND SHOULD BE REVERSED.	70
A. It is legally impossible for Petitioners to be liable without having "solicited" their sellers	70
B. The August 13, Findings of Fact, Conclusions of Law and Order "Find" Petitioners guilty of a "violation" for which they were never charged . .	75
C. Because the Division only had power or authority to suspend exemptions, or even trading, for 10 days, there was no Division order in effect to proscribe (or affect) Petitioners' conduct after at least March 10, 1989. As a result, the "final agency action" is manifest error and must be reversed and dismissed.	75

D. The Conclusions of Law in the Board's August 13, 1990, Order are not supported by "substantial evidence," including, the July 8, 1990, Stipulation of Facts for Purposes of Hearing. For this reason, such Order must be reversed and the proceedings dismissed	76
E. The sanction imposed by the August 13, Order is arbitrary and ridiculous in comparison to the alleged "violation" and must be reversed accordingly.	77
F. There was no evidence to support a "finding" in the August 13, 1990, Order that Petitioners' sellers lacked exemptions from registration, and therefore, there is no evidence that Petitioners could have engaged in "dishonest or unethical practices" under any theory.	78
8. THE DIVISION'S IGNORING OF PETITIONERS' AUGUST 20, 1990, OBJECTION TO THE FORM AND CONTENT OF THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HAS PREJUDICED PETITIONERS. THE DIVISION'S FURTHER IGNORING OF PETITIONERS' AUGUST 20, 1990, DEMAND FOR DISCLOSURE OF HOW AND BY WHOM THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER WAS PREPARED, INCLUDING THE SUPPORTING AFFIDAVIT, HAS FURTHER PREJUDICED PETITIONERS	79
9. DEPARTMENT OF COMMERCE EXECUTIVE DIRECTOR DAVID L. BUHLER'S OCTOBER 29, 1990, ORDER ON AGENCY REVIEW, ADOPTING THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN ITS ENTIRETY, COMPOUNDS THE ERRORS IN ALL OF THE PREVIOUS ORDERS AND AGENCY ACTIONS FROM WHICH APPEAL IS SOUGHT.	81
CONCLUSION.	81
PROOF OF SERVICE.	83

TABLE OF AUTHORITIES

CASES CITED

	<u>Page</u>
<u>Amalgamated Association of Street, Electric Ry. & Motor Coach Employees v. Lockridge</u> , 403 U.S. 274 (1971).....	37
<u>Austin Municipal Securities, Inc. v. NASD</u> , 757 F.2d 676, ['84-'85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,027 (5th Cir. 1985).....	26
<u>Bevans v. Industrial Commission</u> , 790 P.2d 573 (Utah Ct. App. 1990).....	2
<u>Board of Governors, Federal Reserve System v. Dimension Financial Corp.</u> , 106 S. Ct. 681 (1986).....	35
<u>Boyce Motor Line, Inc. v. United States</u> , 342 U.S. 337 (1952).....	50
<u>Brewster v. Maryland Securities Commissioner</u> , (Maryland Ct. of Special Appeals, October 6, 1988), 76 Md. App. 722, 548 A.2d 157, ['88-'90 Transfer Binder], Blue Sky L. Rep. (CCH) ¶72,906, <u>cert. den.</u> 109 U.S. 2449 (Jan. 11, 1989).....	44,50,51,52
<u>Buchman v. Securities & Exchange Commission</u> , 553 F.2d 816, 821 (2nd Cir. 1977).....	63
<u>Calhoun v. Bailar</u> , 626 F.2d 145 (9th Cir. 1980).....	67
<u>Cooper v. U.S.</u> , (Ct. of Claims) 639 F.2d 727, 730 (1980).....	67
<u>Dahl v. Gardner</u> , 583 F. Supp. 1262, 1267 (D. Utah 1984).....	56
<u>Douglas v. New York, N.H. & H.R.R.</u> , 279 U.S. 377, 387-88 (1929).....	38
<u>Edgar v. Mite</u> , (U.S. Sup. Ct., June 23, 1982), 457 U.S. 624, 73 L.Ed.2 269, 102 S.Ct. 2629, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,728.....	39,40,41
<u>Federal Savings & Loan Insurance Corp. v. Provo Excelsior, Ltd.</u> , 664 F. Supp. 1405 (DC Utah), ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,754.....	74
<u>Friedman & Co.</u> , 45 S.E.C. 393 (1973).....	26
<u>G.A. Thompson v. Partridge</u> , 636 F.2d 945, 962-63 (5th Cir. 1981).....	59

<u>Golding v. Shubach Optical Co.</u> , 93 U. 32, 70 P.2d 871, 875 (Utah 1937).....	42
<u>Gonzalez v. Freeman</u> , 334 F.2d 570 (D.C. Cir. 1964).....	44
<u>Grace Drilling v. Board of Review</u> , 776 P.2d 63 (Ut. Ct. App. 1990).....	3
<u>Herman & MacLean v. Huddleston</u> , 459 U.S. 375 (1983).....	56
<u>Hines v. Davidowitz</u> , 312 U.S. 52, 67 (1941).....	36,37
<u>Kennedy v. Josephthal & Company, Inc.</u> , 814 F.2d 798 (1st Cir., 1987), ['87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,186, p. 95,859.....	70
<u>Kerbs v. Fall River Industries, Inc.</u> , (CA-10, 1974) 502 F.2d 731, ['74-'75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,788.....	57,71
<u>Klopp v. SEC</u> , 427 F.2d 455, 460-61 (6th Cir. 1970).....	2
<u>L.P. Acquisition Co. v. Tyson</u> , 772 F.2d 201 ['85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,271 at p. 91,876 (6th Cir. 1985).....	41
<u>Leroy, Attorney General of the State of Idaho v. Great Western United Corp.</u> , (U.S. Sup. Ct., 1979), 443 U.S. 173, 61 L.Ed.2d 464, 99 S.Ct. 2710, ['78 -'81 Transfer Binder] Blue Sky L. Rptr. (CCH) ¶71,488 at p.68,611 (Justice White).....	30,31,32
<u>Lintz v. Carey Manor, Ltd.</u> , 613 F. Supp. 543, 550-51 (D.C. Va. 1985).....	28
<u>Merrill Lynch, Pierce, Fenner & Smith v. Curran</u> , 456 U.S. 353 (1982).....	56
<u>Mobil Oil Corp. v. Doe</u> , 647 F.2d 142 (Em. Ct. App. 1981).....	48
<u>NLRB v. Bell Aerospace Co.</u> , 416 U.S. 267 (1974).....	44
<u>Payable Accounting Corp. v. McKinley</u> , 667 P.2d 15, 17 (Utah 1983).....	60
<u>Pennsylvania v. Nelson</u> , 350 U.S. 497, 502-505 (1956).....	37
<u>People v. Green</u> , 1 U. 11, 15-16 (Utah 1876).....	31
<u>Peters v. United States</u> , 187 Ct.Cl. 63, 408 F.2d 719 (1969).....	68

<u>Pike v. Bruce Church, Inc.</u> , 397 U.S. 137, 90 S.Ct. 844, 847-48 (1970).....	39
<u>Pinter v. Dahl</u> , (June 15, 1988), 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658, ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,790.....	71,72,75,81
<u>Pro-Benefit Staffing, Inc. v. Board of Review</u> , 775 P.2d 439 (Utah Ct. App. 1989).....	2
<u>Public Utilities Commission v. United Fuel Gas Co.</u> , 317 U.S. 456, 467, 63 S.Ct. 369, 87 L. Ed. 396 (1943).....	41
<u>R.H. Johnson & Co. v. Securities Exchange Commission</u> , 198 F.2d 690, 695 (2nd Cir.), <u>cert. denied</u> , 344 U.S. 855, 73 S.Ct. 94, 97 L.Ed. 664 (1952).....	2
<u>Retail, Wholesale & Dept. Store Union v. NLRB</u> , 499 F.2d 846 (2d Cir. 1971).....	48
<u>Richardson v. Perales</u> , 4012 U.S. 389, 402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1972).....	68
<u>Sandy State Bank of Brimhall</u> , 636 P.2d 481 (Utah 1981).....	67
<u>Schafer v. Heitner</u> , 433 U.S. 186, 197 (1977).....	29
<u>Schemmer v. Property Resources, Ltd.</u> , (1975) Ch. 273, (1974) 3 All. Er. 451, (1974) 3 WLR 406.....	28
<u>Schmidt v. Industrial Commission</u> , 617 P.2d 693 (Utah 1980).....	67
<u>Schneiderwind v. ANR Pipeline Company</u> , 108 S.Ct. 1145, 485 U.S. 293 (1988).....	37
<u>Schvanavelt v. Noy-Burn Milling & Processing Corporation</u> , 347 P.2d 553, 554 (Utah 1959).....	59
<u>Schvaveveldt v. Noy-Burn</u>	73
<u>SEC v. Dirks</u>	63,82
<u>SEC v. Dirks</u> , (U.S. Sup. Court, July 1, 1983) 463 U.S. 646, 77 L.Ed.2 911, 103 S.Ct. 3255, ['82-'83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,255, n. 8, p. 96,124	17,63,82
<u>SEC v. Ralston Purina Company</u> , 346 U.S. 119 (1953).....	61
<u>Shaskan & Co., Inc.</u> , SEC Docket 775 (May 28, 1976).....	25

<u>Singer v. Magnavox</u> , 380 A.2d 969 (Del. 1977), ['71-'78 Transfer Binder] Blue Sky L. Rep. (CCH) ¶11,399.....	27
<u>Sloan v. SEC</u> , (CA-2, 1976) 547 F.2d 152, ['76-'77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,757, <u>mod'g</u> (CA-2, 1975), 527 F.2d 11.....	59
<u>Soglin v. Kauffman</u> , 295 F. Supp. 978 (E.D. Wis. 1968), <u>aff'd</u> , 418 F.2d 163, 166 (7th Cir. 1969).....	50
<u>Southern Pacific Co. v. Arizona</u> , 325 U.S. 761, 775 (1945).....	29
<u>State v. Cragun</u> , 38 P.2d 1071 (Utah 1934).....	58
<u>State v. Fertig</u> , 233 P.2d 347 (Utah 1951).....	58
<u>Testa v. Katt</u> , 330 U.S. 368 (1947).....	38
<u>Toomer v. Witsell</u> , 334 U.S. 385, 395-96 (1948).....	39
<u>Universal Camera Corp. v. NLRB</u> , 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1954).....	2
<u>Utah Manufacturers' Assn. v. Stewart</u> , 82 U. 198, 23 P.2d 229, 235-236 (Utah 1933).....	42
<u>Vali Convalescent v. Division of Health Care Financing</u> , 140 Utah Adv. Rep. 21, 27 (Utah Ct. App. 1990).....	2,6
<u>Western Capital & Securities, Inc. v. Knudsvig</u> , (Ut. Ct. of App. Case No. 880198-CA, February 7, 1989), 101 Utah Adv. Rep. 65, 768 P.2d 989, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶94,337.....	27,31
<u>Whiteside & Co. v. Securities and Exchange Commission</u> , 557 F.2d 1118, 1121 (5th Cir. 1977).....	3
<u>Wilson v. The Industrial Commission of Utah</u> , 735 P.2d 403, 55 Utah Adv. Rep. 56 (Utah Ct. App. 1987).....	67
<u>Withrow v. Larking</u> , 421 U.S. 35, 43 L. Ed. 2d 712, 723-24, 95 S. Ct. 1456 (1975).....	80
<u>Yacht Club v. Utah Liquor Control Commission</u> , 681 P.2d 1224, 1226 (Utah 1984).....	67

STATUTES, RULES, AND OTHER AUTHORITIES CITED

	<u>Page</u>
15 U.S.C. §78o-3(b)(7).....	38
15 U.S.C. §78o-3(b)(7).....	34
15 U.S.C.A. §78bb(a).....	31
18 U.S.C. §§1341 and 1343.....	56
18 U.S.C. §2.....	56
¶1401 of the NASAA Guidelines.....	49,53
§12(1) of the Securities Act of 1933.....	57,72,73,74,81,82
§12(2) of the Securities Act of 1933.....	74
§14(2) of the Securities Act of 1933.....	12,54,65,59,66
§14(3) of the Utah Uniform Securities Act.....	12,44,54,59
§15 and 15A of the Exchange Act.....	31
§15 of the Securities Act of 1933.....	73
§19(g)(1), Securities Exchange Act of 1934.....	26
§27 of the Exchange Act.....	26,30,31
§28(a) of the Securities and Exchange Act of 1934.....	30,31,41,47
§4(4) of the Securities Act of 1933.....	59,64
§5 of the Securities Act of 1933.....	58,64
§61-1-7 of the Utah Act.....	58
Act III, §1 of the NASD Rules of Fair Practice.....	13,14,25,26,30,31,38,53,63
Art. IV, §2 and §1 of the Fourteenth Amendment of the Constitution.....	32,46
Art. IV, Secs. 1 and 2 of the federal Constitution.....	39,47
Article I, §10, Cl. 1 of the Constitution.....	47,48
Article VI, Sec. 1, of Utah's constitution.....	31

Article 8 of the Uniform Commercial Code.....	15
Exchange Act Rule 10b-6.....	54
Rule 10b-5.....	10,57
NASD Manual (CCH), "Close-Out Procedure", ¶3559, pp. 3577-3583, Rel. #195, (April 1982).....	12
Rule 56, Utah Rules of Civil Procedure.....	1,5,6,66,68
Rule R177-6-1g.....	13,49,51,53
Rule 10b-5.....	57
Rule 12(b)(1), Utah Rules of Civil Procedure.....	1,4,23,27,43,49
Rule 12(b)(6).....	1,5,61
Rule 144(g)(2) of the General Rules and Regulations of the Securities & Exchange Commission, Reg. §230.144, Fed.Sec.L.Rep. (CCH) ¶2705A at p. 2788.....	65
Rule 4-504, <u>Utah Code of Judicial Administration</u>	79
Rule 56, Utah Rules of Civil Procedure.....	5,6,66,68
SEC Exchange Act Rel. #34-7920.....	14
Section 19 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a-78jj.....	26
Section 5 of the Securities Act of 1933.....	57,64
Section 59 of the <u>NASD Uniform Practice Code</u>	12
Section 61-1-27, Utah Act.....	35
Section 61-1-7, Utah Act.....	57,64
Sections 12(j) and §12(k) of the Securities Exchange Act of 1934.....	59
Sections 9, 10, and 15 of the Exchange Act.....	53
§61-1-14.5, Utah Act.....	66
<u>Utah Code Ann.</u> §63-46b-16(4)(a),(b),(c),(d),(e),(g),(h)(i), (h)(ii),(h)(iii), and (h)(iv).....	1

<u>Utah Code Ann.</u> §§61-1-24 and 27.....	35,47
<u>Utah Code Ann.</u> §61-1-6(1)(g).....	51
<u>Utah Code Ann.</u> §61-1-12(2)(c)(iii).....	76
<u>Utah Code Ann.</u> §61-1-14(3).....	12
<u>Utah Code Ann.</u> §61-1-22(1)(a).....	57,73,74,75,81
<u>Utah Code Ann.</u> §61-1-22(1)(a) and (b).....	57
<u>Utah Code Ann.</u> §61-1-22(2).....	73
<u>Utah Code Ann.</u> §61-1-23.....	1
<u>Utah Code Ann.</u> §61-1-27.....	35,47
<u>Utah Code Ann.</u> §61-1-6.....	17
<u>Utah Code Ann.</u> §61-1-6(1).....	34,36
<u>Utah Code Ann.</u> §61-1-6(1)(g).....	13,16,43,48,50,53
<u>Utah Code Ann.</u> §61-1-7.....	56,57
<u>Utah Code Ann.</u> §61-1-22(1).....	57
<u>Utah Code Ann.</u> §61-1-22(1)(a).....	57,58,74
<u>Utah Code Ann.</u> §61-1-22(4).....	73
<u>Utah Code Ann.</u> §61-1-6.....	35
<u>Utah Code Ann.</u> §61-1-6(1)(g).....	49
<u>Utah Code Ann.</u> §61-1-7.....	58
<u>Utah Code Ann.</u> §63-46b-1(4)(b).....	23,66
<u>Utah Code Ann.</u> §63-46b-12.....	5
<u>Utah Code Ann.</u> §63-46b-14(1).....	1
<u>Utah Code Ann.</u> §63-46b-15(1)(a).....	24
<u>Utah Code Ann.</u> §63-46b-4.....	23
<u>Utah Code Ann.</u> §63-46b-4(3).....	24

OTHER AUTHORITIES

	<u>Page</u>
"A Contemporary Legal Context of Aiding and Abetting," 11 Sec. Reg. L. J. 1982 (1983).....	56
American Heritage Dictionary.....	52
American Heritage Dictionary of the English Language.....	51
Dickerson, Reed. <u>The Interpretation and Application of Statutes</u> , Chapter 8, "Basic Concepts: Legislative Purpose", Little, Brown & Co., Boston (1975), pp. 87-102.....	55
Gifford, "The Morgan Cases: A Retrospective View", 30 Admin. L. Rev. 237 (1978).....	80
Hicks, J. William, <u>Exempted Transactions under the Securities Act of 1933</u> , Clark Boardman Securities Law Series, Vol. 7C, Chapter 13, First Edition, 1989, pp. 13-1 through 13-76, Rel. #22, 6/89.....	66
Joseph C. Long, <u>Blue Sky Law</u> , "Conflict of Laws", Clark Boardman Securities Law Series, Ch. 3, §§3.01-3.05[2], pp. 3-1 through 3-118, Vol. 12, April 1988.....	28
Morgan Quartet in administrative law, i.e., "he who decides must hear", 298 U.S. 468 (1936); 304 U.S. 1 (1938); and 313 U.S. 409 (1941).....	80
NLRB's Adjudication-Rule Dilemma Under the Administrative Procedure Act, 79 Yale L.J. 571 (1970).....	44
<u>Preliminary Note 3</u> , R177-6-1g, Blue Sky L. Rep., Vol. 3, (CCH) ¶57,403, p. 50,507 Rel. #817 (April 1988).....	13
Reg. 240.10a-1, <u>Short Sales</u> , General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 3, ¶22,683 (August 12, 1987).....	9
Reg. 240.3b-3, <u>Definition of "Short Sale"</u> , General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 2, (CCH), ¶21,254 (Nov. 3, 1988).....	9

Reg. 240-10a-2, <u>Requirements for Covering Purchases</u> , General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,684 (July 1, 1987).....	9
SEC Release No. 34-1571, <u>Short-Selling of Securities</u> , February 5, 1938, 11 F.R. 10967, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,685, <u>et seq.</u> (June 11, 1986).....	9
SEC Release No. 34-6778, <u>Short Sales of Securities</u> , April 16, 1962, 27 F.R. 3991, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,696 (June 11, 1986).....	9
Securities Exch. Act Rel. No. 34-7920, July 19, 1966, 31 F.R.D. 10076.....	14

STATEMENT OF JURISDICTION

Utah Code Ann. §61-1-23, as amended, 1990, Utah Code Ann. §63-46b-14(1) and (3)(a), and Utah Code Ann. §63-46b-16(4)(a),(b),(c),(d),(e),(g),(h)(i),(h)(ii),(h)(iii), and (h)(iv) confer exclusive jurisdiction on this Court to review "final agency actions" of Utah administrative adjudicative proceedings. Furthermore, the Department of Commerce Executive Director's October 29, 1990, Order on Agency Review specifically notifies Petitioners of their right to bring this judicial appeal.

STATEMENT OF THE ISSUES

The issues in this case involve Rules 12(b)(1), 12(b)(6), and 56, Utah Rules of Civil Procedure. They further, and most importantly, involve the admitted conflict between state and federal securities regulation, and, as a result, numerous constitutional issues arising therefrom, including corollary confusion over statutory interpretation, not to mention the interpretation and the validity of the agency "order" giving rise to the proceedings below.

This case also involves whether a person who purchases stock in order to comply with federal securities obligations can have his or her state securities brokerage license taken away on the ground that such "purchases" allegedly constitute -- at the same time -- a "dishonest or unethical business practice" under state law. [Emphasis added.] This case further involves a determination of whether one who is in the class of persons securities registration was designed to protect and who has no alternative but to "purchase" stock from other persons who "allegedly" lack an exemption from registration, can be liable for "aiding and abetting" the alleged non-exempt sale of such stock to himself. In addition, this case involves whether a person's state brokerage license can be revoked or

suspended for directly violating an alleged "order" that such person was never even charged with having violated -- an order improperly enforced and allegedly made "permanent" without sufficient notice to Petitioners. Finally, this case involves a determination of whether the sanction ultimately imposed on Petitioners for such alleged "dishonest or unethical business practice" was arbitrary, capricious and excessive in comparison to prior Division disciplinary actions.

(a) Standard of Review.

On the issues of law that Petitioners seek to raise, the standard of review is the "correction-of-error" standard.¹ Because the parties, for purposes of the July 16, 1990, hearing, entered into a Stipulation of Facts, review of the entire proceeding must proceed under the same standard.² With respect to mixed questions of law and fact in which legal issues predominate, "reasonableness" and "rationality" are the proper standards.³

Nonetheless, the record as a whole must be considered, including the body of evidence opposed to the Division's view. R.H. Johnson & Co. v. Securities Exchange Commission, 198 F.2d 690, 695 (2nd Cir.), cert. denied, 344 U.S. 855, 73 S.Ct. 94, 97 L.Ed. 664 (1952). See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1954); Klopp v. SEC, 427 F.2d 455, 460-61 (6th Cir. 1970)(a court of appeals is not required to accept inferences drawn by the Commission unless it finds them to be legitimate). Accordingly, the standard of review concerning issues of fact not covered by

¹Bevans v. Industrial Commission, 790 P.2d 573 (Utah Ct. App. 1990)(under UAPA, interpretations of law are reviewed under non-deferential, correction-of-error standard).

² Vali Convalescent v. Division of Health Care Financing, 140 Utah Adv. Rep. 21, 27 (Utah Ct. App. 1990)(conclusions based on stipulated and undisputed facts are legal conclusions which court reviews under correction-of-error standard).

³Pro-Benefit Staffing, Inc. v. Board of Review, 775 P.2d 439 (Utah Ct. App. 1989)(under UAPA, intermediate standard of reasonableness and rationality apply to review of mixed questions of law and fact).

the Stipulation is whether the Petitioners' alleged "violation" was supported by "substantial evidence" and whether the severe sanction imposed was "arbitrary." Whiteside & Co. v. Securities and Exchange Commission, 557 F.2d 1118, 1121 (5th Cir. 1977); Grace Drilling v. Board of Review, 776 P.2d 63 (Ut. Ct. App. 1990) (under UAPA, more rigorous "substantial evidence" test applies to review of factual findings).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

Based on the federal issues presented, the Supremacy and Commerce clauses of the Constitution, including the mandate of comity, are in issue. Because of the Division's inability to properly interpret and apply its own statutes, "orders", and statutory authority, 5th and 14th Amendment, including equal protection, issues are further presented. These issues are grounded in part on substantial evidence that the Division was simultaneously engaged in regulation and policy inconsistent with the charges brought against Petitioners. Another issue is whether the statute involved namely, Utah Code Ann. §61-1-6(1)(g), as amended, 1989, including the Division's rule promulgated thereunder, are constitutionally "vague and ambiguous" as applied to Petitioners herein. A final Constitutional issue is whether the agency acted improperly in delegating judicial authority to the prosecutor and vice-versa. (Reference is also made to the Constitutional issues raised in Petitioners' related appeal on file herein, Case No. 900210-CA.)

STATEMENT OF THE CASE

(a) Nature of the Proceedings.

This appeal is from the "final agency action" of certain administrative adjudicative proceedings brought by the Utah Division of Securities ("Division") on April 27, 1989, to revoke or suspend the securities brokerage licenses of Petitioners. As a result of

such proceedings, Petitioners are out-of-business and their securities brokerage licenses have been suspended for one (1) year and they have been placed on an additional two (2) years probation, a ruling which also leaves the Division with the peculiar ability to increase its sanction against Petitioners in the interim at its discretion.

(b) Course of Proceedings and Disposition Below.

Soon after filing its petitions in April 1989, the Division, moved the ALJ for an order converting the proceedings from "informal" to "formal". On July 14, 1989, the ALJ granted such motion. (Ex. M; R. 170-174.)

On July 14, 1989, the Division, realizing that its March 1, 1989, Summary Order could not legally proscribe "purchases" of U.S.A. Medical securities, amended its petitions to delete Count I thereof alleging that Petitioners directly violated such Order.⁴ (Ex. L; R. 161-168.) This left two causes of action, one for allegedly "engaging in dishonest or unethical practices" and two, for allegedly violating so-called "suitability rules".

Because Petitioners believed the Division's amended petitions encroached upon their SEC and NASD obligations under the Securities Exchange Act of 1934, including SEC and NASD rules promulgated thereunder, and a February 28, 1989, Ruling of U.S. District Judge J. Thomas Greene, Petitioners filed a Rule 12(b)(1) Motion to Dismiss the Division's amended petitions, arguing that the Division lacked subject-matter jurisdiction to discipline them for conduct undertaken by them solely to comply with federal law. (R. 239-241.) The ALJ denied such motion on August 29, 1989. (Ex. N; R. 149-153.)

⁴This fact is critical to this appeal because in the Securities Advisory Board's August 13, 1990, Order -- which, by virtue of Mr. Buhler's October 29, 1990, Order on Agency Review, constitutes the Division's "final agency action" -- Petitioners have ironically been found guilty of directly violating such Order -- something with which they were never charged. (Ex. EE; R. 1129-1141.)

On September 11, 1989, pursuant to Utah Code Ann. §63-46b-12, and the applicable Department of Commerce Rule, Petitioners timely filed Requests for Agency Review of such Order. (R. 139-143.) In other words, if the Division lacked subject-matter jurisdiction because the same conduct of Petitioners was deemed "honest and ethical" by the NASD, there was no reason to proceed with such administrative adjudicative proceedings. Such Requests for Agency Review were denied by former Division Director John C. Baldwin on October 30, 1989. (Ex. Q; R. 296-300.) (Such Order is the subject of the related appeal before this Court, Case No. 900210-CA.)

Thereafter, Petitioners filed a Rule 12(b)(6) motion to dismiss on the ground that the Division's amended petitions failed to state a claim. (R. 61-62.) The motion was granted on December 18, 1989, as to Count II of the amended petitions, but not as to Count I, leaving the "dishonest or unethical" cause of action intact. (Ex. T; R. 665-672.)

On November 28, 1989, Petitioners made a Rule 56(c) and (d) motion for summary judgment dismissing the Division's amended petitions on several grounds. (R. 717-719.) Petitioners supported such motion by several affidavits. (Exs. U, V, W, and affidavits attached to Ex. CC; R. 720-725, 738-755, 647-650, 694-95.) The Division responded with its own cross-motion for summary judgment. Petitioners then responded with a motion to strike certain purported "affidavits" submitted by the Division to resist Petitioners' motion for summary judgment. (Ex. Z; R. 654-656.) Both motions for summary judgment, including Petitioners' motion to strike, were denied by the ALJ on March 23, 1990. (Ex. AA; R. 597-608.) However, based on the Division's so-called opposing "affidavits" (Ex. Y), the ALJ also ruled that there was an issue of fact as to "solicitation" which he ruled should be tried before the entire Securities Advisory Board.

Petitioners then filed a Request for Agency Review of the ALJ's March 23, 1990, Order denying Petitioners' Motion for Summary Judgment. (R. 584–589.) On April 9, 1990, former Division Director Baldwin issued a second Order on Agency Review denying such Request. (Ex. BB; R. 1230.)

A trial was had on the Division's amended petitions before the Securities Advisory Board on July 16, 1990, the ALJ presiding. For purposes of such full hearing, the parties entered into a detailed Stipulation of Facts with several exhibits. (Ex. CC; R. 1154–1190.) This is again critical to this appeal because Petitioners contend that the Board and the ALJ, including former Division Director Baldwin, ignored such Stipulation of Facts in reaching the Division's "final agency action" dated August 13, 1990. (See Vali Convalescent, footnote 2, supra.) In other words, based on the Stipulation of Facts, a trial wasn't necessary and the inevitable "sanction" could have been entered at that time. It is also significant that by virtue of the ALJ's March 23, 1990, Order denying summary judgment and the Stipulation of Facts, the only issue that should have been tried before the Securities Advisory Board was the "solicitation" issue. Moreover, because the ALJ presided at such full hearing on all the issues, he clearly ignored his own previous Rule 56(d) ruling.

On August 13, 1990, and as a result of the July 16, 1990, hearing, the Securities Advisory Board, in conjunction with former Division Director Baldwin, issued the Division's Findings of Fact, Conclusions of Law and Order. (Ex. EE; R. 1129–1141.)

On August 20, 1990, Petitioners filed an Objection to the Form and Content of such August 13, 1990, Order. (Ex. FF; R. 1116–1120.) They further filed a Demand for Disclosure of How and By Whom the August 13, 1990, Order was prepared and supported the same with an affidavit. (Ex. GG and HH; R. 1112–1115 and 1121–25.) The basis for such

was that Petitioners were convinced that the Division's counsel, not the ALJ, unilaterally drafted the August 13, 1990, Findings of Fact, Conclusions of Law, and Order. Such demand, objection, and affidavit were entirely ignored. Petitioners believe such has prejudiced them on appeal because they are "stuck" with "Findings of Fact and Conclusions of Law" which are contrary to what they believe was actually adduced at the hearing. (R. 860-1111.) Petitioners believe such secret, ex parte assignment of judicial authority to the prosecutor is an unconstitutional delegation of power.

On October 29, 1990, Department of Commerce Executive Director Buhler issued an Order On Agency Review which blanketly adopts the Division's "final agency action" of August 13, 1990, in its entirety. (Ex. II; R. 830-842.) Such Order adds nothing significant to Petitioners' assignments of error, assignments which have only been repeated and embraced by Mr. Buhler, even in light of a September 10, 1990, letter to Mr. Buhler from Petitioners' counsel designed to clarify the task that was then before him. (R. 843-851.)

Finally, there is no evidence in the record that Petitioners did not at all times act reasonably and in good faith. In fact, the August 13, Findings of Fact, Conclusions of Law and Order repeatedly and callously acknowledge Petitioners' dilemma respecting the competing and conflicting state and federal regulatory obligations while, at the same time, disposing of the entire proceedings in the Division's favor. (Ex. EE; R. 1129-1141.)

RELEVANT FACTS

1. Petitioners Johnson-Bowles Company, Inc. ("Johnson-Bowles"), a securities broker-dealer, and Marlen V. Johnson ("Johnson"), a securities agent, were licensed with the Utah Securities Division ("Division") at all times material to this appeal. (R. 149.) Petitioners were also registered with and governed by the National Association of Securities

Dealers, Inc. ("NASD"), a self-regulatory securities organization governed by the U.S. Securities and Exchange Commission ("SEC").⁵ (¶'s 2 and 3, R. 205.)

2. During the latter part of 1988 and January 1989, Johnson-Bowles was trading, primarily on a wholesale basis, the securities of U.S.A. Medical Corporation ("U.S.A. Medical"), a "publicly-held" Wyoming corporation. U.S.A. Medical was engaged in the development and manufacture of novel liposuction devices. The stock traded as high as one dollar (\$1.00) per share. (R. 927.) At that time, the Company had 2.6 million shares issued and outstanding. (R. 77, top.)

3. In late December 1988, a customer of Johnson-Bowles named Rick Hermanson sold 15,000 shares of U.S.A. Medical to and through Johnson-Bowles which he subsequently failed to deliver. (R. 928-929.)

4. On January 23, 1989, U.S.A. Medical suddenly undertook a 10-for-1 forward split of its shares resulting in 26 million shares being issued and outstanding. As a result and as a consequence of other trading that Johnson-Bowles had undertaken since December 1988, Johnson-Bowles was suddenly "short" approximately 530,000 shares as opposed to 53,000 shares, an amount which included the 150,000 (15,000 x 10) shares Rick Hermanson failed to deliver earlier in the month. (R. 930.) Being "short" meant that Johnson-Bowles owed such stock to other NASD member broker-dealers and clearing corporations and agents but that it had no stock to effect physical delivery.

⁵It is significant that under the Exchange Act all broker-dealers and brokers who are not members of a national securities exchange must, by law, be registered with the NASD. For example, in 1983, the SEC did away with SECO, a self-regulatory organization that competed, to a small degree, with the NASD. (R. 9, top.) As a practical matter, however, everyone in the business is registered with the NASD. This is confirmed by Schedule C to the NASD By-Laws which require the registration of all persons "who are engaged in the investment banking or securities business" NASD Manual (CCH) ¶1784, p. 1533 and ¶1785, p. 1541, Rel. #304 (Oct. 1990).

5. After the January 23, 10-for-1 forward split, the price of U.S.A. Medical stock skyrocketed back up to approximately \$1.00 per share (or \$10.00 per share on the old stock) within a matter of days. (Chart Exhibit R-4 admitted into evidence at the hearing, R. 927; Stipulated Facts for Purposes of Hearing, ¶4, p. 2, Ex. CC; ¶4, p. 2, R. 1155.)⁶ As a result of being unable to "cover" its 500,000 share "short" position and because an individual named Reed Petersen suddenly contacted Petitioner Marlen V. Johnson to sell him as many shares of U.S.A. Medical as Mr. Johnson wanted "under the table" for 45¢ per share, Petitioners realized that the securities of U.S.A. Medical were held by an elite group of "control persons" and that Johnson-Bowles was the victim of a primitive stock fraud scheme known as a "short squeeze".⁷

6. There is no dispute that Johnson-Bowles complied with all rules and regulations in having sold securities of U.S.A. Medical "short".⁸

7. Based on Johnson-Bowles' some-500,000 share post-split "short" position, Petitioners immediately went to the SEC, the NASD and the Division, each of whom offered

⁶While U.S.A. Medical's financial statements (See Exhibit "H" to Respondents' Hearing Exhibit R-5, a copy of the Judge Greene complaint, contained in Hearing Exhibits Accordion Folder.) showed about \$42,849 in gross sales during a year period, the Company, after the forward-split, had a market capitalization of \$26 million. In other words, U.S.A. Medical was suddenly trading in the public market as if it were a \$26 million company when, in reality, it was effectively insolvent.

⁷A "short squeeze" may be defined as a fraud scheme in which brokers are deliberately "set up" to get "short" and because no stock is available to "cover" the "short" positions, the "control persons" either negotiate with the "short" broker to sell him or her stock directly or otherwise through another broker, all at a price of the criminals' choosing simply because they have all the stock.

⁸See Reg. 240.3b-3, Definition of "Short Sale", General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 2, (CCH), ¶21,254 (Nov. 3, 1988); Reg. 240.10a-1, Short Sales, General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 3, ¶22,683 (August 12, 1987); Reg. 240-10a-2, Requirements for Covering Purchases, General Rules and Regulations of the Commission, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,684 (July 1, 1987); SEC Release No. 34-1571, Short-Selling of Securities, February 5, 1938, 11 F.R. 10967, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,685, et seq. (June 11, 1986); SEC Release No. 34-6778, Short Sales of Securities, April 16, 1962, 27 F.R. 3991, Fed. Sec. L. Rep., Vol. 3, (CCH) ¶22,696 (June 11, 1986). The Court should note that selling securities "short" ordinarily provides an important and necessary market function in our economy, namely, ensuring that all securities do not rise to an unlimited price per share or any price far beyond the security's legitimate value.

no assistance. As a result and in an effort to protect itself and keep from being put out of business through the execution of \$500,000 worth of "buy-ins" at artificial and manipulated prices, Johnson-Bowles brought suit in the U.S. District Court for the District of Utah, Central Division, on February 16, 1989, against numerous individuals it believed and had come to discover were involved or otherwise orchestrating the "short squeeze" scheme. (Hearing Exhibit R-5 admitted into evidence at July 16, 1990, hearing. See Hearing Exhibit Accordion Folder.) Such defendants included both Reed Petersen and Rick Hermanson referred to above, local attorney James L. Averett, along with their alleged co-conspirator, five-time convicted felon Michael W. Strand. (See Caption on Hearing Exhibit R-5 and Exhibits A and B thereto.)

8. The federal 10b-5 securities fraud action was assigned to U.S. District Judge J. Thomas Greene, Case No. 89-C-157-G. In the same proceeding, Johnson-Bowles included a second claim for declaratory relief which named all of the NASD member broker-dealers and clearing agents and clearing corporations to whom it owed U.S.A. Medical stock and who also owed it stock. The purpose of such second claim was to seek a declaratory judgment that Johnson-Bowles' outstanding NASD contracts in the securities of U.S.A. Medical be declared void for illegality. (Hearing Exhibit R-5.)

9. On February 17, 1989, Judge Greene granted Johnson-Bowles a TRO enjoining Midwest Clearing -- the party most other broker-dealer / parties were dependent upon for their own securities clearing activities -- from effecting "buy-ins" for the account of Johnson-Bowles pending Johnson-Bowles' hearing for preliminary injunction on February 27, 10 days later. (R. 939; also, p. 5, Hearing Exhibit R-3, See Accordion Folder.)

10. At the February 27 and 28, 1989, preliminary injunction hearing before Judge Greene, testimony was adduced that the shareholders' list of U.S.A. Medical had been "fabricated". (R. 941; also, Direct examination of Y. Barton pp. 10-41, Vol. I of Hearing Exhibit R-6.) Further, testimony was adduced from Rick Hermanson that as much as 1,000,000 of U.S.A. Medical's previous 1,032,000 issued and outstanding shares had been "boxed" or physically accumulated in his and one Jim Averett's office.⁹ (R. 940-41; See also direct testimony of R. Hermanson, pp. 75-76, Vol. I of Hearing Exhibit R-6.)

11. Testimony was further adduced in Judge Greene's Court that between 200,000 to 250,000 shares had been distributed into the market out of the "box" by the co-conspirators, and \$45,000 to \$55,000 in proceeds from such sales had been handed-over to the Company. (Direct Testimony of Hermanson, p. 90, Vol. I of Hearing Exhibit R-6.)¹⁰

12. After a two day evidentiary hearing on Johnson-Bowles' motion for preliminary injunction, Judge Greene ruled on February 28, 1989, that the securities of U.S.A. Medical were "unlawfully issued" and that they "had been and continue 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". (p. 6, ¶'s 2 and 3, Hearing Exhibit R-3.) At the same time, Judge Greene denied Johnson-Bowles' motion for preliminary injunction, ruling that the balance of interests or equities did not exclusively weigh in favor of Johnson-Bowles. (p.6, ¶15, Hearing Exhibit R-3.) Because Judge Greene did not grant

⁹This latter point is significant in that it evidences that U.S.A. Medical was not and never had been a legitimate "publicly-held" company and that it was indeed controlled by an undisclosed, select few.

¹⁰This amount tracks the some-\$42,000 accounted for as "sales" on U.S.A. Medical's fraudulent financial statements. (See footnote 6 above.)

Johnson-Bowles a preliminary injunction, Johnson-Bowles was left, on February 28, 1989, with no choice but to somehow honor its outstanding NASD contracts or risk being "bought-in" at artificial prices.¹¹ (R. 204-208).

13. As a direct result of Judge Greene's ruling, during which officials from the Division were present, the Division, on March 1, 1989, the following day, issued a Summary Order denying the availability of all exemptions from registration under Utah Code Ann. §61-1-14(2). (Ex. J; R. 274-278 and 50-54.) The Division enforced such Summary Order longer than ten (10) days as prohibited under §61-1-14(3). Furthermore, the Order makes no mention of "purchasing" securities for which, under all state and federal securities laws, no exemption is (or ever has been) required.¹²

14. On March 27, 1989, the Division issued an order making its March 1, 1989, Summary Order permanent by "default". (Ex. K; R. 1164-1168.) The record is bereft of any evidence that Petitioners ever received any notice to contest, under §61-1-14(3), the issuance of any such order on a "permanent" basis.

15. On March 6, 1989, the SEC suspended trading in U.S.A. Medical for ten (10) days. (Ex. P; R. 56-57.) This is significant for purposes of demonstrating what a complete fraud U.S.A. Medical was.

¹¹ "Buy-ins" are regular occurrences in the securities brokerage business when a broker has not made timely delivery. "Buy-in" procedure is set forth in Section 59 of the NASD Uniform Practice Code, NASD Manual (CCH), "Close-Out Procedure", ¶3559, pp. 3577-3583, Rel. #195, (April 1982).

¹² Securities laws only require that securities offered or sold be registered or that an exemption therefrom be available. In the context of "purchases", nothing in the securities laws, including the '33 and '34 Acts, requires registration or exemption for "purchases". Congress simply determined that the best way to regulate securities was to require registration or an exemption for a sale. (Citations omitted.)

16. After February 2, 1989, one month in advance of the Division and the SEC's Orders, Petitioners did not "trade" in the securities of U.S.A. Medical nor did they "sell" or "offer to sell" any such securities. (R. 1042.)

17. Article III, §1, NASD Rules of Fair Practice which specifically governs both Petitioners provides:

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

This Rule is interpreted by the NASD and SEC to require a broker-dealer and broker to honor all securities transactions or they will be subject to severe discipline including substantial fines, suspension, and even expulsion from the NASD. (NASD Manual, (CCH) ¶2151 at p. 2013-3 and ¶3501, et seq. (May 1989); Ex. H; R. 176-179.)

18. At the same time, the North American Securities Administrators Association ("NASAA") Guidelines, which govern and assist state securities regulatory agencies such as the Division, define a "dishonest or unethical practice" using the exact same language as that contained in Art. III, §1, NASD Rules of Fair Practice. (Ex. O; R. 58-60.)

19. Division Rule R177-6-1g, which further defines Utah Code Ann. §61-1-6(1)(g), as amended, 1989, the statute in issue in this case, 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." Preliminary Note 3, R177-6-1g, Blue Sky L. Rep., Vol. 3, (CCH) ¶57,403, p. 50,507 Rel. #817 (April 1988). (Ex. B; R. 11.)

20. The Division's March 1, 1989, Summary Order, by its own terms, did not prohibit consummation of outstanding securities transactions by broker-dealers when trading is suspended as specifically permitted under Securities Exch. Act Rel. No. 34-7920, July 19, 1966, 31 F.R.D. 10076. (Ex. I; R. 55, 238 and Hearing Exhibit R-7.)

21. It being known in the local brokerage community that Johnson-Bowles was "short" several hundred thousand shares of U.S.A. Medical, Petitioners were contacted in late March 1989, by various individuals who were desirous of selling their U.S.A. Medical securities to "cover" Johnson-Bowles' outstanding short positions. (Ex. U; R. 720-725.)

22. During early March 1989, while Johnson-Bowles' contracts remained outstanding, Petitioner Johnson was informed in person by Ken Schaeffer, Assistant Director of the NASD's Denver Branch Office, that Petitioners would have to honor their outstanding NASD contracts in the securities of U.S.A. Medical or they would be in violation of the NASD Rules of Fair Practice. (R. 951-52 and 206). Mr. Johnson understood this to mean that if Johnson-Bowles did not honor such contracts, disciplinary action would be brought against he and Johnson-Bowles by the NASD to revoke or expel their memberships, thereby putting them out-of-business. (R. 951-52 and 206.)

23. During late March and/or early April 1989, in reliance on Judge Greene's ruling, interpretations of Art. III, §1, NASD Rules of Fair Practice, Ken Schaeffer's admonitions, SEC Exchange Act Rel. #34-7920, the prospect of being put out-of-business and looking at endless other litigation, including advice of counsel, Petitioner Johnson purchased less than 400,000 shares of U.S.A. Medical securities from seven (7) individuals to fulfill all of Johnson-Bowles' outstanding NASD contracts.¹³ (R. 206.) Six (6) of such

¹³The reason Johnson-Bowles purchased less than 400,000 shares to complete its contracts when it had been over 500,000 shares "short" is that several broker-dealers to whom it owed stock

individuals were Utah residents, one of which was a securities broker licensed with the Division named Paul Jones. The seventh individual was a New York resident. (July 9, 1990, Stipulated Facts for Purposes of Hearing, ¶'s 13, 14, and 16, Ex. CC; R. 1154–1190.)

24. Petitioners did not "solicit" the various individuals from whom they ultimately purchased sufficient U.S.A. Medical securities to fulfill their outstanding NASD contracts. (P. 6, ¶12, The Securities Advisory Board's August 13, 1990, Findings of Fact, Ex. EE; R. 1129–41.) Furthermore, Petitioners, acting in good faith, provided each and all of such individuals with full and complete disclosure of Judge Greene's ruling and the Division's Summary Order. (Ex. U and affidavits attached to Ex. CC; R. 720–725, 738–755, 647–50, 694–95.) Petitioners further informed such individuals that the stock would be used solely to fill Johnson–Bowles' outstanding short positions with its clearing brokers and agents -- transactions that had all occurred well in advance of February 28, 1989. (Ex. U; R. 720–725.)

25. The NASD member clearing brokers and corporations who ultimately received delivery of U.S.A. Medical stock from Petitioners in late March/early April 1989 had actual notice of both Judge Greene's ruling and the Division's March 1, Summary Order and each accepted "delivery" of such shares with full knowledge as contemplated in Article 8 of the Uniform Commercial Code. As a result, and with the exception of one contract involving OTRA Clearing, Inc., Johnson–Bowles flattened–out all of its pre–March 1, NASD contracts. (R. 958.)

"D-K'd" or cancelled the trades after Judge Greene's ruling. Further, Johnson–Bowles itself "D-K'd" trades or "reclaimed" stock owed it by other broker–dealers. In addition, Johnson–Bowles had over 100,000 shares "bought-in" on March 1, 1989, by broker–dealer OTRA Clearing, Inc., at approximately 70¢ per share or over \$100,000.

26. On April 27, 1989, and as a result of the foregoing, the Division brought administrative adjudicative proceedings against Petitioners seeking to revoke their registrations with the Division for allegedly violating Utah Code Ann. §61-1-6(1)(g), namely, the prohibition against engaging in "dishonest or unethical business practices". (R. 263-294.) Chronological details of these proceedings have been set forth separately above.

27. While the Division was absolutely convinced that Petitioners "made a lot of money" in "covering" their "short positions," the fact is that excluding well over \$150,000 in attorney's and accountant's fees and costs Petitioners have incurred in the Judge Greene and this litigation, Petitioners only made a "profit" on "covering" their "shorts" in the amount of some-\$6,000. (R. 1045.)

28. No one was damaged or potentially damaged by Petitioners' conduct in fulfilling Johnson-Bowles' federal NASD contracts. (R. 37.) To be sure, by completing their outstanding NASD contracts and obligations, Petitioners prevented numerous NASD member broker-dealers and clearing corporations from using their own money to effect no less than \$500,000 worth of "buy-ins" for Johnson-Bowles' account, money that such entities would never have been able to recover from Petitioners or anyone else because Johnson-Bowles would have been bankrupt. (R. 954.)¹⁴ Further, by completing such contracts, Johnson-Bowles complied with its obligations under NASD and SEC rules which require members to complete all NASD-related transactions. (See ¶17 above.)

¹⁴That Johnson-Bowles would have been out-of-business had the "buy-ins" occurred is evidenced by the very purpose of the Judge Greene litigation. In fact, the NASD was literally sitting on Petitioners' desks during February end/March beginning 1989, requiring them to perform innumerable "what if" net capital calculations based on the "value" of U.S.A. Medical and the prospective "buy-ins". (R. 1038, 930, and 950.)

29. Petitioners were required to vigorously resist the Division's amended petitions in that the Division extortionately and unreasonably demanded settlement from them as follows:

- a. suspensions of Petitioners' brokerage licenses, including extended probation; and
- b. a \$25,000 fine from each Petitioner or a total of \$50,000.

(R. 894.) The foregoing settlement demand was "generously" offered by the Division even though, as a matter of law, it had no power or authority whatsoever to extract or demand "fines" from Petitioners. (See Utah Code Ann. §61-1-6 as effective prior to July 1, 1990; Ex. A.) The foregoing is further not to ignore that Johnson-Bowles could not have operated during a suspension of its registered principal Marlen V. Johnson and therefore, the Division's unlawful settlement demands had the express design of putting Petitioners completely out-of-business. In addition, the foregoing settlement offer was further extended by the Division when it could not point to one single, solitary Utah resident who had been damaged or could ever be damaged by the conduct of Petitioners and when Petitioners single-handedly took it upon themselves to uncover the entire U.S.A. Medical fraud in federal court -- something that the both the SEC and Division itself were unable and unwilling to do in early February 1989.¹⁵ (R. 930.) For instance, had it not been for Johnson-Bowles' uncovering of the U.S.A. Medical fraud in Judge Greene's court, the Division would never have been able to enter its March 1, 1989, Summary Order to allegedly protect Utah residents from subsequent unlawful distributions of U.S.A. Medical securities.

¹⁵In terms of similar regulatory bloodlust and retaliation, compare the stark similarity between this case and the aiding and abetting case of SEC v. Dirks, (U.S. Sup. Court, July 1, 1983) 463 U.S. 646, 77 L.Ed.2 911, 103 S.Ct. 3255, ['82-'83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,255, n. 8, p. 96,124 ("JUSTICE BLACKMUN's dissenting opinion minimizes the role Dirks played in making public the Equity Funding fraud.... The dissent would rewrite the history of Dirks' extensive investigative efforts.... Largely thanks to Dirks one of the most infamous frauds in recent memory was uncovered and exposed, while the record shows that the SEC repeatedly missed opportunities to investigate Equity Funding." [Emphasis added.]

Additional Facts Relevant to this Appeal.

30. On August 9, 1989, during the pendency of these proceedings below, the Division issued, relative to U.S.A. Medical, a private and secret No-Action Letter for the benefit of one Susan Slattery, a local securities broker licensed with the Division. In such unpublicized pronouncement which Petitioners only learned of by accident, the Division informed Ms. Slattery that she could "direct trades" in the securities of U.S.A. Medical from the State of Utah, provided that neither the buyer nor seller were Utah residents. (Ex. S; R. 440, 429, and 1146.) Ms. Slattery was employed by local broker-dealer P.B. Jameson, the principal distributor of U.S.A. Medical securities and which was "long"¹⁶ at least 1.5 million shares of U.S.A. Medical at February end 1989. (R. 21-22.) Ms. Slattery was also intimately associated with five-time convicted felon Michael W. Strand, one of the named co-conspirators in the Judge Greene litigation who allegedly perpetrated the U.S.A. Medical fraud and "short squeeze". (¶48, R. 463 and ¶230, R. 525.)

31. On September 1, 1989, during the pendency of these proceedings, the Division issued a Press Release in which it stated that all problems associated with U.S.A. Medical would be resolved upon the Company's filing of a registration statement with the Division. (Ex. X; R. 716.)

32. On March 1, 1989, the very day the Division issued its Summary Order suspending trading, Utah licensed broker-dealers P.B. Jameson and R.A. Johnson sold at least 150,000 shares of U.S.A. Medical through the market. (R. 946-949.) The Division has yet to bring a disciplinary action against either P.B. Jameson or R.A. Johnson for directly

¹⁶Being "long" means that P.B. Jameson had such stock in its trading inventory. (See Vol. 1, p. 171, l. 10-11 and Vol. II, Part 2, p. 260, l. 24-25, p. 261, l. 1, Respondents' Hearing Exhibit R-6.)

violating the Division's Summary Order and, to date, it has only brought one action against one licensed agent, namely Paul Jones, who sold U.S.A. Medical stock in alleged violation of such Summary Order. (Ex. KK.) At the same time, the Division, after filing such action, has done nothing more to Mr. Jones and such action has remained open since August 1, 1989, Mr. Jones being permitted in the interim to continue to act as a licensed agent with the Division. (Ex. KK.)

33. The Division has given Petitioners access to all of its prior disciplinary actions brought against registered broker-dealers and agents and none is remotely comparable to the sanction imposed herein upon Petitioners relative to the alleged conduct complained of. (Ex. KK.) For instance, licensed securities agent Craig Cannon, who admittedly defrauded elderly people out of their life savings, was only given a two (2) year suspension and no "fine". (Footnote, R. 44.) Further, Mr. Cannon was not ordered to make any restitution to his victims.

34. On July 2, 1990, the U.S. Attorney brought an Amended Felony Information against local attorney James L. Averett. (Ex. JJ.) (See ¶7 and ¶10 above.) Averett, on September 17, 1990, pleaded guilty to conspiracy to commit securities fraud and under the Federal Sentencing Guidelines he received mere probation. (Ex. JJ.) While Petitioners are out-of-business and unemployed as a result of the vicious proceedings below, Averett remains a member in good standing of the Utah State Bar.

SUMMARY OF ARGUMENT

Petitioners were victims of a flagrant securities fraud, unparalleled in the State of Utah, one which prevented them from obtaining physical possession of any stock to effect delivery to those to whom they owed such stock. In fact, such was the very purpose

of the fraud, namely, to drive the price of the stock so high that Petitioners and those similarly caught in the "short squeeze" would have to buy it at artificially created prices -- thereby making the perpetrators handsome illicit profits. Unfortunately, the Division has never been able to comprehend that Petitioners' conduct was wholly justified in order to extricate themselves from a fraud in which they were simple victims.

In an effort to protect themselves, and getting no assistance from the SEC, the NASD, or the Division -- something which was their job, not Petitioners -- Petitioners sought relief in federal court. Based on the equities, the federal court refused to declare Petitioners' outstanding contracts in the securities of U.S.A. Medical "void for illegality". However, such ruling, coupled with the NASD rules governing Petitioners, had the effect of compelling Petitioners to honor their federal contracts regardless. Nonetheless, U.S. District Judge Greene did rule that the stock of U.S.A. Medical was both "unlawfully issued" and the subject of securities fraud and market manipulation. Based on such federal ruling -- a ruling which was the exclusive result of Petitioners' "whistleblowing" -- the Division suspended trading in the stock of U.S.A. Medical the following day. Such March 1, 1989, Summary Order, designed solely to protect Utah residents from unlawful distributions of U.S.A. Medical stock, is the subject of this case.

Knowing that they could not afford to reimburse all of the broker-dealers and clearing corporations and agents who would have effected "buy-ins" at lord knows what price and, knowing that any money so expended would have gone directly into the pockets of the perpetrators of the fraud, Petitioners privately purchased sufficient U.S.A. Medical stock from 7 individuals to flatten-out their contracts. Yet regardless of an SEC Release allowing consummation of brokerage transactions during a trading suspension (Ex. I), the

Division interpreted Petitioners' perfunctory and ministerial conduct as a violation of its March Summary Order and initiated the proceedings subject of this appeal to revoke or suspend their brokerage licenses.

This case is thus about whether the conduct of Petitioners, under such extremely unusual circumstances -- conduct which was, at all times, reasonable and in good faith, if not noble -- constitutes grounds to revoke or suspend their Utah brokerage licenses.

Assuming the Summary Order was properly interpreted (which it wasn't), Petitioners submit that there is nothing else they could have done. In fact, acting like sitting ducks and waiting for \$500,000 worth of "buy-ins" would have been stupid and would have only consummated the fraud. Furthermore, on the basis of pure logic, there is no difference between purchasing the stock themselves or some out-of-state resident purchasing the stock for Johnson-Bowles' account -- a non-distinction the Division has also never been able to comprehend.

This case is about an administrative agency which ignorantly believed that Petitioners made a lot of money "covering" their "short" positions on the basis of the Division's Order -- an order which had the practical effect of making U.S.A. Medical stock worthless -- a price it should have been all along. Yet instead of finding out that Petitioners did not make any money, and that they did not do what they did simply to make a meager \$6,000, the Division blindly and ignorantly embarked on a malicious and asinine campaign to put Petitioners out-of-business -- as if Petitioners alone perpetrated the entire U.S.A. Medical fraud.

Whatever Petitioners did wrong (which is nothing), the most it could ever be is the most hyper-technical violation of anything. Yet the Division, in painting Petitioners as greedy, irresponsible persons, hell-bent on eviscerating the Division's "too-little, too-late" order, the Division has now put Petitioners out-of-business. On the contrary, Petitioners' conduct damaged no one and in fact, no one other than the U.S.A. Medical criminals and the Division could have cared less what Petitioners did. The irony of this case is that the Division has gone to bat for the criminals who perpetrated the U.S.A. Medical fraud and left no government resource unavailable to destroy Petitioners for doing the Division's own work for it.

This Court should not only reverse and vacate the proceedings below, but it should send a strong message to all administrative agencies not to waste the taxpayers' money pursuing personal agendas that are not "in the public interest". Why would any Utah resident care if Petitioners bought U.S.A. Medical stock to keep several out-of-state fellow-NASD members from losing several hundred thousand dollars? There is and was nothing to be proven by these entire administrative adjudicative proceedings; any lesson to be learned, the Petitioners learned on their own with their own money and resources. This entire case is a pathetic waste of human resources, energy, and money and this Court should issue a decision, informing the Division and all other Utah administrative agencies that this type of blind abuse of government power and authority -- a monument to sheer pointlessness -- should not be tolerated.

DETAIL OF ARGUMENT

ORDERS AND AGENCY ACTION FROM WHICH APPEAL IS
SOUGHT AND REASONS WHY SUCH ARE ERRONEOUS AND
THE ENTIRE PROCEEDINGS SHOULD BE REVERSED AND VACATED.

1. THE ALJ'S JULY 14, 1989, ORDER GRANTING THE DIVISION'S MOTION TO CONVERT THE PROCEEDINGS FROM INFORMAL TO FORMAL IS ERRONEOUS AND HAS PREJUDICED PETITIONERS. ACCORDINGLY, THE PROCEEDINGS SHOULD BE REVERSED. (Ex. M; R. 170-174.)

On April 27, 1989, the Division filed its initial petitions against Petitioners herein. Under Utah Code Ann. §63-46b-4, the proceedings were specifically designated by the Division as informal proceedings. In response, Petitioners filed a motion to dismiss under Rule 12(b)(1), Utah Rules of Civil Procedure, as incorporated into such proceedings under Utah Code Ann. §63-46b-1(4)(b). (R. 239-241.) Whereupon the Division moved the ALJ for an order converting the proceedings from informal to formal. The Division undertook such even though its own internal rule then in effect, specifically, R177-46b-6B, designated all such proceedings as "informal". (R. 171.)¹⁷

The Division argued for such conversion solely on the ground that it "believed" Petitioners would be strenuously resisting the proceedings. As set forth in the ALJ's July 14, 1989, Order granting such Division motion, the ALJ singularly reasoned that "agency expertise" justified such conversion. (Ex. M; R. 170-174.) This result was obtained even though the ALJ, an employee of the Department of Commerce, had no particular expertise in securities matters and may have had even less expertise than most, if not all, third district court judges. This result was also obtained even though, later on, in March 1990, the ALJ deferred his obligation to make a determination as to Petitioners' liability to the Securities Advisory Board, a decision which was not only expensive for everyone concerned, but wholly unnecessary. (Ex. AA; R. 597-608.)

¹⁷To remedy this "problem" in the future, the Division amended its administrative rules effective July 1, 1990. (Blue Sky L. Rep., Vol. 3, (CCH), Rule R177-18-6, ¶57,421, Rel. #873, 7-1-90.)

The ALJ's July 14, 1989, Order is erroneous because it deprived Petitioners of a trial de novo in the district court as our legislature has unambiguously provided in Utah Code Ann. §63-46b-15(1)(a). Furthermore, the fact that the Division "thought" the Petitioners would be strenuously resisting the proceedings is not a legitimate ground justifying such conversion under any circumstances. Yet this is precisely why the ALJ found in favor of the Division. In addition, if "agency expertise" were the sole test of whether the "public interest" was satisfied, all proceedings could be converted to formal at the mere insistence of the agency and Utah Code Ann. §63-46b-15(1)(a) would have no meaning. In short, such Order is erroneous because the Division failed to carry its admitted burden that in this case (1) conversion was in the "public interest" and (2) conversion would not "unfairly prejudice the rights [of Petitioners]." Utah Code Ann. §63-46b-4(3).

Being deprived of a trial de novo in the district court is prejudicial error justifying reversal because Petitioners may have well had this entire case resolved at that level. As is now the case, however, these proceedings -- which continued for 1½ years without interruption -- have been far more expensive than would have been the case had Petitioners been availed of their right to first proceed in district court. This is because Petitioners, knowing the results below were a foregone conclusion, may have chosen not to resist the proceedings, opting instead to seek a a trial de novo in the district court when the opportunity was available. Certainly, "public interest" is broader and requires a far greater showing than paying lip service to the words "agency expertise". In fact, if "public interest" is the sole criterion, it is significant that not one single member of the public was ever present at any hearing in the proceedings below.

2. THE ALJ's AUGUST 29, 1989, ORDER DENYING PETITIONERS' MOTION TO DISMISS THE DIVISION'S AMENDED PETITIONS UNDER RULE 12(b)(1), UTAH RULES OF CIVIL PROCEDURE, FOR LACK OF SUBJECT-MATTER JURISDICTION IS ERRONEOUS. (Ex. N; R. 149-153.) BECAUSE THE DIVISION LACKED SUBJECT-MATTER JURISDICTION UNDER THE PECULIAR FACTS OF THIS CASE, THE PROCEEDINGS BELOW SHOULD HAVE BEEN DISMISSED.

A. Under the facts of this case, the Division's disciplinary actions are regulation inconsistent with the pre-emptive SEC and NASD regulatory scheme and Petitioners' obligations thereunder. Because such state action is repugnant to the Securities Exchange Act of 1934 over which federal courts have exclusive jurisdiction and it is otherwise an illogical attempt to frustrate a federal purpose, the proceedings below should have been dismissed.

Johnson-Bowles, as an SEC and NASD registered broker-dealer, effected sales of securities of U.S.A. Medical to certain out-of-state NASD member broker-dealers and one out-of-state clearing corporation, namely Midwest Clearing, prior to the Division's March 1, 1989, Summary Order. These federal NASD contracts remained outstanding after March 1, 1989, regardless of such state order. Article III, §1, NASD Rules of Fair Practice, has been interpreted to require completion of all broker-dealer contracts and the failure to do so is inconsistent with "observing high standards of commercial honor and just and equitable principles of trade." Article III, §1, NASD Rules of Fair Practice, NASD Manual, (CCH), ¶2151, p. 2014, Rel. #303. (See ¶17, Stmt. of Facts above.) For instance, it is well-settled that failure of a broker-dealer or broker to honor securities trades is violative of Article III, §1. In re: Shaskan & Co., Inc., SEC Docket 775 (May 28, 1976)(NASD suspended

and imposed fine on brokers for failing to honor trades with other NASD members); Friedman & Co., 45 S.E.C. 393 (1973)(failing to honor trades is a violation of Article III, §1 and expulsion from NASD and revocation without qualification may be imposed).

Section 19 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a-78jj, as amended, confers authority to establish self-regulatory organizations ("SRO") such as the NASD. In §19(g)(1), Compliance and Enforcement of Compliance, the Exchange Act provides:

(g)(1) every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, and its own rules, [Emphasis added.]

Section 19(h)(2), further provides in substance that a self-regulatory organization (i.e., the NASD) may expel a member who has violated the SRO's rules and regulations. Based on the foregoing, it is evident that had Johnson-Bowles failed to honor its contractual NASD obligations it would have been subject to expulsion, fine, and censure by the NASD. (See Annotations to Art. III, §1, NASD Rules of Fair Practice, NASD Manual (CCH), supra.) Since the NASD was created and because it is governed exclusively by the SEC under the Exchange Act,¹⁸ it is significant that any dispute relative to such Act must be brought in a district court of the United States. For instance, Section 27 of the Exchange Act, 15 U.S.C. §78aa, provides in part:

The District Court of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. [Emphasis added.]

¹⁸For an informative discussion of the NASD and how it is directly regulated by the SEC and must, as a matter of law, comply with all the provisions of the Exchange Act, its own rules, and the rules of both the SEC and the Municipal Securities Rulemaking Board ("MSRB"), reference is made to Austin Municipal Securities, Inc. v. NASD, 757 F.2d 676, ['84-'85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,027 (5th Cir. 1985).

The Division's amended petitions usurp the NASD's pre-emptive authority and power by attempting to discipline the Petitioners simply for complying with their explicit and unequivocal (i.e., exclusively federal) obligations as NASD members. In other words, implicit in the Division's amended petitions is the conviction that it has power and authority to compel NASD-member Petitioners to violate NASD rules.

The Utah Court of Appeals has recently addressed this very issue. In Western Capital & Securities, Inc. v. Knudsvig, (Ut. Ct. of App. Case No. 880198-CA, February 7, 1989), 101 Utah Adv. Rep. 65, 768 P.2d 989, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶94,337, this very Court held that the issue of violating or interpreting NASD Rules "comes under the regulatory provisions of the Exchange Act and is subject to exclusive federal jurisdiction." Western Capital, supra at p. 92,193. The Division's attempt to discipline Petitioners merely for complying with their NASD and SEC obligations is in direct conflict with the Securities Exchange Act of 1934 over which federal courts (or even the NASD itself) have exclusive jurisdiction and therefore, the Division lacks subject-matter jurisdiction over these proceedings. Thus, the amended petitions should have been dismissed under Rule 12(b)(1), Utah Rules of Civil Procedure.

B. The Division's amended petitions give unlawful extra-territorial effect to its March 1, 1989, Summary Order.

The Division has attempted to unlawfully give its March 1, Summary Order exclusive application to Petitioners as NASD members doing business out-of-state and further give it effect on several out-of-state broker-dealers and one out-of-state clearing corporation, all of which do no business in Utah. This is an effort on the part of the Division to give unlawful, extra-territorial effect to its March 1, Summary Order. Singer

v. Magnavox, 380 A.2d 969 (Del. 1977), ['71-'78 Transfer Binder] Blue Sky L. Rep. (CCH) ¶171,399 (holding that a state cannot give extra-territorial effect to its own Blue Sky laws).

Exclusive application of the Division's Summary Order to Johnson-Bowles' interstate business dealings is further penal in nature and therefore unconstitutional. In Schemmer v. Property Resources, Ltd., (1975) Ch. 273, (1974) 3 All. Er. 451, (1974) 3 WLR 406, an English chancery court refused to give extra-territorial effect to the United States securities laws, holding that the same were penal in nature. Though Schemmer is an English case, it is well reasoned and cited by noted authorities for this very proposition in the Blue Sky law context. (See Joseph C. Long, Blue Sky Law, "Conflict of Laws", Clark Boardman Securities Law Series, Ch. 3, §§3.01-3.05[2], pp. 3-1 through 3-118, Vol. 12, April 1988.) Accordingly, to give validity to the Division's amended petitions is nothing less than penalizing Johnson-Bowles for having sold securities out-of-state prior to March 1, 1989, acts performed in the normal course of everyday NASD business.

One of the parties from whom Petitioners purchased U.S.A. Medical securities -- who is identified in the amended petitions -- is Sheldon Flateman, a New York resident. (p. 5, Ex. L; R. 165.) The Division contends that Flateman himself violated the Division's March 1, Order. As a result, the Division's March 1, Order is given further unlawful extra-territorial effect by attempting to suspend exemptions in other states such as the State of New York. This untenable position is antithetical to well-settled conflicts of law problems in the Blue Sky law area. See Lintz v. Carey Manor, Ltd., 613 F. Supp. 543, 550-51 (D.C. Va. 1985)(holding that two separate states' Blue Sky laws apply to the same transaction if both states have jurisdiction over such transaction).

The Division's action is an attempt to prevent interstate securities transactions from having been completed. Accordingly, it has the practical effect of regulating and controlling conduct beyond the boundaries of Utah in violation of the Commerce Clause. Southern Pacific Co. v. Arizona, 325 U.S. 761, 775 (1945). The limits on a state's power to enact substantive legislation are similar to the limitation on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extra-territorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of a State's power." Schafer v. Heitner, 433 U.S. 186, 197 (1977).

There is absolutely no difference between Johnson-Bowles' purchase of U.S.A. Medical stock to cover its "short position" and the purchase by its fellow NASD members and clearing agents of U.S.A. Medical stock for Johnson-Bowles' account. [Emphasis added.] Putting it another way, what difference does it make who buys the stock if it is by and for Johnson-Bowles? Because the reality is that "buy-ins" would have similarly violated the March Summary Order, such order is given extra-territorial effect.

While the ALJ and the Division take the ridiculous position that Johnson-Bowles should have sat back and allowed \$500,000 worth of "buy-ins", the ALJ's Order ignores that the subject out-of-state entities would have more than likely had to purchase stock from the State of Utah inasmuch as virtually all of the stock of U.S.A. Medical was in the State of Utah. (See ¶10, Stmt. of Facts above.) For this reason, the fact that Johnson-Bowles purchased the stock itself for its own account as opposed to negligently allowing someone else to purchase it for its own account from Utah at a price it had no control over is a distinction without a difference. The August 29, Order concluded the contrary and is thus erroneous.

The above points mandate that the proceedings below be dismissed and that the August 29, Order be reversed.

C. Under the "Non-Delegation Doctrine" in administrative law, the August 29, Order or Ruling is erroneous and must be reversed.

The ALJ's Order of August 29, is repugnant to the Securities Exchange Act of 1934. This is because Congress has specifically delegated the power and authority to regulate interstate trading of securities to the SEC and the NASD thereunder. Section 27 of the Securities Exchange Act of 1934, 15 U.S.C.A. §77aa, provides that any suit "to enforce any liability or duty created by this Chapter [the '34 Act]" must be brought in a U.S. District Court. The Utah Department of Commerce's ALJ is not a district court of the United States. Section 27 broadly encompasses all suits to enforce or interpret "any . . . duty created by" the Act. [Emphasis added.] Leroy, Attorney General of the State of Idaho v. Great Western United Corp., (U.S. Sup. Ct., 1979), 443 U.S. 173, 61 L.Ed.2d 464, 99 S.Ct. 2710, ['78 - '81 Transfer Binder] Blue Sky L. Rptr. (CCH) ¶171,488 at p.68,611 (Justice White). In this regard, what "duty" could be more applicable to the Exchange Act than the very Exchange Act duty and obligation to complete interstate brokerage transactions under Act III, §1 of the NASD Rules of Fair Practice? Because the dispute in this case goes to the very existence and purpose of SEC and NASD rules governing broker-dealers operating interstate, the Division's efforts to prohibit compliance with SEC and NASD rules and regulations is a usurpation of power and authority not delegated to it.

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

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

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

That the NASD and SEC and their concomitant rules and regulations are embraced by the Exchange Act is specifically set forth in §15 and 15A of the Exchange Act. (See Austin case cited in previous footnote.) This very Court confirmed a federal court's exclusive jurisdiction to interpret NASD and SEC rules and regulations in Western Capital, supra. The ALJ thus ignored the law, including the effect of Judge Greene's federal ruling.

The Supremacy and Commerce Clauses of the federal Constitution, and most, if not all state Constitutions, impose limits upon the legislature's actions. (See People v. Green, 1 U. 11, 15–16 (Utah 1876)(holding that the Utah legislature may not, under Article VI, Sec. 1, of Utah's constitution, encroach upon the provisions of the federal Constitution nor has it the power to increase or diminish powers of any federal court in this state).) Nonetheless, the Division has brazenly taken upon itself the unlawful task of regulating and disciplining Petitioners merely for obeying their Exchange Act obligations, obligations they had every right to fulfill under the circumstances. (See SEC Exch. Act Rel. No. 34–7920; Ex. I; Hearing Exhibit R–7.).¹⁹

¹⁹If those to whom Petitioners owed stock could effect "buy-ins" during the alleged pendency of the Division's Summary Order, there would be no reason why this couldn't work both ways. Yet the Division's position is that this isn't the case simply because Petitioners were Utah residents and for no other or better reason.

The non-delegation doctrine in administrative law provides that a legislature may not delegate full legislative powers to an agency that is repugnant to the Constitution. The source of the doctrine is in the Constitution itself. Article 1, Section 1 provides that "all legislative powers herein granted shall be vested in the Congress of the United States" Based on the non-delegation principle, state legislatures cannot confer duties and authorities on administrative agencies that are repugnant to the federal Constitution or federal enactments. To be sure, the Supremacy Clause of the Constitution, Art. IV, cl. 2, provides that if a state law conflicts with federal law, federal law necessarily prevails. Based on this delegation of power, the existence of the Securities Exchange Act of 1934 creates the right not to be subject to conflicting state regulation. [Emphasis added.] Leroy, supra at p. 68,611. Viewed from the perspective of state officials, the existence of the Exchange Act creates a duty in such individuals not to undertake conflicting regulation efforts. Nonetheless, the instant proceedings could not be more diametrically conflicting with SEC and NASD rules which compel broker-dealers and NASD members to honor their trades, more especially in light of Judge Greene's February 28, 1989, ruling. Moreover, it is impossible to understand how Petitioners could have complied with their NASD and SEC obligations and the Division's unilateral interpretation of its own order at the same time. [Emphasis added.]

The important component of non-delegation is to whom the decision-making power is given. For instance, Congress has not delegated Exchange Act authority to the Utah legislature to in turn delegate the same authority to the Utah Securities Division to, in its turn, inconsistently regulate and enforce that which specifically and exclusively comes under the Exchange Act. Because the decision-making power to regulate trading in the

over-the-counter securities markets in interstate commerce has been expressly delegated to the SEC and NASD under the Securities Exchange Act of 1934, the Division has no jurisdiction to regulate Petitioners, inconsistently or at all, in this regard. (See e.g., Securities Exchange Act Release No. 25,669, 40 SEC Docket 1123 (1988)(giving the NASD exclusive authority to prohibit members and associated persons from effecting over-the-counter transactions in securities subject of a trading halt).) Unfortunately, contrary regulation is what the August 29, Order says the Division can do. Moreover, the preamble to the Securities Exchange Act of 1934 provides that it is:

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

Based on the foregoing, it is legally impossible that the Division has jurisdiction to regulate in a manner which is not only opposite to, but which fully frustrates specific federal purposes. For this reason, the ALJ's Order of August 29, is erroneous and must be reversed.

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

Delegation, as discussed above, should not be confused with the ultra vires doctrine in administrative law. This doctrine asks whether an agency is functioning within its statutory powers. [Emphasis added.] The easy way to distinguish these two issues is to keep in mind that the non-delegation principle involves a look the face of the agency's

enabling act and does not normally inquire into subsequent actions taken by the agency's administrator. Ultra vires, by contrast, presumes that the agency's enabling act contains a proper standard (i.e., that it is constitutional on its face), and then investigates subsequent agency action to see if that action is authorized.

The Division's enabling statute relative to these proceedings is contained in Utah Code Ann. §61-1-6(1). (Ex. A.) This enabling statute does not give the Division power or authority to revoke the registration of a broker-dealer or agent for complying or attempting to comply with superseding SEC and/or NASD rules and regulations. It does not say that the Division can override or supersede the SEC and NASD rules in acting to suspend or revoke the registration of a Utah broker-dealer and NASD member. It does not say that compliance with SEC and NASD rules and regulations under the Exchange Act creates a basis upon which a broker-dealer or agent can be simultaneously subject to a state revocation proceeding. The statute as in effect in 1989 stated but nine (9) grounds upon which the Division may act to revoke a broker-dealer or agent's license, none of which are remotely applicable to the interstate NASD conduct of Petitioners. To be sure, the statute clearly does not say that unambiguous SEC and NASD rules, designed to facilitate trading of securities in interstate commerce, can be capriciously deemed by the Division as "dishonest or unethical practices". Ironically, had Petitioners deemed the Division's March 1, Summary Order as superseding federal law -- including Judge Greene's ruling -- and thereby preventing consummation of their out-of-state trades, and, as a result thereof, had Petitioners ignored express Exchange Act obligations, Petitioners would have been accused by the NASD and SEC of engaging in "dishonest or unethical practices." See 15 U.S.C. §78o-3(b)(7).

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

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

Contrary to Utah Code Ann. §61-1-27, the Division's amended petitions are repugnant to any "coordinating" of its interpretation and administration of §61-1-6 "with the related federal regulation". Quite literally, it is impossible to imagine a set of circumstances under which conduct by a state could be more conflicting with the federal regulatory scheme. Surely, no respectable business person should be subjected to such conflicting regulation -- conflicting regulation the Division callously contends is simply Petitioners' "problem", not government's.

In this case, the Division's amended petitions must be overturned and dismissed because such petitions are clearly outside the Division's regulatory boundaries. Board of Governors, Federal Reserve System v. Dimension Financial Corp., 106 S. Ct. 681 (1986)(applying the "plain purpose" test to determine if agency is acting within its authority). As the Supreme Court in Board of Governors put it:

"In determining whether the Board was empowered to make such a change, we begin of course, with the language of the statute. If the statute is clear and unambiguous (with regard to an agency's authority), that is the end of the matter"

Id. at p. 685. In this case, there should be no ambiguity in statutory interpretation. Even a "plain view" of Utah Code Ann. §61-1-6(1), evidences that the Division cannot take action to discipline a broker-dealer or agent simply for honoring Exchange Act obligations. For this reason, the ALJ's August 29, 1989, ruling is erroneous.

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

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

In a leading Supreme Court preemption case, the Court stated that the test for preemption is whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The Constitutional principle is simply that state and federal government should have a common end in view, namely, to

avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. Amalgamated Association of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). Where there is no indicia of Congressional intent (i.e., a "dormant" Commerce Clause issue), a court may have to balance the state and federal interest to achieve this end. Such is not the case here. The August 29, Order fails to address or discuss Congressional intent in the area of interstate, over-the-counter trading of securities and had the ALJ done so, he would have concluded that there is clear, concise, and unambiguous legislative intent within the Securities Exchange Act of 1934. Schneiderwind v. ANR Pipeline Company, 108 S.Ct. 1145, 485 U.S. 293 (1988)(holding that a preemption question requires an examination of Congressional intent and striking down a state statute under the commerce clause for impinging on a federal regulatory scheme). Based merely on the preamble to the '34 Act quoted above, there can be no dispute over Congress' intent. Nonetheless, the ALJ concluded that the Division has subject-matter jurisdiction to regulate and discipline Petitioners in diametric conflict therewith.

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

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

Pennsylvania v. Nelson, 350 U.S. 497, 502-505 (1956). The progeny of Hines and Pennsylvania have continually narrowed the scope of judicial inquiry into a determination of

whether, under the particular facts of the case, the existence of the state regulatory scheme is facilitative or detrimental to the purposes and objectives of the federal statute. In fact, most preemption cases discuss state legislation as possibly being in conflict or inconsistent with the federal scheme, not, as in this case, unilateral, self-serving "state action" 180 degrees in conflict with the federal regulatory scheme. Here, the Division has revoked Petitioners' state registrations for their allegedly engaging in "dishonest and unethical practices." At the same time, the NASD is mandated to secure compliance by its members with the federal securities laws as well as its own regulations, which are themselves designed to promote "ethical business behavior." 15 U.S.C. §78o-3(b)(7). Petitioners' conduct from a purely federal standpoint was indeed "ethical". How then, can the very same conduct be deemed "unethical" from a state standpoint and yet there be no "conflict" between the regulatory schemes?

Cooperation is also a two-way street. Thus, states may not, under the Supremacy Clause, refuse to enforce valid federal laws even though such enforcement is in state court. Testa v. Katt, 330 U.S. 368 (1947). The only exception is if Congress expressly or impliedly excuses a state from enforcing such federal law. See e.g., Douglas v. New York, N.H. & H.R.R., 279 U.S. 377, 387-88 (1929). In this case, Congress has not excused the Division or the State of Utah from enforcing SEC and NASD mandates; Congress has never said a state can force its licenses to violate Art. III, §1, NASD Rules of Fair Practice. In fact, one cannot imagine a greater, more poignant conflict between state and federal law: if Petitioners comply with NASD and SEC rules they, according to the Division, engage in "dishonest or unethical practices" yet, if they comply with the Division's unilateral interpretation of its own "order," they violate SEC and NASD obligations, subjecting

themselves to fine, suspension and expulsion from the brokerage business, let alone costly litigation with every out-of-state entity to whom they owed stock and who would have together had to effect \$500,000 worth of "buy-ins" for the account of Johnson-Bowles. Finally, the August 29, Order is repugnant to the mandate of comity as further articulated in Art. IV, Secs. 1 and 2 of the federal Constitution. See e.g., Toomer v. Witsell, 334 U.S. 385, 395-96 (1948).

A discussion of pre-emption relative to the Exchange Act cannot be made without reference to Edgar v. Mite, (U.S. Sup. Ct., June 23, 1982), 457 U.S. 624, 73 L.Ed.2 269, 102 S.Ct. 2629, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,728. In Edgar, the U.S. Supreme Court was confronted with the question of whether the Illinois Business Takeover Act was unconstitutional under the Williams Act, a 1968 amendment to the Exchange Act. After analyzing the protections afforded localities versus the burden imposed by the state statute on interstate commerce, the Court concluded that the Illinois statute was unconstitutional under the Commerce Clause and therefore preempted under the Exchange Act. The Court held that the Commerce Clause precludes the application of a state law to commerce that takes place outside a state's borders regardless of whether or not such commerce has effects within the state. The state statute was thus declared unconstitutional in that it imposed a burden on interstate commerce which was excessive in light of the local interests the state statute was designed to further. Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 847-48 (1970)(where state statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits). The Division's amended petitions serve

no purpose for the benefit of Utah residents when compared to the burdens such actions were calculated to impose on interstate commerce, namely, preventing each out-of-state NASD member broker-dealer and a major clearing corporation, who were together owed over 500,000 shares of U.S.A. Medical stock, from ever receiving either it or the money they would have each spent to get it. In fact, the Division's amended petitions in no way serve to protect anyone, let alone a Utah resident. If anything, Petitioners ensured that several hundred thousand shares of U.S.A. Medical are no longer subject to being sold to Utah residents as such shares have been "exported" out of Utah. Would the Division rather have all such stock still sitting here in Utah waiting to be redistributed at some point to Utah residents in violation of the Division's March 1, Order? If one balances the interest of this locality in disciplining Petitioners as against the burden imposed on several out-of-state broker-dealers and a major clearing corporation, one must conclude that the purely speculative nature of protection afforded by the Division's disciplinary actions impose a substantial burden on interstate commerce -- a burden which far outweighs any local putative benefit. Because the Division's actions seek to affect interstate commerce and prohibit the facilitation of interstate securities transactions -- transactions previously undertaken and entered into by Petitioners with out-of-state residents -- such action by the Division can hardly be said to affect interstate commerce only incidentally. Edgar v. Mite, supra. Furthermore, Edgar held that if a state law affects interstate securities transactions, it violates the Exchange Act. The Division's actions are clearly atypical of everyday Blue Sky regulation in that the Division has sought -- after the fact -- to directly regulate specific interstate securities transactions that have already taken place across state lines. There can also be no question that Petitioners' executory NASD contracts --

for which their securities licenses have now been revoked -- are interstate commerce.

[Emphasis added.]

The Petitioners are also being discriminated against as federal licensees and NASD members merely because they are Utah residents. This kind of discrimination characteristically invalidates a state law under the Commerce Clause because such state action is based on impermissible protectionist intent or effect. See e.g., L.P. Acquisition Co. v. Tyson, 772 F.2d 201 ['85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,271 at p. 91,876 (6th Cir. 1985). The only difference is that in this case we are taking of "reverse-discrimination" which has no rational basis and serves to protect no one, more especially, any Utah resident. On the contrary, the Division's form-over-substance protectionism harms Petitioners who are themselves Utah residents. The question is: don't Petitioners, as Utah residents, count for anything?

In sum, the Supreme Court has made no suggestion that §28(a), the savings provision in the Exchange Act [15 U.S.C. §78bb(a)(1982)], authorizes, in any way, state violations of the Commerce Clause. Edgar, supra. In Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456, 467, 63 S.Ct. 369, 87 L. Ed. 396 (1943), the U.S. Supreme Court upheld an injunction against a state on the ground that a supplier suffered injury from enforcement of a state's order which "confused [state and federal] functions". In other words, compliance with such [state] orders is among the contingencies against which Congress sought to guard against in creating exclusive federal jurisdiction. [Emphasis added.] Id.

The Division's only argument is that the instant proceedings fall within its "legitimate police power". On the contrary, it well settled in Utah that the mere declaration

by the legislature -- not a mere agency -- that an act is within the exercise of its police power is not binding on courts unless the act is specifically within the scope of such power. Utah Manufacturers' Assn. v. Stewart, 82 U. 198, 23 P.2d 229, 235–236 (Utah 1933). In addition, Art. I, Sec. 18 of the Utah Constitution prevents a state from "impairing the obligation of contracts". While the Division argues in this case that impairing Petitioners' outstanding interstate brokerage contracts is within its police power, such is not true. No Utahns have been damaged in any respect by the conduct of Petitioners and under Utah law the Division's right to impair contracts is subject to such reasonable policing regulations as may be enacted to promote the public good. Golding v. Shubach Optical Co., 93 U. 32, 70 P.2d 871, 875 (Utah 1937)(A statute purporting to charge or limit the right of contract in the public interest must expressly declare such charge or limitation or it must be reasonably implied from the language used.). Saying it another way, no "public good" is possibly served by putting Petitioners out-of-business merely for fulfilling their obligations as NASD members. On the other hand, surely it is not the Division's position that it is compelled to discipline Petitioners to protect them from themselves as in the case of jay-walking -- a crime within a state's police power for that very reason.

While the Division maintains that its amended petitions are within the exercise of its police power delegated to it by Utah legislature, such is not binding on courts unless the act is specifically within the scope of the law's general purpose. Utah Manufacturers' Assn., supra at p. 235–36 (the legislature may not delegate powers to executive officers). Since the Division can show no legitimate purpose behind the administrative proceedings below other than flexing its own regulatory muscles, the amended petitions serve no legitimate purpose within the Division's power or authority.

Based on the foregoing, the August 29, Order skirts the entire issue of pre-emption and comity, ignoring the Exchange Act and Supremacy and Commerce Clauses in their entirety, and erroneously concludes that regulation designed to frustrate federal rules and regulation and otherwise seriously damage several out-of-state residents is within the legitimate police power of the Division when it is not. Accordingly, the August 29, Order must be reversed and vacated under Rule 12(b)(1), Utah Rules of Civil Procedure.

3. FORMER DIVISION DIRECTOR JOHN C. BALDWIN'S OCTOBER 30, 1989, ORDER ON AGENCY REVIEW DENYING ANY ADMINISTRATIVE AND JUDICIAL REVIEW OF THE ALJ'S AUGUST 29, 1989, ORDER IS ERRONEOUS AND HAS PREJUDICED PETITIONERS. (Ex. Q; R. 296-300.)

This order is the subject of a related appeal before this Court, Case No. 900210-CA and thus, Petitioners will not be addressing the same herein. It would also be repetitive of the foregoing discussion. Reference is thus made to the briefs of Petitioners and the Division on file herein relative to such appeal.

4. THE ALJ'S DECEMBER 18, 1989, ORDER DENYING PETITIONERS' MOTION TO DISMISS THE DIVISION'S AMENDED PETITIONS UNDER RULE 12(b)(6), UTAH RULES OF CIVIL PROCEDURE, FOR FAILURE TO STATE A CLAIM IS ERRONEOUS AND MUST BE REVERSED. (Ex. T; R. 665-672.)

A. The amended petitions are unconstitutional under the due process clauses of the Fifth and Fourteenth Amendments.

The Division unilaterally interprets its Summary Order as prohibiting "purchases" of U.S.A. Medical stock for any purpose and that such somehow constitutes a violation of Utah Code Ann. §61-1-6(1)(g) and the rules promulgated thereunder. The very

language of the Order itself says nothing at all of "purchases". Further, nothing in the Order, the Utah Uniform Securities Act, or Petitioners' industry training and education indicates that such Order could be (or would be) interpreted to designate "purchases" of U.S.A. Medical stock after March 1, 1989, as in any way "dishonest or unethical", let alone as a dishonest or unethical "practice". (See Brewster, *infra*.) Petitioners thus had no notice that their ministerial and perfunctory purchases and out-of-state delivery of such securities after March 1, 1989, could have or would have resulted in any administrative adjudicative proceeding. They also had no opportunity to be heard in this regard, especially when the Division, having been present at the Judge Greene preliminary injunction hearing, knew full well that Petitioners had no choice but to purchase stock to fulfill their federal obligations.²⁰

The Division should also have proceeded in its theory of liability by advance rulemaking as opposed to adjudication. The Division's failure to choose rulemaking in this case over adjudication or to otherwise give Petitioners any notice of how it would unilaterally and self-servingly interpret its own Summary Order is inherently unfair and violates Petitioners' right of substantive and procedural due process. In short, the Division abused its discretion in choosing order, or even administrative adjudicative proceeding, rather than rule. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). See, e.g., Bernstein, *The NLRB's Adjudication-Rule Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970).

A property interest can be conferred by the federal government. Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964)(due process is involved in the suspension of a

²⁰Petitioners also had no notice that the Division would attempt to make the Summary Order "permanent" under Utah Code Ann. §61-1-14(3).

company's right to enter into federal contracts.) In this case, several persons including Petitioners, had federal property rights in the outstanding NASD contracts. The Division's actions to unlawfully interfere with such federal contracts -- be it after such contracts were fulfilled or not -- violate due process.

For the above reasons, the amended petitions are unconstitutional and fail to state a claim.

B. The amended petitions violate Petitioners' equal protection guarantees.

Section 1 of the Fourteenth Amendment entitles Petitioners to equal protection of the law. It is undisputed that several local broker-dealers and other individuals, with the exception of Petitioners, traded, sold, and fulfilled contracts in the securities of U.S.A. Medical after having actual knowledge of Judge Greene's and the Division's Order. Yet there is no evidence of any contemporary or consistent disciplinary action taken by the Division with respect to them, including local broker-dealers R.A. Johnson and P.B. Jameson who directly violated the Division's Summary Order. (See ¶32, Stmt. of Facts above.) As federal licensees and NASD members, Petitioners are entitled to be treated the same as every other such licensee.

The Fourteenth Amendment commands that individuals be treated in a manner similar to others as an independent constitutional guarantee. This guarantee governs all governmental actions which classify individuals for different benefits or burdens under the law. To single-out and give its Summary Order a predatory and discriminatory effect on Petitioners under the circumstances of this case is not treating Petitioners equally. As U.S. citizens, Petitioners are to be accorded equal and fair treatment in the exercise of fundamental rights or, they are entitled to the elimination of distinctions based on

impermissible criteria. Because the Division has not enforced its order evenhandedly, let alone against those who directly violated it by "selling" stock, the amended petitions violate Petitioners' equal protection guarantees.

On August 9, 1989, the Division issued a secret and private No–Action letter to a Utah licensed securities broker named Susan Slattery, authorizing her to execute "directed trades" in the securities of U.S.A. Medical provided neither the buyer nor the seller were Utah residents. (Ex. S; R. 440, 229, 1146; ¶29, Stmt. of Facts above.) While the Division's Summary Order acknowledges (and publicizes) that U.S.A. Medical is a fraud and that its stock is "bad stock", the Division takes the simultaneous position that a licensed Utah securities agent can still transact in the securities of U.S.A. Medical. In short, the Division has disciplined Petitioners for buying U.S.A. Medical stock to complete federal executory contracts yet, at the same time, a local securities agent can deal -- from Utah! -- in U.S.A. Medical's securities knowing U.S.A. Medical is a complete, unadulterated fraud. Thus, so long as Susan Slattery defrauds someone who is not a Utah resident, such is perfectly acceptable to the Division and not inconsistent with the amended petitions (which, by the way, have nothing to do with "fraud" on the part of Petitioners). This is but further evidence of why the amended petitions violate Petitioners' right of equal protection.

C. The amended petitions violate the privileges and immunities of Petitioners as United States citizens and federal licensees.

Under Art. IV, §2 and §1 of the Fourteenth Amendment of the Constitution, Petitioners are entitled to all of the privileges and immunities reserved to American citizens. This merely means that a state may limit rights so long as they don't affect federal rights. The subject administrative adjudicative proceedings are merely the enforcement of state

"law" which abridges the privileges and immunities guaranteed Petitioners as citizens (and federal licensees) of these United States. As NASD members and federal licensees, Petitioners have the right to be treated the same as other in state and out-of-state NASD member broker-dealers and in a manner consistent with the Exchange Act. Accordingly, such proceedings are unconstitutional.

D. The amended petitions violate the mandate of comity in both the Constitution and the Utah Uniform Securities Act.

Article IV, §§1 and 2 of the Constitution mandate comity or cooperation between federal and state governments. For instance, as set forth above, a state must regulate consistently and in cooperation and harmonization with federal securities law. See Utah Code Ann. §§61-1-24 and 27, including §28(a) of the Securities and Exchange Act of 1934 and, §1904, which taken together with §514 of the Uniform Securities Act, have both been adopted in Utah. Because the subject amended petitions are repugnant to the constitutional principles of comity and the express mandate of Utah Code Ann. §61-1-27, such petitions are unconstitutional and fail to state a claim.

E. The amended petitions are unconstitutional because they have the effect of an ex post facto law.

Article I, §10, Cl. 1 of the Constitution prohibits a state from passing or enforcing an ex post facto law which is defined as a law making an act illegal after the act was performed or undertaken. Prior to April 27, 1989, the date of the Division's initial petitions, there was nothing illegal or "dishonest or unethical" about purchasing securities, either in and of itself or by way of the Division's March 1, Summary Order. However, on April 27, 1989, after the conduct of Petitioners in issue, the Division unilaterally interpreted its

Summary Order as "illegalizing" Petitioners' pre-April 27, conduct. The amended petitions thus have the operative effect of an ex post facto law. This is further prohibited under Art. I, §18 of the Constitution of Utah. Retail, Wholesale & Dept. Store Union v. NLRB, 499 F.2d 846 (2d Cir. 1971); Mobil Oil Corp. v. Doe, 647 F.2d 142 (Em. Ct. App. 1981). Accordingly, the amended petitions are unconstitutional and the ALJ's December Order should be reversed.

F. The amended petitions violate Petitioners' Constitution right to be free from contractual interference by a State.

Article I, §10, cl. 1 of the Constitution prohibits a state from impairing a contractual obligation. The same prohibition is contained in Art. I, §18 of the Utah Constitution. The Division's amended petitions were knowingly designed to impair Petitioners' executory contractual obligations incurred in interstate commerce as contemplated under the Exchange Act. Since the Division's action is in direct and diametric conflict with Petitioners' Exchange Act obligations, no argument can be made that such petitions do not impair and disrupt such interstate executory contracts. Accordingly, the amended petitions are unconstitutional and fail to state a claim.

G. Utah Code Ann. §61-1-6(1)(g), and R177-1-6g as applied in this case are constitutionally "void for vagueness".

Utah Code Ann. §61-1-6(1)(g), and the Division's rules promulgated thereunder empower the Division to revoke the registration of a broker-dealer or agent for "dishonest or unethical practices". (Ex. A and B.) It is not clear to a reasonably intelligent person that the conduct in this case would be or could be deemed a "dishonest or unethical practice", nor did Petitioners have notice that their conduct could be and would be unilaterally

deemed by the Division as violative of §61-1-6(1)(g) and the rule of the Division promulgated thereunder. This is particularly true when R177-6-1g is, by its own language, patterned after Art. III, §1 of the NASD Rules of Fair Practice, the rules of the SEC, and NASAA Guidelines. (See ¶19, Stmt. of Facts above.)

At the hearing on Petitioners' Rule 12(b)(1) Motion to Dismiss, Petitioners provided the ALJ with a copy of the NASAA Guidelines defining "dishonest or unethical practices". (Ex. O; R. 58-60.) A review of such Guidelines, which the Division has every obligation to follow based on the Preliminary Notes to R177-6-1g, say nothing of purchasing securities nor do they say anything of prohibiting the purchase of securities to complete outstanding Exchange Act obligations undertaken in ordinary interstate securities transactions. The same can be said of R177-6-1g itself, as effective, 1989. In fact, what is even more remarkable is that ¶1401 of the NASAA Guidelines are the exact same language as Art. III, §1 of the NASD Rules of Fair Practice. In other words, the Division has interpreted the very same guideline with the exact same language contrary to the NASD itself. For instance, the NASD interprets not honoring trades as "dishonest or unethical" whereas the Division interprets honoring trades in the exact same context as "dishonest or unethical." The problem is: how can the same conduct be both "honest or ethical" and "dishonest or unethical" at the same time and the applicable guidelines, rules, or statute not be ambiguous and vague? It is thus peculiar that guidelines specifically designed by various regulatory authorities to encourage "honest or ethical practices" are simultaneously interpreted by the Division as "dishonest or unethical practices". In short, if the Division can't interpret NASAA Guidelines or its own R177-6-1g consistently with identical federal law and NASAA Guidelines, how can a reasonably intelligent person (who is regulated by

both) be expected to know, in advance, what he can and will be charged with by the Division?

Because Utah Code Ann. §61-1-6(1)(g) and the rules promulgated thereunder are vague and ambiguous in their application to this case and otherwise do not curb unfettered Division discretion, such statute and the rules promulgated thereunder are constitutionally void for vagueness. In Boyce Motor Line, Inc. v. United States, 342 U.S. 337 (1952), the dissenters insisted that the regulation under review was excessively vague and that it is in the public interest and the interests of justice "to pronounce this vague regulation invalid." Id. at 343-46. The Seventh Circuit has held a state university regulation authorizing sanctions for "misconduct" void in violation of the Fourteenth Amendment's due process clause. Soglin v. Kauffman, 295 F. Supp. 978 (E.D. Wis. 1968), aff'd, 418 F.2d 163, 166 (7th Cir. 1969)(statute void because of non-existent or unconstitutionally vague standards). Soglin involved the existence of a penal statute susceptible of sweeping and improper application. Similarly, with respect to this case, a recent Maryland case discussing "dishonest and unethical practices" in the brokerage business is easily distinguishable. In Brewster v. Maryland Securities Commissioner, (Maryland Ct. of Special Appeals, October 6, 1988), 76 Md. App. 722, 548 A.2d 157, ['88-'90 Transfer Binder], Blue Sky L. Rep. (CCH) ¶172,906, cert. den. 109 U.S. 2449 (Jan. 11, 1989), the Court held that the absence from the Maryland Securities Act of a definition of "dishonest and unethical practices" did not preclude punishment of a securities agent who "encouraged" her customer to falsify his net worth in order to facilitate approval of trading in his account by the agent's brokerage firm employer. The Court held that the phrase "dishonest and unethical" was well defined in both the NASD's rules and the agent's employee compliance manual and that the Maryland Act

should be read in conjunction with these sources. Since the agent was familiar with and had passed a comprehensive examination on NASD rules and regulations, she was expected to be aware of the norms in her industry. Thus, the Court found that the Maryland Act was not ambiguous, and that the securities agent knew or should have known that the particular sale to her customer and the deception she had him practice with respect to his net worth was misleading and dishonest. [Emphasis added.] Accordingly, the decision that the suspension of the agent's registration was not an unconstitutional deprivation of her securities license was affirmed. The case at bar is nothing like Brewster and demonstrates that the "dishonest or unethical practice" prohibition is designed to regulate "sales" by brokers and dishonest conduct relative thereto which can harm customers and the investing public. On the contrary, Petitioners conduct had nothing to do with the "public" and there is nothing in any examinations that Petitioners have had to take which put them on notice that "purchasing" stock to complete federal executory contracts is in any way a "dishonest or unethical practice". For this and the reasons above, Utah Code Ann. §61-1-6(1)(g) and R177-6-1g as applied to Petitioners in this case are constitutionally vague and ambiguous.

H. The amended petitions fail to state a claim because Petitioners' conduct was neither "dishonest or unethical" nor a "dishonest or unethical practice" as a matter of law.

The amended petitions allege that Petitioners engaged in "dishonest or unethical practices". To understand these allegations, an examination of the very words at stake is informative. The American Heritage Dictionary of the English Language defines "dishonest" as:

1. Disposed to lie, cheat, defraud, or deceive.
2. Proceeding from, gained by, or betokening falseness.

The American Heritage Dictionary does not define "unethical" but defines "ethical" as "Of, pertaining to, or dealing with ethics." It further defines "ethics" as:

- 1.a. The study of the general nature of morals and of the specific moral choices to be made by the individual in his relationship with others; the philosophy of morals. Also called "moral philosophy."
- 1.b. The moral sciences as a whole, including moral philosophy and customary, civil, and religious law.
2. Any set for moral principles or values.
3. The moral quality of a course of action; fitness; propriety.

Petitioners' conduct was entirely open and above-board; nothing was secretive, clandestine, or deceptive or morally wrong; no one was misled; no one did not receive full disclosure; no one was lied to; no one was cheated; no one was defrauded or swindled; no one was harmed or damaged. Further, none of those individuals who sold their U.S.A. Medical stock to Petitioners for purposes of completing interstate securities transactions have complained that they have been defrauded or cheated by Petitioners, nor have they claimed that Petitioners' conduct was in any way deceitful or immoral, and Petitioners have never been notified that any of such individuals want or desire their worthless stock back in exchange for Petitioners' money. In fact, what occurred is really none of the Division's business. Conversely, certainly it is not the Division's position that Petitioners cheated or defrauded themselves as purchasers. In short, because the Division cannot point to one single, solitary Utah resident or any other person who has been or could have been damaged or harmed in any way by the conduct of Petitioners, the Division has no standing to complain that Petitioners' conduct was "dishonest or unethical". Certainly, such terms, being adjectives, require a recipient or object of some kind as in Brewster supra. In this

case there are none. The amended petitions thus miserably fail to achieve a legitimate governmental purpose and are otherwise not "in the public interest" as alleged in ¶'s 14 and 24 of the amended petitions.

The second part of the applicable statute and rules promulgated thereunder requires a "practice". There is no evidence that this particular, isolated conduct of Petitioners on but one occasion pertaining to but one particular security is in any way a common business "practice" of Petitioners. Surely the Petitioners are not looking forward to spending another hundred thousand dollars in attorney's fees and costs as they have in the Judge Greene litigation merely to possibly buy stock once again at a price lower than they sold it. This is what the Division would have one believe, however, assuming such conduct is indeed a "practice". In fact, the word "practice" contemplates something occurring (or potentially occurring) in the regular and ordinary course of business. Certainly that is not what is involved here. What is deemed an "unethical or dishonest practice" is contained in the NASD Rules of Fair Practice and the NASAA Guidelines. (See Petitioners' Expert Testimony, Ex. DD.) It is on the basis of these Guidelines that R177-6-1g is "patterned" and which determines the scope of Utah Code Ann. §61-1-6(1)(g). Such practices include but are not limited to a broker undertaking excessive mark-ups (i.e., "scalping") and otherwise not making proper disclosure on confirmations to customers; in other words, violations of Sections 9, 10, and 15 of the Exchange Act and the rules promulgated by the SEC thereunder. These are the types of activities that are unethical and dishonest practices as they ultimately work a fraud on the public. (See Ex. KK.) There is no evidence that Petitioners' conduct worked a fraud or even could have worked a fraud on anyone. Because the amended petitions are grounded solely upon speculation, not reality, the amended petitions fail to state a claim upon which relief may be granted.

I. The amended petitions fail to state a claim because the Division failed to comply with Utah Code Ann. §61-1-14(3), as effective 1989. (Ex. C)

Under Utah Code Ann. §61-1-14(3), as effective 1989, the Division's Summary Order was only valid for ten (10) days. In fact, all of Petitioners' purchases occurred after March 10, 1989. Thus, there is nothing actionable, directly or indirectly, against Petitioners by virtue of an order which no longer existed.

In addition, a so-called "permanent order" under §14(3) couldn't have been made on the heels of a summary order which didn't exist and had expired. Furthermore, a "permanent order" cannot be made so by "default" -- including "findings" by default -- without notice, a hearing, and an opportunity to be heard by all affected by the order. There is no evidence that Petitioners had notice that the Division would seek to make its so-called Summary Order permanent by "default." Because the Division failed to follow §14(3), its amended petitions fail to state a claim.

J. The amended petitions fail to state a claim because the Division misinterpreted the statute and its own Summary Order.

The linchpin of the Division's amended petitions are that the March 1, Summary Order somehow "prohibited" purchases of U.S.A. Medical stock, let alone more than 10 days thereafter. Clearly, nothing in either state or federal law requires registration by anyone to undertake purchases of securities nor is there any law anywhere which requires an exemption of any kind for purchasing securities.²¹ By the very language and title of the

²¹As set forth in the Statement of Facts above, no exemption is or ever has been required under state or federal securities laws to "purchase" stock. This is why the Division amended its initial defective petitions in July 1989, to delete an admittedly unsupportable claim that Petitioners, by simply "purchasing" non-exempt stock, directly violated the Division's March 1, 1989, Summary Order suspending all §14(2) exemptions. The only possible exception to the foregoing is Exchange Act Rule 10b-6 which requires an exemption for purchases by an underwriter

March Summary Order, only the offer or sale of U.S.A. Medical stock was thereafter prohibited. In fact, the Order was never intended to proscribe purchases. Since neither the Securities Act of 1933, the Securities Exchange Act of 1934, nor the Utah Uniform Securities Act requires registration or an exemption for mere "purchases", Petitioners' conduct in simply purchasing stock "privately" is not actionable either directly or by way of baldfaced, conclusory "opinion" that such conduct is a "dishonest or unethical practice". Congress has simply declined to delegate authority to either the SEC or the Division, through the Utah legislature or otherwise, to prohibit purchases of stock for any reason. In fact, in this case, the purchases in issue were entirely "private"; they were not "trading" transactions effected on any "market". Thus, Count I of the amended petitions misinterprets the law and therefore, it fails to state a claim upon which relief may be granted. (See e.g., Dickerson, Reed. The Interpretation and Application of Statutes, Chapter 8, "Basic Concepts: Legislative Purpose", Little, Brown & Co., Boston (1975), pp. 87-102.)

K. As a matter of law, allegations that Petitioners, as mere purchasers, "aided [and abetted]" or "participated" in the alleged non-exempt sale thereof is not actionable, and therefore, Count I of the amended petitions fails to state a claim.

Count I of the amended petitions alleges that Petitioners "participated" in the allegedly unlawful sales of securities to themselves. In other words, Petitioners allegedly "aided [and abetted]" their own purchases merely because of their status as "purchasers". (Ex. L; R. 161-168.)

during its simultaneous underwriting and distribution. This rule is wholly inapplicable to these proceedings as Johnson-Bowles was neither doing an underwriting of U.S.A. Medical's securities nor was it purchasing them at the same time during any initial distribution thereof.

The Division's novel concept of liability is remarkable in light of the aiding and abetting theory of liability applicable to securities law. Aiding and abetting is a judicially created doctrine of secondary liability in private civil suits which is not explicitly found in the securities laws. [Emphasis added.] The Supreme Court's continued use of the "contemporary legal context" analysis in Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), and Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), supports the legitimacy of aiding and abetting liability in private civil suits since the aiding and abetting theory of liability was well established among the circuits when Congress amended the 1934 Act in 1975, and no action has ever been taken to repudiate it, thus resulting in a ratification. In the Utah U.S. District Court case of Dahl v. Gardner, 583 F. Supp. 1262, 1267 (D. Utah 1984), U.S. District Court Judge Winder held that the principle that an aider and abettor may be liable for securities fraud in private litigation has been established by judicial interpretation. See Brunelle, "A Contemporary Legal Context of Aiding and Abetting," 11 Sec. Reg. L. J. 1982 (1983). The existing proceedings are not private litigation by a defrauded purchaser to pursue Petitioners as prospective "deep pocket" defendant/sellers. Further, Petitioners were never charged with an underlying crime which could conceivably trigger aiding and abetting liability. See 18 U.S.C. §2. For instance, criminal aiding and abetting requires, along with it, a substantive crime such as mail or wire fraud. See 18 U.S.C. §§1341 and 1343. Because Petitioners have not been charged with a substantive crime and were not "found" guilty of any substantive crime, aiding and abetting liability as alleged by the Division in this case is utter nonsense.

The significant language of Count I of the amended petitions appears to be "encouragement" or "aiding" of violations of Utah Code Ann. §61-1-7. Regardless of the

fact that, on July 16, 1990, the Division failed to "prove" that Petitioners' sellers violated Utah Code Ann. §61-1-7, the amended petitions are blatantly defective in their allegations of "aiding [and abetting]" liability. For instance, all aiding and abetting cases require a fraudulent scheme as contemplated in Rule 10b-5, namely, an independent tort, not as in this case, alleged strict liability (on the part of Petitioners' sellers). See e.g., Kerbs v. Fall River Industries, Inc., 502 F.2d 731, 740-741 (10th Cir. 1974)(setting forth the elements of aiding and abetting in the context of securities). In this case, Petitioners are not charged with being parties to or aiding and abetting the underlying U.S.A. Medical stock fraud and "short squeeze" as exclusively uncovered by them in Judge Greene's Court. In this case, the only alleged illegality is that of Petitioners' sellers who allegedly sold Petitioners stock of U.S.A. Medical without alleged Utah exemptions. While it was never proved on July 16, 1990, that Petitioners' sellers lacked exemptions, it is undisputed that such people did so with full knowledge of precisely what they were doing. Nonetheless, selling stock in violation of §12(1) of the '33 Act or Utah Code Ann. §61-1-7, is a strict liability offense. It is not a tort. Section 61-1-7 is Utah's counterpart to Section 5 of the Securities Act of 1933. Utah Code Ann. §61-1-22(1)(a),²² as in effect in 1989, is the state counterpart to §12(1) of the '33 Act. Both sections of both acts are strict liability offenses which entitle the buyer to automatic rescission against his or her seller for selling a stock that was neither registered nor for which there was an appropriate exemption. Count I of the Division's amended petitions alleges no more than a violation by Petitioners' sellers of Utah Code Ann. §61-1-22(1)(a). The point here is that the Division is construing §61-1-22(1)(a) in a

²²Utah Code Ann. §61-1-22(1)(a) and (b), the Utah corollaries to §12(1) and §12(2) of the Securities Act of 1933, respectively, were amended effective April 23, 1990, as simply §61-1-22(1). However, such amendment is not retroactive and therefore, it does not pertain to these proceedings. See Exs. D and F in Petitioners' Addendum.

manner which enables it to prosecute the purchaser when, in reality, §61-1-22(1)(a) is a purchaser and only a purchaser's cause of action. In other words, the purpose of §61-1-22(1)(a) is to protect purchasers not prosecute them as joint tortfeasors. [Emphasis added.] Further, since a violation of §5 of the '33 Act or §61-1-7 of the Utah Act are strict liability offenses, it would appear legally impossible that a person can "aid [and abet]" it. Common examples of strict liability offenses are bigamy and statutory rape. Intent and scienter are irrelevant just as they are with violations of §5 and §61-1-7. Either the instrument in issue was a "security" or it was not; either it was "registered" or it was not; either it was "exempt" or it was not; either it was "sold" or it was not. Since aiding and abetting requires not only intent, substantial knowing participation, and scienter and, because it also requires a fraudulent scheme or deceptive device or contrivance, namely, a tort, Count I miserably fails to state a claim against Petitioners any more than the victim can be guilty of aiding and abetting bigamy or statutory rape. If the performance of an abortion is illegal, what the Division has done is prosecute the woman who has sought it, not the doctor who performed it and who is the express target of the statute. State v. Fertig, 233 P.2d 347 (Utah 1951) and State v. Cragun, 38 P.2d 1071 (Utah 1934)(both holding that in Utah a woman cannot aid and abet in the illegal performance of an abortion on herself unless she in fact does it to herself). The crux of this case is simply that there has been a failure on the part of the Division to conceptually distinguish the victim from the perpetrator.

Because aiding and abetting is a tort theory of liability designed to protect a purchaser, not a seller, from securities fraud and because Petitioners have not been injured by their own purchases in issue, and, further, when nothing alleged against Petitioners

involves fraud or any other tort, Count I abjectly fails to state a claim upon which relief may be granted. Securities laws exist only to protect purchasers and because Petitioners have neither been harmed nor defrauded by their sellers, Count I fails to state a claim. A Utah Supreme Court case is directly on point: Schvanavelt v. Noy-Burn Milling & Processing Corporation, 347 P.2d 553, 554 (Utah 1959)(The Securities Act was enacted to impose a penalty upon the seller, and not upon the purchaser, where stock is sold without compliance with its provisions, and a purchaser should not ordinarily be held in pari delicto with the seller unless equally culpable); Accord: G.A. Thompson v. Partridge, 636 F.2d 945, 962-63 (5th Cir. 1981). The amended petitions thus fail to state a claim under an aiding and abetting theory.

L. The Division has no power or statutory authority to summarily suspend all §14(2) exemptions for more than 10 days. Further, to suspend exemptions in perpetuity is an unconstitutional "taking" without due process. Thus, after March 10, 1989, whatever Petitioners (or their sellers) did was not actionable.

Nothing in Utah law confers power or authority on the Division or anyone else to gratuitously suspend all exemptions from registration under Utah Code Ann. §61-1-14(2) forever. In fact, not even the U.S. Securities and Exchange Commission has power or authority to suspend all §4 exemptions from registration under the securities laws. See Sections 12(j) and 12(k) of the Securities Exchange Act of 1934. (Ex. G.) In fact, it is plainly unlawful for the SEC to combine successive or back-to-back 10 day suspensions in order to suspend trading in a security for more than 10 days. Sloan v. SEC, (CA-2, 1976) 547 F.2d 152, [’76-’77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,757, mod’g (CA-2, 1975), 527 F.2d 11. Furthermore, under federal law, only the President of the United States may

suspend trading in a security for more than 10 days. (See §12(k), Exchange Act.)

Significantly, the Utah Supreme Court has held that states rely on federal law to interpret their own Blue Sky Laws. Payable Accounting Corp. v. McKinley, 667 P.2d 15, 17 (Utah 1983). If the SEC, which has been given Congressional authority to exclusively regulate securities trading in interstate commerce, cannot suspend trading (i.e., but one particular exemption) for more than 10 days, where does the Division get its authority to suspend all exemptions in perpetuity?

To suspend exemptions beyond 10 days is an unconstitutional taking without due process because it prevents those who have acquired a security from disposing of it. The idea is perhaps most analogous to a TRO which can never be extended for successive 10 day periods. The inherent ludicrousness of "permanent suspension" (even of mere "trading") is exemplified by the following example: assume the State of New York suspended trading in IBM forever, let alone beyond 10 days. Would such conduct be fair to its thousands and thousands of shareholders who would not be able to dispose of their securities on the New York Stock Exchange?

Based on the fact that any such authority is unconstitutional, the Division's March, 1989, Orders cannot have prohibited Petitioners from having purchased stock from anyone after March 10, 1989. For the above reasons, Count I of the amended petitions exceeds the Division's statutory authority and they are otherwise unconstitutional.

M. The Division's regulatory posture relative to the securities of U.S.A. Medical after the date of its amended petitions is inconsistent with such petitions. Thus, they fail to state a claim by the Division's own subsequent policy and conduct.

Petitioners argued below in their Memorandum in Support of their Rule 12(b)(6) Motion to Dismiss that the Division's secret and private No–Action letter of August 9, 1989 (Ex. S) -- a policy allowing a licensed Utah securities agent to "direct trades" in the securities of U.S.A. Medical -- is legally inconsistent with the posture of the Division in its amended petitions. This argument is further bolstered by the Division's September 1, 1989, Press Release relative to U.S.A. Medical. (Ex. X; R. 716.) In such Press Release, the Division notifies the world that it will rescind its March 1989, Orders once U.S.A. Medical has filed a registration statement with the Division. This means that whatever problems the Summary Order was designed to redress, "registration" will solve them (as far as the Division is concerned). Nonetheless, neither Petitioners nor those out–of–state NASD broker–dealers and clearing corporations to whom Johnson–Bowles owed stock, needed the protections afforded by registration. To be sure, as parties, they were all present in Judge Greene's Court when everything concerning U.S.A. Medical was exposed. Simply put, by March 1, 1989, everyone affected by Johnson–Bowles' "short" (namely everyone in the Judge Greene litigation) already knew everything that anyone would want to know or that would otherwise be disclosed in a registration statement. In fact, none of such parties who obtained the stock strictly for "delivery" were in the least concerned whether the stock was registered or not. In short, registration is only to protect prospective innocent and unsophisticated purchasers, not fully informed, sophisticated NASD member broker–dealers and clearing agents and corporations. SEC v. Ralston Purina Company, 346 U.S. 119 (1953)(holding that securities laws do not apply to persons who do not need the protections afforded by registration). Since registration is something that would have admittedly made the March 1989, Orders obsolete or wholly unnecessary, it is clear that Petitioners did nothing wrong,

let alone "dishonest or unethical" by purchasing stock to "flatten-out" their pre-existing federal executory contracts. Because registration has and would have no bearing on Petitioners' conduct from a legal, or even moral, standpoint, the amended petitions are legally inconsistent with the Division's avowed policy enunciated in both its August 9, No-Action Letter and its September 1, 1989, Press Release. Based on such regulatory inconsistencies, the amended petitions fail to state a claim.

N. There must be damage or even the prospect or potential of damage to the public before a broker-dealer or agent's registration with the Division can be revoked at all, let alone for one year. Because Petitioners acted at all times in good faith and their conduct lacked any possibility of ever damaging anyone (and, on the contrary, both frustrated the fraud and protected those to whom Petitioners owed stock), the amended petitions do not achieve a legitimate state governmental purpose. Because they are not in the "public interest", they fail to state a claim.

There is no dispute that Petitioners' conduct damaged no one. There is also no dispute that Petitioners' conduct never could have potentially damaged anyone. Moreover, there is no dispute that Petitioners' conduct saved several NASD member broker-dealers and at least one clearing corporation from losing hundreds of thousands of dollars effecting "buy-ins" for which none of them ever could have ever been reimbursed or paid. Furthermore, the stock that such entities would have purchased "on the market" to effect "buy-ins" would have come from the "control persons" and criminals who orchestrated the "short squeeze" in the first place. Thus, Petitioners' conduct prevented hundreds of thousands of dollars from being placed in the pockets of the criminals who in fact orchestrated the fraud from the beginning. Instead of being put out-of-business,

Petitioners should be commended for doing the Division's work for it and preventing the U.S.A. Medical criminals from reaping the unlawful fruits of their crimes. In fact, as opposed to injuring anyone, Petitioners ensured that other Utah residents wouldn't be damaged by the U.S.A. Medical fraud. Based on the fact that Petitioners were victims, not wrongdoers, who at all times acted in good faith, coupled with the fact that Petitioners, as "whistleblowers", single-handedly exposed the U.S.A. Medical fraud, the Division's amended petitions designed solely to penalize them for doing what the Division and the SEC were designed to do, fail to state a claim. (See SEC v. Dirks footnote 15, supra.) This point is supported by Buchman v. Securities & Exchange Commission, 553 F.2d 816, 821 (2nd Cir. 1977). In Buchman, a case involving the violation of the NASD Rules of Fair Practice by a broker, the Second Circuit stated:

The touchstone, in other words, is good faith -- the ultimate test of violation of an ethical standard The measure of culpability then becomes whether appellants were in good faith.

Because Petitioners acted reasonably and in good faith and there is no evidence to the contrary, Count I of the amended petitions fails to state a claim.

5. THE ALJ'S MARCH 23, 1990, ORDER DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT UNDER RULE 56, UTAH RULES OF CIVIL PROCEDURE, IS REVERSIBLE ERROR. (Ex. AA; R. 597-608.) THIS IS BECAUSE THERE WAS NO ISSUE OF FACT AS TO WHETHER PETITIONERS ENGAGED IN SO-CALLED "DISHONEST OR UNETHICAL PRACTICES" AND SUMMARY JUDGMENT DISMISSING THE AMENDED PETITIONS SHOULD HAVE BEEN GRANTED.

Count I of the amended petitions alleges that Petitioners (not merely Petitioner Johnson) "solicited", "encouraged", or "aided" Petitioner Johnson's sellers in selling their

U.S.A. Medical stock to him. There was no evidence of this at the summary judgment level and in fact, such was contradicted by the affidavits submitted by Petitioners and their sellers in support of this motion. (Exs. U, V, W and CC; R. 720–725, 694–95, 738–758, and 647–650.) Furthermore, none of the Division's allegations were supported in any respect by the Division's responses to Petitioners' first set of discovery requests. (R. 738–802.) There was further no evidence which the Division proffered which could rebut the fact that no solicitation, encouragement or aiding of any such sellers was involved, even if "solicitation" was legally relevant to such motion, which it was not. The foregoing is also not to ignore that only Petitioner Johnson, not Petitioner Johnson–Bowles, was involved in the purchases in issue. Thus, at a minimum, summary judgment dismissing the amended petitions against Petitioner Johnson–Bowles should have been granted.

"Solicitation" is only an issue insofar as it involves one of the federal and state exemptions from registration. Other than being applicable to a specific exemption, the term "solicitation" has no meaning and no bearing on anything in securities laws. For example, §4(4) of the Securities Act of 1933, "Broker's Transactions", Vol. 1, Fed. Sec. L. Rep. (CCH) ¶1555 at p. 1574, provides an exemption from §5 [the registration provisions] of the Act as follows:

Sec. 4. The provisions of section 5 shall not apply to -- . . . (4) brokers' transactions, executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders. [Emphasis added.]

(See Ex. E.) Utah Code Ann. §61–1–14(2)(c), is the state corollary to the federal, §4(4) exemption. However, it goes one step further by including language specifically proscribing sales by broker–dealers. It reads:

The following transactions are exempted from Sections 61–1–7 and 61–1–15:

(c) any non-issuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy; . . . [Emphasis added.]

(See Ex. C.) The Division's March 1, 1989, Summary Order allegedly suspended all §14(2) exemptions, including subparagraph (c) thereof. The Division alleged "solicitation" on the part of Petitioners (not merely Petitioner Johnson) in Count I as if Petitioners were in fact relying on §14(2)(c), the so-called "brokers' special exemption" or the "unsolicited order exemption", when, in fact, Petitioners do not need an exemption to effect a "purchase".²³ In other words, the Division suspended Utah's "unsolicited order exemption" -- which, by the way, only pertains to "buys" by "customers" from broker-dealers by its own unambiguous language -- only to allege in Count I that Petitioners don't have that very exemption -- an exemption Petitioners never argued they ever had or needed to have in the first place. Were this case to involve "sales" by Petitioner Johnson to certain Utah residents, instead of the other way around, the Division could contend that Petitioner Johnson "solicited" his "customers" and therefore further contend that he or Johnson-Bowles (whoever the "seller" would be) lacked Utah's §14(2)(c) exemption from registration. As a result, the burden would be on Petitioners to prove the availability of §14(2)(c) or another exemption. Unfortunately for the Division, "solicitation" is not at issue in these proceedings -- even under express Utah law -- because (1) no "sales" by Petitioners occurred as contemplated in §14(2)(c), and (2) Petitioners are not and never have claimed an exemption simply to "purchase", let alone the §14(2)(c) exemption. In short, "solicitation" which, if it was applicable, which it is not, would only mean that Petitioners --

²³See e.g., Rule 144(g)(2) of the General Rules and Regulations of the Securities & Exchange Commission, Reg. §230.144, Fed.Sec.L.Rep. (CCH) ¶2705A at p. 2788; Lipton, Broker-Dealer Regulation, Clark Boardman Securities Law Series, Vol. 15, §3.03[3][d][i], p. 3-95, ("... the prohibition on solicitation of customers applies only to the solicitation of buy orders, rather than the solicitation of sell orders.").

if they were "sellers" -- would have the burden of proving entitlement to the §14(2)(c) exemption. See Utah Code Ann. §61-1-14.5. "Solicitation" is thus irrelevant as a matter of law to Petitioners' alleged conduct. See also, Hicks, J. William, Exempted Transactions under the Securities Act of 1933, Clark Boardman Securities Law Series, Vol. 7C, Chapter 13, First Edition, 1989, pp. 13-1 through 13-76, Rel. #22, 6/89.

Based on the affidavits filed by Petitioners in support of summary judgment, affidavits un rebutted by the Division, there was no genuine issue of material fact. Accordingly, the ALJ erred in not dismissing the amended petitions under Rule 56, Utah Rules of Civil Procedure.

6. FORMER DIVISION DIRECTOR JOHN C. BALDWIN'S APRIL 9, 1990, ORDER ON AGENCY REVIEW DENYING ANY ADMINISTRATIVE AND JUDICIAL REVIEW OF THE ALJ'S MARCH 23, 1990, ORDER (DENYING SUMMARY JUDGMENT) WAS ERRONEOUS AND HAS OTHERWISE PREJUDICED PETITIONERS.

This order (Ex. BB; R. 1230.) ought to be reversed for the same general reasons as those articulated in Petitioners' corollary appeal relative to Mr. Baldwin's similar October 30, 1989, Order on Agency Review, Case No. 900210-CA. This is so even though Mr. Baldwin's April 1990, order is not the subject of such appeal. Reference is thus made to such related appeal.

In addition, however, such order is erroneous because the ALJ's Order of March 23, 1990, denying Petitioners' motion for summary judgment was based exclusively on second-hand hearsay statements, which were neither in proper affidavit format nor averred on personal knowledge. Thus, they were inadmissible to defeat summary judgment under Rule 56, a rule incorporated into the UAPA under Utah Code Ann. §63-46b-1(4)(b).

Based on the Division's defective affidavit and an unverified internal Division memorandum -- which were both subject to a motion to strike by Petitioners -- it was concluded that there was a remaining issue of fact as to "solicitation". Such is manifest error because the opposing affidavits failed to create an issue of fact as to "solicitation" and the proceedings never should have gone to trial before the Securities Advisory Board.

The Utah Supreme Court has held that, in administrative proceedings, "findings . . . cannot be based exclusively on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law." Yacht Club v. Utah Liquor Control Commission, 681 P.2d 1224, 1226 (Utah 1984), Wilson v. The Industrial Commission of Utah, 735 P.2d 403, 55 Utah Adv. Rep. 56 (Utah Ct. App. 1987). See also Sandy State Bank of Brimhall, 636 P.2d 481 (Utah 1981); Schmidt v. Industrial Commission, 617 P.2d 693 (Utah 1980). There can be no dispute that the Division's defective affidavit and unverified internal memo were not "substantial evidence" that would be competent in a court of law to defeat Petitioners' motion for summary judgment. Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980)(discussing admissibility of hearsay in administrative proceedings). However, based exclusively on the Division's defective affidavit and such Division internal memorandum, the ALJ "found" on March 23, 1990, that there was an issue of fact as to "solicitation". [Emphasis added.] In Cooper v. U.S., (Ct. of Claims) 639 F.2d 727, 730 (1980), the Court stated:

Upon specific facts of this case, however, the hearsay relied upon by the Government was not sufficient to constitute substantial evidence. We arrive at our conclusion basically for three reasons.

In removing plaintiff, the Government relied solely on the DIS report, the contents of which consisted merely of data excerpted from state arrest records, a police officer's report of

interviews with witnesses, and a DIS interview with an investigator as to why no information was filed on the involuntary sexual battery charge. This type of attenuated and highly unreliable evidence is qualitatively, at best, triple hearsay. It is beyond doubt that the hearsay evidence before the Government should not have been given any probative force without some assurance of its creditability and reliability. See Richardson v. Perales, 4012 U.S. 389, 402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1972); Peters v. United States, 187 Ct.Cl. 63, 408 F.2d 719 (1969).

For these reasons, the ALJ's March 23, 1990, determination that "solicitation" remained an issue of fact to defeat summary judgment was error. That it was error is further confirmed -- with admitted hindsight -- by the Securities Advisory Board's specific "finding" on p.6, ¶12 in its August 13, Findings of Fact, that Petitioners did not engage in the "solicitation" of anyone. (Ex. EE; R. 1129-1141.)

Mr. Baldwin's affirmation (by default) of the ALJ's March Order ignored other factors. For instance, the ALJ's determination that former Johnson-Bowles trader Bruce Eatchel's alleged (hearsay) conversations with Paul Jones, an NASD member and trader of U.S.A. Medical securities, constituted "sufficient evidence" of "solicitation" to create an issue of fact as to Petitioners in that regard. [Emphasis added.] Significantly, neither the Division's amended petitions nor their opposing affidavits alleged that Eatchel was an aider and abettor, a co-conspirator, a substantial participant or factor, or that he was a person "controlled" by Johnson-Bowles or Marlen V. Johnson under securities laws; they further do not allege that Eatchel was acting within the scope of his employment or agency when he engaged in such alleged conversations with Jones concerning U.S.A. Medical. The Division made no allegations of any kind which would even imply the foregoing. This is not to ignore that Eatchel, Johnson, and Johnson-Bowles attested under oath to the contrary with admissible evidence under Rule 56 -- evidence which was not rebutted in the least by the

Division. (Ex. U and W; R. 720–725, 647–50, 738–758, and 694–95.) Without more, there can be no dispute that whatever Eatchel may have said, it does not result in respondeat superior liability on the part of Petitioners which could create an issue of fact as to their alleged "solicitation" of Jones. (Innumerable citations holding that securities brokerage firms not responsible for the oral communications of their employee/brokers omitted.)

The ALJ further determined (Ex. AA.) that Petitioner Johnson's alleged conversation with one John Dawson created an issue of fact as to "solicitation". Regardless of the fact that the Division's evidence was procedurally defective in this regard, even if it wasn't, such conversation never resulted in a sale of U.S.A. Medical stock and thus never resulted in a violation of the Division's March 1, 1989, suspension of exemption order. Thus, such evidence, whether admissible or not, could not create an issue of fact as to whether Dawson was "solicited" or "induced" to violate Utah law, simply because he never did. To be sure, the amended petitions do not allege that simply talking to someone about U.S.A. Medical after March 1, 1989, without anything more, is itself "dishonest or unethical" conduct on the part of Petitioners. Certainly there is nothing "dishonest or unethical" about exercising one's First Amendment right of free speech.

On the other hand, assuming ad arguendo that Petitioners indeed somehow, through Eatchel, directly or indirectly, "solicited" licensed broker Paul Jones to sell his U.S.A. Medical stock, it is undisputed that Paul Jones was an NASD registered representative and himself a trader of U.S.A. Medical securities (§14, p. 3–4, Stipulation of Facts for Purposes of Hearing, Ex. CC; R. 1156–1157), and therefore, as a matter of law, he was "sophisticated", more especially vis-a-vis U.S.A. Medical and its stock. The law is well settled that a sophisticated investor of the caliber of Jones, by his mere status (and obvious

knowledge of the Division's March 1, 1989 Order), could not have been "solicited", aided, encouraged, counseled, or urged to sell his U.S.A. Medical stock to Petitioners. This is confirmed, for example, by the highly significant First Circuit case of Kennedy v. Josephthal & Company, Inc., 814 F.2d 798 (1st Cir., 1987), ['87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,186, p. 95,859 (holding that because investors were sophisticated, there was a "complete absence of justifiable reliance" on the alleged oral misrepresentations and inducements of the broker). In this case, Jones was not an investor but a licensed securities trader who had himself been making a market in U.S.A. Medical stock with local broker-dealer Wasatch Stock Trading. Furthermore, Petitioners never made (or are alleged to have made) any "misrepresentations or inducements" to Jones in order to get him to part with his U.S.A. Medical stock. (R. 161-168.) Thus, the Kennedy holding ought to apply to Jones to a far greater degree than it did to the sophisticated plaintiffs in that case. In short, if Jones was legally incapable of being "solicited", how was there an issue of fact as to his being "solicited"?

Based on the foregoing, both the ALJ and Baldwin erred in not dismissing the proceedings.

7. THE SECURITIES ADVISORY BOARD AND DIVISION DIRECTOR JOHN C. BALDWIN'S AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON ARE PATENTLY ERRONEOUS AND SHOULD BE REVERSED. (Ex. EE; R. 1129-1141.)

A. It is legally impossible for Petitioners to be liable without having "solicited" their sellers.

After 1½ years of relentless litigation, the Division's entire case against Petitioners rested on an "aiding and abetting" theory. However, if Petitioners did not

"solicit" their sellers to sell (as unambiguously held in ¶12, page 6 of the Securities Advisory Board's August 13, 1990, Findings of Fact), it is legally impossible for Petitioners to have "aided and abetted" such persons' alleged violations of a strict liability statute prohibiting only the sale of securities. [Emphasis added.] (See, e.g., Pinter v. Dahl *infra*.) This is in turn because, not having induced their sellers to part with their stock, Petitioners cannot have legally "substantially participated" in such underlying and unilateral illegality -- a necessary prerequisite for aiding and abetting liability to attach. Kerbs v. Fall River Industries, Inc., (CA-10, 1974) 502 F.2d 731, ['74-'75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,788. Thus, the August 13, Order is error because there was no evidence by which Petitioners could be found guilty of anything, more especially aiding and abetting. Simply put, if Petitioners didn't "solicit", induce, or encourage anyone to violate the law (p. 6, ¶12, Ex. EE), Petitioners, by definition, could not have "substantially participated" in the alleged unilateral illegality, namely, the unlawful securities sales themselves (i.e., parting with title to securities in exchange for consideration). [Emphasis added.] The foregoing is perhaps what this entire case boils down to and because the August 13, 1990, Order concludes the contrary, it must be vacated and reversed. In this regard, reference is made to David R. King's expert testimony at pages 190-203 of Exhibit "A" to Petitioner's August 23, 1990, Request for Agency Review, testimony dispensed with in the August 13, Order as being "specious". (Ex. DD; R. 1049-1062.) Therein Mr. King, a former staff attorney for the SEC, testified that Petitioners' conduct was not and could not have been "dishonest or unethical". Thus, while supposedly deferring to so-called "agency expertise", Mr. King was flatly ignored. Furthermore, if one does a search of all the case law interpreting §12(1) of the Securities Act of 1933 -- the federal counterpart to the statute in issue in this case -- one will not

find a single solitary case in which a person -- let alone the purchaser involved -- can "aid and abet" the violation of such strict liability statute.

Naturally, if Petitioners did not aid and abet their sellers, they could not have engaged in "dishonest or unethical business practices". This is confirmed by the cross-examination of Broker-Dealer Section Director Kathleen C. McGinley in Exhibit "A" to the Request for Agency Review in which she clearly admits that the Division's entire case rested on an "aiding and abetting" theory. (See p. 37, lines 7-9, R. 896 and p. 40, l. 22-25, p. 41, l. 1-3, R. 899-900.).

The U.S. Supreme Court case of Pinter v. Dahl, (June 15, 1988), 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658, ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,790, is directly on point. In Pinter, the U.S. Supreme Court held that liability for the sale of unregistered securities under §12(1) of the Act could extend to persons who successfully "solicit" a "purchase" (not a sale) of securities (by someone else) so long as the solicitors are motivated by a desire to serve their own financial interests or those of the securities owner. The Court categorically rejected the "substantial factor" test -- one of the three prongs of the aiding and abetting test -- under which liability may be imposed on persons whose participation in the sales transaction was a "substantial factor" in causing the transaction to take place. By way of background, Pinter involved a civil suit by purchasers who were damaged by certain parties who talked them (as purchasers) into buying (not selling) unregistered stock; in the case before this Court, the purchasers are the Petitioners themselves, who could not have engaged in "soliciting" under Pinter by virtue of the fact that they didn't "solicit" anyone to "purchase" -- they themselves, and no one else, being the purchasers. (See again ¶12, page 6 of such Findings of Fact.) Were Pinter to apply to the

instant case, the legal effect would be that Petitioners are to sue themselves and only themselves to recover something they have no desire or need to recover. This is but further evidence that the Division's August 13, Order, is contrary to the law of the land and otherwise totally nonsensical.

By way of additional technical background, §12(1) of the Securities Act of 1933 (to which Utah Code Ann. §61-1-22(1)(a), is the state counterpart), provides that if a security is unregistered and the seller has no exemption from registration, the purchaser can seek rescission from his or her immediate seller -- and no one else (other than perhaps a "control person" of the seller under §15 of the Securities Act).²⁴ In short, §12(1) is nothing but a strict liability, rescission statute designed only to protect a "purchaser" of securities, allowing him or her to unwind the transaction when the seller has not adhered to the required technicalities. Further, the statute could not logically apply to aiders and abettors because, their not being sellers of the stock, how could anyone contend that they needed an exemption? In this case, the Petitioners were but purchasers of unregistered stock and the Division is applying the rescission statute (one which ironically exists only to protect Petitioners as purchasers) to contend that they, as purchasers, aided and abetted a violation of law solely enacted to protect them and only them -- simply because they "purchased" stock that was unregistered. This is simply absurd in the context of a rescission statute requiring privity of contract between a seller and his direct buyer. (See Schvaveveldt v. Noy-Burn, supra at p. 554.) Certainly if a person buys a car from General Motors he can't obtain rescission from someone who didn't sell him the car in the first place (including himself). Yet this is the Division's case. In fact, it would be even more ridiculous

²⁴It has never been alleged, let alone proven, that Petitioners "controlled" their sellers under either §15 of the '33 Act or Utah Code Ann. §61-1-22(2), the state counterpart thereto, now amended, effective April 23, 1990, as §61-1-22(4).

for a purchaser to sue himself for aiding and abetting an unlawful sale to himself. Going a step further, the conspicuous legal precedent necessarily resulting from the Division's August 13, Order, is that, thanks to the Division, a seller who unlawfully sells unregistered, non-exempt securities can now defend a §12(1) or Utah Code Ann. §61-1-22(1)(a) lawsuit by his purchaser by saying that his purchaser aided and abetted him -- merely by purchasing the illegally sold stock!! [Emphasis added.] Petitioners doubt that the Division has realized the dangerous precedent that it has now created to protect professional stock swindlers, a precedent that would enable criminals to sell unregistered, non-exempt stock with a Division-endorsed, strict liability defense. The end result and irony is that while the Division parades the banner of the so-called "public interest", the legal precedent resulting from its August 13, Order -- a precedent establishing a strict liability defense to §12(1) and §61-1-22(1)(a) -- could not be less in the "public interest" and will no doubt substantially harm the investing public in the long run.

Putting the foregoing in even another perspective, aiding and abetting is only used in the context of fraud, namely, when a defrauded purchaser cannot get his money back from his immediate seller and it allows the purchaser to pursue -- under §12(2), not §12(1) of the Securities Act of 1933 -- aiders and abettors of the seller who may have deeper pockets, more particularly when the immediate seller (who directly engaged in the fraud) is judgment proof. [Emphasis added.] A good example, at least in this district, is U.S. District Judge Greene's decision in Federal Savings & Loan Insurance Corp. v. Provo Excelsior, Ltd., 664 F. Supp. 1405 (DC Utah), ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,754 (adopting the "substantial factor" test for secondary liability under §12(2), not §12(1)). In the case now before this Court, Petitioners are not and never have been

charged with either fraud or a violation of §61-1-22(1)(b), and thus, aiding and abetting is wholly inapplicable.

Because a person cannot violate §12(1) of the '33 Act or Utah Code Ann. §61-1-22(1)(a) if he or she has not "solicited" the sale (as opposed to the purchase) under Pinter v. Dahl, and because Petitioners didn't even "solicit" the purchase, the Division's August 13, Order, which concludes the contrary, is erroneous and must be vacated.

B. The August 13, Findings of Fact, Conclusions of Law and Order "Find" Petitioners guilty of a "violation" for which they were never charged.

As a direct result of the Division's overzealousness at "convicting" Petitioners, the Board's August 13, 1990, Order goes so far as to "find" Petitioners "guilty" of directly violating the Division's March 1, 1989, Summary Order. (Ex. EE; R. 1129-1141.) Without reiterating previous argument to the effect that exemptions are not needed to effect securities purchases, this is a "crime" that Petitioners were never charged with in the amended petitions. (See, p. 40, l. 22-25, p. 41, l. 1-3, R. 899-900; see also Ex. L.) In fact, what is remarkable is that the Division initially alleged such direct liability in its initial April 27, 1989, petitions (R. 263-295) only to turn around in July 1989, and delete such charges in its amended petitions. Because someone cannot be "convicted" of a "crime" for which he or she was never charged, the August 13, Order must be vacated and reversed.

C. Because the Division only had power or authority to suspend exemptions, or even trading, for 10 days, there was no Division order in effect to proscribe (or affect) Petitioners' conduct after at least March 10, 1989. As a result, the "final agency action" is manifest error and must be reversed and dismissed.

The Division makes no "finding" in its August 13, 1990, Order as to exactly when Petitioners specifically purchased U.S.A. Medical securities in order to determine that such constituted a "dishonest or unethical practice". (p. 11, Ex. EE; R. 1129-1141.) It does conclude, however, that Petitioners only violated the March 1, Summary Order. (p. 9, bott., p. 10, top, Ex. EE; R. 1129-41.) Based on these "conclusions of law", there is a complete lack of evidence to "find" Petitioners "guilty" of engaging in "dishonest or unethical practices" during the pendency of the Division's March 1, 1989, Summary Order, an order which, under Utah Code Ann. §61-1-14(3), lawfully expired by at least March 10, 1989. (Cf. Utah Code Ann. §61-1-12(2)(c)(iii).) In other words, since there was no evidence that Petitioners "purchased" any U.S.A. Medical stock between March 1 and March 10, 1989, the August 13, Order is unsupported by the evidence. Accordingly, the August 13, Order as adopted by the Executive Director of the Department of Commerce on October 29, 1990, must be reversed and vacated.

D. The Conclusions of Law in the Board's August 13, 1990, Order are not supported by "substantial evidence," including, the July 8, 1990, Stipulation of Facts for Purposes of Hearing. (Ex. CC; R. 1129-1141.) For this reason, such Order must be reversed and the proceedings dismissed.

The August 13, 1990, Order "finds" Petitioners guilty of "dishonest or unethical practices" based solely on the repeated lip service paid to the words: "driven by a desire to realize monetary gain and/or avoid financial loss". Petitioners did not buy the stock to make any profit but to stay alive and otherwise protect those to whom they owed stock -- persons that they needed to remain in good stead with were they to continue in business. Were Petitioners to cause Midwest Clearing, Spear, Leads & Kellog, M.S. Myerson, William

Frankel & Co., Paragon Capital Corp., Merrill, Lynch, etc., to incur several hundred thousand dollars in losses, no doubt Petitioners would have been all washed-up in the brokerage business -- not to mention defending at least five other lawsuits. Certainly Petitioners have a duty to mitigate their damages and those potentially caused others by the fraud in this case.

In this case, Petitioners were acting in good faith out of self-preservation and a desire to protect those they never could have reimbursed. They were not acting for profit. Surely anyone can see that there is a substantial difference between being "greedy" and losing \$500,000 of investment capital or causing others to lose the same, not to mention one's business and reputation. Because Petitioners' conduct was not "for financial gain" but was merely to mitigate potential losses caused by a fraud unrelated to them, their conduct was reasonable and justified. Because the August 13, Findings, Conclusions, and Order mischaracterize and misconstrue the evidence, it is unsupported and must be reversed.

E. The sanction imposed by the August 13, Order is arbitrary and ridiculous in comparison to the alleged "violation" and must be reversed accordingly.

Attached in Petitioners' Addendum as Ex. KK are certified copies of the Division's disciplinary accomplishments relative to other licensed broker-dealers and agents. In such cases, each respondent engaged in far more egregious conduct, including specified "dishonest or unethical practices", yet each one's sanction was far less severe than that imposed on Petitioners herein. In fact, in one instance the suspension was one day. This exhibit demonstrates that the sanction imposed in this case is wholly arbitrary and capricious and that it was only entered to "teach Petitioners a lesson" for resisting the Division.

By the same token, Exhibit JJ includes certified copies of James L. Averett's Amended Felony Information, Criminal Judgment, and Conditions of Probation and Supervised Release in a case before U.S. District Court Judge David Sam. In such action, Mr. Averett, a local attorney, pleaded guilty to criminal conspiracy to commit fraud in the sale of U.S.A. Medical securities. Mr. Averett received mere probation under Federal Sentencing Guidelines and is still a member in good standing of the Utah State Bar.

Exhibits KK and JJ are offered to demonstrate not only that the Division's sanction is arbitrary and capricious, but that the Division's conduct with respect to Petitioners is a violation of their equal protection of the laws.

F. There was no evidence to support a "finding" in the August 13, 1990, Order that Petitioners' sellers lacked exemptions from registration, and therefore, there is no evidence that Petitioners could have engaged in "dishonest or unethical practices" under any theory.

The Division never proved that Petitioners' sellers lacked exemptions from registration for their admitted sales of U.S.A. Medical stock to Petitioners. This alleged prerequisite to Petitioners' liability was simply assumed in the August 13, Order. The failure of the Division to carry this burden relative to Petitioners' sellers is dispositive of this appeal. Accordingly, without any such finding or without any evidence to support any such finding -- it all being assumed in the August 13, Order that Petitioners' sellers lacked exemptions -- there is no corollary evidence that Petitioners did anything, let alone anything wrong or improper relative to their sellers' conduct. Thus, the August 13, 1990, Order is wholly unsupported by the evidence.

8. THE DIVISION'S IGNORING OF PETITIONERS' AUGUST 20, 1990, OBJECTION TO THE FORM AND CONTENT OF THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HAS PREJUDICED PETITIONERS. (Ex. FF; R. 1116–1120.) THE DIVISION'S FURTHER IGNORING OF PETITIONERS' AUGUST 20, 1990, DEMAND FOR DISCLOSURE OF HOW AND BY WHOM THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER WAS PREPARED, INCLUDING THE SUPPORTING AFFIDAVIT, HAS FURTHER PREJUDICED PETITIONERS. (Ex. GG and HH; R. 1112–1115 and 1121–21.)

Immediately after the July 16, 1990, hearing, Petitioners were informed by the ALJ that the Board's ultimate Findings of Fact, Conclusions of Law and Order Thereon would be prepared by the Board with the assistance of the ALJ who presided at such hearing. Upon receipt of the same, Petitioners knew that it had not been drafted by either the Board or the ALJ. This is evidenced by Petitioners' affidavit filed in support of their Motion for Disclosure. (Ex. HH; R. 1121–25.) On the contrary, it was self-evident that the same had been unilaterally drafted by Mr. Mark J. Griffin, the Division's counsel, without any input, knowledge or notice on the part of either Petitioners or their counsel.

Petitioners reached this conclusion because the Order tracked Mr. Griffin's closing argument virtually verbatim. (See R. 1085–1091 and 1101–1104.) This type of deliberate and unethical agency sandbagging has prejudiced Petitioners in that they are "stuck" with such Findings of Fact and Conclusions of Law on this appeal. Furthermore, such "findings" are inconsistent with what actually occurred at the hearing as evidenced by the entire transcript. (R. 860–1111.) Such ex parte sandbagging is grossly improper for the very reasons that under Rule 4–504, Utah Code of Judicial Administration, respective

counsel are to work together in drafting written orders and judgments. Since the ALJ deferred to the prosecutor to draft the August 13, Findings, Conclusions, and Order, it was only fair that Petitioners be given the right to contribute to drafting such to the same degree as the Division's counsel. Instead, however, once this was brought to the Division's attention on August 20, it was ignored.

The Division's overzealousness in its compulsion to prevail by secretly "doctoring" the Findings of Fact and Conclusions of Law is prejudicial error. Not only did the Division take the same out of the hands of the ALJ, but it deprived Petitioners of any say-so in the creation of the same. Petitioners are prejudiced because this Court may not take the time to read the entire transcript of the hearing, including the testimony of Petitioners' expert (Ex. DD) and it may well take the "doctored" Findings at face value. This Court should not countenance such outrageous agency misconduct designed only to prevail at all costs. Because it is unconstitutional for the prosecutor to act as judge, the proceedings should be vacated and dismissed. (See the so-called Morgan Quartet in administrative law, i.e., "he who decides must hear", 298 U.S. 468 (1936); 304 U.S. 1 (1938); and 313 U.S. 409 (1941). See also Gifford, "The Morgan Cases: A Retrospective View", 30 Admin. L. Rev. 237 (1978).) At the same time, it is noteworthy that the ALJ signed the Division's Amended Notice of Agency action (R. 261–264) and former Division director Baldwin signed the Division's motion to convert. (R. 260.) It is thus evident that not only has Griffin acted as prosecutor and judge in the proceedings below, but the ALJ and Baldwin have also acted as judge and prosecutor below. The U.S. Supreme Court has held such conflicts of interest unconstitutional in administrative adjudicative proceedings. Withrow v. Larking, 421 U.S. 35, 43 L. Ed. 2d 712, 723–24, 95 S. Ct. 1456 (1975). (See pp. 4, 23, and 24 of Petitioners' brief in Case No. 900210–CA.)

Based on the foregoing, the August 13, Order is inherently prejudicial and unconstitutional and must be reversed.

9. DEPARTMENT OF COMMERCE EXECUTIVE DIRECTOR DAVID L. BUHLER'S OCTOBER 29, 1990, ORDER ON AGENCY REVIEW, ADOPTING THE AUGUST 13, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN ITS ENTIRETY, COMPOUNDS THE ERRORS IN ALL OF THE PREVIOUS ORDERS AND AGENCY ACTIONS FROM WHICH APPEAL IS SOUGHT. (Ex. II; R. 830-842.)

Executive Director Buhler's Order adds nothing to that which the Division was hell-bent on obtaining, namely, putting Petitioners out-of-business no matter what the cost to the Utah taxpayer. However, because the August 13, Findings concluded that Petitioners did not "solicit" their sellers, Petitioners served a September 10, 1990, letter on Mr. Buhler which detailed why there could be no legal "conclusion" of "dishonest or unethical practices" as a matter of law. (R. 843-851.) As set forth above, under the U.S. Supreme Court's decision in Pinter v. Dahl, it is legally impossible to be liable under §12(1) of the Securities Act of 1933, the corollary to Utah Code Ann. §61-1-22(1)(a), if one does not "solicit" a non-exempt sale to someone else. Thus, in ignoring Petitioners' counsel's September 10, letter, including the Pinter decision, Mr. Buhler's Order on Review is erroneous and should be reversed for each and every reason set forth above.

CONCLUSION

After wading through the foregoing prolix brief, Petitioners would hope that the Court is just as exasperated and perplexed as they are as to why or how the Division believes this case is even remotely "in the public interest". In fact, the entire proceedings below accomplish nothing in terms of teaching someone a lesson, other than: "You can't

fight City Hall." The only thing to be learned from the proceedings below is that it pays to keep one's mouth shut and go along with a fraud, more especially when one is a victim (or potential victim), not only of fraud, but of a more dangerous creature: a power-hungry regulatory agency that is incapable of distinguishing victims from perpetrators. Because the Division's amended petitions categorically penalize "whistleblowing", the result of which any intelligent broker would be insane to ever cooperate with the Division, such petitions are ironically contrary to the "public interest," including public policy. (See SEC v. Dirks, supra.) In other words, the lesson in "ethics" so eloquently taught by the Division is that Petitioners should have quietly given convicted felon Mike Strand the several hundred thousand dollars he wanted for the stock (even if it required a payment plan) and today, both they, Mr. Strand and his unsavory co-conspirators, including U.S.A. Medical Corporation, would still be in business.

Other than a complete "non-lesson", the legal precedent resulting from any endorsement of the Division's August 13, 1990, Order, is that one who sells non-exempt stock has a Division-endorsed, strict liability defense against his purchaser who might sue him under either §12(1) of the '33 Act or Utah's corollary. This too makes the result of the proceedings below contrary to "public policy" if not simply ludicrous.

Based on the foregoing, Petitioners would hope that the Court reverses the "final agency action" on any number of grounds under Utah Code Ann. §63-46b-16(4) and that the Division be given a strong reprimand not to waste everyone's time and money again in the future on something of equal or comparable pointlessness, including but not limited to the evil of trying to extort a \$50,000 "fine" out of a licensee when the agency has no authority to do so.

RESPECTFULLY SUBMITTED,

DATED this 23rd day of January, 1991.



John Michael Coombs
Craig F. McCullough
Attorneys for Petitioners

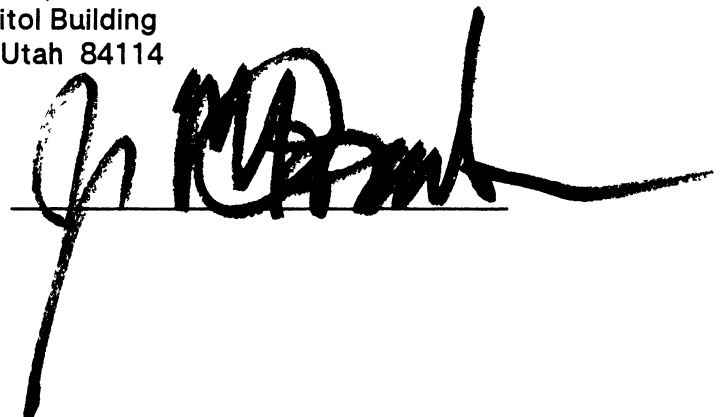
PROOF OF SERVICE

The undersigned hereby certifies that on the 23rd day of January, 1991, (s)he hand-delivered two (2) true and correct copies of the foregoing BRIEF OF PETITIONERS and PETITIONERS' ADDENDUM to:

Earl S. Maeser, Director
Utah Division of Securities
Utah Department of Commerce
160 East 300 South, Second Floor
P.O. Box 45802
Salt Lake City, Utah 84145-0802

and two (2) of the same to:

Mark J. Griffin
David B. Thompson
Assistants Attorney General
115 State Capitol Building
Salt Lake City, Utah 84114



1000.01A:BRIEF.1-35

FILED

IN THE UTAH COURT OF APPEALS

JAN 21 1991

-----ooOoo-----

Johnson-Bowles Company, Inc.,
and Marlen Vernon Johnson,

Petitioner,

v.

The Division of Securities and
Utah Department of Commerce,
State of Utah,

Respondents.

ORDER

Case No. 900558-CA

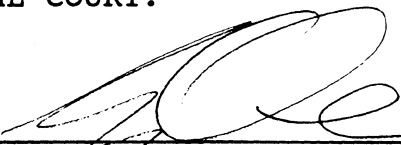
Mary T. Norr
Mary T. Norr
Clerk of the Court
Utah Court of Appeals

The above-entitled matter is before the Court upon petitioner's Motion to Supplement the Record filed 31 December, 1990. Respondent's objection to the motion was filed 9 January, 1991.

Now therefore, IT IS HEREBY ORDERED that the motion is denied. Such denial is without prejudice to 1) petitioner's ability to renew the motion before the panel to whom this case is assigned for disposition on the merits and 2) such panel's prerogative to take judicial notice of the supplemental materials referred to if such panel determines they are relevant and that it may appropriately do so.

Dated this 22^d day of January, 1991.

BY THE COURT:



Gregory K. Orme, Judge

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Johnson-Bowles Company, Inc.,)	ORDER
and Marlen Vernon Johnson,)	
)	
Petitioner,)	
)	
v.)	900558-CA
)	
The Division of Securities)	
and the Utah Department of)	
Commerce, State of Utah,)	
)	
Respondents.)	

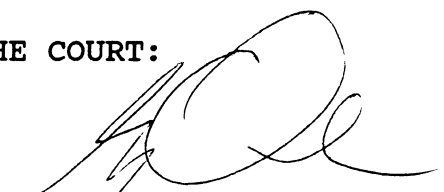
This matter is before the court upon petitioner's motion for leave to file overlength brief and supporting memorandum, filed 23 January 1991.

The court having considered the motion and supporting affidavit, and no response having been filed in opposition thereto,

Now therefore, IT IS HEREBY ORDERED that the motion is granted and the brief is accepted for filing. The grant of this motion is without prejudice to the prerogatives of the panel to whom this case is assigned for consideration on the merits to strike such portions of the brief as may be found, upon closer study, to be unnecessary, unhelpful, or not in compliance with the Utah Rules of Appellate Procedure.

Dated this 12th day of February, 1991.

BY THE COURT:



Judge Gregory K. Orme

FILED

FEB 13 1991

COURT OF APPEALS

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

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

ATTORNEYS FOR PETITIONERS

ORIGINAL PROCEEDING
IN AND BEFORE THE UTAH
COURT OF THE APPEALS

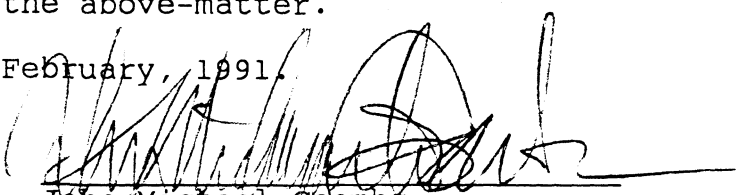
JOHNSON-BOWLES COMPANY, INC., and	:	
MARLEN VERNON JOHNSON,	:	
	:	CORRECTED TABLE OF
	:	AUTHORITIES IN
Petitioners,	:	PETITIONERS' BRIEF
	:	
v.	:	
	:	
The DIVISION OF SECURITIES and	:	
the UTAH DEPARTMENT OF COMMERCE,	:	
STATE OF UTAH,	:	
	:	Case No. 900558-CA
Respondents.	:	
	:	

PLEASE TAKE NOTICE that based on the time constraints of getting Petitioners' Brief filed on January 23, 1991, Petitioners' sub-section containing "Statutes, Rules, and Other Authorities Cited" on pages ix through xii contain errors. While Petitioners' were able to code the statutes, rules, and authorities cited, they were unable to properly organize such in a format to make them easily readable. Attached hereto are four

pages substituting and correcting the sub-section in Petitioners' Brief entitled "Statutes, Rules, and Other Authorities Cited" which have been further broken down into categories of "Federal, State, and Other Authorities".

The Court is respectfully requested to refer to such corrected portion of the Table of Authorities when reading or reviewing Petitioners' Brief in the above-matter.

DATED this 12th day of February, 1991.


John Michael Coombs
Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of February, 1991, (s)he mailed a true and correct copy of the foregoing CORRECTED TABLE OF AUTHORITIES IN PETITIONERS' BRIEF by regular mail, postage prepaid to:

R. Paul Van Dam, #3312
Attorney General
David N. Sonnenreich, #4917
Assistant Attorney General
Fair Business Enforcement Unit
115 State Capitol Bldg.
Salt Lake City, Utah 84114
Telephone: 538-1331

Earl S. Maeser, Director
Utah Division of Securities
Utah Department of Commerce
160 East 300 South, 2nd Floor
P.O. Box 45802
Salt Lake City, Utah 84145-0802

1000.01A:ABRIEF.1-2

STATUTES, RULES, AND OTHER AUTHORITIES CITED

A. FEDERAL RULES AND STATUTES:

	<u>Page</u>
§4, Securities Act of 1933.....	59
§4(4), Securities Act of 1933.....	64
§5, Securities Act of 1933.....	5,57,58,64
§12(1), Securities Act of 1933.....	57,71,72,73,74,81,82
§12(2), Securities Act of 1933.....	57,74
§15, Securities Act of 1933.....	73
§9, Securities Exchange Act of 1934.....	53
§10, Securities Exchange Act of 1934.....	53
§12(j), Securities Exchange Act of 1934.....	59
§12(k), Securities Exchange Act of 1934.....	59,60
§15, Securities Exchange Act of 1934.....	31,53
§15A, Securities Exchange Act of 1934.....	31
§19, Securities Exchange Act of 1934, 15 U.S.C. §78a-78jj.....	26
§19(g)(1), Securities Exchange Act of 1934.....	26
§19(h)(2), Securities Exchange Act of 1934.....	26
§27, Securities Exchange Act of 1934, 15 U.S.C.A. §77aa....	26,30,31
§28(a), Securities Exchange Act of 1934.....	30,31,36,41,47
15 U.S.C. §78a-78jj.....	26
15 U.S.C. §78o-3(b)(7).....	34,38
15 U.S.C.A. §78bb(a).....	31
18 U.S.C. §2.....	56

18 U.S.C. §1341.....	56
18 U.S.C. §1343.....	56
Art. I, §10, Cl. 1, Federal Constitution.....	47,48
Art. IV, Sec. 1, Federal Constitution.....	39,46,47
Art. IV, Sec. 2, Federal Constitution.....	39,46,47
Art. III, §1, NASD Rules of Fair Practice.....	13,14,25,26,30, 31,38,49
Art. 8, Uniform Commercial Code.....	15
Exchange Act [15 U.S.C. §78bb(a)(1982)].....	41
NASAA Guidelines, ¶1401.....	49
NASD Manual (CCH), §59, "Close-Out Procedure", Uniform Practice Code, pp. 3577-3583, Rel. #195 (April, 1982).....	12
Rule 10b-5, General Rules and Regulations of the SEC.....	10,57
Rule 10b-6, General Rules and Regulations of the SEC.....	54
Rule 144(g)(2), General Rules and Regulations of the SEC.....	65
SEC Exchange Act Rel. #34-7920.....	14
Supremacy Clause, Art. IV, Cl. II.....	36

B. UTAH RULES AND STATUTES:

Art. I, §18, Utah Constitution.....	42,48
Art. VI, Sec. 1, Utah's Constitution.....	31
Division Rule R177-6-1g.....	13,48,49,51,53
Rule 12(b)(1), Utah Rules of Civil Procedure.....	1,4,23,27,43,49
Rule 12(b)(6), Utah Rules of Civil Proceudre.....	1,5,61
Rule 56, Utah Rules of Civil Procedure.....	1,66,68
Rule 56(c), Utah Rules of Civil Procedure.....	5

Rule 56(d), Utah Rules of Civil Procedure.....	5,6
Rule 4-504, Utah Code of Judicial Administration.....	79
<u>Utah Code Ann.</u> §61-1-6.....	17,35
<u>Utah Code Ann.</u> §61-1-6(1).....	34,36
<u>Utah Code Ann.</u> §61-1-6(1)(g).....	3,13,16,43,48,49,50,51,53
<u>Utah Code Ann.</u> §61-1-7.....	56,57,58,64
<u>Utah Code Ann.</u> §61-1-12(2)(c)(iii).....	76
<u>Utah Code Ann.</u> §61-1-14(2).....	12,54,59,65
<u>Utah Code Ann.</u> §61-1-14(2)(c).....	64,65,66
<u>Utah Code Ann.</u> §61-1-14(3).....	12,44,54
<u>Utah Code Ann.</u> §61-1-14.5.....	66
<u>Utah Code Ann.</u> §61-1-15.....	64
<u>Utah Code Ann.</u> §61-1-22(1).....	57
<u>Utah Code Ann.</u> §61-1-22(1)(a).....	57,58,73,74,75,81
<u>Utah Code Ann.</u> §61-1-22(1)(b).....	57
<u>Utah Code Ann.</u> §61-1-22(2).....	73
<u>Utah Code Ann.</u> §61-1-22(4).....	73
<u>Utah Code Ann.</u> §61-1-23.....	1
<u>Utah Code Ann.</u> §61-1-24.....	35,47
<u>Utah Code Ann.</u> §61-1-27.....	35,47
<u>Utah Code Ann.</u> §63-46b-1(4)(b).....	23,66
<u>Utah Code Ann.</u> §63-46b-4.....	23
<u>Utah Code Ann.</u> §63-46b-4(3).....	24
<u>Utah Code Ann.</u> §63-46b-12.....	5
<u>Utah Code Ann.</u> §63-46b-14(1).....	1
<u>Utah Code Ann.</u> §63-46b-14(3)(a).....	1

<u>Utah Code Ann.</u> §63-46b-15(1)(a).....	24
<u>Utah Code Ann.</u> §63-46b-16(4)(a).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(b).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(c).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(d).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(e).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(g).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(h)(i).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(h)(ii).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(h)(iii).....	1,82
<u>Utah Code Ann.</u> §63-46b-16(4)(h)(iv).....	1,82
Utah Uniform Securities Act.....	44,55

C. OTHER AUTHORITIES:

§1904, Uniform Securities Act.....	47
§514, Uniform Securities Act.....	47

John Michael Coombs
Lawyer
72 East 400 South, Suite 220
Salt Lake City, Utah 84111
801-359-0833
Fax No. 801-359-0837

FILED

FEB 27 1991

COURT OF APPEALS

February 25, 1991

Mary T. Noonan, Clerk
Utah Court of Appeals
230 South 500 East
Salt Lake City, Utah 84102

Re: Case No. 900210-CA and related Case No. 900558-CA, both
involving the same parties

Dear Ms. Noonan:

On behalf of Petitioners/Appellants in the above-matters, namely, Johnson-Bowles Company, Inc., and Marlen V. Johnson, I received the Clerk's Remittitur indicating that because Case No. 900210-CA was ordered dismissed, the record will be remitted back to the Third District Court. As you know, the Remittitur follows on the heels on a ruling approximately two weeks ago in which Case No. 900210-CA was dismissed by the Court as "moot".

Please be advised that 900210-CA was deemed "moot" simply because the issues and arguments contained therein were incorporated by reference into Petitioners' Brief filed January 23, 1991, in Case No. 900558-CA. (See pages 43 and 66, Petitioners' Brief in Case No. 900558-CA.)

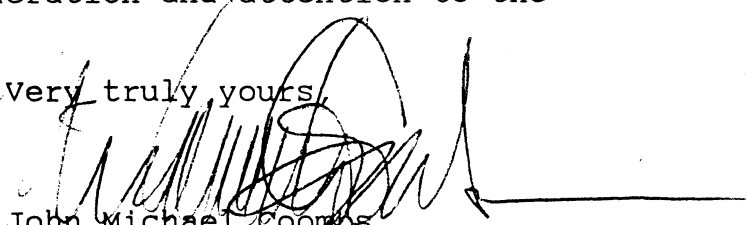
The purpose of this letter is to respectfully request that the record below -- or at least Petitioners' Briefs -- in 900210-CA be maintained on file with your Court pending a complete determination of Case No. 900558-CA. In other words, because 900558-CA incorporates 900210-CA by reference, the panel hearing 900558-CA just may want to refer to 900210-CA. We simply don't know what the panel will want to do and no doubt the Court will want to be fully informed before rendering a decision in 900558-CA. Furthermore, the reason 900210-CA was dismissed as "moot" is that it had no independent life of its own without reference to the pending appeal known as 900558-CA. I would thus

Mary T. Noonan, Clerk
Page Two
February 25, 1991

think that the foregoing request is only fair and reasonable inasmuch as 900210-CA has been specifically referenced in the pending and on-going appeal known as 900558-CA.

Thank you for your consideration and attention to the above-matter.

Very truly yours,



John Michael Coombs

JMC:ca

cc: David N. Sonnenreich