

1992

# Johnson-Bowles Company and Marlen V. Johnson v. Division of Securities and the Utah Department of Commerce : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

920145

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ORIGINAL PROCEEDING

IN AND BEFORE

THE UTAH SUPREME COURT

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

Petitioners,

v.

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

Respondents.

PETITION FOR WRIT OF  
CERTIORARI

Case No. 920145  
Rule 29(a)(13) priority

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Petition for Review of an Amended Decision of the Utah Court  
of Appeals Issued on February 19, 1992, Case No. 900558-CA

---

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ERRATA

Case No. 920145

Rule 29(b)(13) priority

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PLEASE TAKE NOTICE THAT the Johnson-Bowles Company, Inc., and Marlen V. Johnson's Petition for Writ of Certiorari filed on March 20, 1992, contains two minor typographical errors.

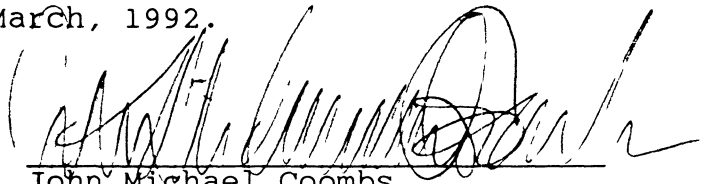
First, p. 28, footnote 16 should read 26 million not "2.6 million." The arithmetic would make no sense otherwise.

Second, Petitioners mistakenly refer to §12(j) of the Securities Exchange Act of 1934 on pages 7 and 29 of their Petition. Section 12(j) governs securities "registered for trading" under the Exchange Act and has no bearing on this appeal

by analogy or otherwise. Petitioners only meant to refer to §12(k) of the Exchange Act on such pages, a full copy of which is contained in their separately filed Appendix as Exhibit "16". The Court should thus ignore the foregoing references to §12(j) of the Exchange Act.

RESPECTFULLY SUBMITTED.

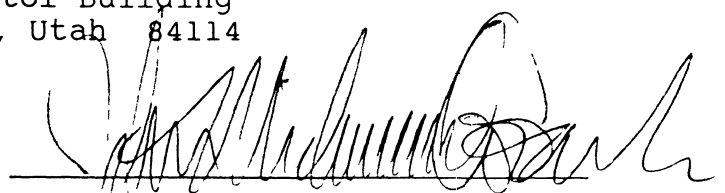
DATED this 26th day of March, 1992.

  
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John Michael Coombs  
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PROOF OF SERVICE

The undersigned hereby certifies that on the 26th day of March, 1992, he mailed a true and correct copy of the foregoing ERRATA to:

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1000.01A:ERRATA.1

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PARTIES TO PROCEEDING

All parties to the proceeding are the same as in the caption hereinabove.

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## QUESTIONS PRESENTED FOR REVIEW

### Constitutional Issues.

1. Preemption and the Supremacy Clause. Whether there is a conflict between the federal regulatory scheme embodied in the NASD Rules of Fair Practice and the Division's own interpretation and application of its March 1, 1989, Summary Order such that the two cannot stand, the result of which enables the Division to subject the Johnsons to diametrically inconsistent regulation. In other words, when it was "physically impossible" for the Johnsons to honor outstanding brokerage contracts under both the federal and state regulatory schemes at the same time, how can the Court of Appeals be correct in holding that no conflict between state and federal regulation exists? Whether the Court of Appeals' amended opinion is consistent with its own decision in Western Capital & Securities, Inc. v. Knudsvig, (Utah App. 1989), 101 Utah Adv. Rep. 65, 67-68, 768 P.2d 989, 992-994, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,337 (recognizing that federal courts have exclusive jurisdiction to interpret and enforce NASD rules).

2. The Commerce Clause. In light of the fact that, after March 1, 1989, the date of the Division's Summary Order, Johnson-Bowles owed 397,900 shares of U.S.A. Medical stock to four out-of-state brokerage firms and one out-of-state clearing corporation and could not afford to reimburse them in the event any effected a "buy-in" at admitted manipulated prices, and, in light of the fact that to dishonor the trades themselves or,

dishonor any "buy-in," would subject the Johnsons to severe disciplinary action by the NASD (even expulsion), including several NASD arbitrations, whether Mr. Johnson's conduct in merely purchasing -- not selling or offering to sell -- sufficient stock to cover these pre-existing, federal executory contracts (and thereby protect the Johnsons' fellow-NASD members against hundreds of thousands of dollars in losses) is merely incidental to the "local putative benefit" derived from seeing the Johnsons dishonor the same contracts. How does the "public"'s alleged "interest" in seeing that no U.S.A. Medical stock was "offered or sold" to Utah residents relate to, let alone outweigh, the interests of at least four out-of-state NASD-member broker-dealers and one major clearing corporation in receiving the stock to which they were contractually entitled? In other words, in comparison to Johnson-Bowles' contractual obligations to non-resident third-parties, what "local putative benefit" is derived from putting the Johnsons out of business simply for not breaching such federal contracts? Further, how does that "benefit" outweigh the interests of Johnson-Bowles' 5,000 customers in seeing it remain in business to service their accounts? What Utah resident could have possibly cared whether Johnson-Bowles completed the outstanding brokerage contracts in issue?

3. Due Process. How did the Johnsons have notice, particularly under the standards in the industry, that Mr. Johnson's private purchases would subject them to discipline

under Utah Code Ann. §61-1-6(1)(g)? How did the Johnsons have notice that their conduct allegedly "frustrated" the "intent, scope or purpose" of the Summary Order when the Court of Appeals (in order to skirt the issue of whether "private purchases" constitute "trading") invents this fiction in its amended opinion? Did the Court of Appeals err in holding that the Division's Summary Order issued under §14(3) was "permanent" and therefore operative at the time of Mr. Johnson's purchases, especially when specific statutory measures are provided under §14(3) to make a Summary Order "permanent"? If a Summary Order is "permanent" without so stating, is it an unconstitutional restraint on alienation? If a Summary Order entered under §14(3) is indeed "permanent," is it Constitutional to delegate authority to one government official to summarily and permanently restrain the alienation of property?

Utah Uniform Securities Act Issues. Whether it is reasonable and rational -- or correct -- to conclude that a securities broker-dealer and agent engaged in "dishonest or unethical practices" under Utah Code Ann. §61-1-6(1)(g) simply because, in order to complete federal executory contracts and otherwise comply with the NASD Rules of Fair Practice (which simultaneously govern them), Mr. Johnson purchased -- and didn't "sell" or "offer to sell" -- stock subject of a Division order suspending the availability of the types of "offers or sales" itemized in §61-1-14(2). If such conduct is a "dishonest or unethical practice," how is revocation or suspension of the Johnsons'

brokerage licenses "in the public interest"? In other words, when certain purchases made by Mr. Johnson were necessary to protect fellow out-of-state NASD-members and satisfy Johnson-Bowles' pre-existing obligations under the federal regulatory scheme, what is it that is truly "dishonest or unethical" about such conduct, how is it a "practice," and how is suspending the Johnsons' brokerage licenses "in the public interest"? Precisely how or why did the purchases "frustrate" or undermine the "intent, scope or purpose" of the Division's March 1, 1989, Summary Order suspending all §14(2) exemptions, an order which only prohibited certain "offers or sales" to Utah residents? Saying it a final way, when the Division's Summary Order of March 1, 1989, was designed solely to prevent the further distribution of U.S.A. Medical stock to Utah residents, what did the Johnsons actually do to undermine that purpose such that their conduct is (1) a "dishonest or unethical practice" and (2) that the revocation or suspension of their brokerage licenses is "in the public interest"?

REFERENCES TO REPORTS OF OPINIONS  
ISSUED BY THE COURT OF APPEALS

The Court of Appeals' amended opinion is: Johnson-Bowles Co., Inc. and Marlen Vernon Johnson v. The Division of Securities and the Department of Commerce, State of Utah, 181 Utah Adv. Rep. 11 (Utah App. February 19, 1992), Appendix Exhibit "1" hereto. The Court of Appeals' initial and now withdrawn opinion is found

at 175 Utah Adv. Rep. 29 (Utah App. November 29, 1991), App. Ex. "2".

GROUND ON WHICH JURISDICTION  
OF THE SUPREME COURT IS INVOKED

The date of entry of the amended decision sought to be reviewed is February 19, 1992. This Petition is thus timely under Rule 48(a). The statutory provision which confers jurisdiction on the Supreme Court to review the amended decision is Utah Code Ann. §78-2-2(3)(a).

STATUTES AND RULES THAT THE CASE INVOLVES

Constitutional Provisions at Issue.

U.S. Const. art. IV, §1 and §2, mandating comity between federal and state government. The Supremacy Clause, U.S. Const. art. IV, §2, providing that federal law preempts state regulations where there is an actual conflict between the two sets of law such that both cannot stand. The Commerce Clause, U.S. Const. art. I, §8, providing that Congress shall have the power to "regulate commerce with foreign nations, and among the several states." The due process clauses of the 5th and 14th Amendments to the federal Constitution.

Securities Provisions at Issue.

Utah Code Ann. §61-1-6(1)(g), effective 1989, provides that an agent and broker-dealer's registration with the Utah Division of Securities ("Division") may be suspended or revoked if he or she "engaged in dishonest or unethical practices in the securities business" and the director "finds" that such revocation or suspension is "in the public interest." Ex. "10".



Division Rule R177-6-1g, effective 1989, lists the types of conduct which are considered contrary to §6(1)(g) of the Utah Uniform Securities Act, none of which proscribe the conduct in issue. Ex. "11". The Rule acknowledges that it is "patterned" after NASD Rules, Rules which ironically require the Johnsons to do what they did.

Sections 1401-1404 of the National Association of Securities Administrators Association ("NASAA") Guidelines (CCH) sets forth guidelines for state securities regulators relative to "dishonest or unethical business practices" in the securities industry. Ex. "12". Like Division Rule R177-6-1g, it is "patterned" after Article III, §1, NASD Rules of Fair Practice and similarly makes no mention of purchasing stock to cover pre-existing, federal executory contracts which cannot be honored in the normal course as a result of other persons' fraud and market manipulation.

Utah Code Ann. §61-1-14(2), effective 1989, lists the types of "offers or sales" of securities which are exempt from registration under §61-1-7 and §61-1-15. Ex. "13".

Utah Code Ann. §61-1-14(3), effective 1989, authorizes the executive director of the Division to summarily suspend all exemptions from registration found in §61-1-14(1) and (2). Ex. "13".

Utah Code Ann. §61-1-7 provides that only "offers or sales" must be registered under the Utah Uniform Securities Act, not purchases. This ties in directly with §14(2) which exempts certain, specified "offers or sales" from the registration provisions of §7.

Utah Code Ann. §61-1-26(3) contains the jurisdictional provisions. Under the 1989 law, a transaction with a non-Utah resident did not come under the Act. Ex. "15". Effective April 23, 1990, the legislature amended §26(3) consistent with the Uniform Act to make the Act apply to transactions with out-of-state residents.

Article III, §1, NASD Rules of Fair Practice, NASD Manual (CCH) ¶2151 at p. 2013-3 and ¶3501, et seq. (May 1989), provides: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."

Section 12(j) and (k) of the Securities Exchange Act of 1934 provides that summary orders thereunder may only issue for 10 days. Ex. "16".

Section 15A of the Securities Exchange Act of 1934 authorizes the formation and regulation of self-regulatory organizations such as the NASD and further provides that they are governed by the SEC under the Act. Ex. "16".

Section 19 of the Exchange Act, 15 U.S.C. §78a-78jj, as amended, sets forth the obligations of self-regulatory organizations such as the NASD. Section 19(g)(1), Compliance and Enforcement of Compliance, provides in part:

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) provides in substance that the NASD may expel a member who has violated its rules and regulations. Ex. "16".

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, provides that federal courts have exclusive jurisdiction over "the rules and regulations thereunder," etc., including "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." Ex. "16". Based on §15A and §19 referred to above, this necessarily includes the NASD Rules of Fair Practice.

Securities Exchange Act Release No. 34-7920, July 19, 1966, 31 F.R. 10076 authorizes the completion, by broker-dealers, of brokerage transactions during a 10-day SEC trading suspension. Ex. "17".

Utah Code Ann. §61-1-24 and §61-1-27 provide that the Utah Uniform Securities Act must be applied in uniformity and in harmony with the federal securities laws (i.e., comity), and, by virtue of the Exchange Act, the NASD Rules of Fair Practice. Ex. "14".

#### STATEMENT OF THE CASE

Nature of the Case. The case is one of first impression and based on the competing nature of the state and federal securities regulatory interests involved, it is of significant and substantial Constitutional dimension. It further meets the considerations set forth in Rule 46(a), (c) and (d).

Specifically, this case is an appeal from the Court of Appeals' amended opinion of February 19, 1992, upholding a "final agency action" adopted by the executive director of the Department of Commerce.

The amended opinion may be summed-up thus: While the Johnsons admittedly did what they did to avoid a breach of pre-existing federal, executory contracts entered into in interstate commerce -- something required of them by the NASD (i.e., the federal regulatory scheme) -- and, while the Johnsons admittedly did not violate the law in any way, their purchase of stock to prevent "buy-ins"<sup>1</sup> at artificial and manipulated prices and thus complete such executory contracts "frustrated" or undermined the "intent, scope or purpose" of a March 1, 1989, Summary Order entered by the Division under §14(3), an order which only removed the availability of certain types of "offers or sales" of securities itemized in §14(2). As a result, the amended opinion concludes (1) that the Johnsons engaged in "dishonest or unethical practices" under §6(1)(g), and (2) that it was "in the public interest" under §6(1)(g) to put them out of business.

Course of Proceedings and Disposition in the Lower Courts.

As a result of the Division's mistaken belief that the Johnsons made a "fortune" covering their "short" positions,<sup>2</sup> the Division, on April 27, 1989, brought administrative adjudicative proceedings against Johnson-Bowles and Johnson to revoke their registrations as a broker-dealer and agent, respectively. In

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<sup>1</sup> "Buy-ins" are necessary occurrences in the securities brokerage business when a broker has not, or cannot, make timely delivery to the buying broker or its clearing agent. "Buy-in" procedure is set forth in Section 59 of the NASD Uniform Practice Code, NASD Manual (CCH), "Close-Out Procedure," ¶3559, pp. 3575-3583, Rel. #308 (April 1991).

<sup>2</sup> While the Division was absolutely convinced that the Johnsons made a fortune in covering their "short" positions, the fact is that excluding well over \$150,000 in attorney's and accountant's fees and costs incurred in the Judge Greene litigation (see Ex. "1", p. 3) -- an amount with further excludes this litigation and subsequent litigation with Otrá Clearing -- Johnson-Bowles only made a "profit" on covering its "short" positions in the amount of \$6,500. Hearing testimony of Johnson-Bowles' independent auditor, R. 1045.

July 1989, the Division amended its petitions and deleted one of three counts which charged the Johnsons with a direct violation of the Division's Summary Order of March 1, 1989, an order entered under §61-1-14(3). (See Exs. "8" and "6") One of the remaining two counts was dismissed by the ALJ under Rule 12(b)(6). This left one count which charged the Johnsons with "aid[ing] in the violation of §61-1-7 of the Act." See p. 6, ¶16-17, amended petitions, Ex. "8".<sup>3</sup> On July 16, 1990, the Johnsons went to a full hearing before the Securities Advisory Board on the count charging them with a violation of Utah Code Ann. §61-1-6(1)(g) and the Division's corollary rule promulgated thereunder.

On August 10, 1990, the Securities Advisory Board, with the August 13, approval of the director of the Division, issued Findings of Fact, Conclusions of Law and an Order (Ex. "4"). In finding that Mr. Johnson's unsolicited purchases were "trading," that is, conduct directly prohibited by the Summary Order, the director found them guilty of "dishonest or unethical practices." In further finding that suspending or revoking their licenses was [somehow] "in the public interest," the Division suspended the Johnsons' brokerage licenses for one year and put them on probation for two years.

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3 That the Division's sole theory of liability below was that the mere purchase of securities constituted "aiding and abetting" the alleged non-exempt sale thereof is not only confirmed by the language of Count I of the amended petitions (Ex. "8", p. 6, ¶'s 16-17) but it is further confirmed by the testimony of Division witness Broker-Dealer Section Director Kathleen C. McGinley, Esq., at the July 16, 1990 trial. See Ex. "A" to the Johnsons' Request for Agency Review, p. 37, lines 7-9, R. 896 and p. 40, lines 22-25, p. 41, lines 1-3, R. 899-900; see also p. 72, the Johnsons' Brief below.

The August 10, 1990, order (Ex. "4") was adopted by the executive director of the Department of Commerce as a "final agency action" on October 29, 1990 (Ex. "3"). Appeal to the Court of Appeals ensued and on November 29, 1991, the Court of Appeals issued a written opinion (Ex. "2") upholding such "final agency action."

On December 13, 1991, the Johnsons filed a Petition for Rehearing. The Petition was granted. This is because the Court of Appeals analyzed and applied the wrong statute to the entire case (i.e., §61-1-12, governing registered securities). The Court further came to realize that even if Mr. Johnson's conduct was tantamount to "trading," trading comes exclusively under the jurisdiction of the Exchange Act and an order entered under §14(3) cannot be deemed a "stop trading order." As a result, a dramatically amended opinion was issued on February 19, 1992 (Ex. "1").

The amended opinion now holds that the Johnsons did not violate the Summary Order directly. On the contrary, the Johnsons merely undermined or "frustrated" the "purpose, scope or intent" of the Division's March 1, 1989, Summary Order. Ironically, the Johnsons were never charged with such. See Ex. "8", p. 6, ¶'s 16-17. Further, while the Johnsons were admittedly instrumental in getting the Summary Order entered, the Court of Appeals (and the Division) ignores that such Order simply caused U.S.A. Medical stock to attain a price it was worth -- that is, next to nothing. This is because, according to

Judge Greene, U.S.A. Medical stock was "fraudulently issued," had no intrinsic value to begin with, and its market price was "manipulated." Ex. "1", p. 3. As a result, and contrary to the premise of the amended opinion, there was no "financial gain" to be had by subsequently purchasing the stock at a price even exceeding what it should have been from day one. Further, the Division did what it should have done regardless of the Johnsons' predicament and, contrary to the amended opinion, the Division certainly didn't enter the Summary Order as some special "favor" to the Johnsons.<sup>4</sup> Ex. "1", p. 21, 1st ¶.

#### STATEMENT OF FACTS

In the interest of complying with Rule 49(d), reference is made to the Court of Appeals' Statement of Facts. Ex. "1"; pp. 1-6. This scanty and omissive version of the facts is accurate on its face, however, it does not articulate the fact that the Johnsons were not in pari delicto with the U.S.A. Medical conspirators (i.e., the Johnsons had no connection to the reasons the stock was either "illegally issued" or its price "manipulated"), that the Johnsons were "whistleblowers" and victims of a "short squeeze" fraud scheme, and, as a result of their noble conduct in exposing the fraud -- in which Judge

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The Division was admittedly infuriated that the Johnsons allegedly "took advantage" of its Summary Order. To "teach them a lesson," it initiated the proceedings against the Johnsons. Respecting the wrath that a government agency is capable of wielding upon those who apparently annoy or embarrass it, the Court might compare the ironic similarity between this case and SEC v. Dirks, (U.S. Sup. Ct., July 1, 1983) 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911, ['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]

Greene declined to go one step further to declare outstanding contracts void for illegality -- the Johnsons were left in the dire predicament of having to somehow honor various federal executory contracts.<sup>5</sup>

#### ARGUMENT

I. MR. JOHNSON'S PURCHASES DID NOT CAUSE OR RESULT IN A DISTRIBUTION OF U.S.A. MEDICAL STOCK TO UTAH RESIDENTS, THE EXPRESS PURPOSE OF THE DIVISION'S SUMMARY ORDER. AS A RESULT, THE JOHNSONS' CONDUCT COULD NOT HAVE FRUSTRATED THE "INTENT, SCOPE OR PURPOSE" OF SUCH ORDER AS A MATTER OF LAW. MORE IMPORTANTLY, BECAUSE THE JOHNSONS' CONDUCT HAD NO ADVERSE EFFECT ON A UTAH RESIDENT, THERE IS NO BASIS TO CONCLUDE THAT REVOKING OR SUSPENDING THEIR LICENSES WAS "IN THE PUBLIC INTEREST" -- A REQUIREMENT OF §61-1-6(1).

While the amended opinion no longer holds that the Johnsons directly violated the Summary Order (a conclusion initially embraced by the Court of Appeals) and that, in fact, the Johnsons didn't violate the law at all, the opinion concludes that the Johnsons "frustrated" the "intent, scope or purpose" of the Summary Order. As a result, the amended opinion rather dexterously embraces the same result as that obtained in the initial opinion. While the Johnsons have never been charged with "frustrating" the Summary Order, no explanation of how the Johnsons "frustrated" the order is offered; nor why the Johnsons' conduct is "dishonest or unethical"; nor why purchasing stock under the circumstances is a "practice" (other than stating at the outset that "selling short" is a "practice"); nor is any explanation given as to why putting the Johnsons out of business



merely for completing Johnson-Bowles' federal executory contracts is conceivably "in the public interest" -- requirements under §61-1-6(1). Ex. "10".

In Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972), the U.S. Supreme Court, in upholding the reversal of an FTC cease-and-desist order, held that "[the Court of Appeals'] opinion is barren of any attempt to rest its order on the unfairness of particular competitive practices or on considerations of consumer interests. Nor did the FTC articulate any standards by which such alternative assessments might be made." 405 U.S. at pp. 245-249. The amended opinion in this case is no less bereft of explanation and thus, no less erroneous.

Instead of analyzing the purpose of the Summary Order, the amended opinion applies Morton Int'l infra with a vengeance and holds that if an agency says conduct is a "dishonest or unethical practice" and that it thinks the suspension of a brokerage license is "in the public interest," that is good enough. Yet comparing the Court of Appeals' two diverse decisions, including the fact that it initially applied the wrong statute, there is little dispute that the Court of Appeals has had enormous difficulty grappling with the issues this case presents.

In analyzing §14(3), the Court of Appeals applies its holding in Tasters Ltd., Inc. v. Department of Employment Security, 172 Utah Adv. Rep. 17, 819 P.2d 361 (Utah App. 1991) (citing Morton Int'l v. Auditing Div. of the Utah State Tax

Comm'n, 814 P.2d at 585 (Utah 1991)). Ex. "1", p. 7. Tasters involved a specific grant of statutory authority to the agency. 172 Utah Adv. Rep. at 19. While the statutory deference accorded the Division may allow it great leeway with respect to the reasons for implementing a Summary Order under §14(3), nothing in §14(3) allows the Division to spontaneously bring "purchases" (as opposed to "offers or sales" under §14(2)) within the reach of §14(3), let alone §6(1)(g). Furthermore, there is no indication that the legislature gave the Division unreviewable authority to determine, as a matter of law, that the mere purchase of stock sold without a §14(2) exemption is a "dishonest or unethical practice" which undermines, as a matter of law, a Summary Order designed to temporarily remove certain, specific exemptions for the mere "offer or sale" of securities. Further, no agency discretion exists to say that, by mere allegation, an unelected government official may dictate what constitutes a "dishonest or unethical practice" in the securities industry and that that is the end of the matter. Yet this is what the Court of Appeals has concluded by shirking its responsibility to discuss what the intent of the Summary Order was, why the conduct in issue is "dishonest or unethical," why it is a "practice" to boot, and worse still, why suspending or revoking the Johnsons' licenses under the circumstances is even remotely "in the public interest." Accordingly, and because the amended opinion pays mere lip service to these terms, the opinion has no basis. FTC v. Sperry & Hutchinson, supra.

In its amended opinion, it is acknowledged -- for the first time -- that the Johnsons' conduct was not technically "against the law." Ex. "1", p. 19 (citing Heinecke v. Department of Commerce, 158 Utah Adv. Rep. 55, 810 P.2d 459, 465-66 (Utah App. 1991)).<sup>6</sup> This is a vast distinction between the amended opinion (Ex. "1") and the initial opinion (Ex. "2"). Yet, while holding that the Johnsons are guilty under §6(1)(g) even if they didn't violate any law, the Court of Appeals proceeds to state:

It would be difficult to imagine a more willful violation of the intent, scope and purpose of an order than that presented in this case.

Ex. "1", p. 21, 1st ¶. The question is why? What did the Johnsons do to "willfully" violate the "intent, scope and purpose" of the an order designed to prevent the distribution of U.S.A. Medical securities to innocent Utah investor/residents, even assuming such order was in effect beyond ten days? (See Argument IV below.) No answer to this question is given.

If the scope of the Summary Order was to prevent unknowledgeable Utah residents from acquiring U.S.A. Medical

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With all due respect to the Court of Appeals, it is malignantly preposterous to analogize this case to Heinecke. Heinecke involved a male nurse who seduced and had sex with a recovering patient -- a patient with severe psychological disorders. It takes little mental dexterity to realize that such conduct is contrary to what a "nurse" is by definition and that such conduct runs the risk of undermining a vulnerable and imbalanced patient's recovery. In this case, assuming ad arguendo that the Johnsons were omniscient enough to know in advance how the Division intended to interpret its Summary Order, it was reasonable under the circumstances for the Johnsons to choose compliance with the NASD Rules of Fair Practice over waiting helplessly for \$500,000 worth of "buy-ins" to be executed (i.e., being sitting ducks), something the Division contends the Johnsons should have done. In Heinecke, the nurse was presented with no conflict at all, let alone a federal/state conflict, and common sense dictates that it is not reasonable for a nurse to choose his own sexual gratification over considerations of the patient's mental well-being and recovery. Furthermore, the nurse in Heinecke was not presented with the choice of having to have sex with the patient in order to keep his federal license to practice nursing (assuming there were such a license) and thereby maintain his livelihood, a choice the Johnsons, by analogy, had to make in order to remain in good standing with the NASD and to keep from filing bankruptcy and thus continue in business.

stock after March 1, 1989, Mr. Johnson's conduct in no way undermined such purpose. Mr. Johnson, himself a sophisticated and knowledgeable purchaser, was well aware of U.S.A. Medical and all circumstances surrounding it. As a result, Mr. Johnson was not within the class of persons the Order was designed to protect. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 124-125 (1953) (securities laws do not apply to those who don't need the protections afforded by them).<sup>7</sup> At the same time, the Utah Uniform Securities Act, as effective 1989, did not regulate transactions with out-of-state residents. Ex. "15". In this case it is certainly arguable (though not dispositive) that Mr. Johnson's sellers really sold out-of-state. Accordingly, the amended opinion reads an intent and purpose beyond the reach of the Utah Uniform Securities Act and therefore, the Division's power.

It is furthermore undisputed that Mr. Johnson did not solicit those from whom he purchased U.S.A. Medical stock "during March 1989." (See Ex. 4, p. 6, ¶12; see also Affidavits attached to Ex. "5") No one was deceived, cheated or lied to; no one was not told the truth; none wants his worthless U.S.A. Medical stock back in exchange for Mr. Johnson's money. See e.g., the Johnsons' Brief, pp. 48-53. The Johnsons also singlehandedly financed the uncovering of a massive fraud and market manipulation, something no one else was willing to do. It is thus hypocritical for the Court of Appeals to complain about the

Johnsons' conduct relative to an order which would not exist but for the Johnsons' singular and noble efforts. Ex. "1", p. 21, 1st ¶. Ironically, the opinion even goes so far as to criticize the Johnsons' efforts to get the SEC and the Division to investigate U.S.A. Medical as if the SEC and Division had no purpose or reason for their mutual existence. Id.

Authority holds that if a person acts in "good faith," the conduct cannot be violative of an "ethical standard." Buchman v. Securities and Exchange Commission, 553 F.2d 816, 821 (2nd Cir. 1977), a decision the Court of Appeals chooses to ignore. In this case, there can be no dispute that the Johnsons acted in "good faith" in doing what they thought they had to to protect themselves, four fellow-NASD members, and Midwest Clearing Corporation, Johnson-Bowles' own clearing agent and the entity upon whom it was dependent to remain in business. How then can the Johnsons be faulted?

The Court of Appeals quotes from the Division's August 10, 1990, order in which the Division not only erroneously deemed Mr. Johnson's conduct as "trading" but which compounds its error by stating that [the Johnsons] were:

driven by a desire to realize monetary gain and/or avoid financial loss and that [the Johnson's] willingness to engage in trading the securities shifted over time, depending on whatever would promote [their] economic interests. [Emphasis added.]

Ex. "1", p. 21. While still clinging to the discarded idea that Mr. Johnson's conduct was "trading" (see also Ex. "1", p. 8 bott., 11 top, 13 top, and 19 top), is the Court of Appeals also

saying that the extent to which one avoids being defrauded by others is, of all things, reportable or taxable income and thus, the Johnsons "profited" by their conduct?

Relying on the magic words "agency discretion" or "agency expertise," the opinion begs the very question of whether the Johnsons' conduct was indeed a "dishonest or unethical practice." Ex. "1", p. 18. The Johnsons and those like them are left with no understanding as to why the conduct is allegedly a "dishonest or unethical practice" in the securities industry or even why revoking or suspending their licenses is "in the public interest." While dodging an analysis of why or how, the amended opinion holds that, under Morton, if the Division says the conduct is, it is. Nothing more is apparently necessary. This is not judicial review. Cf. Brewster v. Maryland Securities Commissioner, 76 Md. App. 722, 548 A.2d 157, ['88-'90 Transfer Binder] Blue Sky L. Rep. (CCH) ¶12,906 (Md. App. 1988), cert. denied 109 U.S. 2449 (1989), a decision the Court of Appeals also ignores and which is helpful to a proper §6(1)(g) analysis.<sup>8</sup>

Applying a reasonableness/rationality (or even a correctness-of-error) standard for legal conclusions, the Court of Appeals should have analyzed whether buying stock under the circumstances undermines or frustrates a Summary Order entered under §14(3), an order which, in order to protect innocent Utah investors, only suspends certain, specific "offers or sales" itemized in §14(2).

If purchasing stock does indeed so "frustrate" or undermine such an order, the next step is to determine how or why such conduct, under the circumstances, constitutes a "dishonest or unethical practice" in the securities business and why it is then "in the public interest" to discipline the Johnsons. See Brewster supra.

The Court of Appeals' amended opinion is illogical, irrational and unreasonable. Further, because the facts of this case are stipulated to (Ex. "5"), the Court of Appeals ignores its own standard of review enunciated in Vali Convalescent v. Division of Health Care Financing, 140 Utah Adv. Rep. 21, 27, 797 P.2d 438 (Utah App. 1990) (if facts are stipulated to, the court reviews under a correctness-of-error standard).

II. THERE IS A DIAMETRIC CONFLICT BETWEEN THE REQUIREMENTS OF ART. III, SECT. I, NASD RULES OF FAIR PRACTICE AND THE DIVISION'S INTERPRETATION AND ENFORCEMENT OF ITS SUMMARY ORDER OF MARCH 1, 1989. UNDER THE SUPREMACY CLAUSE AND THE CONSTITUTIONAL MANDATE OF COMITY, THE JOHNSONS' EFFORTS TO COMPLY WITH THE FEDERAL REGULATORY SCHEME PRE-EMPT AND OUTWEIGH THE STATE'S ALLEGED "INTEREST" IN REVOKING OR SUSPENDING THE JOHNSONS' STATE BROKERAGE LICENSES FOR THAT SAME CONDUCT.

The Court of Appeals closes its eyes to the blatant conflict between the Division's amended petitions and the Johnsons' obligations under the NASD Rules of Fair Practice. Ex. "1", pp. 9-11. Article III, §1, NASD Rules of Fair Practice, is interpreted by the NASD and SEC to require a broker-dealer and broker to honor all securities transactions and/or all corollary

"buy-ins" or they will be subject to severe discipline, including substantial fines, suspension, and even expulsion from the NASD.<sup>9</sup>

A conflict therefore exists because no one can honor and dishonor a contract at the same time. In short, it was a "physical impossibility" to comply with both the federal and state schemes of regulation simultaneously. Cf. Ex. "1", p. 9 bott. If the Johnsons complied with one scheme, they violated the other. This is simple enough. Yet the amended opinion is silent on how the NASD and the SEC interpret Article III, §1 of its Rules of Fair Practice even though the law in this regard was conspicuously before the Court of Appeals. Saying it another way, there can be no dispute that the Johnsons stood the risk of being expelled from (and severely fined by) the NASD had they neither honored the contracts nor honored subsequent "buy-ins," the latter of which would eventually have to have been undertaken by third-parties to even-out such contracts. Id. Contrary to the issues at hand, the amended opinion states:

. . . the Johnsons have failed to show that such conflict would have to be resolved in favor of the NASD.

Ex. "1", p. 9, 1st ¶. Who would "win," as if this case were some kind of athletic competition, is not the issue. If it is, it is the Court of Appeals' task to "resolve" such a conflict, a task

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9 NASD Manual, (CCH) ¶2151 at p. 2013-3 and ¶3501, et seq. (May 1989); see Brief Ex. H; R. 176-179; see also Friedman & Co. 45 S.E.C. 393 (1973) (failing to honor trades is a violation of Art. III, §1 and expulsion from NASD and revocation without qualification may be imposed); In re: Shaskan & Co., Inc., SEC Docket 776 (May 28, 1976) (NASD suspended and imposed fine on brokers for failing to honor trades with other NASD members); In The Matter of the Application of Nassau Securities Service, November 19, 1964, SEC Ex. Act. Release No. 7464, 42 S.E.C. 445, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,158 (broker sanctioned for failing to honor "buy-in" even though he claimed that stock was manipulated and it may well have been). See also references to §§15A and 19 of the Exchange Act in Ex. "16".



it has shirked. On the contrary, the issue is why should a person be placed in the position of choosing his state license over his federal license or vice-versa? Showing who would prevail in such a conflict (whatever that means) or which license is more important begs the question and is irrelevant. The issue is the conflict itself, a conflict in regulation which was facing the Johnsons and, assuming they knew what the Division would do, put them in a position of having to stand up and sit down at the same time.<sup>10</sup> The amended opinion, for no reason, simply disregards the well-settled interpretations of the NASD Rules of Fair Practice and ruthlessly concludes that the Johnsons' dire predicament -- the sole reason for their conduct -- is irrelevant.

The Johnsons have never argued that the NASD Rules of Fair Practice are tantamount to a federal statute. On the contrary, it is undisputed that the NASD Rules of Fair Practice are merely an integral part of the federal regulatory scheme -- a scheme which regulated the Johnsons and those like them in the conduct of their business on a daily basis.<sup>11</sup> See Western Capital &

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10 That the Johnsons were in a complete quandary is evidenced by the position they took in their letter of March 21, 1989, to the NASD, a pronouncement relied on heavily by the Court of Appeals to apparently show "knowledge," a non-issue. Ex. "1", p. 16, top. What "knowledge" there was was the result of Judge Greene's ruling and nothing else. Ex. "1", p. 3. The Johnsons simply refused to believe, even by March 21, 1989, that Judge Greene's ruling did not, in some way, help them relative to prospective "buy-ins." In fact, such self-serving letter, which everyone ignored, only demonstrates the confusion and panic confronting the Johnsons as a result of Judge Greene's ruling and that they had no choice but to take a contrary position later on. In short, because Otra had effected a \$104,600 "buy-in" at 70¢ per share and nothing existed to prevent the others from doing the same, the letter only underscores the Johnsons' predicament.

11 As stated earlier and as set forth in Ex. "16", the NASD was created under the Section 15A of the Securities Exchange Act of 1934, an Act created to regulate the trading of securities in interstate commerce. Accordingly, there can be little dispute that the NASD and its own rules form part of the overall federal regulatory scheme. It is further significant that under the Exchange Act all broker-dealers and brokers who are not members of a national

Securities, Inc. v. Knudsvig, 101 Utah Adv. Rep. 65, 67-68, 768 P.2d 989, 992-994 (Utah App. 1989) -- the Court of Appeals' own decision which acknowledges the pre-emptive status of the NASD Rules of Fair Practice.

There is also no dispute that the NASD Rules of Fair Practice necessarily relate to the idea of comity, a concept expressly embodied in §§24 and 27, Utah Uniform Securities Act and the federal Constitution.<sup>12</sup> Yet comity, including §61-1-24 and §61-1-27, is never even alluded to in the opinion. See Ex. "14". Instead, comity is cursorily dealt with like several of the Johnsons' other Constitutional arguments in footnote 5, p. 11 of the amended opinion.

III. THE INTERESTS OF FOUR OUT-OF-STATE  
BROKER-DEALERS AND ONE MAJOR OUT-OF-STATE CLEARING  
CORPORATION IN HAVING THEIR NASD CONTRACTS WITH  
JOHNSON-BOWLES COMPLETED FAR OUTWEIGH ANY "LOCAL  
PUTATIVE BENEFIT" DERIVED FROM REVOKING OR SUSPENDING  
THE JOHNSONS' LICENSES WITH THE DIVISION. AS A  
RESULT, THE REGULATION ENGAGED IN BY THE DIVISION IS  
REPUGNANT TO THE COMMERCE CLAUSE.<sup>13</sup>

On p. 11-13, Ex. "1," the Court of Appeals holds that there is no Commerce Clause violation simply because the Division may give extra-territorial effect to its Summary Order (i.e., Utah's

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securities exchange must, by law, be registered with the NASD. For example, in 1983, the SEC did away with SECO ("SEC Only"), an alternative means of registering with the SEC that competed, to a small degree, with the NASD. (R. 9, top) Thus, everyone in the business not registered with an exchange 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).

<sup>12</sup> See p. 47, the Johnsons' Brief below.

<sup>13</sup> The Johnsons have also argued that the Division's efforts to put them out-of-business are violative of their right to be free from contractual interference by a state in violation of the Art. I, §18 of the Utah Constitution and Art. I, §10, cl. 1 of the federal Constitution. See e.g., p. 48, the Johnsons' Brief below. These and other Rule 12(b)(6) arguments have been consistently ignored by the Court of Appeals, the executive director of the Department of Commerce, the Division and Securities Advisory Board, and the ALJ.

Blue Sky laws). Ex. "1", p. 12. This conclusion is plain wrong because, as aforesaid, during 1989 the legislature expressly restricted application of the Act to Utah residents only. See Ex. "15", a copy of §61-1-26(3), effective 1989; see also Singer v. Magnavox, 380 A.2d 969, 981, ['71-'78 Transfer Binder] Blue Sky L. Rep. (CCH) ¶11,399 (Del. 1977).

Nonetheless, a Commerce Clause analysis in the Division's favor requires a determination that the burdens imposed on interstate commerce are incidental compared to the "local putative benefits" derived from the state regulation. Ex. "1", p. 12, 1st full ¶. In this case, there is no "local putative benefit" to be derived from revoking or suspending the Johnsons' licenses with the Division merely because Mr. Johnson bought 397,900 shares of U.S.A. Medical stock to complete pre-existing, federal, executory contracts undertaken with out-of-state residents in interstate commerce and as required by the NASD. To be sure, why would any Utah resident care whether the Johnsons' licenses are revoked or suspended for such conduct? How does such conduct even relate to the legitimate interests of a Utah resident?

On the other hand, Spear, Leeds & Kellogg, William Frankel & Co., M.S. Myerson & Co., Paragon Capital Corporation, and Midwest Clearing Corporation -- all out-of-state residents doing no business in Utah -- were together owed 397,900 shares of U.S.A. Medical stock. Were these entities required to dip into their own pockets and expend \$500,000 or more to effect "buy-ins"

at artificial and manipulated prices -- prices over which they too had no control -- and, were they then unable to collect the difference from Johnson-Bowles, a significant burden, including substantial damage, would necessarily have been imposed upon them. Common sense dictates that their interests in completing the contracts far outweigh the interests of any Utah resident in seeing Johnson-Bowles put out of business.<sup>14</sup> In addition, what difference does it make if Johnson-Bowles bought the stock or one of the foregoing entities bought the stock for Johnson-Bowles' account? The contracts could not remain open and the stock had to be bought sooner or later by someone. What difference does it make who bought the stock? Doesn't Johnson-Bowles have the same rights as those to whom it owed stock? If not, why? Is it merely because Johnson-Bowles is a Utah corporation and Mr. Johnson himself is a Utah resident? Why should this matter? The Court of Appeals, while having two cracks at this case, offers no explanation.

The Court of Appeals' conclusion is unrealistic and ignores the facts of this case: the Division's efforts to enforce their Summary Order under the circumstances imposes an excessive burden on out-of-state residents (including the Johnsons) in relation to the interests of any Utah resident in seeing the Johnsons put out of business. Accordingly, the amended opinion sanctions a

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<sup>14</sup> Having been in business over 12 years, Johnson-Bowles had approximately 5,000 retail customers, many of whom had stock in their accounts, and the large majority of whom are Utah residents. Johnson-Bowles also had at least 12 employees, all of whom are Utah residents and who had to seek other employment as a result of these proceedings. The additional question is: Doesn't this substantial number of Utah residents count for anything in the Court of Appeals' undefined conception of "in the public interest?"

violation of the Commerce Clause.

IV. UNDER THE STANDARDS IN THE INDUSTRY, THE JOHNSONS HAD NO NOTICE THAT THEIR EFFORTS TO COMPLETE FEDERAL, EXECUTORY CONTRACTS WOULD SIMULTANEOUSLY BE DEEMED A "DISHONEST OR UNETHICAL PRACTICE" BY THE DIVISION. THE JOHNSONS WERE ALSO NEVER CHARGED WITH "FRUSTRATING" THE "INTENT, SCOPE OR PURPOSE" OF THE SUMMARY ORDER. FURTHERMORE, TO HOLD THAT A SINGLE GOVERNMENT OFFICIAL MAY SUMMARILY AND PERMANENTLY ENJOIN ALL CONCEIVABLE TRANSFERS OR SALES OF SECURITIES UNDER §61-1-14(3) IS AN UNCONSTITUTIONAL RESTRAINT ON ALIENATION AND AN UNCONSTITUTIONAL DELEGATION OF POWER TO THE EXECUTIVE BRANCH. AS A RESULT, THE COURT OF APPEALS' AMENDED OPINION VIOLATES DUE PROCESS AND IS OTHERWISE UNCONSTITUTIONAL.

The amended opinion acknowledges that, prior to March 1, 1989, the Johnsons tried to get the Division to do something about the U.S.A. Medical "short squeeze." The Division and the SEC declined to do anything -- something which is their job, not the Johnsons -- thereby forcing Johnson-Bowles to seek relief before Judge Greene. After Judge Greene ruled on February 28, 1989, the Division jumped on the bandwagon and issued its Summary Order of March 1, 1989 (Ex. "6"). The Division knew that Johnson-Bowles was in a bind -- the very purpose of the Judge Greene litigation. In fact, its agents and employees were present throughout the two-day preliminary injunction hearing. Yet even after the Division entered its Summary Order, it never told the Johnsons not to buy stock to complete the contracts. Further, anyone connected with the industry knows that securities laws only regulate "offers or sales," not unsolicited purchases. There is simply no industry standard or norm which would put the Johnsons on notice that buying stock to deliver out-of-state would in any way undermine the Summary Order. Cf. Brewster

v. Maryland Securities Commissioner, supra. Furthermore, on March 1, 1989, the very day the Summary Order was issued, Otra Clearing, a Utah licensed broker-dealer, bought U.S.A. Medical stock from two Utah resident broker-dealers and yet the Court of Appeals sees nothing wrong in such identical conduct, let alone the non-exempt sales undertaken by Utah resident broker-dealers P.B. Jameson and R.A. Johnson in direct violation of the Summary Order. Ex. "1", p. 4 top. If Otra Clearing can purchase 150,000 shares from two Utah residents with impunity, why can't Mr. Johnson purchase 397,900 shares from six Utah residents and a New York resident with the same impunity, especially when he did such for the same reason as Otra (i.e., to complete open contracts)?<sup>15</sup> The Division's answer is that it didn't have the resources to do battle with everyone. See footnote 8, p. 7, Division's January 22, 1992, Response to Petition for Rehearing below. Surely, this is no excuse or justification for selective prosecution of the Johnsons.

The Court of Appeals concludes that the Johnsons knew their conduct was chargeable by the Division by virtue of a March 21, 1989, letter they wrote to the NASD. Ex. "1", pp. 4 and 15-16. This is a classic non sequitur. The Johnsons' own letter -- a letter no one paid any attention to -- had nothing to do with the Division; it was written in panic and was merely an attempt to

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<sup>15</sup> This and other facts formed the basis of several Equal Protection arguments raised by the Johnsons which were also ignored not only by the Court of Appeals, but by the executive director of the Department of Commerce, the Securities Advisory Board and director of the Division, including the ALJ. See pp. 18-19 and 45-46, the Johnsons' Brief below; see also p. 20, Reply Brief below and p. 7-9, Petition for Rehearing below.

stall or get Otra Clearing to back-off from collecting on its trumped-up "buy-in" with P.B. Jameson.<sup>16</sup> Further, while it was ignored by both Otra and the NASD, the letter preceded the Division's initial petitions by over a month.

The Johnsons were only charged with "aiding" [and abetting] a violation of the Summary Order. (See Ex. "8", p. 6, ¶'s 16-17) The amended opinion holds that the Johnsons did not violate the law, a conclusion which necessarily means that the Johnsons did not "aid and abet" a direct violation of such Order.<sup>17</sup> As a result, the Johnsons, until February 19, 1992, have similarly had no notice that their conduct allegedly "frustrated" the "intent, scope or purpose" of the Summary Order. The Court of Appeals has simply invented the Division's theory of the case and allowed the Division to accomplish something indirectly that it could never do directly. This is inherently unfair and this Petition is the first time the Johnsons are able to respond to such charges. Accordingly, by holding the Johnsons guilty on grounds of which the Johnsons never had notice until the date of the amended opinion, the amended opinion is itself violative of due process (i.e., notice).

On p. 8 of the amended opinion, the Court of Appeals concludes that the March 1, 1989, Summary Order (Ex. "6") was "permanent" and therefore in effect at the time of Mr. Johnson's

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<sup>16</sup> In other words, after the January 23, 1989, forward split, U.S.A. Medical had 2.6 million shares issued and outstanding. At \$1.00 per share, the Company had a market capitalization of \$26 million when, in reality, it was insolvent. In fact, the "sales" appearing on its financial statement were merely proceeds from the market manipulation. See footnotes 6, 9 and 10, pp. 9 and 11, the Johnsons' Brief below.

<sup>17</sup> See pp. 2-6, the Johnsons' Petition for Rehearing below.

March 1989 purchases. The Johnsons have argued that such order, like an SEC trading suspension order entered summarily under §12(j) or (k) of the Exchange Act, is only valid for 10 days and, like a TRO, it cannot be "piggy-backed" for successive 10-day periods.<sup>18</sup> Sloan v. Securities and Exchange Commission, 547 F.2d 152, 157-158 (2nd Cir. 1976), cert. denied 434 U.S. 821, 98 S.Ct. 63, 54 L.Ed.2d 77, reh. denied 434 U.S. 976, 98 S.Ct. 535, 54 L.Ed.2d 468 (1977), aff'd. 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978). In fact, under §12(k) of the Exchange Act, only the President of the United States may authorize the suspension of trading in a security beyond ten days. (See §12(k)(1)(B), Ex. "16") Furthermore, the Summary Order, by its own language, says nothing about being "permanent" and the director did nothing to extend it by or before March 10. It was only as late as March 27, 1989, nearly one month after its issuance, that the director finally took steps to make the Summary Order "permanent by default." Ex. "7". If such order expired by operation of law on March 10, 1989, and because the Division never proved that Mr. Johnson purchased between March 1 and March 10, 1989 (Ex. 5, p. 3, ¶12), there is simply no basis to these entire proceedings.

In Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 443-445, 94 S.Ct. 1113, 93 L.Ed.2d 435 (1974), the U.S. Supreme Court held:

It would be inconsistent with this basic

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<sup>18</sup> See ¶23, pp. 14-15 and pp. 75-76, the Johnsons' Brief below and pp. 21-23, the Johnsons' Reply Brief below.



principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. . . . Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b).

The Court of Appeals' conclusion that a Summary Order entered under §14(3) is "permanent" -- even when it doesn't so state -- belies Granny Goose supra and further misreads legislative intent. If a Summary Order can be and is "permanent" (even without so stating), why would the legislature have included provisions in §14(3) for making such an order permanent? What would be the reason for making a permanent order permanent? Why did the Division take steps to make it permanent nearly one month later? The amended opinion provides no answer.

More importantly, to give a single government official the power to summarily suspend all §14(2) exemptions permanently --when only the President of the United States has the power to suspend mere trading of securities beyond ten days -- is an unconstitutional "taking" or restraint on alienation without due process. This is because it prevents stockholders from disposing of their property.<sup>19</sup> As a result, to conclude that the director

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19 In the securities regulatory context, the Johnsons have been unable to find any case law involving an alleged unconstitutional restraint on alienation. No doubt this is because under federal law, exemptions from registration (as opposed to trading) cannot be suspended. This issue would thus appear to be one of first impression. Cf. Sloan v. SEC, supra. In the civil context, however, reference is made to Benson v. RMJ Securities Corp., 683 F.Supp. 359, 371-372, ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,723 at p. 98,358 (S.D.N.Y. 1988) (discussing restraints on alienation of corporate stock and citing authorities); Globe v. Hasner, 333 F.2d 413, 415 (2d Cir. 1964) cert. denied 379 U.S. 969, 85 S.Ct. 666, 13 L.Ed.2d 562 (1965) (restraints on alienation are disfavored and should be construed narrowly).

of the Division has power and authority far beyond that of the President of the United States further misreads the statute or, if it doesn't, the statute unconstitutionally delegates power to but one individual.<sup>20</sup> See e.g., Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3181, 1391-92, 92 L.Ed.2d 583 (1986) (overturning the Gramm-Rudman-Hollings Act as an unconstitutional delegation of power); see also pp. 30-36, the Johnsons' Brief below discussing the non-delegation and ultra-vires doctrines in administrative law, including pp. 59-60 thereof.

Because it is illegal for a Summary Order to continue in effect beyond 10 days, and, when the Securities Advisory Board concluded that the Johnsons violated only the Summary Order, not the subsequent March 27, order, the Court of Appeals decision has no basis in fact, let alone law, and must be summarily reversed. See Ex. "4" (discussing only the March 1, order). Finally, because the amended opinion is premised on an unconstitutional delegation of authority and a clear misreading of legislative intent, there is simply no legal or factual basis with which to charge the Johnsons with any misconduct, let alone find them guilty and suspend their licenses. See Ex. "1", p. 8.

#### CONCLUSION

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20 By way of further example, the Securities Act of 1933 regulates the "offer or sale," not the trading of securities. The Utah Uniform Securities Act is patterned after the '33 Act, not the '34 Act. Section 14(2) of the Utah Uniform Securities Act is the state counterpart to §4 of the '33 Act. There is nothing in the Securities Act of 1933 which allows the SEC, the President of the United States, or anyone else to suspend any §4 exemption from registration at all, let alone permanently. Thus, it is remarkable that the amended opinion not only confers one unelected government official with the power and authority to suspend all §14(2) exemptions (i.e., restrain the alienation of property) not merely for 10 days, but permanently.

The amended opinion is premised on the undisclosed value judgment that Johnson-Bowles acted wrongly or improperly back in January 1989 because it had become "short" 53,000 shares of U.S.A. Medical. See Ex. "1", p. 2, 1st ¶, in which, at the very outset, "selling short" is referred to as a "practice". While Judge Greene admittedly concluded that Johnson-Bowles was negligent (perhaps even stupid) in having made a market in U.S.A. Medical stock, this conduct neither comprises the charges nor the findings against the Johnsons. More importantly, securities could never be traded if brokers didn't regularly sell stock they didn't have at that moment in their trading inventory. Contrary to the premise of the amended opinion, selling "short" is neither sinister nor unscrupulous: it is the very essence of "making a market" and it is essential to a free-market economy. Carlson v. Bagley Securities, Inc., DC Utah Case No. 89-C-1062A, Memorandum Opinion, p. 7, (April 8, 1991) (J. Anderson) (citing 1 T. Hazen, The Law of Securities Regulation §10.3 at 531-32 (2d ed. 1990)). Based on this false premise alone, the amended opinion is fatally flawed.

It is fundamentally unjust to punish someone for doing the "right" thing. In refusing to cover their "short" positions by purchasing U.S.A. Medical "control" stock from the conspirators "under the table" and instead, exposing the fraud, the Johnsons did the "right" thing. The Johnsons could just as easily have gone along with the fraud and today no one would know about it. Having made the decision to expose the fraud, the Court of

Appeals' amended opinion callously closes its eyes to the Johnsons' predicament, a predicament resulting from Judge Greene's refusal to declare the outstanding brokerage contracts "void for illegality." Ex. "1", p. 3. The amended opinion ignores that the Johnsons were victims of an egregious fraud and that they did what they did to protect themselves, their fellow-NASD members, and to frustrate the entire fraud, namely, to prevent the U.S.A. Medical co-conspirators from reaping handsome illicit profits in that such criminals were sitting happily with sell orders on the other side of every prospective "buy-in."

The amended opinion further ignores that the Johnsons acted as "whistleblowers" who financed the exposure of a fraud that no one else would, including the Division. That Johnson-Bowles never should have made a market in U.S.A. Medical in January 1989 or that, faced with paying Otra a net \$89,600 (and paying others more) and that, in a moment of panic and indecision it wrote a letter to the NASD on March 21, 1989, inconsistent with a position the Johnsons later found they had to take is irrelevant: Such acts do not comprise the charges against the Johnsons nor are such acts "dishonest or unethical practices" in and of themselves. Furthermore, even if the Johnsons "frustrated" the order on this one occasion, it does not amount to a "practice."

The amended opinion reflects a fundamental misunderstanding and lack of appreciation of the realities and practicalities of making a living in this highly regulated, complex day and age.

The opinion is fundamentally anti-business and reflects no appreciation or sense of the Johnsons' predicament and victimization. It gives an agency the power to define and impose its employees' view of morality upon the business world and to destroy people's livelihoods without explanation or justification. In fact, the "moral" of the amended opinion is: Never come forward with knowledge of a fraud; on the contrary, if caught in the middle, one should use all efforts to negotiate with the perpetrators and otherwise secretly further the fraud.<sup>21</sup>

Contrary to the dangerous significance the amended opinion gives the words "agency expertise" or "agency discretion" under Morton<sup>22</sup> no reason has ever been stated why the innocuous purchases in this case constitute a "dishonest or unethical practice" and why such purchases justify taking the Johnsons' licenses away. Contrary to the opinion, the Johnsons did the right thing and people's livelihoods do matter. Finally, "judicial review" in this context was never intended to become an expensive and pointless exercise.

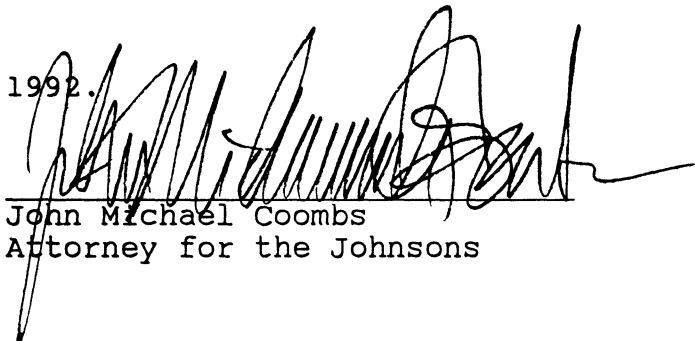
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21           Thus, it can be readily argued that the amended opinion is against public policy. After the message this case communicates, it will be a long, long time before another broker-dealer ever exposes a fraud.

22           Without meaning to detract from the merits of this Petition, important policy and civil rights considerations are at stake in this case and other cases surely to arise like it. For instance, one must consider whether it is a truly fair for the law to be moving in the direction of allowing government agencies to make law, enforce that law, and then interpret that very law, including morality, thereby acting as legislator, prosecutor, judge, jury and executioner, and, at the same time, based on so-called "agency expertise," the courts will now dodge meaningful judicial review. Cf. Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 723-24, 95 S.Ct. 1456 (1975). This case is a sterling example of the abuse attendant to giving a government agency the power to define morality and thereby destroy a person's livelihood. The problem is also not unique to state government. For example, The New Republic, a national opinion magazine, Issue 4,013, December 16, 1991, p. 9, in an article entitled "Uncivil Rites," criticizes the now accepted practice of wholeheartedly "deferring to agency expertise." Therein, the article stated in conclusion: "The upshot is that in conflicts with the new executive/judicial axis, Congress will lose one way on another." See Ex. "18" for a full copy of this article.

This Petition fulfills the considerations set forth in Rule 46(a), (c) and (d). Based on the foregoing, this Court should take a long, hard look at what the Court of Appeals has done and the dangerous legacy such a misinformed and result-oriented decision necessarily leaves behind.

RESPECTFULLY SUBMITTED,

DATED this 20th day of March, 1992.



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Attorney for the Johnsons