

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

	:	RECOMMENDED ORDER
	:	ON PENDING MOTIONS
In the Matter of the Licenses of	:	
Access Financial, Inc.,	:	Case No. SD-00-0041
Anthony Pappas,	:	SD-00-0042
Victor Chigas, Sr.,	:	SD-00-0044
Richard Konst, and	:	SD-00-0045
Todd Davis	:	SD-00-0043

By the Administrative Law Judge:

This adjudicative proceeding was initiated pursuant to the issuance of a July 5, 2000 notice of agency action. The Court conducted the initial prehearing teleconference on July 26, 2000. The Court thus ordered the Division to provide the relevant and non-privileged contents of its investigative file to Respondents by August 4, 2000. Sparing extended detail, Respondents received those documents from the Division on November 28, 2000. Respondents Access Financial, Inc., Anthony Pappas, Victor Chigas, Sr., and Richard Konst filed their response on December 29, 2000. Respondent Todd Davis filed his response on January 26, 2001.

Respondents Access Financial, Inc., Anthony Pappas, Victor Chigas, Sr. and Richard Konst took the depositions of a Craig Wennerholm and Respondent Todd Davis on or about September 2001. The Division and Respondents then elected to pursue settlement negotiations as to possibly resolve this proceeding in lieu of a subsequent hearing. Those negotiations commenced in late 2001 and proceeded until early 2003. However, there was no resolution of this proceeding thus realized by reason of those negotiations.

The Court conducted a prehearing teleconference on April 23, 2003. Pursuant to a May 5, 2003 Supplemental Scheduling Order, Respondents were granted leave to pursue and conduct

discovery in this proceeding until July 25, 2003. Specifically, the Order recites that respective counsel would coordinate a schedule for any remaining depositions to be taken within that time and that another prehearing teleconference would be conducted during the week of July 28-August 1, 2003 to review the status of discovery, determine whether any additional time is necessary to conclude discovery in this proceeding and possibly schedule the hearing to be conducted.

The Court conducted prehearing teleconferences on June 9, 2003 and June 10, 2003 with respective counsel. During those prehearing teleconferences, Respondents informed the Court that they had sought production of documents from the Division and Mr. Buckner then informed the Court that those documents had been produced. The Court thus ordered that the Division confirm that it has disclosed the relevant and non-privileged contents of its investigative file and coordinate any necessary review of the file with Respondents as warranted.

The Court further ordered that any relevant and non-privileged contents of the investigative file which had not yet been provided were to be submitted by the Division to Respondents by July 9, 2003. Moreover, that disclosure was to include any relevant and non-privileged documents as contained in the investigative file after September 20, 2000 and the Division was to provide a privilege log pertaining to any documents which may be withheld. During the prehearing teleconference, the Court also reviewed the scope of the anticipated deposition of Mr. George Robison, Director of Licensing for the Division, and the Court noted the deposition could then be followed by an informal interview of Mr. Robison.

Respondents interviewed Mr. Robison on July 18, 2003. Pursuant to a November 4, 2003 Scheduling Order, the Court informed the parties that the Court assumes the various disclosures required of the Division were made as ordered by the Court, that the deposition of Mr. Robison

had been taken and any informal interview of Mr. Robison had also occurred. The November 4, 2003 Scheduling Order further notes Respondents filed an October 17, 2003 motion with supporting memorandum to dismiss this proceeding. The Division was granted leave until November 14, 2003 to file a response to that motion and any final reply on the motion was to be filed by November 28, 2003.

The Division's response to the motion was filed on November 14, 2003. Respondent's final reply in support of the motion was filed December 16, 2003. Respondents filed a January 12, 2004 notice to submit for decision their October 17, 2003 motion to dismiss. Respondents then submitted proposed findings of fact and conclusions of law to the Court on March 23, 2004. The Division filed a March 30, 2004 objection to the proposed findings of fact and conclusions of law which had been filed by Respondents. The Court conducted an April 19, 2004 prehearing teleconference with respective counsel to schedule oral argument on Respondent's pending motion. Respondents subsequently filed a May 11, 2004 memorandum in opposition to the Division's objections

The Court conducted oral argument on May 26, 2004. The Division was thus represented by Jeffrey S. Buckner, Assistant Attorney General, State of Utah. Respondents Access Financial, Inc., Anthony Pappas, Victor Chigas, Sr. and Richard Konst were represented by Loren E. Weiss and Mark A. Wagner. Respondent Todd Davis was not present for oral argument nor represented in that proceeding by Paul T. Moxley, his legal counsel of record.

During oral argument on its motion, Respondents asserted that the Division has failed to support the naked allegations of the June 26, 2000 Petition. Respondents urged the Division has not marshaled the evidence which supports the specific claims set forth in that pleading. Respondents further asserted the Division has been either unable or unwilling to document those

claims, beyond merely providing approximately 3,000 documents to Respondents which purportedly support the allegations in question.

The Division argued Respondents have been provided all relevant and non-privileged documents pertaining to this case. The Division urged it would be too burdensome to identify the specific documents which support the specific allegations in the Division's Petition. The Division suggested such could be done at a later stage of this proceeding, but not in the discovery phase of this case.

The Division also urged that Respondents' motion appears to be nothing more than an attempt to get an order compelling discovery. The Division thus argued that Respondent's motion to dismiss should be denied, a discovery cut off date should be set, a schedule for any pretrial motions established and this case thus scheduled for hearing. The Division also urged there are disputed issues of material fact which preclude summary judgment.

Based on those arguments, the Court noted Respondents' motion to dismiss included two affidavits and the submission of other matters outside the pleadings. Accordingly, the Court concluded Respondents' motion should be considered as one for summary judgment. The Court further noted that the Division has identified and disclosed the relevant and non-privileged contents of its investigative file and it was not necessary that the Division pinpoint specific evidence in support of a given claim during the discovery phase of this proceeding. The Court concluded final witness and exhibit lists would adequately identify the specific evidence to be offered by the Division during the subsequent hearing.

However, the Court also concluded that the submissions made by the parties on Respondents' motion do not readily establish whether there are any factual conflicts relative to the allegations of the Division's June 26, 2000 Petition in this proceeding. The Court thus

granted leave to the Division to file a concise, specific and supplemental submission to identify the evidence supporting the factual allegations set forth in that pleading. Counsel for the Division stated that he had been preparing and could file a motion for summary judgment. However, the Court further informed respective counsel that the Court was not expecting any such motion from the Division. Rather, the Court only granted leave to the Division to provide a supplemental submission by June 30, 2004 as to better enable the Court to readily identify whether there are matters of disputed facts and if it would be appropriate—as a matter of law—to grant summary relief based on the motion presently under review.

The Division filed what it termed a “Motion for Summary Judgment” on June 30, 2004. Respondents Access Financial, Inc., Anthony Pappas, Victor Chigas, Sr., and Richard Konst filed an August 6, 2004 motion to strike the Division’s motion for summary judgment and also sought entry of sanctions. The Division filed a September 3, 2004 opposition to Respondents’ motion to strike. The Division also filed a September 3, 2004 motion to strike Respondents’ October 17, 2003 motion.

Respondents filed a September 30, 2004 memorandum opposing the Division’s motion to strike the October 17, 2003 motion to dismiss. Respondents also filed a September 30, 2004 reply memorandum in support of their motion to strike the Division’s motion for summary judgment and for sanctions. The Division submitted an October 8, 2004 reply in support of its motion to strike the October 17, 2003 motion to dismiss. The Division next submitted an October 12, 2004 request for a hearing on the pending motions.

That oral argument was conducted December 14, 2004. The Division was represented by Mr. Buckner. Respondents Access Financial Group, Inc., Anthony Pappas, Victor Chigas, Sr., and Richard Konst were represented by Mr. Weiss, Mr. Wagner and also Jennifer Tryza, who is

counsel for Access Financial Group, Inc. Respondent Todd Davis was not present, but he was represented by Mr. Moxley. Based on the Court's review of the numerous submissions filed by the parties since the May 26, 2004 oral argument, the Court initially informed the Division that it would not consider the Division's June 30, 2004 submission as a motion for summary judgment.

However, the Court informed respective counsel that it would consider that submission to have been made in response to the order entered by this Court at the conclusion of the May 26, 2004 oral argument. The Court thus confirmed with respective counsel that Respondent's motion to strike the June 30, 2004 submission would be disregarded and deemed withdrawn, inasmuch as any motion by the Division for summary relief is not properly before the Court.

The Court then informed respective counsel that the Division's motion to strike Respondent's motion to dismiss—or as considered a motion for summary judgment—is not timely. During the May 26, 2004 oral argument, the Court ruled that Respondents' October 17, 2003 motion to dismiss should be considered as a motion for summary judgment and the Court is not persuaded that ruling should be modified. Accordingly, the Court informed respective counsel that the Division's motion to strike Respondent's October 17, 2003 motion was denied.

Respondents still urge that the June 30, 2004 submission by the Division is not adequate to identify those facts in support of the Division's allegations. Respondents continue to urge that the Division does not track the documents relevant in this proceeding to the claims made in the petition. Respondents thus assert that the Division is still not marshaling its evidence and the submissions made by the Division in that regard at the present time are such that it would be excessively costly to review each of those matters.

The Division urges that it has identified the factual basis for each claim in question and the Division further asserts this Court has already rejected any marshaling requirement at this

stage of the proceeding. The Division urges it has established a prima facie case of securities violations and Respondents motion should thus be dismissed.

CONCLUSIONS OF LAW

U.C.A. §63-46b-1(4) provides as follows:

This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

.....

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

Rule 56(c) provides:

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

Rule 56(e) states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Summary judgment is only proper if the pleadings, affidavits and other submissions

reflect there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 831 (Utah App. 1989); *Rich v. McGovern*, 551 P.2d 1266 (Utah 1976). When addressing a motion for summary judgment, the Court must carefully scrutinize all the evidence and the reasonable inferences drawn therefrom in a light most favorable to the party opposing summary judgment. *Conder v. A. L. Williams & Associates, Inc.*, 739 P.2d 634, 637 (Utah App. 1987); *Rich v. McGovern*, *supra*, at 1268.

Since summary disposition of a case denies the benefits of a trial on the merits, any doubt or uncertainty concerning questions of fact should be resolved in favor of the opposing party. *Beehive Brick Co. v. Robinson Brick Co.*, *supra*; *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Thus, summary judgment should only be granted when it appears “there is no reasonable probability that the party moved against could prevail. *Frisbee v. K. & K. Const. Co.*, 676 P.2d 387, 389 (Utah 1984).

Respondents rely on *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) for the following proposition:

. . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party *who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is “entitled to a judgment as a matter of law” because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Id* at 322-23.

In *Jensen v. IHC Hosps.*, 944 P.2d 327 (Utah 1977), the Utah Supreme Court further stated as follows:

On a motion for summary judgment, the moving party bears the burden

of proof for its motion, namely, the burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. However, in opposing a motion for summary judgment, *the plaintiff still has the ultimate burden of proving all of the elements of his or her cause of action. Further, once challenged, the party who opposes such a motion must come forward with sufficient proof to support his or her claim,* particularly when that party has had an opportunity to conduct discovery. The party opposing a properly supported motion for summary judgment “may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Put another way, once the moving party has brought forth evidence either tending to prove a lack of genuine issue of material fact or challenging the existence of one of the elements of the cause of action, the nonmoving party then bears the burden of “providing some evidence, by affidavit or otherwise, in support of the essential elements of his [or her] claim. *Id.* At 339. (Citations omitted). (All emphasis added).

Given the voluminous documents obtained by the Division in its investigation of this case, the Court understands that Respondents initially would have been unable to readily cross-reference those documents to the various allegations in the Division’s Petition and Respondents would incur excessive and unreasonable costs to so reference those documents without further assistance from the Division. Since the Division would have prepared its Petition upon review of such documents, and the Division must adequately respond to the October 17, 2003 motion for summary judgment, the Court concludes it is not an unreasonable requirement to now expect the Division to specifically identify the underlying factual basis for the allegations set forth in that Petition.

Consistent with this Court’s order, the Division thus ultimately did so when it submitted the June 30, 2004 “motion for summary judgment”. That submission, regardless of its title, sets forth the Division’s statement of undisputed material facts and the underlying basis for such facts in Pages 1 through 26 of that submission. Respondents urge that, given such a submission in its present form, it would still be excessively costly to review each of the matters set forth therein.

The Court concludes the June 30, 2004 submission made by the Division is adequate to meet its burden of setting forth the underlying factual basis for the allegations in the Division's Petition—at least for the purpose of responding to Respondents' pending motion for summary judgment. Based on a considered review of the foregoing, the Court concludes no proper factual basis exists to grant summary relief in this proceeding. Accordingly, the Court concludes Respondents' October 17, 2003 motion should be denied.

Consistent with the matters set forth herein, the Court further concludes the Division's June 30, 2004 motion for summary judgment may not be properly considered as a motion for such relief, but that motion should be appropriately considered in the context of Respondent's October 17, 2003 motion. Consistent with the Court's ruling during oral argument on December 14, 2004, Respondents August 6, 2004 motion to strike the Division's motion for summary judgment and for sanctions shall be deemed withdrawn as moot. Further, the Division's September 3, 2004 motion to strike Respondents' motion for summary judgment is also denied.

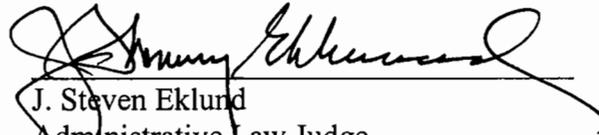
RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED that Respondents' motion to dismiss, dated October 17, 2003, is denied. It is further ordered that the Division's motion for summary judgment, dated June 30, 2004, is denied. Respondents' motion to strike the just-stated motion for summary judgment, dated August 6, 2004, is also denied. Further, the Division's motion to strike Respondents' motion for summary judgment, dated September 3, 2004, is also denied.

The Court will conduct the next prehearing teleconference in this proceeding with respective counsel within two (2) weeks after the date this Recommended Order may be adopted by the Division. During that conference, the Court will schedule the parties' exchange of final witness and exhibit lists, the filing of any further prehearing motions, review the anticipated

duration of the subsequent hearing and accordingly schedule that hearing.

I hereby certify the foregoing Recommended Order on Pending Motions was submitted to David N. Preece, Director of the Division of Securities, on the 6th day of May, 2005, for his review and action.


J. Steven Eklund
Administrative Law Judge

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

In the Matter of the Licenses of	:	ORDER
Access Financial, Inc.,	:	Case No. SD-00-0041
Anthony Pappas,	:	SD-00-0042
Victor Chigas, Sr.,	:	SD-00-0044
Richard Konst, and	:	SD-00-0045
Todd Davis	:	SD-00-0043

By the Division:

The foregoing Recommended Order on Pending Motions is hereby adopted by the Division of Securities.

Dated this 9th day of May, 2005.




David N. Preece, Director

Certificate of Mailing

I hereby certify that on the 6th day of ~~May~~^{JUNE}, 2005 a copy of the foregoing Recommended Order on Pending Motions was sent, by regular mail, postage prepaid, to Arthur B. Ralph, Loren E. Weiss and Mark A. Wagner, 50 So. Main #1600, Salt Lake City, UT 84144. A copy of the Recommended Order on Pending Motions was also hand delivered to Jeffrey S. Buckner, Assistant Attorney General, Heber M. Wells Building, 160 E. 300 So., 5th Flr., Salt Lake City, UT 84114-0872.


Pamala Radzinski
Executive Secretary