

Mark L. Shurtleff (4666)  
Utah Attorney General  
Jeffrey Buckner (4546)  
Assistant Attorney General  
Utah Attorney General's Office  
Commercial Enforcement Division  
160 East 300 South, Fifth Floor  
P. O. Box 140872  
Salt Lake City, UT 84114-0872  
Telephone: (801) 366-0310  
FAX: (801) 366-0315

Attorneys for Utah Division of Securities

---

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

---

**IN THE MATTER OF:**

**NORTHSTAR ENERGY, INC.,  
LARRY M. KOONCE,  
PAUL M. ESPOSITO,**

**Respondents.**

**REPLY SUPPORTING JUDGMENT  
ON THE PLEADINGS**

**Docket No. SD 05-0041  
Docket No. SD 05-0042  
Docket No. SD 05-0043**

---

**LAW AND ARGUMENT**

Northstar Energy, Inc., Larry M. Koonce, and Paul M. Esposito (collectively "Northstar") advance three interrelated arguments in support of their motion to dismiss and in their opposition to the Division's motion for judgment on the pleadings: first, that Northstar is entitled to dismissal

on its version of unsupported facts.<sup>1</sup> Second, that in opposing summary judgment, Northstar may rest on the unsupported allegations in its own motion, and is not required to set forth specific facts, by affidavit or otherwise, that show the existence of a genuine issue of fact for trial because the administrative rules render the need for supporting evidence to be either permissive or optional. Third, that Northstar can circumvent the possibility of judgment on the pleadings because it is not statutorily required to specifically admit or deny the allegations in the OSC as would be required by the rules of civil procedure, and it is not required to come forward with evidence because evidence is optional. Finally, Northstar claims that the Las Raices Joint Venture is a legal entity even though it is not registered in Texas. Northstar's arguments are frivolous.

#### **I. Evidentiary Support Is Required For Dispositive Motions**

The Utah Administrative Procedures Act (UAPA) permits the filing of both dismissal as well as summary judgment so long as the requirements of the Utah Rules of Procedure are met.

...

(4) 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 of the Utah Rules of Civil Procedure are met by the moving party, except to the extent those rules are modified by this chapter.

...

---

<sup>1</sup>Northstar's version of facts were taken, in part, from its response rather than the allegations in the OSC. *See Division's Memorandum Supporting Motion for Judgment on the Pleadings at 5, n. 2.*

*Utah Code Ann. § 63-46b-1(4)(b).*

In the case of motions for summary judgment and dismissal, the Rules of Civil Procedure are not looked to simply as persuasive authority as Northstar claims. The rules have been made to apply specifically to these types of dispositive motions in administrative proceedings by statute.<sup>2</sup> The administrative rule does not vitiate the requirements of the statute. The procedural requirements for both motions to dismiss and summary judgment are well-settled law. These procedural requirements protect several legal interests at stake in an adjudicative proceeding, among them, the burden of responding to insubstantial claims or meritless arguments.

The notion that parties, especially attorneys, should not file motions unless there is some basis in law or fact is basic to motion practice. *Utah R. Civ. P. 11*. However, Northstar takes an opposite position on this basic requirement of motion practice based on a distorted interpretation of the administrative rule, and proclaims in bold type, contrary to the requirements of the statute, “Summary judgment evidence is not necessary.”<sup>3</sup> Indeed, consistent with Northstar’s insistence on

---

<sup>2</sup>If a motion for judgment on the pleadings presents matters outside the pleadings, it is treated a motion for summary judgment. *Utah R. Civ. 12(c)*.

<sup>3</sup>Besides insisting that the Utah Rules of Civil Procedure do not apply in any form to dispositive motions in an administrative proceeding, and that evidence is optional, Northstar’s reply is irregular in other respects. As a matter of form, Northstar’s reply is single spaced. All pleadings in administrative proceedings before the Department of Commerce, however, must be double spaced. *Utah Admin. Code 151-46b-7(2)*. Northstar’s reply is also not prefaced with a verbatim restatement of facts that are being disputed as required by rule. *Utah R. Civ. P., 7(c)(3)(B)*. Instead, the section of Northstar’s reply that precedes its law and argument section is not even designated as a “fact section,” but is broken down into five subparts that either purport to address footnotes or that argue why unsupported denials are proper; why evidence is not

its supposed right to file or oppose a dispositive motion by means of unsupported allegations in an administrative proceeding, none of the allegations in Northstar's motion are supported by any evidence at all.<sup>4</sup> The Division has pointed out these deficiencies as well as the problem with

---

necessary for dispositive motions; why a joint venture not registered in Texas is somehow a legal entity; and why counsel's failure to provide a certificate of good standing earlier as required by the rules is someone else's fault, but harmless anyway. The notion that counsel for Northstar would have filed a certificate of good standing if only the Division had brought the rule to his attention earlier, much like the claim that Northstar would "happily revise" its website, is inconsistent with a defense that the rules and evidence do not apply, and that the agency lacks subject matter jurisdiction. It is axiomatic that an attorney cannot practice law in a jurisdiction where he is not licensed, and the idea that such restrictions on the ability to practice are new, or that ignorance of the existence of such a restriction provides an excuse for out of state counsel until the Division insisted on a certificate of good standing is disingenuous because Northstar appears to be sufficiently familiar with the administrative rules, since the company cites them in support of its defense. Accusing and blaming the Division, as well as asserting irrelevant issues or arguments, to inflame the fact finder in hopes of persuading him to decide the issues in this case on the basis of emotion rather than the law seems to be part of Northstar's litigation strategy. For example, Northstar uses its objection to the Division's request to submit as an opportunity to accuse the Division of failing to respond to earlier correspondence (even though Northstar did not follow through and seemed to have dropped the matter), and "attempting to obtain a favorable ruling on a technicality due to [the Division's] poor legal position." Failure to file an opposition is not a technicality, however, the weight of legal authority is in favor of the Division, and counsel's notes are not a substitute for an order or a rule. Regardless of what the hearing officer may have said about the scheduling of briefs, "the language in the court's final written order controls," *Evans v. State*, 963 P.2d 177, 180 (Utah 1998); and the Division filed a motion that was not contemplated at the time of the telephonic hearing in December 2006. In the absence of a written order, the time limits for responses under the rule apply. No written order extending Northstar's response to February 7, 2007, was issued. Thus, the irregularities in Northstar's reply must be viewed not only in context of other irregular filings by Northstar, such as the filing a verified response when no authority for verification was cited, and that response was not properly verified by someone with knowledge of the facts anyway, in addition to all of the other irrelevant matters asserted in its motion to dismiss and reply. *See footnote 1 above.*

<sup>4</sup>*See Division's Memorandum Supporting Motion for Judgment on the Pleadings at 5, n. 3 for explanation.*

Esposito's affidavit, and Northstar does not deny or fix them. Even though Northstar could have corrected these deficiencies by now, the statements in its motion remain unsupported, and Northstar defends its supposed right to do so. Northstar's insistence on filing or opposing dispositive motions without support is tantamount to saying it can file frivolous motions. Northstar's argument is contrary to law.

In opposing summary judgment, an adverse party cannot rest upon mere allegations or denials, "but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Utah R. Civ. P. 56(e)(emphasis added)*. The requirement for evidence is not optional. It is not novel. It is black letter law. The evidentiary requirement in an administrative proceeding is somewhat relaxed to allow hearsay to a degree not otherwise admissible, see *Utah Code Ann. §§ 63-46b-8(c), -10(3)*, but it has not been completely negated as Northstar contends either. There must be a residuum of admissible evidence. Whether Northstar's response to the OSC was proper, is irrelevant to what is required to properly oppose summary judgment or a motion for judgment on the pleadings.

In this case, Northstar has not opposed summary judgment in the manner prescribed by rule. Northstar has not identified a single issue of fact for trial except for ¶ 2(j). Although Northstar purports to be disputing ¶ 2(j), the only support for the company's denial to that paragraph is a reference back to the Division's own Exhibit E.<sup>5</sup> Exhibit E speaks for itself. Exhibit E does not

---

<sup>5</sup>If Northstar purports to be disputing any other of the Division's statement of facts, Northstar has not identified them. The remainder of the individually numbered paragraphs of the

contradict that “[o]n or around August 1, 2005, Mr. Bowen contacted Respondents’ attorney and gave her notice of Northstar’s disqualification from a Rule 506 exemption and requested that the web site be shut down.” Indeed, Fallon’s letter confirms the existence of such a telephone call. The remainder of Northstar’s comments that follow are unsupported statements or argument. The hearing officer cannot consider them.

Although Northstar claims it would “happily revise” its website if the Division would only tell the company what was wrong, *see Reply at 4*; the statement is disingenuous. Northstar has no intention of changing its website. Northstar’s intention is just the opposite. Northstar’s intention can be inferred by its motion to dismiss. Northstar moved for dismissal on jurisdictional grounds to avoid compliance with any state regulation, arguing that NSMIA completely preempts all state securities laws, not so that it could “happily revise” its website. Thus, the essence of Northstar’s argument is this: even though a court assumes the allegations in the OSC to be true, as long as the OSC alleges a violation of state securities laws, there are no facts on which the Division could ever prevail because, again according to Northstar, NSMIA completely preempts all state securities laws – which may explain why Northstar felt no need to provide any support for the allegations in its motion. If NSMIA completely preempts state law, no fact would make any difference. The upshot of Northstar’s argument, of course, is also this: because all blue sky laws of all fifty states have been

---

Division’s statement of facts are not even mentioned. *Utah R. Civ. P. 7(c)(3)(B)(opposition must contain verbatim restatement of each fact opposing party purports to controvert)*. Because Northstar does not dispute the Division’s statement of facts, they are deemed admitted.

completely preempted by NSMIA, all state security commissions have been operating illegally since the adoption of NSMIA in 1996, and this illegality is only now being brought to the State's attention. And finally, courts cannot make decisions in the abstract. There has to be some factual basis for a decision.

The party alleging complete preemption has the burden showing Congressional intent to extinguish all state regulation, making a federal cause of action the exclusive remedy.<sup>6</sup> Northstar failed to meet its burden. Northstar provided no analysis of NSMIA or Congressional intent in its motion to dismiss. Northstar merely cited a disputed decision of a federal district court and other

---

<sup>6</sup>The test for complete preemption is twofold: first, whether Congress, in enacting the federal statutory scheme, clearly manifested an intent to completely preempt and convert state law claims into federal-question claims so as to make them removable to federal court. *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 (9th Cir. 1993); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S. Ct. 1542, 1547, 95 L.Ed.2d 55 (1987); and second, whether the federal statutory scheme provides for some cause of action granting "jurisdiction over the parties and the subject matter." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 n.4, 107 S.Ct. 2425, 2492, 96 L.Ed.2d 318 (1987). The intent must be explicit. *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 401-02, 106 S. Ct. 1904, 1917-18, 90 L.Ed.2d 389 (1986)(Rehnquist, C. J., concurring) (noting that congressional intent to preempt state forum should be explicit); and analysis begins with the language of the federal statute itself. *Davis*, 476 U.S. at 391 n. 9, 106 S. Ct. at 1912 n. 9 ("The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute."); see also *Metropolitan Life*, 481 U.S. at 741, 105 S. Ct. at 2389-90 (noting presumption against preemption). Moreover, any analysis of preemption begins "with the assumption that the historic police powers of the state were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 432-33, 1225 S. Ct. 226 (2002)(citations omitted); see also *State v. Jones*, 958 P.2d 938 (Utah App. 1998) (court does not lightly infer preemption). "[M]ost federal statutes," however, "do not fall in this category." *Hofler v. Aetna US Healthcare of Cal., Inc.*, 296 F.3d 764, 768 (9th Cir. 2002)(citations omitted). Only national labor law and ERISA are completely preempted by federal law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 2063, 156 L.Ed.2d 1 (2003).

court decisions that adopted Temple, and then failed to respond in rebuttal to any of the problems with Temple in its reply brief, such as the decision's lack of analysis of NSMIA or why the decision of a federal district court case is controlling. A split of authority on a disputed decision is insufficient to establish complete preemption. In fact, all courts that have done any analysis of NSMIA have rejected Temple for its lack of analysis. Indeed, after the Division moved for judgment on the pleadings in this case, another court has rejected Northstar's preemption argument. *Capital Research and Management Co. v. Brown*, 147 Cal.App.4th 58, 53 Cal.Rptr.3d 770 (Cal. App. 4<sup>th</sup> 2007). Likewise, Northstar has not come forward with any case extending IPONET or Lamp Technologies apply to issuers, or why posting an offer on the Internet does not constitute general solicitation. *In re Blue Flame Energy Corp.*, 2006 WL 3775856, ¶¶ 50-52 (posting offer on unrestricted and therefore public Internet site constitutes general solicitation). Northstar merely says that the website is not a general solicitation, and re-cites those cases without responding to the problem with those cases in rebuttal. Northstar cannot be both an issuer and an intermediary.<sup>7</sup>

The purpose of a reply brief is to respond in rebuttal to matters raised in an opposition, not simply to restate the moving party's initial argument. *Utah R. Civ. P. 7(c)(1)*. Recycling the same arguments in the moving party's opening brief without responding in rebuttal to the problems with those arguments adds nothing by way of substance. Since the purpose of reply is to respond in

---

<sup>7</sup>Whether Northstar applied with the SEC is irrelevant since the company is no longer eligible for an exemption. *See Division's Memorandum Supporting Judgment on the Pleadings at 9-13.*

rebuttal, and Northstar failed to do so, its reply should be disregarded. Since agencies have no authority to rule on the constitutionality of a statute, *Clayton v. Bennett*, 5 Utah 2d 152, 154-55, 298 P.2d 531, 533 (1956); and Northstar's preemption challenge is a challenge to the constitutionality of the statute, the agency should affirm the constitutionality of the statute and enter judgment against Northstar so it can pursue its constitutional claim in a proper forum.

### CONCLUSION

For these reasons, the Division's motion for judgment on the pleadings should be granted.

Respectfully submitted this February 28, 2007.

MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Jeffrey Buckner", is written over a horizontal line.

Jeffrey Buckner  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I, Ina Jensen, hereby certify that I have this day served a copy of the foregoing **Reply Supporting Motion for Summary Judgment** to Respondents by mailing a copy, with postage prepaid, to:

Craig G. Ongley  
Epstein Becker Green Wickliff & Hall, P. C.  
Lincoln Plaza  
500 North Akard Street, Suite 2700  
Dallas, TX 75201-3306

Dated this 28<sup>th</sup> day of February 2007.

  
\_\_\_\_\_  
Ina Jensen