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

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IN THE MATTER OF;

AMERICAN-DAIRY.COM, INC.,  
ALPATI PAUL SCHWENKE,  
JAMIS MELWOOD JOHNSON,

Respondents.

**REPLY TO DIVISION'S OPPOSITION  
TO JOHNSON'S MOTION TO STRIKE  
AND MOTION FOR SANCTIONS**

Docket No. SD-06-0010  
Docket No. SD-06-0011  
Docket No. SD-06-0012

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Respondent, Jamis M. Johnson, comes now *pro se*, pursuant to Department of Commerce Administrative Procedures Act Rule 151-46b-7(b) and Utah R. Civ. Pro. 7(d) and submits his reply to the Division's two pleadings which were entitled "Opposition to Johnson's Motion to Motion for Sanctions" and "Opposition to Johnson's Motion to Strike Division's Reply and Motion for Sanctions" as follows:

PROCEDURAL HISTORY

- 1) This action was commenced by the filing by the Division of an Order to Show Cause and Notice of Agency Action filed February 28, 2006.
- 2) Respondent Johnson replied pursuant to Department of Commerce Administrative Procedures Act Rule 151-46b-7(b) and Utah R.Civ. Pro. 12(b)(6) with a Motion to Dismiss and Supporting Memorandum filed on March 30, 2006.
- 3) The Division opposed such Dismiss Motion by filing a pleading called Opposition to Motion to Dismiss April 17, 2006.

4) One day later on April 18, 2006, the Division filed a simple Motion to Strike Johnson's Motion and Memorandum without any supporting memorandum but rather stated the bases for such strike motion were contained in the already filed Opposition to Motion to Dismiss.

5) Johnson filed a Reply to the Division's Opposition to Motion to Dismiss on April 21, 2006.

6) The Division then filed its "sur-reply" in opposition to the Motion to Dismiss camouflaged by entitling it a Reply on Motion to Strike on May 19, 2006. This sur-reply was filed despite the fact Johnson had not filed a formal Opposition to Motion to Strike pleading to which the Division could reply to. This Division's reply for its strike motion included improper argument not directed to the strike motion or its opposition but instead running to the substance of the bases for Johnson's Motion to Dismiss - argument it was not permitted to make because it had previously filed its only and final argument allowed to it when it filed its opposition to the Motion to Dismiss, and argument to which Respondent Johnson could not respond as he otherwise would be entitled to an opposition pleading because there is no reply to a sur-reply in any manner contemplated by any rule.

7) Johnson filed a Motion to Strike the Division's Improper sur-reply, the second opposition memorandum to the Motion to Dismiss on June 6, 2006.

8) On June 5, 2006, Respondent Johnson sent to the Division a letter giving notice of his intent to file for Rule 11 sanctions listing the substantive reasons therefore, but Johnson did not file the sanctions motion, giving the Division the 21 day "safe harbor" allowed by the Rule. Johnson sent the proposed and unfiled Motion for Sanctions to the Division outlining how the sur-reply pleading was improper and should be withdrawn.

9) Despite the fact that Johnson had not yet filed his Motion for Sanctions, the Division on June 16, 2006, prematurely filed a response to that sanctions motion. Their responsive pleadings were entitled “Opposition to Johnson’s Motion to Motion for Sanctions” and “Opposition to Johnson’s Motion to Strike Division’s Reply and Motion for Sanctions,” which are the pleadings being here replied to herein. The Division improperly argued yet again for a third time the substance of its arguments with respect to opposing the Motion to Dismiss on the face of replying to a sanctions motion for that very violation.

9) Further, the Division wrongfully and prematurely filed a Request for Ruling on all the Motions on July 6, 2006, asserting that all briefing had been completed when in fact the Motion for Sanctions had not even been filed, much less any reply memorandum to the Division’s opposition which Johnson is entitled to make.

10) Johnson filed the Motion for Sanctions and supporting Memorandum on July 31, 2006.

## ARGUMENT

### I. OVER LENGTH BRIEF.

Respondent Johnson moves for leave to file this over-length reply memorandum for the reasons that i) the pleadings now filed present a convoluted procedural disarray caused by the Division’s repeated disregard for the rules of pleading and ii) this memorandum responds to two separate pleadings which were only just received July 30, 2006, although dated earlier, regarding the convoluted procedural history of filings in this instant matter.

### II. IMPROPER PLEADINGS.

The Division’s improper multiple pleadings reflect its premise that it is above the rules of pleading and that it basically is entitled to three bites at the same apple, to wit, opposing Johnson’s Motion to Dismiss. This is false and wholly improper. Further, the Division’s argument themselves used in opposing the Motion to Dismiss are superficial and

devoid of merit and pled in a manner to prevent Johnson from answering each of the specious arguments under ordinary rules of procedure and conduct of due process.

The premise of Johnson's Motion to Dismiss that the Division failed to state a claim upon which relief may be granted, was set out in direct and simple terms, based wholly upon the allegations found in the Division's own OSC. The Division's opposition response (only one of which they are allowed but now three of which they have filed in three separate memoranda), inadequately again attempts to rebut Johnson's Dismiss Motion but without reference to virtually any supporting case law. The Division's brief also sought refuge in a flimsy procedural end run by relying on a false premise that Johnson's Motion to Dismiss is really a Motion for Summary Judgement because it supposedly relies on facts outside the pleadings. The Division thereby, seeks to divert attention from and ignore Johnson's substantive arguments which were based entirely upon facts alleged in the OSC and which were reviewed under governing law. The Division then makes the leap that because there are not affidavits supporting the few alleged extraneous minor facts, the Dismiss Motion fails as really being a motion for summary judgment. The Division's argument that because there is a minor reference in passing to matters outside the OSC requiring the entire Dismiss Motion to be ignored and treated as a summary judgment motion is a false either/or, all or nothing proposition. A judge has the discretion under the plain language of U.R.Civ. Pro. 12(b)(6) as well as case law to either not consider or rely on any matters raised which are outside the pleadings or to treat the motion as one for summary judgement - "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court . . ." A tribunal can and should simply not consider any allegedly extraneous facts and deal with only those germane facts

that it actually properly has before it, Strand v. Associated Students of the Univ. of Utah, 561 P.2d 191, 193 (Utah 1977) - "if a motion to dismiss under Rule 12(b)(6) is presented, the decision to consider matters outside the pleadings initially lies in the discretion of the trial court." This is critical where the allegedly extraneous facts are not the operative bases for the Dismiss Motion.

However, here in the present case, extraneous facts do not form the basis of Johnson's Dismiss Motion. This is obvious by simple examination of the Dismiss Motion and Memorandum themselves. While reference is made, in passing, to some minor facts not found directly within the four corners of the Order to Show Cause, these minor facts are not the substance of the Motion to Dismiss. The Dismiss Motion is based upon entirely undisputed facts as were set forth in the Division's own Order to Show Cause and is based upon the absence of necessary facts. Johnson in his Memorandum clearly recited specific paragraph and sub-paragraph numbers of the OSC that prove the Division's claims are factually and legally unsupportable.

The basis for Respondent Johnson's Motion for Sanctions against the Division is the Division's improper re-arguing and adding in new expanded arguments in their opposition which Johnson cannot reply, which is done through these multiple briefs, contrary to the rules of procedure. An opponent to a motion only gets one opposition pleading - U. R. Civ. Pro. 7(c)(1), not the multiple attempts used by the Division herein. Respondent Johnson wrote the Division attorney and gave notice of the improper filing pursuant to U.R.Civ.Pro. 11 with the opportunity to withdraw the wrongful pleading. Respondent Johnson did not notify the Administrative Law Judge of this sanctionable and improper pleading by the Division, but instead, gave the Division the time allowed by rule to rectify the problem to avoid sanctions. The Division was given the safe harbor opportunity of U.R. Civ. Pro. 11 to

withdraw their improper second bite at the apple but has not only refused to withdraw the improper pleading, but they further violated the rule again with their responsive pleading by re-arguing their same faulty premise opposing the Dismiss Motion yet again a third time.

The Division claims they have a procedural justification for repeatedly re-arguing the motion to dismiss but burying these repeated arguments in a Reply to Johnson's Opposition to their Motion to Strike. The Division claims they could do this because they were entitled to make a reply under Rule 7(c)(1) to Johnson's opposition to their Motion to Strike. The first problem with the Division's concept is that Johnson did not ever file a formal Opposition to Motion to Strike to which the Division could reply, to begin with. The Division seems now to believe they can again raise the same improper arguments a third time because they were entitled to oppose a Motion for Sanctions which had not even been filed. The clear problem here is that the contents of the Division's sanctionable Reply to Strike Motion pleading did not respond to the arguments of Respondent Johnson's opposition to their motion to strike (for which no formal opposition pleading had been filed), but instead the Division re-argued and expanded their arguments in opposition to the Motion to Dismiss about really being a summary judgment having to be denied due to lack of supporting affidavit for the allegedly extraneous facts which they had already stated in their opposition to Johnson's Dismiss Motion. Just because the Division titled the pleading "Reply Supporting Motion to Strike" with minor reference to that strike motion made only in passing, that does not mean that this is what the pleading in fact was. That title is misleading. The pleading was not about striking, it was about opposition to the Dismiss Motion. The Division instead primarily re-argued and expanded upon the same opposition they had already briefed. The Division extensively re-argues these matters it is simply not permitted to continue to reopen and reargue. It is quite well established in Utah law that the

title of a pleading is not dispositive of, nor replaces its actual substance, Kunzler v. O'Dell, 855 P.2d 270 (Utah App. 1993); Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1064 (Utah 1991); Darrington v. Wade, 812 P.2d 452, 457 (Utah App.1991).

A major undisputed fact set out by the Division in their OSC is the only relevant transaction was an Agreement dated August 9, 2000. This was the last thing Johnson was involved with. This undisputed fact, admitted and alleged by the Division itself, frames a significant basis for Johnson's dismiss motion. Johnson's minor involvement with the three other extensively involved persons, i.e. Schwenke, Young and Myers, ended totally and abruptly on August 9, 2000. However, the agency action was not commenced until February 28, 2006, after the five year applicable specific statute of limitations defined in the Securities Act. Here is an issue that involves only an exclusively legal argument (as opposed to argument relying on any extraneous facts). The ALJ may freely rule on this undisputed fact as to whether or not the statute of limitations bars this administrative agency enforcement proceedings, or only precludes civil and criminal court actions.

Another undisputed fact that the transaction, which occurred on August 9, 2000, whereby dairy farmers obtained 200,000 shares of stock in American Dairy.com, Inc. was nothing more than a change in form of ownership of title to the dairy farm. It was transferred from the Utah limited liability company owned by Young and Myers, Milk King Dairy, LLC, to the Utah corporation owned by Young and Myers, American Dairy.com, Inc. This was set out by the Division in paragraphs 9, 10 and 11 of their OSC. Young and Myers gave nothing of value and merely changed the form of ownership. They did not actually even, according to the OSC, give up their member interest shares of the limited liability company in exchange for the shares of stock in the corporation. Thus, the OSC itself demonstrates that there was not an offer for, or sale of, a security for value.

OSC itself demonstrates that there was not an offer for, or sale of, a security *for value*, which is the definitional predicate for relief under every subsection of the Securities Act relied upon by the Division, Utah Code Anno. §61-1-13(1)(v). This is demonstrated purely on facts in the OSC, this issue is unaffected by any alleged “extraneous” fact.

Moreover, there is no dispute under the Division’s own facts as alleged in their own OSC that the August 9, 2000, Agreement was both only an isolated transaction and which involved only Young and Myers, i.e. not a public offering; and thus, it was entirely exempt pursuant to Utah Code Anno. §61-1-14(2)(a) and (n), defeating any claim by the Division under Utah Code Anno. §61-1-7 for sale of or offering for value an unregistered security for a public sale.

It is the Division’s failure to allege in the OSC necessary facts sufficient to establish the essential elements of the offenses charged being alleged by the Division which instantly defeats the Division’s claims. For example, as with the above-mentioned claim of unregistered sale, so also goes the Division’s claim for being an unlicensed broker or dealer of securities under Utah Code Anno. §61-1- 3, which by definition in Utah Code Anno. §61-1-13(1)(b)(ii) and (c) excludes an “issuer,” or “agent of an issuer,” i.e. Johnson as alleged CEO of the issuer, American Dairy.com, Inc., who receives “no commission or other remuneration” for the sale or with respect to an exempt transaction under Utah Code Anno. §61-1-14(2). There is no allegation of Johnson receiving any commission or remuneration, as well as this having been an exempt transaction. Since the transaction, by the OSC’s own factual allegations is clearly exempt and no sale occurred, there was certainly “no commission or other remuneration” received and none is alleged. This is the basic element necessary for application of this section and is totally missing from the

Division's allegations. These are not just extraneous facts; these are non-existent facts which are necessary to state a claim for relief which therefore also does not exist.

Further, as to the Division's claim under Utah Code Anno. §61-1-1(2), it is undisputed under the Division's own statements of fact in its OSC that there was no predicate statement of any fact by Respondent Johnson material to this transaction which was false. There are three types of predicate statements that the Division alleged in the OSC, "credentials" predicate statements in paragraph 27, subsections a and b, an "IPO" predicate statement in paragraph 27, subsection (c) and "financing" predicate statements in paragraph 27, subsections d and e. It is the Division's very OSC which claims in paragraph 27 (a) and (e) that it was Schwenke, not Johnson, who allegedly claimed he would cover the mortgage payment on the dairy which induced the farmers to change title from their LLC to their corporation and had "people lined up to provide financing." So Johnson was not even involved with making the "financing" predicate statements which by definition therefore does not state a claim for relief against him.

These purported "inducements" by Schwenke alone or by Schwenke and Johnson however, still do not relate to the only transaction involving Johnson. Schwenke could have promised the sun, moon, and free mortgage payments all he liked to individual dairy businessmen, limited liability company members or corporate shareholders and his alleged promises would be no more enforceable as a mere gratuity without consideration. Nor would such promise relieve any farmer of his own contractual duties to make payments on his own dairy mortgage; nor would it have any bearing on changing the form of ownership. Schwenke could have claimed all the financial backing in the universe from Bill Gates, but that had no more bearing on changing title from a LLC to a corporation than the other statements. Schwenke could have made the same claims to the farmers as individuals or as

members of the LLC or as corporate shareholders - no difference. Whether Schwenke would pay the mortgage or had financial backing at bottom line simply has no bearing on the only transaction involving Johnson, i.e. changing the form of entity on title from a limited liability company to a corporation. There is just no connection between the two, that which was actually done had nothing being “induced” to be done which did anything of significance. Furthermore, there is no allegation that any of Schwenke’s statements were actually false, but only that “Schwenke and Johnson had no reasonable basis on which to make those representations.” That does not satisfy the statutory element of falsity.

It is undisputed that there was no omission of any material fact which would make any predicate statement actually made misleading. The “credentials” predicate statements recited by the Division in paragraph 27 subsections b of the OSC with respect to Johnson were true statements. Johnson was an attorney licensed to practice in Utah who had Wall Street experience. That he may have a far distant future disciplinary proceeding and had tax liens is irrelevant to that true statement that Johnson was a Utah licensed attorney. The “IPO” predicate statements (attributed allegedly to both Johnson and Schwenke) in paragraph 27, subsection c that an IPO offering 6-24 months in the future might be worth \$5 per share remained a true statement that such a thing might occur. It was at best a future hope and not actionable.

Being true at all times relevant herein, nothing in the omissions alleged by the Division in paragraph 28 in subsections a to h for the credentials statements or i through p for the IPO statements of the OSC rendered any statement misleading. The additional omissions respecting IPO’s simply are the sort of disclosures required by the “prospectus statute.” That there would be risks or underwriting requirements simply does not, on their face, in any way, shape or form in any manner render misleading a claim that stock shares in 6-24 months might be worth \$5. Not disclosing the “hoops that would have to be jumped

through” does not make the statement misleading because the bottom line is it remained a true hope at every moment when the prospect of a public offering still existed. This, of course, was before the farmers defaulted on their mortgage payments which they were contractually bound to make and the farm was foreclosed. There is no affirmative disclosure requirement in the “omission statute,” but even the omissions do not make the IPO hopes which were actually affirmatively stated, to be false or misleading in any manner.

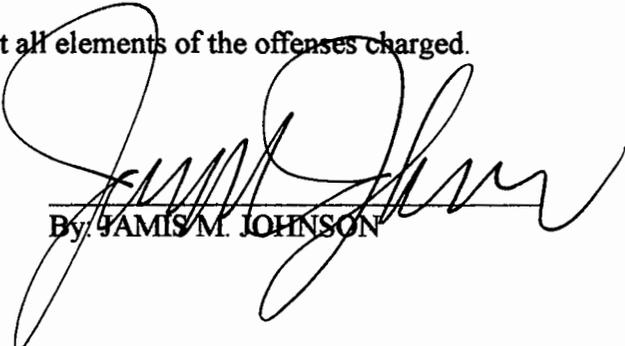
Fundamentally however, neither the alleged statements nor alleged omissions were *material* in any way, shape or form to the change of form of ownership transaction in issue where Young and Myers had independent counsel. Johnson’s attorney status or credit worthiness or the alleged hope to have additional cows and farms in the undefined future to make a potential public offering had absolutely nothing whatsoever to do with a decision to make a simple change of title transaction from being held by a limited liability company owned by Young and Myers to a corporation owned by Young and Myers wherein they gave up nothing. The OSC simply fails to state a claim for relief on its face under Utah Code Anno. §61-1-1(2).

The Division finally itself admits the validity of Johnson’s Fifth Amendment challenge to continuation of this administrative proceeding during the pendency of the criminal proceeding respecting the same transaction on the bottom of p. 2 of their opposition memorandum noting that he could not be compelled to submit an administrative Affidavit in support of a Motion for Summary Judgment which would violate his right not to testify.

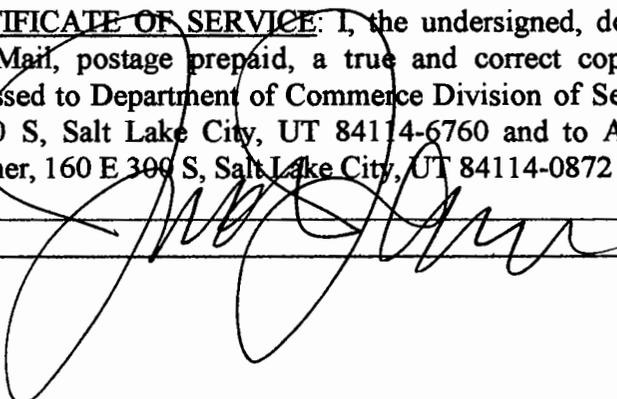
CONCLUSION

The Division has improperly responded in improper pleadings to a well founded Motion to Dismiss by which the Division's OSC must be dismissed under its own alleged facts or lack of essential facts necessary to support all elements of the offenses charged.

DATED this August 1, 2006.

  
By: JAMIS M. JOHNSON

**CERTIFICATE OF SERVICE:** I, the undersigned, do hereby certify that I deposited in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing, in the U.S. mail, addressed to Department of Commerce Division of Securities, Attention: Pam Radzinski, 160 E 300 S, Salt Lake City, UT 84114-6760 and to Assistant Utah Attorney General Jeffrey Buckner, 160 E 300 S, Salt Lake City, UT 84114-0872

  
Dated

8/9/06