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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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DIVISION OF SECURITIES  
UTAH DEPARTMENT OF COMMERCE,

Plaintiff,

vs.

LIFE PARTNERS, INC., a Texas Corporation  
LIFE PARTNERS HOLDINGS, INC., a  
Texas Corporation, and  
MARK BRUCE SUTHERLAND, a Nevada  
resident,

Defendants.

**DEFENDANTS' MOTION FOR THE  
COURT TO CONSIDER  
BRIEFS & ARGUMENT ON  
REMOVABILITY OF THE  
UTAH SECURITIES DIVISION'S  
PROCEEDING**

Civil No.: 2:06cv00968 PGC

Judge: Paul G. Cassell

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### INTRODUCTION

On November 20, 2006, Defendants Life Partners, Inc. (“LPI”), and Life Partners Holdings, Inc. (“LPHI”), both Texas corporations, filed a Notice of Removal in this Court from a proceeding pending before the Utah Division of Securities.

While the nature of the removed proceeding is outlined more fully in the Notice of Removal and the Order to Show Cause attached thereto, at its core, the Order to Show Cause seeks to punish Defendants for their dealings in Texas with, among others, citizens from California, Connecticut, and Tennessee. Defendants believe that enforcement of the Utah Securities Act as outlined in the Order to Show Cause operates in an unconstitutionally extraterritorial fashion and violates the *Commerce Clause* of the United States Constitution, the National Securities Markets Improvement Act (“NSMIA”), and the *Excessive Fines Clause* of the 8<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. Defendants believe that a federal court is the appropriate forum to address their federal constitutional and statutory rights to be free of extraterritorial regulation by Utah officials.

Defendants were concerned that the proceeding initiated by the Order to Show Cause would be deemed a “court” proceeding subject to removal under 28 U.S.C. § 1441(a). Thus, out of an abundance of caution, and to ensure that they did not waive their statutory right, Defendants removed the action to this Court.

To the extent that this Court has concerns regarding the removal of the proceeding to this Court, Defendants request that this Court receive briefs and argument from Defendants and the Utah officials on the question of whether the Utah proceeding constitutes a state court

proceeding properly removed to federal court.<sup>1</sup> While Defendants reserve the right to more fully brief the matter were this Court to request briefs on the issue, they offer the following:

**Removability of Judicial-Like State Administrative Proceedings**

Several Courts have concluded that under the “functional test” certain judicial-like administrative proceedings qualify as “court” proceedings subject to removal under 28 U.S.C. § 1441(a). According to the Moore’s Federal Practice treatise:

State administrative bodies generally are treated as state courts for removal purposes, provided that these bodies are involved in essentially judicial functions. Thus, removal of an administrative proceeding may be proper if the proceeding is adversarial or punitive, and disputed matters are being adjudicated.

*See* 16-107 *Moore’s Federal Practice*, Civil § 107.12[3] (internal citations omitted).

In applying this functional test, the Seventh Circuit held that “the title given a state tribunal is not determinative; it is necessary to evaluate the functions, powers, and procedures of the state tribunal and consider those factors along with the respective state and federal interests in the subject matter and in the provision of a forum.” *Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100, 1102 (7<sup>th</sup> Cir.1979), *citing Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38, 44 (1<sup>st</sup> Cir. 1972); *contra Oregon Bureau of Labor & Indus, ex rel. Richardson v. U.S. West Communications, Inc.*, 288 F.3d 414, 419 (9<sup>th</sup> Cir. 2002) (administrative proceedings cannot be removed because they are not “courts”); *see also Sun Buick v. Saab Cars USA*, 26 F.3d 1259 (3<sup>rd</sup> Cir. 1994) (criticizing *Floeter*).

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<sup>1</sup> Defendants do not know whether the Utah Securities Division will seek to remand this matter pursuant to 28 U.S.C. § 1447. As an alternative to additional briefing at this time, the Court could defer action until the Utah Securities Division’s position on removal can be ascertained.

The federal district courts that have accepted jurisdiction over matters removed from state administrative proceedings have done so after determining that the proceedings were “judicial in character.” As the federal district court for Wisconsin stated:

Although the WERC [Wisconsin Employment Relations Commission] is a state agency, not a state court, it follows procedures which may be described as judicial in character. Moreover, the agency would be obligated to apply federal law to the claims presented in the complaint. The agency’s special expertise would not appear to extend to adjudicating questions in which federal standards must be applied. Also, this action could have been brought in a Wisconsin state court, from which it could without question have been removed to this court under § 1441(a).

All of these considerations persuade me that this action is properly removable from the WERC to this court under the provisions of § 1441(a). My prior decision and order to the contrary will therefore be vacated.

*Martin v. Schwerman Trucking Co.*, 446 F. Supp. 1130, 1131 (D. Wis. 1978) (internal citations omitted); *accord Ins. Comm. of Puerto Rico v. Doral Ins. Agency*, 2006 U.S. Dist LEXIS 80333 (D. Puerto Rico, October 31, 2006).

Even in cases where courts have remanded proceedings to state administrative agencies, they have done so based principally upon a case-specific analysis of the agency’s judicial-like functions. *See, e.g., Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708, 710 (7th Cir. 2000); *Gottlieb v. Lincoln Nat’l Life Ins.*, 388 F.Supp.2d 574 (D. Md. 2005) (Maryland Insurance Administration); *Borough of Olyphant v Pa. Power & Light Co.*, 269 F Supp 2d 601 (M.D. Pa. 2003) (Pennsylvania Public Utilities Commission).

**Removability of Proceedings  
Pending before the Utah Securities Division**

Defendants have located no precedent deciding the removability of a proceeding initiated by the Utah Securities Division. However, Defendants note that the Securities Division designated the removed proceeding as a “formal” adjudicatory proceeding pursuant to Utah Code Ann. §§ 63-46b-4 and 63-46b-6 through -10. Thus, the removed proceeding would be heard by an administrative law judge who would be required to issue a written order containing, among other things, his findings of fact and conclusions of law and, where appropriate, ordering fines or sanctions. *See*, Utah Code Ann. § 63-46b-10 (“Orders”). Furthermore, the statutes provide for detailed and comprehensive “procedures for formal adjudicative proceedings.” *See*, Utah Code Ann. § 63-46b-6 (“Responsive Pleadings”); Utah Code Ann. § 63-46b-7 (“Discovery and subpoenas”).

**Conclusion**

In light of the significant right of removal at stake for Defendants and the legitimate question as to whether the proceeding initiated by the Utah Securities Division constitutes a “court” proceeding under 28 U.S.C. § 1441(a), Defendants respectfully request the Court to receive briefs and argument from the parties prior to deciding whether or not to remand this matter. A proposed Order is attached.

Dated this 22nd day of November, 2006

RAY, QUINNEY & NEBEKER

/s/ Ryan B. Bell

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22th day of November, 2006, I electronically filed the foregoing **DEFENDANTS' MOTION FOR THE COURT TO CONSIDER BRIEFS & ARGUMENT ON REMOVABILITY OF THE UTAH SECURITIES DIVISION'S PROCEEDING** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Jeffery Buckner, Esq.  
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160 E. 300 South, Fifth Floor  
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And mailed, postage prepaid, to the following:

Administrative Court Clerk  
c/o Pam Radzinski  
Utah Division of Securities  
P.O. Box 146760  
Salt Lake City, UT 84114-6760

John A. Snow  
Van Cott, Bagley, Cornwall & McCarthy  
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/s/ Jeanette Evans

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Defendants.

**PROPOSED ORDER GRANTING  
DEFENDANTS' MOTION FOR THE  
COURT TO CONSIDER  
BRIEFS & ARGUMENT ON  
REMOVABILITY OF THE  
UTAH SECURITIES DIVISION'S  
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The Court having reviewed Defendant's Notice of Removal and its Motion for the Court to Consider Briefs and Argument on the Removability of the Utah Securities Division's Proceeding, and being otherwise fully informed, hereby GRANTS the Motion.

If Plaintiff Division of Securities desires to oppose the removal, it shall submit a memorandum detailing its position by \_\_\_\_\_. Defendants shall then submit a memorandum supporting their removal by \_\_\_\_\_.

SO ORDERED.

Dated this \_\_\_\_ day of November, 2006

BY THE COURT

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Hon. Paul G. Cassell  
U.S. District Court Judge

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