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

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' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION TO REMAND**

Civil No.: 2:06cv00968 PGC

Judge: Paul G. Cassell

INTRODUCTION

Defendants Life Partners, Inc. (“LPI”), and Life Partners Holdings, Inc. (“LPHI”) (collectively “Defendants”) properly removed this case—a formal adjudicatory proceeding before a state agency acting as a tribunal—to this Court. The Division of Securities of the Department of Commerce of the State of Utah (“Plaintiff”), by way of an Order to Show Cause and Notice of Agency Action (collectively “Order to Show Cause”),¹ has unconstitutionally applied the Utah Securities Act to LPI’s conduct of interstate commerce in Texas. Plaintiff seeks to regulate and sanction Defendants for LPI’s dealings in Texas with, among others, citizens of California, Connecticut, Tennessee, and Florida. Defendants assert that enforcement of the Order to Show Cause against LPHI and LPI under the facts of this case violates the *Commerce Clause* of the United States Constitution, the National Securities Markets Improvement Act (“NSMIA”), and the *Excessive Fines Clause* of the 8th and 14th Amendments to the United States Constitution. Defendants have the right to remove this case, and a federal court is the appropriate forum to address these important federal constitutional and statutory issues.

PROCEDURAL BACKGROUND

On October 20, 2006, Plaintiff initiated a “formal adjudicatory proceeding” against Defendants seeking \$500,000 in fines, requiring each Defendant to file an answer by November 20, 2006, to appear for a hearing on November 27, 2006, or be held in default. Plaintiff served the Order to Show Cause upon the Defendants at their headquarters in Texas.

On November 20, 2006, Defendants, both Texas corporations, filed a Notice of Removal in this Court of the “formal adjudicatory proceeding” initiated by Plaintiff.

¹ The Order to Show Cause was issued by Wayne Klein, the Director of the Division of Securities.

On November 21, 2006, Plaintiff delivered a letter to Defendants' counsel demanding that the Notice of Removal be withdrawn by noon the following day, threatening that if Defendants failed to withdraw their removal, Plaintiff "will claim fees and costs and will withdraw any settlement offers that have been made." Exhibit 1.

On November 22, 2006, Defendants hand-delivered a response to Plaintiff's demand letter explaining that Defendants had acted to preserve their rights under federal law as enunciated in specific federal court opinions. Defendants further suggested that the parties agree to a mutual stay in the removed action in order to allow the parties to discuss the matter in a calm fashion. Exhibit 2. Defendants' counsel also left voicemail messages for two of Plaintiff's attorneys.

On November 22, 2006, Defendants amended their Notice of Removal asserting that removal of the action also was proper under 28 USC § 1441(b) due to the complete federal preemption provided by NSMIA. Further, recognizing that this was a case of first impression in this circuit, Defendants filed a Motion for the Court to Consider Briefs & Argument on Removability ("Motion to Consider Briefs"), asking the Court to allow the parties to brief the removability issue or, at a minimum, to determine Plaintiff's position on removal before taking any affirmative action. Docket #3, & n. 1 ("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").

On November 27, 2006, the Court granted Defendants' Motion to Consider Briefs. The same day, Plaintiff's counsel delivered a letter to Defendants' counsel refusing, among other things, to agree to a stay. Exhibit 3.

On November 28, 2006, LPI filed its Answer and Grounds of Defense. Docket #9. On November 28, 2006, LPHI filed its Motion to Dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(2) & (6). Docket #8. *See also* Fed. R. Civ. P. R. 81(c).

On November 30, 2006, this Court entered a briefing schedule ordering Plaintiff to make its arguments regarding removability, if they were going to do so, *and to respond to LPHI's Motion to Dismiss* on or before December 15, 2006. Docket #11 (emphasis added).

On December 14, 2006, Plaintiff filed a Motion to Remand ("Motion"), refusing to respond to LPHI's Motion to Dismiss. Motion p.5. By failing to comply with this Court's Order, Plaintiff has conceded LPHI's Motion to Dismiss. Accordingly, Defendants shall confine this pleading to opposing Plaintiff's Motion to Remand.

FACTUAL BACKGROUND

A "viatical settlement" is the sale of a beneficial interest in an existing life insurance policy by a terminally ill individual. By selling his or her beneficial interest in a policy, the seller receives an immediate cash payment to use as he or she wishes. The purchasers take an ownership interest in the policy at a discount to its face value and receive the death benefit under the policy when the seller dies.

A "life settlement" is the sale of a beneficial interest in an existing life insurance policy by an individual 65 years of age or older who is not terminally ill. By selling his or her beneficial interest in a policy, the seller receives an immediate cash payment to use as he or she

wishes. The purchasers take an ownership interest in the policy at a discount to its face value and receive the death benefit under the policy when the seller dies.

A. LPI.

LPI is a Texas corporation whose principal, and only, place of business is Waco, Texas. LPI assists purchasers who desire to buy interests in life insurance policies placed for sale on the national market by sellers located across the United States. LPI conducts transactions on behalf of its clients in interstate commerce through the United States Postal Service and commercial mail service, the telephone, telefax and Internet solely from its headquarters in Texas. In accordance with Texas law, LPI is licensed and regulated in Texas. At no time has LPI maintained any offices or facilities in Utah. At no time has LPI employed employees or agents in Utah. LPI does not discuss, negotiate, or execute contracts for viatical or life settlements in Utah. LPI does not target the Utah market for advertising or other marketing efforts. LPI is wholly-owned by LPHI.

LPI does not purchase insurance policies for its own use in the ordinary course of its business, or purchase and re-sell policies. LPI does not represent sellers, who are typically represented by their own brokers. LPI acts as a purchaser's agent, assisting purchasers in identifying, assessing and acquiring interests in valid life insurance policies placed for sale on the interstate market by individual sellers. LPI did not own any of the policies in the transactions referenced below. In all of the transactions below, LPI acted solely as a purchaser's agent. Potential purchasers generally learn about LPI through their individual financial planners.

LPI has developed a proprietary business system that facilitates the transfer of interests in insurance policies from an individual seller to buyers. LPI licenses use of its business system to

independent contractors, typically financial planners or advisors, who access information from LPI's proprietary computer system and refer individuals to LPI to assist them in purchasing interests in life insurance policies.

LPI makes its proprietary business system available for use under two different types of license agreements: (1) Master Licensee Agreement and (2) Licensee Agreement Under the Master Licensee. LPI has entered into a Master Licensee contract with a handful of planners or referral sources around the country (none in Utah). A master licensee may recruit other planners or referral sources to enter into subsidiary licensee arrangements. Individuals who execute Licensee Agreements Under the Master Licensee contracts are paid by the master licensee pursuant to a separate agreement between them and the master licensee. Neither LPI nor LPHI is a party to the contract between a master licensee and the sublicense. Nor is there any relationship between a master licensee and LPHI.

By the terms of the Master Licensee contract, the master licensee is an independent contractor to LPI. The Master Licensee contract specifically states that it does not create a partnership, joint venture, employment, franchise, or agency relationship between LPI and the master licensee. As part of this contract, the master licensee also agrees to bear the sole responsibility for compliance with all federal, state, and local laws, rules, and regulations.

By the terms of the license granted under the Licensee Agreement Under the Master Licensee, the independent financial planner is an independent contractor to LPI and is paid exclusively by the Master Licensee. The Licensee Agreement Under the Master Licensee specifically states that it does not create a partnership, joint venture, employment, franchise, or agency relationship between the independent financial planners and LPI. Through the Licensee

Agreement Under the Master Licensee, each independent financial planner agrees to bear the sole responsibility for its compliance with all federal, state, and local laws, rules, and regulations. One of the primary purposes of the Licensee Agreement Under the Master Licensee license agreement is to preserve confidential information when the independent financial planner accesses information from LPI's proprietary computer system via the internet. There is no relationship between a sublicensee and LPHI.

Each financial planner who signs a Licensee Agreement Under the Master Licensee works through, and is paid by, the master licensee pursuant to a separate agreement between the individual financial planner and the master licensee.

B. LPHI.

LPHI is a Texas corporation with its principal place of business in Waco, Texas. LPHI is publicly traded on the NASDAQ market under the symbol LPHI. LPHI is a passive holding company. LPHI owns LPI and other assets. LPHI does not conduct viatical or life settlements. LPHI has no Utah contacts.

C. Alpha & Omega.

Upon information and belief, Alpha & Omega Global Risk Management L.P. ("Alpha & Omega") is a Florida limited partnership with its principal place of business in West Palm Beach, Florida. Neither LPI nor LPHI has any ownership interest in or control over Alpha & Omega. Alpha & Omega is not an agent of LPI or LPHI.

On October 22, 2002, Alpha & Omega entered into a Master Licensee license agreement with LPI. LPHI is not a party to the Alpha & Omega Master Licensee agreement.

D. Sutherland.

Mark Bruce Sutherland (“Sutherland”) is a resident of Nevada. Sutherland is an independent contractor and is not an employee or agent of LPI or LPHI.

Upon information and belief, in May 2004, Sutherland entered into an agreement with Alpha & Omega to work in association with Alpha & Omega pursuant to the terms of the Master License and to receive all compensation from Alpha & Omega according to the terms of this separate agreement. Neither LPI nor LPHI is a party to this separate agreement

In May 2004, Sutherland entered into a Licensee Agreement Under the Master Licensee agreement with LPI. LPHI is not a party to this agreement.

E. Morgan Bay/Edward Raine.

Upon information and belief, Morgan Bay Management, LLC (“Morgan Bay”) is a limited liability company with a place of business in Utah. Upon information and belief, Edward Raine, LLC (“Edward Raine”) is a limited liability company with a place of business in Utah and a successor company to Morgan Bay (collectively “Edward Raine”). Neither LPI nor LPHI has any ownership interest in or control over Morgan Bay or Edward Raine. Neither Morgan Bay nor Edward Raine is an agent of LPI or LPHI.

Upon information and belief, in October 2005, on behalf of Morgan Bay, M.B.C. entered into an agreement with Alpha & Omega to work in association with Alpha & Omega pursuant to the terms of the Master License and to receive compensation from Alpha & Omega according to the terms of this separate agreement. Neither LPI nor LPHI is a party to this separate agreement.

On October 14, 2005, on behalf of Morgan Bay, M.B.C. entered into a Licensee Agreement Under the Master Licensee agreement with LPI. Upon information and belief,

Edward Raine is a successor business interest to Morgan Bay. On January 10, 2006, Edward Raine entered into a Licensee Agreement Under the Master Licensee agreement with LPI. LPHI is not a party to either the Morgan Bay or Edward Raine agreements.

F. Sterling Trust.

Sterling Trust Co. (“Sterling”) is a Texas company with its principal place of business in Waco, Texas. Sterling is a wholly-owned subsidiary of Matrix Bancorp, Inc. (“Matrix”) (NASDAQ NMRS: MTXC). Neither LPI nor LPHI has any ownership interest in or control over Sterling or Matrix. Individuals seeking to purchase interests in insurance policies deposit money with Sterling.

G. Referrals.

Plaintiff’s Order alleges that Edward Raine referred several individuals to Sutherland in Nevada.² Order ¶ 16. The Order to Show Cause does not specify the individuals but, based upon its records, LPI believes these referred individuals are K. M., a Connecticut resident, K. S., a California resident, P. C., a Tennessee resident, and A.A. a Florida resident.

H. Individuals.³

1. M.B.C. of Utah.

Upon information and belief, M.B.C. was a principal of Morgan Bay, is the Vice President of Edward Raine, and is a resident of Utah. In late November 2005, M.B.C. completed an Accredited Investor Suitability Form and other documents representing that, among other

² In addition to these referrals, the Order alleges that a principal of Edward Raine, M.B.C., personally bought interests in two policies.

³ Due to privacy concerns the names of all individuals have been redacted from LPI’s public pleadings. LPI will provide this information to the Court, under seal, as necessary.

things, he was “an accredited investor as defined in SEC Rule 501 under Regulation D ...”

On or about November 30, 2005, M.B.C. deposited \$10,000 with Sterling for future purchases.

On February 8, 2006, M.B.C. executed two \$5,000 Policy Funding Agreements authorizing LPI to act as his agent, in Texas, so that he could purchase interests in two separate life insurance policies being offered for sale by two non-Utah residents. Each Policy Funding Agreement chose Texas law to govern the agreement.

2. K. M. of Connecticut.

In late January 2006, K.M., a Connecticut resident, completed an Accredited Investor Suitability Form and other documents representing that, among other things, he was “an accredited investor as defined in SEC Rule 501 under Regulation D ...”

On January 17, 2006, K.M. executed four Policy Funding Agreements totaling \$28,000 authorizing LPI to act as his agent, in Texas, so that he could purchase interests in four separate life insurance policies being offered by four non-Utah residents. Each Policy Funding Agreement chose Texas law to govern the agreement.

On or about February 27, 2006, K.M. deposited \$40,000 with Sterling. His purchases of an interest in four insurance policies, totaling \$28,000, were completed thereafter.

On or about April 25, 2006, K.M. indicated that “an emergency ha[d] come up and he would like the \$12,000 that ha[d] not been placed to be returned to him immediately.”

On or about May 2, 2006, Sterling returned the \$12,000 balance to K. M.

3. K. S. of California.

In March 2006, K. S., a California resident, completed an Accredited Investor Suitability

Form and other documents representing that, among other things, he was “an accredited investor as defined in SEC Rule 501 under Regulation D ...”

On or about April 26, 2006, K. S. deposited \$9,800 with Sterling for any future purchases he decided to make.

On or about June 12, 2006, K. S. indicated that “he was no longer interested in investing in viaticals” and asked for a return of the money he had deposited at Sterling.

On or about June 13, 2006, Sterling returned the \$9,800 to K. S.

4. P. C. of Tennessee.

In March 2006, P. C., a Tennessee resident, completed an Accredited Investor Suitability Form and other documents representing that, among other things, he was “an accredited investor as defined in SEC Rule 501 under Regulation D ...”

On or about June 8, 2006, P.C. deposited \$5,000 with Sterling for any future purchases he decided to make.

Seven days later, on or about June 15, 2006, P. C. indicated that “he was no longer interested in placing a viatical” and asked for a return of the money he had deposited at Sterling.

On or about June 20, 2006, Sterling returned the \$5,000 to P.C.

5. A.A. of Florida.

In May 2006, A.A., a Florida resident, completed an Accredited Investor Suitability Form and other documents representing that, among other things, he was “an accredited investor as defined in SEC Rule 501 under Regulation D ...”

On or about May 26, 2006, A.A. deposited \$100,000 with Sterling for any future purchases he decided to make.

On or about June 16, 2006, A.A. indicated that “he no longer wanted to pursue the viatical account” and asked for a return of the money he had deposited at Sterling.

On or about June 20, 2006, Sterling returned the \$100,000 to A.A.⁴

LAW AND ARGUMENT

In its Motion to Remand, Plaintiff cites to an 11th Circuit case, involving a different company with a different business model, implying that Defendant LPI sold securities. Motion at 2, n 1. The United States Court of Appeals for the District of Columbia Circuit, however, specifically held that LPI’s purchasing services, which does not involve the purchase and resale of interests in insurance policies, is not the sale of a security. *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996).⁵ Nor does LPI represent sellers. Rather, LPI functions solely as a purchaser’s agent. *See Fine v. Bradford*, 109 Ga. App. 380 (1964) (distinguishing between seller and purchaser’s agent for purposes of state securities laws). LPI sells only its services, which consists of facilitating the transfer of an interest in an insurance policy to a purchaser.

A. This Case Was Properly Removed.

Removal from an administrative agency to a federal court is proper where the administrative agency at issue functions as a state court (its functions, powers and procedures are those of a state tribunal) and the federal interests in the subject matter and in the provision of a forum are greater than the state’s. *See, e.g., Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*,

⁴ A.A.’s later decision to purchase interests in life insurance policies, without the involvement of any Utah resident, is immaterial to the conduct alleged in the Order to Show Cause. *See*, Order to Show Cause ¶ 16.

⁵ Similarly, Connecticut does not include the purchase of an interest in a life insurance policy in their definition of a “security.” Conn. Gen. Stat. § 36b-3 (19) (2006).

454 F.2d 38, 44 (1st Cir. 1972); *Kolibas v. Committee on Legal Ethics*, 872 F.2d 571 (4th Cir. 1989) (utilizing functional test for evaluating removal under 28 U.S.C.A. § 1442); *Ins. Comm. of Puerto Rico v. Doral Ins. Agency*, 2006 U.S. Dist LEXIS 80333 (D. Puerto Rico, October 31, 2006); *Martin v. Schwerman Trucking Co.*, 446 F. Supp. 1130, 1131 (D. Wis. 1978); *Tool & Die Makers Lodge No. 78 Int'l Ass'n of Machinists, AFL-CIO v. Gen. Elec. Co. X-Ray Dep't*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (deriving the functional approach from two Supreme Court cases, *Upshur County v. Rich*, 135 U.S. 467 (1890), and *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908)); *see also* 16-107 *Moore's Federal Practice*, Civil § 107.12[3] (“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”).

Instead of this existing test, Plaintiff has proposed a four-part “label” test for reviewing actions removed under 28 U.S.C. § 1441(a). Motion at 5. Plaintiff has not cited a single case in this Circuit to support that test. Other federal courts, however, have specifically rejected the “label” test. *Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100, 1102 (7th Cir.1979) (“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.”); *Tool & Die Makers*, 170 F. Supp. at 950 (“In the construction of Federal statutes dealing with proceedings in State courts, it is clear that the Supreme Court of the United States has adopted a functional rather than a literal test. Thus the question of whether a proceeding may be regarded as an action in a State

court within the meaning of the statute is determined by reference to the procedures and functions of the State tribunal rather than the name by which the tribunal is designated”).

[T]he legislature of a state cannot, by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction nor prevent a removal. A state legislature, if the constitution of the state does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine questions of law and fact; and, if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only thing the legislature of a state would have to do to entirely destroy the jurisdiction of the federal courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. Neither the legislature nor the courts of a state have the power, by giving new names to legal proceedings, to change their essential character. Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the courts of the United States.

In re The Jarnecke Ditch, 69 F. 161, 163 (C.C.D. Ind. 1895).⁶ This Court should reject Plaintiff’s “label” test and, instead, follow the functional test as outlined by other federal courts.

The functional test involves two steps. First, the court must evaluate “the functions, powers, and procedures of the state tribunal” in order to consider whether the proceeding is essentially judicial in nature. *Floeter*, 597 F.2d at 1102. Second, the court must consider “the respective state and federal interests in the subject matter and in the provision of a forum.” *Id.*

1. The Formal Adjudicative Proceeding Here Is Judicial in Nature.

The first prong of the functional test requires evaluation of the functions, powers and procedures of the state administrative agency. Plaintiff commenced its “formal adjudicatory

⁶ Ironically, by arguing that the proceeding is not “civil” (Motion pp. 6-7), it appears that the Attorney General’s office may lack authority to represent Plaintiff in this matter. Utah Code Ann. § 61-1-21.5 (Attorney General only authorized to represent the division in “civil matters” and “criminal actions.”).

proceeding” pursuant to Utah Code Ann. §§ 63-46b-3 to -11 and 20. Notice of Agency Action at 1. A formal adjudicatory proceeding requires that a written Answer be filed within 30 days of the date of the notice. Utah Code § 63-46b-3(2)(a)(vi). This is similar to the language regarding answers contained in the Utah Rules of Civil Procedure. Utah R. Civ. P. Rule 12(a).

Citing Utah Code § 63-46b-6(3), Plaintiff ordered that the written Answer state, “a) by paragraph, whether you admit or deny each allegation contained in the Order to Show Cause, including a detailed explanation for any response other than an unqualified admission; b) any additional facts or documents which you assert are relevant in light of the allegations made; and c) any affirmative defenses (including exemptions or exceptions contained within the Utah Uniform Securities Act) which you assert are applicable.” Notice of Agency Action at 1-2. The Utah Code section cited by Plaintiff does not contain this language. However, this language is similar to general rules of pleadings under the Utah Rules of Civil Procedure. Utah R. Civ. P. R. 8(b) (Defenses, form of denials) Utah R. Civ. P. R. 8(c), 12(b) (Affirmative Defenses).

Without citation, Plaintiff ordered that “to the extent that factual allegations or allegations of violations contained in the Order to Show Cause are not disputed in your Answer, they will be deemed admitted.” Notice of Agency Action at 2. The Utah Code does not contain this language. However, this is similar to general rules of pleadings under the Utah Rules of Civil Procedure. Utah R. Civ. P. R. 8(d).

Plaintiff unilaterally scheduled a hearing at 9:00 am on November 27, 2006, requiring Defendants to travel from Texas and appear in Utah the Monday after the Thanksgiving holiday, stating that “[i]f you fail to file an Answer or fail to appear at the Order to Show Cause hearing, you may be held in default in accordance with Utah Code Ann. § 63-46b-11 without any further

notice to you, or the hearing may proceed without your participation under § 63-46b-8.” The ability to schedule hearings to resolve disputed issues is a judicial function. Furthermore, the default standard Plaintiff has created is similar to the default rules under the Utah Rules of Civil Procedure. Utah R: Civ. P. R. 55.

Formal adjudicatory proceedings are adversarial in nature with the Plaintiff represented by counsel. Utah Code Ann. § 61-1-21.5. Similar to court proceedings, formal adjudicatory proceedings are heard by a Presiding Officer. The Presiding Officer acts like a judge to:

1. control the hearing;
2. exclude evidence;
3. determine whether evidence is privileged;
4. receive documentary evidence;
5. take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence.

Utah Code Ann. § 63-46b-8(a)-(b). These are all judicial powers. Similar to a proceeding in court, in a formal adjudicatory proceeding all testimony at the hearing is under oath, recorded, and available for transcription. Utah Code Ann. § 63-46b-8(f)-(h). Finally, at the conclusion of the hearing, the Presiding Officer must issue a written order containing, among other things, his *findings of fact and conclusions of law* and, where appropriate, *ordering fines or sanctions*. Utah Code Ann. § 63-46b-10 (“Orders”) (emphasis added). Thus, the process is adversarial, disputed matters are being adjudicated, and individuals may be punished for adjudged violations. *See* 16-107 *Moore’s Federal Practice*, Civil § 107.12[3].

Other than the fact that the Director of the Division of Securities is the individual who issued the Order to Show Cause, is listed as the Presiding Officer for the merits hearing, and is the individual charged with reviewing the Presiding Officer’s opinion (in effect the prosecutor,

trial judge, and appellate judge), formal adjudicatory proceedings have virtually all of “the functions, powers, and procedures of the state tribunal.” *Floeter*, 597 F.2d at 1102. Thus, the first prong of the functional test is satisfied.

2. There is a Strong Federal Interest In Upholding the United States Constitution and Federal Law.

The second prong of the functional test requires consideration of the respective state and federal interests in the subject matter and in the provision of a forum. The federal interest in ensuring that the United States Constitution is not infringed upon, and ensuring that federal law is complied with, is stronger than any purported state interest in this case.

As explained above, Defendants assert that enforcement of the Utah Securities Act pursuant to the Order to Show Cause operates in an unconstitutionally extraterritorial fashion and violates the *Commerce Clause* of the United States Constitution, NSMIA, and the *Excessive Fines Clause* of the 8th and 14th Amendments to the United States Constitution. A state has no interest in the unconstitutional enforcement of a statute. *See, State Life Ins. Co. v. Daniel*, 6 F. Supp. 1015, 1018 (W.D. Texas 1934), *citing, Reagan v. Garmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *Ex parte Young*, 209 U.S. 159 (1908); *Greene v. Louisville & Interurban R.R. Co.*, 244 U.S. 49 (1917).

The Fourth Circuit, when asked to weigh the state and federal interests in considering abstention doctrines where a *Commerce Clause* challenge had been made, stated:

The dormant Commerce Clause demonstrates a difference of kind, not merely of degree. By its very nature, it implicates interstate interests. It protects all states by ensuring that no state erects the kind of barriers to trade and economic activity that threatened the survival of a fledgling country under the Articles of Confederation.

Harper v. PSC, 396 F.3d 348, 355-56 (4th Cir. 2005) (finding district court abused its discretion by abstaining under *Younger* where *Commerce Clause* issue raised). *Harper* held that Commerce Clause challenges implicate a “peculiarly national interest.” 396 F.3d at 356. Thus, traditional notions of comity do not apply:

When there is an overwhelming federal interest -- an interest that is as much a core attribute of the national government as the list of important state interests are attributes of state sovereignty in our constitutional tradition -- no state interest, for abstention purposes, can be nearly as strong at the same time. *See Transouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1296 n.1 (11th Cir. 1998). “The notion of comity, so central to the abstention doctrine, ‘is not strained when a federal court cuts off state proceedings that entrench upon the federal domain.’” *Zahl v. Harper*, 282 F.3d 204, 210 (3d Cir. 2002) (quoting *Ford Motor Co. v. Ins. Comm’r*, 874 F.2d 926, 934 (3d Cir. 1989))

Id. Plaintiff has not articulated any state interest that would outweigh the strong federal interest in upholding the provisions of the United States Constitution.

Furthermore, when Plaintiff’s Director, and thus Plaintiff, agreed earlier this year to be preliminarily enjoined from enforcing a portion of the Utah Securities Act that allegedly violated the dormant Commerce Clause and the Supremacy Clause due to NSMIA preemption, Plaintiff tacitly acknowledged that NSMIA reflects the strong federal interest in national uniformity of securities laws. *SIA v. Klein*, Case No. 06CV624 (D. Utah 2006). Plaintiff similarly articulated a lack of State interest in having securities registered with the state in “transactions” with accredited investors, like the ones here, stating that “registration is not necessary or appropriate for the protection of [such] investors ...” Rule 164-14-25s (“Accredited investor exemption”).

Thus, the strong federal interest in ensuring that the United States Constitution not be infringed upon, and that federal law preempting the state’s regulation of national markets be complied with, is stronger than any purported state interest in this case.

Defendants have satisfied both prongs of the two-part functional test and removal was therefore proper.

B. Jurisdiction Is Proper Before This Court.

This court has jurisdiction over this matter based on both diversity and federal question jurisdictional grounds.

1. Diversity Jurisdiction.

Plaintiff's sole argument against diversity jurisdiction is that the "State is not a citizen for purposes of diversity jurisdiction." Motion at p. 11. Plaintiff's argument misses the point.

A state agency is normally held to be a citizen, and diversity jurisdiction present, where the state is determined not to be the real party in interest. *Missouri, K. & T.R.Co. v. Missouri R. & Warehouse Comrs.*, 183 U.S. 53 (1901); *Blease v. Safety Transit Co.*, 50 F.2d 852 (4th Cir. 1931); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149, 155 (SDNY 1970). In determining whether the state is the real party in interest, courts have looked to the attributes of the particular agency to determine how closely associated it is to the state. *South Carolina Public Service Authority v. New York Casualty Co.*, 74 F. Supp. 831 (D. S.C. 1947) (Power of the South Carolina Public Service Authority to sue and be sued, handle its own contracts, and do all things necessary within the purview of the statutes and within the territorial limits, together with other factors -- that the authority's funds were not commingled with those of the state, that the state was expressly free from any responsibility for the debts or obligations of the authority, and that the projects handled by the authority were not statewide -- warranted federal diversity jurisdiction and thus denial of the motion to remand); *Missouri, K. & T.*, 183 U.S. at 61 (Absence of a financial or other beneficial interest by state considered in holding the

agency to be a citizen); *University of R.I. v. A. W. Chesterton Co.*, 2 F.3d 1200 (1st Cir. 1993) (In determining whether state-created entity is an arm of the state for diversity purposes, courts consider whether the entity: “(1) performs an ‘essential’ or ‘traditional’ governmental function, as opposed to a nonessential or merely proprietary one; (2) exercises substantial autonomy over its internal operations; (3) enjoys meaningful access to, and control over, funds not appropriated from the State treasury; (4) possesses the status of a separate ‘public corporation’; (5) may sue and be sued in its own name; (6) can enter into contracts in its own name; (7) has been granted a state tax exemption on its property; or (8) has been expressly debarred from incurring debts in the State’s name or behalf.”).

While courts must weigh a number of factors, one factor that courts do not weigh is a state’s general interest in having compliance with its own laws. *Missouri, K. & T.*, 183 U.S. at 60 (“State has a governmental interest in the welfare of all its citizens; in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the State, either statute or common. The interest must be one in the State as an artificial person.”).

First, the proceeding was not initiated by the State of Utah, but rather, it was Plaintiff, an agency of the state, who initiated the proceeding through its Director. Order p. 9, Notice of Agency Action p. 3. Indeed, Plaintiff concedes that it is but an agency of the State. Motion at 9. (“[T]he Division is simply an agency within the executive branch [of the state].”). Furthermore,

Plaintiff is not bringing this action on behalf of the state as an “artificial person,” but rather on behalf of Utah residents who Plaintiff alleges purchased unregistered securities sold in Utah by Defendants. Order to Show Cause ¶¶ 18-36. While Defendants dispute these allegations, in any such dispute the real parties in interest would be the Utah residents alleged to have purchased the allegedly unregistered securities sold by Defendants, and not the state as an “artificial person.” See *Missouri, K. & T.*, 183 U.S. at 60; *State of Utah, Division of Securities of the Department of Commerce v. Lloyd's, et al.*, Case No. 96CV00396 (D. Utah 1996) (finding state agency only nominal plaintiff in action alleging, among other things, the unlawful offer or sale of unregistered securities).

In addition, reviewing the attributes of Plaintiff agency also leads to the conclusion that the state is not the real party in interest this matter. Here, at a minimum, Plaintiff: exercises substantial autonomy over its operations;⁷ can sue and be sued;⁸ has autonomous authority to enter into contracts to employ experts and specialists;⁹ is overseen by an independent Advisory Board;¹⁰ and enjoys meaningful access to, and control over, funds not appropriated by the state treasury.¹¹ Thus, given this level of autonomy over its own affairs, the state is not the real party in interest in this matter.

⁷ Utah Code Ann. § 61-1-18(2).

⁸ *State of Utah, Department of Commerce v. Quest Comm'n Int'l, et al.*, Case No. 02CV01253, (D. Utah 2002); *State of Utah, Division of Securities of the Department of Securities v. Lloyd's*, Case No. 96CV00396, (D. Utah 1996); *SIA v. Klein*, 06CV624 (D. Utah 2006).

⁹ Utah Code Ann. § 61-1-18.1.

¹⁰ Utah Code Ann. § 61-1-18.5.

¹¹ According to its annual report, Plaintiff generated, and has controlled revenue, of up to \$3,535,142. Utah Division of Securities Statistics (available at <http://www.securities.utah.gov/stats/fy06stats.pdf>.)

In addition to Plaintiff suing and being sued in this Court, on at least two occasions the Utah Department of Commerce has been a Defendant in this Court in cases founded on diversity jurisdiction. *Amer. Honda Mtr. Co. v. Centerville Mtr. Sports, et al.*, Case No. 03CV00029 (D. Utah 2003); *Amer. Honda Mtr. Co. v. Rockriver, et al.*, Case No. 03CV00118 (D. Utah 2003). *See also, First Charter v. BancBoston Mortgage Corp.*, Case No. 90CV00089 (D. Utah 1990) (Department of Financial Institutions of the State of Utah listed as Movant in action founded on diversity jurisdiction).

On at least one occasion, an action brought by the Plaintiff was properly removed to this Court on both diversity and federal question jurisdictional grounds. *State of Utah, Division of Securities of the Department of Commerce v. Lloyd's, et al.*, Case No. 96CV00396 (D. Utah 1996) (denying Plaintiff's Motion to Remand).¹²

Given the above factors, Plaintiff should be considered a "citizen" of Utah for purposes of diversity jurisdiction.

2. Federal Question Jurisdiction.

Plaintiff's sole objection to Federal Question Jurisdiction is that Plaintiff did not include reference to a federal statute in their Order to Show Cause. This argument misses the point. Even where a complaint does not affirmatively allege a federal claim, a case is removable on federal question grounds if a federal statute completely displaces the state law cause of action through preemption. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *Cisneros v. ABC*

¹² The Division of Securities of the Department of Commerce was listed as the "Plaintiff" in the initial pleading alleging that the Defendants violated the Utah Securities Act through: "The Offer and Sale of Unregistered Securities," "Offers and Sales of Securities by Unlicensed Broker-Dealer and Agents," "Misrepresentations or Omissions of Material Fact," and "Fraudulent or Deceptive Acts, Practices and Courses of Business." *See* Verified Complaint attached to Notice of Removal.

Rail Corp., 217 F.3d 1299, 1302 (10th Cir. 2000) (removal proper where a federal statute completely preempts state law claims).

It is similarly well settled that preemption arises where state law “stand[s] as an obstacle to the accomplishment and execution of the full *purposes and objectives* of Congress,” or “prevent[s] or significantly interfere[s] with” the exercise of powers recognized under federal law. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 & 33 (1996) (citations omitted, emphasis added). *See also, In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F. Supp. 2d 474, 490 (D. Md. 2002) (“[W]here the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts.”)

When a federal statute completely pre-empts a state-law cause of action, a claim that comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. The claim is then removable under 28 U.S.C. § 1441(b), which authorizes any claim that “arises under” federal law to be removed to federal court: *Beneficial Nat’l Bank*, 539 U.S. at 8.

Here, Plaintiff’s claim requires the resolution of a substantial question of federal law. Plaintiff accuses Defendants of violation of state securities registration requirements that are, among other things, completely preempted by NSMIA.

In 1996, Congress enacted NSMIA. “The primary purpose of NSMIA was to preempt state ‘Blue Sky’ laws which required issuers to register many securities with state authorities prior to marketing in the state. By 1996, Congress recognized the redundancy and inefficiencies

inherent in such a system and passed NSMIA to preclude states from requiring issuers to register or qualify certain securities with state authorities.” *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001). “The legislation seeks to further advance the development of national securities markets and eliminate the costs and burdens of duplicative and unnecessary regulation by, as a general rule, designating the Federal government as the exclusive regulator of national offerings of securities.” H.R. Rep. No. 104-622, 104th Cong., 2d Sess., at 16 (1996), reprinted in 1996 U.S.S.C.A.N. 3877, 3878.

To accomplish this purpose, NSMIA preempts state laws requiring registration of transactions involving “covered securities”:

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof--

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that--

(A) is a covered security[.]

15 U.S.C.S. § 77r(a).¹³

NSMIA defines a “covered security” in two ways relevant to this matter. First, a covered security includes a security involved in a “transaction that is exempt from registration ... pursuant to ... [SEC] rules or regulations issued under § 4(2) [of the Securities Act].” 15 U.S.C. § 77r(b)(4)(D). Rule 506 of Regulation D is one such rule. Transactions that satisfy the conditions of Rule 506 “shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.” 17 C.F.R. § 230.506(a). A transaction satisfies the

¹³ During “registration” a state agency reviews and approves a security before it is offered. “Qualification” is a particular method of gaining state approval. See Utah Division of Securities – Registration by Qualification (available at http://www.securities.utah.gov/corpfm_qualification.html). These requirements are precisely what Plaintiff claims that Defendants did not do.

conditions of Rule 506 if: (a) sales are made only to “accredited investors”; and (b) no form or general solicitation or general advertising is used in connection with the sales. 17 C.F.R. § 230.506. If these conditions are met, the transaction is exempt from federal registration. In addition, pursuant to NSMIA, the transaction thus involves a covered security and is exempt from state registration as well.

The contracts at issue here satisfy the conditions of Rule 506.¹⁴ First, they were entered into only with “accredited investors” as defined in Rule 501(a) of Regulation D. Each of the individuals referenced in the Order to Show Cause represented to LPI in writing that he was an accredited investor as defined in SEC Rule 501 under Regulation D. Second, no form of general solicitation or general advertising was used in connection with these contracts. Because the transactions at issue in this case are exempt from registration under Rule 506, NSMIA preempts Utah’s state registration requirements. *Pinnacle Commun’s. Int’l, Inc. v. Am. Family Mortg. Corp.*, 417 F. Supp. 2d 1073, 1088 (D. Minn. 2006) (“When an offering purports to be exempt under federal Regulation D, any allegation of improper registration is covered exclusively by federal law.”); *citing Temple v. Gorman*, 201 F. Supp. 2d 1238, 1243-44 (S.D. Fla. 2002) (“[R]egardless of whether the private placement actually complied with the substantive requirements of Regulation D or Rule 506, the securities sold to Plaintiffs are federal ‘covered securities’ because they were sold pursuant to those rules [and] as a result, Fla. Stat. § 517.07 does not require registration of such securities. ... Furthermore, any attempt by Florida to require registration of such securities or securities transaction would be preempted by NSMIA.”).

¹⁴ Plaintiff is bound by its own assertion that the contracts at issue here are securities and its assertion of regulatory authority rests solely upon it. However, LPI has consistently maintained that in LPI’s specific business model, LPI does not sell or offer to sell any security based upon the decision in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996).

Second, a “covered security” includes a security involved in a sale to “qualified purchasers, as defined by the Commission by rule.” 15 U.S.C. § 77r(b)(3). Congress authorized the Commission to define the term “qualified purchaser” to include “sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary.” H.R. Rep. No. 622, 104th Cong. 2d Sess. at 31 (1996) (“House Report”). *See also* S. Rep. No. 293, 104th Cong. 2d Sess. at 15 (1996) (“Senate Report”). The Commission has not adopted a rule defining the term “qualified purchasers;” however, in 2001, the Commission proposed a rule which under which the definition of the term would have mirrored the term “accredited investor” as defined in Rule 501(a) of Regulation D, 17 C.F.R. 230.501(a). SEC Release No. 33-8041 (Dec. 19, 2001) (“Given the legislative intent which looks to simplification, conforming different state standards governing sophisticated investors, eliminating redundancy and working a meaningful preemption in the area of disparate securities registration systems to reduce unnecessary costs to issuers, we believe using ‘accredited investor’ is more appropriate than any of the alternatives”).

Although the rule has not yet been adopted, the Commission correctly concluded that using the same definition for “qualified purchasers” and “accredited investors” would further the legislative intent of NSMIA. Applying that definition, the contracts at issue here would be “covered securities.” Each of the individuals referenced in the Order to Show Cause represented to LPI in writing that he was an accredited investor. Because the interests alleged in the Order to Show Cause were acquired only by qualified purchasers, they are covered securities. Because they are covered securities, NSMIA preempts all state registration requirements including Utah’s. *See, Temple*, 201 F. Supp. 2d at 1244.

Not only does the language of NSMIA demonstrate that it preempts Plaintiff's attempt to enforce the Utah Securities Act against LPI, but such preemption is consistent with the purpose underlying NSMIA. In passing NSMIA "Congress intended to provide national, uniform standards for the securities markets and nationally marketed securities." *Lander*, 251 F.3d at 111. By claiming that Defendants' actions constitute the sale of a security, Plaintiff has prevented the uniformity Congress sought. Under federal law, Defendants' actions as a purchaser's agent do not constitute the purchase or sale of a security. *SEC v. Life Partners, Inc.*, 87 F.3d 536. Furthermore, at least one state relevant to this case does not include the purchase of an interest in a life insurance policy in their definition of a "security." Conn. Gen. Stat. § 36b-3 (19) (2006). Accordingly, permitting Plaintiff to define LPI's activity as a purchaser's agent as the sale of a security, and then require registration of each individual contract in Utah in these interstate transactions, would disrupt the uniform national standards NSMIA sought to create.¹⁵

As demonstrated above, NSMIA completely preempts Plaintiff's allegations. Thus, this Court also has jurisdiction over this matter based on federal question jurisdiction.

CONCLUSION

Since removal was proper, and grounds for diversity and federal question jurisdiction have been shown, Defendants respectfully request the Court to deny Plaintiff's Motion to

¹⁵ Plaintiff's fraud allegations are similarly precluded by NSMIA. NSMIA does not preempt states' authority to investigate and bring enforcement actions with respect to fraud. 15 U.S.C. § 77r(c)(1). In this case, however, the "fraud" alleged is that LPI (through its alleged agents) stated that interests in life insurance policies did not have to be registered as securities in Utah. Based upon NSMIA, and even upon Connecticut law for the Connecticut purchaser, such statements are true as a matter of law. *See, SEC v. Life Partners, Inc.*, 87 F.3d 536. Thus, although NSMIA does not preempt Plaintiff's efforts to regulate fraud in Utah, it makes the fraud allegation in Plaintiff's Order to Show Cause legally untenable.

Remand, and instead, to adjudicate the merits of Defendants' important constitutional and federal rights.

DATED this 16th day of January 2007.

RAY QUINNEY & NEBEKER P.C.

/s/ Mark W. Pugsley

Mark W. Pugsley

Ryan B. Bell

RAY, QUINNEY & NEBEKER

36 South State Street, Suite 1400

P.O. Box 45385

Salt Lake City, Utah 84145-0385

Telephone: (801) 532-1500

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*Attorneys for Life Partners, Inc.
and Life Partners Holdings, Inc.*

Of counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January 2007, I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Jeffery Buckner, Esq.
Assistant Attorney General
160 E. 300 South, Fifth Floor
P.O. Box 140872
Salt Lake City, UT 84114-0872

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
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144

/s/ Kelly D. Pickering

Exhibit 1

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND HINTZE
Chief Deputy

Protecting Utah • Protecting You
November 21, 2006

KIRK TORGENSEN
Chief Deputy

Hand Delivered

Mark W. Pugsley
Ryan B. Bell
Ray, Quinney & Nebeker
36 South State Street, Suite 1400
Salt Lake City, UT 84145-0385

Re: Division of Securities Action Against Life Partners

Dear Messrs. Pugsley and Bell:

The Division of Securities has received a copy of the Notice of Removal to federal court of the Division's administrative action against Life Partners and others. The Division wants to give you an opportunity to withdraw your Notice. There are four independent reasons we believe the removal is inappropriate:

1. The Division's administrative action is not a "civil action" under 28 U.S.C. §1441(a).
2. The administrative action you are removing is not an action brought in a "State court," a necessary predicate to a removal action under §1441(a).
3. Contrary to the claim in ¶23 of your Notice of Removal, the State of Utah is *not* a citizen. There is abundant and longstanding precedent that a state is not a citizen for purposes of removal. We will be happy to provide you with citations of relevant cases.
4. Removal of this action violates the protections granted to the state by the Eleventh Amendment.

Before filing a motion to remand the case, we want to give you an opportunity to reconsider the soundness of your attempt to remove, which we view as a transparent attempt to delay the hearing set for November 27. If the removal has not been withdrawn by noon on Wednesday, November 22, the Division will claim fees and costs and will withdraw any settlement offers that have been made.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott W. Reed", written over a large, stylized flourish.

SCOTT W. REED
Chief, Commercial Enforcement Division

cc: Jeff Buckner, Jennifer Korb

Exhibit 2

November 22, 2006

Via Facsimile & Hand Delivery

Scott W. Reed
 Chief, Commercial Enforcement Division
 Office of the Utah Attorney General
 160 East 300 South
 Salt Lake City, Utah 84114-0872

Dear Mr. Reed:

We are in receipt of your letter dated November 21, 2006, requesting that Life Partners Inc. ("LPI") withdraw its Notice of Removal. First, let me assure you that LPI did not file the Notice in an attempt to delay the hearing set for November 27. The Notice was filed because LPI had an arguable right to remove and have this matter and the significant federal legal issues it raises heard by a federal court. *Ins. Comm. of Puerto Rico v. Doral Ins. Agency*, 2006 U.S. Dist LEXIS 80333 (D. Puerto Rico, October 31, 2006). As our filing with the court today indicated, we understand that courts have split on the issue of removing state enforcement proceedings. Nevertheless, in an abundance of caution, LPI acted in good faith to preserve its apparent statutory right during the statutorily proscribed period.

Second, let me assure you that LPI has been diligent in seeking a good faith and mutually acceptable settlement of this matter to date. LPI dispatched Joel Held of Baker & McKenzie in Dallas to discuss the potential for settlement with Jeffery Buckner of your office. Mr. Held apparently had discussions with Mr. Buckner, but received no written offer or communication from him. More recently, Mark Pugsley of our firm contacted Mr. Buckner last week to again discuss the potential for settlement. Mr. Buckner was unable to provide a formal settlement offer (he forwarded a draft letter) or any of the factual and legal admissions your office would require of LPI as part of any such settlement. Mr. Pugsley subsequently asked Mr. Buckner to provide the factual admissions and/or the terms of a consent order that LPI would be requested to execute as part of a settlement. As of today, we still have not received either a formal settlement offer or the text of any admissions. LPI remains interested in discussing settlement opportunities with you and we would invite a detailed

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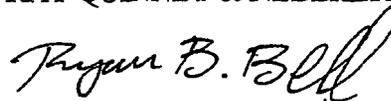
Scott W. Reed
November 22, 2006
Page 2

settlement offer as quickly as you can provide it to avoid any needless litigation. To this end, we recommend that the parties mutually agree to a brief stay of the removed action, preserving each of our client's respective rights, while we continue to discuss the possibility of settlement. We believe that this would give all of us an opportunity to discuss settlement options in a calm fashion.

While we are hopeful that we will be able to resolve this matter amicably, we believe that it would be irresponsible for LPI to waive its apparent statutory right before we at least have a chance to review the case authority referenced in your letter. Therefore, we respectfully ask that you kindly forward the authority referenced in your letter and reconsider your threat to withdraw all settlement offers made heretofore (none in a formal writing) unless LPI unilaterally waives its apparent statutory right. We would also invite a meeting with you early next week to sit down and discuss settlement opportunities. Please call me to schedule a meeting at your earliest convenience.

Sincerely,

RAY QUINNEY & NEBEKER P.C.



Ryan B. Bell

cc: Jeff Buckner
R. Scott Peden
Mark Pugsley

902083

Exhibit 3

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND HINTZE
Chief Deputy

Protecting Utah • Protecting You

KIRK TORGENSEN
Chief Deputy

November 27, 2006

Via Facsimile and Mail

Mark Pugsley
Ryan B. Bell
Ray Quinney & Nebeker
P.O. Box 45385
Salt Lake City, UT 84145-0385

Re: Life Partners

Dear Messrs. Pugsley & Bell:

I am responding to your letter dated November 22, 2006 to Scott Reed. Mr. Reed had written our November 21, 2006 letter because I was out of the office for the Thanksgiving week. The Division responds as follows:

1. The Division welcomes the opportunity to resolve the legal questions raised by LPI whether state administrative proceedings can be removed in Utah and whether there is any cloud over the Division's ability to enforce its securities laws in enforcement cases. While resolution of these questions may delay the ultimate resolution against LPI, the Division believes that resolution of the issues will save the Division the trouble of facing these questions in the future.
2. Since LPI has chosen to challenge the Division's authority to bring this case and has asserted that the Division's right to bring enforcement actions is preempted by federal law, those legal issues need to be resolved by a final ruling from this court and final rulings from the administrative proceeding after the case is remanded back to the Division. Accordingly, the Division will not be sending a settlement offer. The Division meant what it said in Mr. Reed's November 21 letter; there will be no settlement discussions on this matter.
3. The Division will not negotiate while the removal motion is pending. The Division will not enter into a settlement while LPI is asserting that the Division's authority is questionable. The Division will not discuss a settlement with an entity that has brought a spurious claim with the hope or intent of gaining a negotiating advantage. To engage in

settlement discussions or reach a settlement under these circumstances might be interpreted as the Division agreeing that it faces a risk of removal to federal court or that it is concerned that the preemption claim is valid. For these reasons, the Division is not interested in a stay of the removed action to facilitate settlement discussions.

4. Whether or not LPI's Notice of Removal was "an attempt to delay the hearing" or not, it had that effect. The removal notice was not filed immediately after the Division issued its Order to Show Cause, which might have allowed the removal question to be decided before the November 27 hearing. Instead, the removal was filed only a week before the scheduled hearing. Plus, the "target" keeps moving as LPI has made two subsequent filings changing its claim and adding other arguments.
5. As to your November 22 motion to the court on briefing, it is our view that your motion inappropriately usurps the Division's role. It is not up to you to ask the court to set a briefing schedule. It is up to the Division to determine whether to move to remand the proceeding and, if so, when. LPI should not be attempting to set the briefing schedule for a decision that belongs to the Division. Additionally, we do not believe it is appropriate for LPI to attempt to set a briefing schedule for a motion that is not yet filed.
6. The caselaw holding that the state is not a citizen for diversity jurisdiction purposes goes back over a hundred years. *Arkansas v. Kansas & Tex. Coal, Co.*, 183 U.S. 185 (1901) (citing earlier cases) and *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24 (1934). We have found no cases since then repudiating or limiting the holdings of these cases.
7. The Division is willing to meet with you if you would like, but the Division is not willing to discuss settlement at such a meeting.

Sincerely,



JEFFREY BUCKNER

cc: Jennifer Korb, Division of Securities