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**BEFORE THE DIVISION OF SECURITIES (Petitioner)  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

Utah Department of Commerce  
Division of Securities

IN THE MATTER OF:

)  
) REPLY TO PETITIONER'S  
) MEMORANDUM IN OPPOSITION  
) MOTION TO DISMISS OR, IN THE  
) ALTERNATIVE, FOR  
) SUMMARY JUDGMENT

DAVID STERLING JENSEN,  
CRD#11095958

) Docket No. SD-09-0040

Respondent.

) Judge J. Steven Eklund  
)

**DAVID JENSEN'S REPLY TO PETITIONER'S MEMORANDUM IN OPPOSITION OF  
RESPONDENT'S MOTION TO DISMISS ORDER TO SHOW CAUSE AND NOTICE  
OF AGENCY ACTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT  
LACK OF JURISDICTION, ACCOUNTANT EXEMPTION**

**Preliminary Statement**

Division of Securities Order to Show Cause, fails for the most fundamental of reasons.

A accountant is exempt, under Utah's Securities Laws (under Federal Law, any accountant) from having to be licensed as an Investment Adviser.

**FACTS**

1. Petitioner hasn't contested one fact of Respondent's original Motion for Accountant Exemption facts or alleged that Respondent is not an accountant in any of their legal filings.
2. Respondent has been an accountant his entire professional career, starting in 1967.
3. Forty years prior and while dealing with complainant, Mr. Jensen has had gross receipts in excess of \$1,000,000 for accounting services.
4. Respondent has never received any compensation, not one penny, for being an

investment advisor or for giving any investment advise from anyone, including complainant.

5. Respondent has never had one single complaint filed during any of his professional career as an Accountant.

6. Respondent told complainant that Jensen was (past tense) a CPA as Division's Order to Show Cause so states and respondent admitted to such, Unlicensed Investment Advisor, page 2.

7. Professional people, including accountants, give advice and advise people all the time to others.

8. Accountants, when giving advice, sometimes are compensated and often times they are not.

9. Petitioner keeps making references about Cal Jones and Cal Jones's wife. Respondent, has never spoken with, met, seen, know Cal Jones's wife. Nor was respondent ever aware the Brokerage account was in anyone else's name, but Cal Jones. Cal Jones continually referred to the account as "my" account and "his" account. Thus, I would appreciate it if the Court would strike from the record any references petitioner continues to make about Cal Jones's wife and respondent, since nothing between her and I has ever existed and are irrelevant to this matter.

10. Respondent and complainant discussion included but weren't limited to the following accounting matters;

- a. Selling short tax treatment versus option tax treatment.
- b. Wash sales strategies.
- c. How to report gains and losses.
- d. Difference between an investor, trader and market maker.
- e. FICA taxes of the different taxable entities.

- f. Medicare and medicaid taxes on the different taxable entities.
- g. Unemployment taxes on the different taxable entities.
- h. Long term versus short term
  - g. Long term versus short term options
  - h. Pension, profit sharing, 401(k) if the different entities
  - I. Method of accounting under different entities
  - j. How to take gains or losses to each of our returns and who was going to prepare such.
  - k. How taxes would be filed if there were gains for the year and how things would be filed if there were a losses for the year.
    - l. The importance of maintaining the flow of the gains or losses as capital.
- 10. I don't know of any profession, that won't meet with a client for the first time and give the potential client free advise and advise them on many things for free of charge.
- 12. Petitioner never brings forward any facts showing respondent's relationship with complainant was anything more than incidental to Jensen's profession as an accountant.
- 13. Division in their statement of facts or Memorandum in opposition to Respondent's Motion for Dismissal or in the Alternative never allege Jensen isn't an accountant.
- 14. Division in their statement of facts never allege as Jensen having ever receiving one penny of compensation from anyone for investment advise regarding securities.
- 15. Respondent, David Jensen, attests under penalties of perjury that the above facts regarding Jensen are true and correct (I could file a Declaration as an Exhibit but that seems like a lot of extra work).

## LEGAL AUTHORITY

### 1. Utah Securities Law 61-1-13 Definitions.

(iii) "Investment advisor" does not include;

C. *a* lawyer, *accountant* (emphasis added), engineer, or teacher whose performance of these services is solely incidental to the practice of the profession;"

### Federal Investment Advisers Act of 1940

Section 202 (a): Definitions.

(11) Investment Adviser ..... does not include;

(B) *any* (emphasis added) lawyer, *accountant* (emphasis added), engineer, or teacher whose performance of such services is solely incidental to the practice of his profession.

## ARGUMENT IN SUPPORT OF MOTION REQUESTING MOTION TO DISMISS

### LACK OF JURISDICTION

David Jensen from 1967, through and including the end of 2006 was an accountant and respondent doesn't allege one fact stating otherwise.

Instead Division meanders off with a novel, but unsupported claim, that in order to qualify for the accountant exemption Respondent must have acted as an accountant or provided accounting services to respondent. Utah state law says *a* (emphasis added) accountant. Federal Securities Law (which is the foundation for Utah State Laws) regarding an Investment Advisor exemption for accountants, says *any* (emphasis added) accountant. There is absolutely no reference in the law, Federal or State of an accountant needing to in some way being provided accounting services or being an accountant of complainant's.

Accountants under Generally Accepted Accounting and Auditing Standards *MUST* (emphasis added) be independent when doing an audit. In order to be independent from an accounting client one cannot accounting service or accounting for the client. And CPA's make all kinds of financial disclosures, write reports, give opinions, provide graphs and do all of the

other things clearly shown in the Investment Advisors Acts when they issue audited financial statements. And who relies on these audited financial statements of accountants? Hundreds of thousands it not millions of investors, brokers, dealers, bankers, insurance companies, IRS, ratings agencies, State and Federal Securities Divisions, etc., none of whom have ever had accounting services nor has the independent accountant ever been an accountant for most of the above referenced entities and investors. Thus if Division's argument is to be taken seriously, every accountant who writes a financial opinion, makes charts, makes opinions, or does any other things clearly defined in the Investment Advisors act, such person should under the states argument need be registered with the State of Utah (or the Federal Government) as an Investment Adviser? Thus the state's argument is spurious.

Above is one example, I, as an accountant, can give. If the court wants, I can think of several other arguments where accountants are NOT accountants for the client nor are have they ever done any accounting work for the client or potential client. If the court wants me to go over these real life examples, I will gladly do such telephonically. Let me mention a few briefly to remind myself. And perhaps Division will realize how shallow their arguments are.

1. Accountant hired by an attorney, for the attorney's client to do accounting and financial services. The lawyer pays the accountant, not the client. And such arrangements are best, when the accountant has had no prior involvement with the client.

2. Accountant speaking before (including but not limited to the following);

- a. Bar Associations
- b. Insurance Groups
- c. Professional accounting groups

d. Limited partnership companies

e. Broker-dealer firms

f. Financial planning group

3. Accountant hired by other accountants for a second (or more) opinion.

4. Accountant hired as an Expert and/or Summary Witness.

5. Accountants who meet with prospective clients, perhaps more than once for free to decide if they want to become clients of the accountant.

All of the foregoing are common as an Accountant, and when I as an accountant did the same thing I was trained to do by the US Government (including the United States Securities and Exchange Commission). Accountants are NOT paid directly by the clients, audience, potential clients, professional education participants, expert witnesses, summary witnesses, etc. shown in the preceding paragraph. Nor had I as an accountant done accounting work in these situations, for the client.

What is of interest to petitioner is also the teacher exemption. Division by their argument above would require that a teacher would have had to have been a teacher for the person receiving the "Investment Advise" or been a teacher for the student in the past. I've been to hundreds, if not thousands of investment seminars, trainings, professional developments, where teachers took the podium and they certainly weren't any of my teachers, nor had they ever given me any teaching in the past. Yet there they were telling all of the people in the audience their opinions on all kinds of Investment related Advise and activities. And most of these conferences and seminars I went to were here in Utah. I didn't ask, but I doubt the Utah Securities Division had filed any complaints against these people for being unlicensed investment advisors because

of the argument Divisions is making against me as an accountant.

I don't have access to Lexis-Nexis. But did the Court notice petitioners lack of coming up with any Cases regarding their unsupported theory? I wonder if there were any exculpatory cases in respondent's favor that Division didn't show in their Memorandum opposing my motion?

Actually, complainant and I discussed several accounting matters, including but not limited to tax ramifications, short sales, options taxable ramifications, investor versus trader versus market maker, how gains from the account would flow to each's tax returns and what and how gains and/or losses would be reported and the ramifications of different entities in reporting such gains. Accountants give lots of accounting services for no compensation. I don't think a day goes by when someone doesn't ask me an accounting question for no remuneration.

And if compensation for services needs to be passed between accountant and client for the accountant to be exempt as the Division so claims, the Division is again arguing out of both sides of their mouth. Division gives a delirious argument of how "potential" gains between 2 parties is compensation. What makes the petitioner think the alleged contingent compensation was only for securities matters? Who was going to prepare the tax returns on the gains? Who do you think told complainant the best way to handle gains from a tax standpoint? And what entity we would use? Don't you think part of the contingent gains coming my way would be due to accounting matters? So again the state argues out of both sides of their mouths. Contingent gains on securities in a partnership, per the Division, is deemed as compensation per some case out of New York. Yet contingent fees related to doing the accounting work related to such gains some how doesn't exist. But when did logic bother the "ruthless" (complainant's words not mine)

Division?

Now let's discuss the issue of incidental to the practice of my being an accountant. First of all, the legal definition of incidental as shown on the Lectric Law Library's Website (<http://www.lectlaw.com/def/i021.htm>) shows;

“INCIDENTAL - Related to and relatively minor by comparison.”

Lets do some analysis.

A. Compensation/Income received by complainant or any other investment advise =  
None.

Gross Receipts received through my profession of accounting during my 40 years up through and including 2006 = \$1,000,000 +.

Zero divided by any number is zero.

B. Time spent as an “alleged” investment advisor.

Respondent would say the handful of trades made in complainant's account, with complainant's full knowledge, control, access to and approval would have taken at most a half hour. Complainant solicited Respondent on August 29, 2006 and we spent about a half hour on the telephone going over what would be done in complainant's account. Respondent probably spent about 2 hours writing emails to complainant during the just over one month period, respondent had access to complainant's account. Thus respondent would say during the short period of time he had access to complainant's account, with complainants, full knowledge, control, access and approval to trades made would have been about 3 hours ( $\frac{1}{2} + \frac{1}{2} + 2$ ).

Complainant is the only person, respondent has ever in his life traded in their account with the possibility of ever receiving one penny of compensation, which we all know was never

received.

As an accountant, I had several jobs positions that required lots of over time more than a forty hour week. When with IRS, as a Special Agent Accountant, I was on what is called premium pay. I would work at least 50 hours a week for that extra pay, but often times I worked more hours than 50 hours. So for 5ish years, I worked an average of about 55 hours per week. When I had my own CPA practice and when working for Coopers and Lybrand, I would work easily 70-80 hours a week, especially during tax season and also during quarterly cutoffs of payroll taxes and sales taxes. I had to spend a lot of time not only studying for but passing the Certified Public Accountant Examination. I also spent a lot of nights and weekends studying for my Bachelors degree in Accounting and my Masters Degree in Business Administration with an emphasis in Accounting. Thus during my 40 years as an accountant I would easily say I worked an average of about 200 hours per month. Accordingly

Time spent with complainant = 3 hours ( $\frac{1}{2} + \frac{1}{2} + 2$ ).

Time spent as an accountant 40 years X 12 months X 200 hours per month = 96,000 hours.

3 divided by 96,000 is equal to .00003125

So let's find the average of the above 2 numbers. Take item A. = 0 and add it to item B. = .00003125 and divide that number by 2 to come up with an average.

The average if the two above is .0000015625. Now if the foregoing number isn't incidental, thus minor by comparison, please tell me how low one must go.

In fact petitioner doesn't even argue if respondent's arrangement with complainant wasn't incidental.

## CONCLUSION

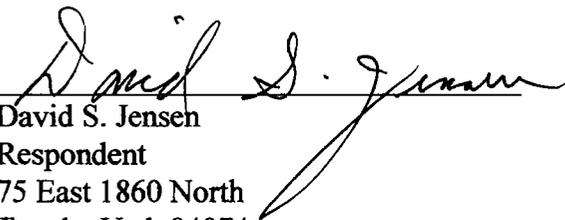
For the foregoing reasons, Division's claims should be dismissed with Prejudice, for failure to provide facts to support the claim made by respondent and the fact that respondent is clearly exempt from Investment Advisor provisions as a (any) accountant. And in the alternative, because of Division's own admissions and undisputed facts, the relevant facts clearly demonstrate that Division's claims have no merit as a matter of law, the Court should grant summary judgment to David Jensen.

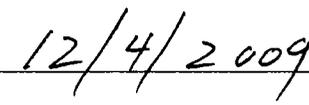
## PRAYER

Wherefore, it is prayed that this matter be dismissed with prejudice.

## SIDEBAR

David Jensen, respondent, is requesting this motion be decided with written materials provided to the Court. If the court deems oral arguments are required, Jensen prays he be allowed to talk telephonically during oral arguments, thus saving respondent extensive time, expense, inconvenience, since I live in Tooele, Utah (about 90 miles round trip, plus parking costs) and attending a hearing at adversary's place of business doesn't seem or appear very impartial to me.

  
\_\_\_\_\_  
David S. Jensen  
Respondent  
75 East 1860 North  
Tooele, Utah 84074

  
\_\_\_\_\_  
Date

A copy of this was mailed (or emailed) to Charles M. Lyons via email on the date shown above.  
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