

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

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IN THE MATTER OF:

DAVID STERLING JENSEN,  
CRD#11095958

Respondent.

)  
) REPLY TO PETITIONER'S  
) MEMORANDUM IN OPPOSITION  
) **MOTION TO DISMISS OR, IN THE**  
) ALTERNATIVE, FOR  
) **SUMMARY JUDGMENT**  
)  
) Docket No. SD-09-0040  
)  
) Judge J. Steven Eklund  
)

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**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**

**Preliminary Statement**

Division in this case allege respondent, made a handful of trades for one single sophisticated client for just over a month, receiving no compensation. Respondent has never received any compensation, had access to one client's account for one month with \$30,000 of complainant's money in the account. Mr. Jensen has had no firm, has had no access to any other client's accounts, has written no publications or given advise regarding securities for a fee to anyone and he is not a financial planner. Division of Securities Order to Show Cause, fails for the most fundamental of reasons. People are exempt, under Utah's Securities Laws from having to be licensed as an Investment Advisor if they have less than 6 clients, have less than \$25 Million under management, don't have a firm, don't hold themselves out as investment advisers, don't receive compensation and are not financial planners.

## STATEMENT OF FACTS

1. David Jensen traded put equity options for just over a month from September and October 2006 with the full knowledge, approval, consent and access of Cal Jones (hereinafter referred to as C.J.) in his account.

2. Jensen has never been in the trade or business of advising others either directly or indirectly about securities.

3. Respondent did not for compensation advise others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

4. Respondent did not for compensation advise others, either directly or through publications or writings, as to the value of securities or promulgate analyses or reports concerning securities.

5. Respondent never has been financial planner.

6. Respondent has never held himself out to be a financial planner.

7. Respondent has never in any way applied for or tried to become a financial planner.

8. Respondent has no letter head of either a financial planner nor an investment adviser.

9. Respondent has no calling cards of either a financial planner nor an investment advisor.

10. Respondent has no business telephones as either a financial planner nor an investment adviser.

11. Respondent has no business address as either a financial planner nor an investment adviser.

12. Respondent has no business licenses as either a financial planner nor an investment

adviser.

13. Respondent has never reported any compensation nor has respondent ever received any income for being as an investment advisor or financial planner.

14. Respondent has never had any office in Utah as an investment adviser nor financial planner.

15. Respondent has never had a firm in Utah.

16. Respondent David Jensen, in 2003 contacted Attorney, Wallace Boyack, regarding his relationship with complainant. Jensen was told as long as he traded in no more than 5 other's accounts, no one, including respondent, need to be licensed as an investment adviser with the state of Utah.

17. Respondent was able to contact Attorney, Wallace Boyack, for the first time, after our telephonic hearing on

18. Attorney Boyack, says he does remember discussing with myself and Mr. Jones something about trading in year 2003, when Mr. Jones first approached Mr. Jensen about trading in his account. Mr. Boyack said, he just could not remember specifically what was said. After all, said Mr. Boyack to me, that was 6 years ago. (Remember my argument under the Statute of Limitations regarding people's memories and right to be able to call witness for the accused?)

19. Mr. Boyack could not specifically remember the contract nor the fact that he billed Mr. Jensen \$1,000 for Boyack's advise.

20. In December of 2003, after Jones and I had met with Boyack and Boyack had prepared the contract for Jones and after billing me, he had a heart attach and had quadruple bypass surgery late December 2003. Mr. Boyack told me his health hasn't been the best since

then and he admitted his memory isn't nearly as good as it use to be. Mr. Boyack is 68 years old and also has other health problems, which I'm sure he would prefer keeping confidential. He told me, over the telephone, you know the mind is the second thing to go. I asked him, what's the first thing to go and he didn't feel at ease telling me, what the first thing to go is.

21. For the reasons explained above in the preceding statements of fact, Mr. Boyack said, he would be unable to provide under penalties of perjury an affidavit as to his advise to me back in year 2003, because he just didn't remember. He couldn't even remember sending me a \$1,000 Legal bill.

22. The last time, I talked to Mr. Boyack before contacting him about a week ago, was in January of 2004. Actually at that meeting Mr. Cal Jones and Mrs. Boyack was present, because Mr. Boyack was recovering from quadruple bypass surgery. It so happens that is the last time, I talked to Cal Jones too, until he called me in late August 2006 and for which this case is all about.

23. I didn't know that Mr. Boyack's health and memory, had deteriorated as much as it has and I thought I would be able to get an affidavit from Mr. Boyack. I apologize to the Court, because I thought I would be able to obtain such affidavit, because my recollection is the truth.

25. Respondent was billed \$1,000 for the above legal services provided by Mr. Boyack regarding Jensen and complainant.

26. Compensation as defined by Nolo's English Law Library is defined as, "**Payment** (emphasis added) for work performed or damages suffered."

<http://www.nolo.com/dictionary/compensation-term.html>

27. Compensation for a cash basis taxpayer, is taxable income when received.

28. Compensation expense for a cash basis taxpayer is deductible when paid.
29. Complainant was and is a cash basis taxpayer.
30. Respondent was and is a cash basis taxpayer.
31. Compensation is taxable for tax purposes. No compensation has been reported by respondent for any investment advising.
32. A vested interest in a partnership is not compensation.
33. Gains between Jensen and Complainant were to be divided.
34. Losses between Jensen and complainant were to be 100% complainant's.
35. Contractually losses accrued from month to month and carried over to the end of the year were to start again at zero at the beginning of the subsequent calendar year between complainant and respondent.
36. The arrangement between complainant and Respondent was a partnership.
37. Complainant was to handle compliance with all matters making the arrangement between complainant and Jensen legal. (See written contract complainant provided Division).
38. Advising others (plural) means advising more than one other person.
39. Others is plural for other and is defined as more than one other person.
40. Complainant was a broker-dealer.
41. Place of business is a term used in conjunction with a firm in Utah.
42. Respondent isn't involved with any firm in Utah, much more a place of business with any firm in Utah.
43. Complainant had Full Trading Authorization with Privileges to Withdraw Money and/or Securities, dated 6/6/1998.

44. Respondent found several definitions “place of business”. They all showed the same definition; “Place of business - an establishment (a factory or an assembly plant or retail store or warehouse etc.) where business is conducted, goods are made or stored or processed or where services are rendered.”

45. Jensen has no office. I share a **BEDROOM** (emphasis added) in my wife’s home with my wife. I have several computers, several monitors, printers, bookcase, computer desks, copier, scanner, television on my side. My wife basically has the same equipment on her side of the bedroom. The bedroom is about 10 feet by 12 feet. When my wife and I are both in the bedroom at the same time our chairs bang up against each other, it is so small. I have never had any client, accounting or otherwise in the bedroom. There isn’t even a chair for someone to sit in the bedroom. The court is more than invited to come out and see my wife’s bedroom.

46. I have never provided ANY service to anyone in my wife’s bedroom. Complainant has never been to my house in his life. I have had accounting clients come to my house, but we meet in my wife’s dining/kitchen area on the table and go over accounting matters, but most of the time, I’m on the road, going to my accounting clients businesses.

47. The ONLY “alleged” investment advisor person I’ve ever been involved with is complainant. Complainant has never seen my wife’s house or the small bedroom.

48. I never heard from complainant, saw, met, mailed, emailed, solicited or provided advisory services to complainant or any other alleged investment client from my wife’s bedroom during the time period in question.

49. Complainant was a broker-dealer.

50. Respondent has never deducted one penny of depreciation deduction or deducted one

penny of rental expense, paid to my wife, on his tax returns for an office in my wife's home. In my "professional" opinion, such deduction would not be allowed by the IRS, if such were taken.

51. Complainant and complainant's spouse, have the same principal residence.

52. Business is defined as; "a usually commercial or mercantile activity engaged in as a means of livelihood : trade, line <in the restaurant business> b : a commercial or sometimes an industrial enterprise; also : such enterprises <the business district> c : dealings or transactions especially of an economic nature . (Source Merriam-Webster).

53. Regular is defined best by synonyms; Regular, normal, typical. (Source Merriam-Webster).

## **LEGAL AUTHORITY**

### **UTAH DIVISION OF SECURITIES WEBSITE SHOWS**

Licensing as shown on the Utah Division of Securities Website  
[http://www.securities.utah.gov/license\\_investmentadviser.html](http://www.securities.utah.gov/license_investmentadviser.html) (Attached as Exhibit 1)

**Investment Advisers** (Attached as Exhibit 1)

### **DEFINITION**

"Investment Adviser" is defined, in section 61-1-13(1)(o) of the Utah Uniform Securities Act ("Act"), as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." "'Investment adviser' also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation."

TYPE OF INVESTMENT ADVISORY FIRM (Attached as Exhibit 1)

- \* State Covered Investment Adviser:
- \* Has assets under management of less than \$25 million
- \* Required to license as an investment adviser with the state if they meet either of the following criteria:
  - + Firm has more than 5 clients who are Utah residents
  - + Firm has a place of business in Utah

UTAH SECURITIES ACT

Section 61-1-3(3) of the Utah Securities Act states: (the bold and italicized below, Division didn't show, with special emphasis on underlined (D)).

(3) It is unlawful for a person to transact business in this state as an investment adviser or as an investment adviser representative unless:

- (a) the person is licensed under this chapter;
- (b) the person's only clients in this state are:

***(I) one or more of the following whether acting for itself or as a trustee with investment control:***

***(A) an investment company as defined in the Investment Company Act of 1940;***

***(B) another investment adviser;***

***© a federal covered adviser;***

***(D) a broker-dealer; .....***

- (c) the person has no place of business in this state and during the preceding 12-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

INVESTMENT ADVISORS ACT OF 1940

Rule 203(b)(3)-1 - Definition of a "Client of an Investment Adviser"

(a) General.- For purposes of section 203(b)(3) of the Act, the following are deemed a single client:

- (1) A natural person, and:
  - (ii) Any relative, spouse or relative of spouse of the natural person who has the same principal residence.

INVESTMENT ADVISERS ACT OF 1940 SHOWN ON THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION WEBSITE

Located on the U.S. Securities and Exchange Commission website

<http://www.sec.gov/about/whatwedo.shtml> it explains the purpose and mission of the Investment Advisors Act, which is the purpose of the Utah Securities Investment Advisers law says;  
“Investment Advisers Act of 1940

This law regulates investment advisers. With certain exceptions, this Act requires that firms or sole practitioners compensated for advising others about securities investments must register with the SEC and conform to regulations designed to protect investors. Since the Act was amended in 1996, generally only advisers who have at least \$25 million of assets under management or advise a registered investment company must register with the Commission.”

### **RESPONDENT’S ARGUMENTS**

Division in this case in their statement of facts show the same information as their Order to show Cause, which well over 95+% of those allegations were not admitted to by respondent and have not been proven by petitioner and their repetitions are unsupported allegations and appears to be no more than filler, because they have nothing else to say and should be ignored by the Court other than the one’s respondent has admitted.

Ok, now let’s talk about the issues. First of all, let’s talk about the investment advisor statute itself.

### **OTHERS**

In order for respondent to be an investment adviser he must give investment advise to others. Others is plural. First of all the only person Jensen ever dealt with was complainant. I have never met, seen, talked to and have no knowledge of complainant’s wife. It was a total surprise to me that the account, I was provided access to was complainant’s wife’s. In the information provided to Division and numerous emails to Jensen, complainant continually called the account “my” accout and “his” account. At NO time did complainant EVER tell petitioner the account was his wife’s account. Thus my dealing were with one person.

And if Division comes back and says, no there were others, namely complainant's wife . I ask the Court to read the definition of a single client per the Investment Advisors Act of 1940. A husband and wife having the same principal residence is one investor per Federal law as shown above in the Legal Authority.

### COMPENSATION

In order to be an investment adviser or financial planner per the statute one needs to do it for compensation. Compensation is defined as *payment* (emphasis added) for services. Respondent was never paid one penny from anyone for investment advise or for financial planning.

In my 40 plus years as an accountant, one becomes an expert in accounting matters. And I have in fact been deemed an expert on several occasions in Federal Court, State Courts, Tax Court and Arbitrations. With all of my accounting background, I have NEVER heard of potential profit sharing split between 2 individuals as compensation. What we had wasn't compensation anyway, it was a profit split based upon gains. If such is compensation, isn't it taxable? Compensation by it's very definition is for the payment for services. No payment, no consideration, thus not income nor taxable.

Did complainant take a deduction for the alleged "compensation". Did complainant make payment to Jensen. The answer to both is no.

There are lots of accountants working for the state of Utah. Can you bring forward one accountant working for the State of Utah, who will swear under penalties of perjury, who was a CPA and has a Masters Degree and has 4 decades of accounting experinece and who has been qualified as an expert witness in accounting matters before several courts, to support Division's

allegation?

Division cites some case in New York. This case is in Utah. The case was a 2007 case, this matter before the courts took place from 2003 until mid October 2006, long before any ruling. I could not read the case petitioner references without paying several hundred dollars for access. Thus I don't have the slightest idea, if it is even relevant. If the Division would provide such case to respondent, I would be happy to read it and see if relevant and to have to go all the way to New York to find a low level case in years after this matter before the courts, sure seems like a stretch, in fact a very long stretch to me.

And without any compensation, again respondent is not covered under the investment advisors act.

### **REGULAR BUSINESS**

Division argues out of both sides of their mouth. They spend several pages, arguing how the de minimus exemption provisions, don't apply to respondent, then petitioner's counsel turns right around and define the de minimus exemption definition of a place of business in association with a firm as to whether or not respondent is an Investment Adviser, which is a false representation.

Utah's Investment Advisers law says, to be an investment adviser in Utah, they need to do those things shown above in the statute, "and as part of a *regular business* (emphasis added), issues or promulgates analyses or reports concerning securities". In my facts about I defined business and normal. And let me ask the Court if the would consider the following a regular business?

No business telephone number

No business checks

No business letterhead

No business cards

No business license

One “alleged” (see broker-dealer exemption, than there are zero clients) business client  
who has never paid one penny of compensation to the business from 2003 until the end of 2009.

No business office

No business stationary

No business address

No bricks and mortar at the business

No business checking account

No business advertising

No business taxes

No business employees

No business furniture

No business machinery

No business income

No business expenses

No business accountant

No business entity

No business payroll taxes

No business commissions

No business depreciation

No income tax return filed for the business

No income for the business

No gross receipts for the business

No cost of goods sold for the business

No utility bills for the business

No employer identification number for the business

No entity creation for the business

I could go on, but I think the Court gets my point or the Court could ask me additional questions if it need further clarification.

Do the above shown criteria sound like a “regular business” to the Court? Clearly the answer is a resounding no and a regular business is required to be deemed a Financial Advisor.

**THE DE MINIMIS EXEMPTION (Division’s Designation)**

Division argues the de minimis exemption is inapplicable for respondent. Their reason is the de minimis exemption exists only for out of state investment advisors. They quote Section 61-1-3(3) of the Utah Securities Act. Respondent has read what Division has referenced as their source for excluding Utahns and see nothing about out of state status being required. Respondent has attached as an exhibit the State’s website discussing Licensing of Investment Advisers and the de minimis exemption which is located at

[http://www.securities.utah.gov/license\\_investmentadviser.html](http://www.securities.utah.gov/license_investmentadviser.html). Would the Court go and read the above two references and tell me why the de minimis exemption doesn’t apply for respondent.

The amount in question with complainant is \$30,000. The exemption is less than

\$25,000,000. Thus respondent is \$24,970,000 below the Utah threshold level. Also one of the 2 following must occur; 1. The firm must have more than 5 clients with the State of Utah. Respondent had “allegedly” one client, which is in dispute; or 2. firm must has a place of business in Utah. As was discussed above in the REGULAR BUSINESS section, it is clear, that respondent did NOT have a firm and did NOT have a place of business in Utah. Actually Division’s page doesn’t really reflect what the law says, which is;

61-1-3(3)© the person has no place of business in this state and during the preceding 12-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

There is absolutely nothing in Utah Law saying the de minimis exemption does not apply to Utah residents.

#### **A BROKER DEALER EXEMPTION**

While the Division was arguing the de minimis exemption didn’t apply to Jensen, I was reading closely Section 61-1-3(3) of the Utah Securities Act and I noticed the State didn’t want to list “[certain listed entities (exemptions to investment adviser registration)]. And what did I read in that list as exempt from registration with the State of Utah as an Investment Advisor? Item (D) shown in that list is an exemption for investment advisers in dealings with a broker-dealer acting for itself. Complainant was a fully registered broker-dealer principal and President of several broker-dealer firms and was acting for himself or as trustee (Full Trading Authorization with Privilege to Withdraw Money and/or Securities, dated 6/6/98)) and is the only “alleged” client in this matter. Accordingly respondent again is exempt from registration as an investment adviser with the State of Utah in this matter.

You know why the Broker-Dealer exemption exists? Read the purpose for the creation of

the Investment Advisers Act of 1940 shown in the legal authority above. The purpose was “designed to protect investors”. Complainant had at least 4 securities licenses to become a Broker Dealer and been in the securities business during 3 decades. Complainant had complete control, custody, knowledge, access, received all confirmations on trades made and at any time could have terminated the agreement between himself and respondent. Complainant was for all intent and purposes much more sophisticated and knowledgeable about securities matters than respondent and in his complaint filed with Division stated, “I take some responsibility in this case. I have been a broker (not true, he has been a principal, President of several Broker-Dealer firms), I should have know better and .. (I) share responsibility and even offered to take \$7,000 (to settle this matter)”.

Well Mr. Jones, you did know better. In fact YOU were the one who picked the strategies pursued and you continually acknowledged to respondent, that what respondent was doing was just fine with you. And if it wasn't fine with you, why didn't you terminate the relationship. It was your account. You could have terminated it at any time. Or if the trades made were on the wrong side, why didn't you cancel the trades and take the other side?

Let me give the Court a flavor for what was going on between complainant and respondent from 9/1/2006 through 10/19/2006;

- a. “Rock and roll baby!” (sound close to the vest or conservative to you?) 9/1/2006
- b. “there's 30k in there, use what you need” 9/3/2006
- c. “we'll see what's going on with these bonehead” 9/5/2006 (Money couldn't be used for options trading at Ameritrade, where his brokerage account was and C.J. was upset)
- d. “yes, I did (call) and it won't be cleared until the 13<sup>th</sup>, I could put another 30k in via

cashiers check if you want. They said the Q order (short) could still go through though. I hate brokerage firms, that's why I don't work for them any longer" 9/5/2006

e. "ok" 9/5/2006 (on adding another 30k) Dave says no we're fine. I'll just short instead of using options.

f. "yeah, those hemorrhoids at Ameritrade." 9/5/2006

g. "hey good job" 9/6/2006

h. "I can't complain" 9/6/2006

I. "Good job this week" 9/7/2006

j. Jensen says to C.J., "I'm unsure on market direction" 9/7/2006

k. "I believe my account is fully operations after today, all funds should be cleared now 9/13/2006 ((see 9/5/2006) Cal is chomping on the bit for me to be buying equity options, puts)

l. "yes you (Jensen) are right, I hope we see some sanity soon" 9/13/2006

m. "ok, I am with you" 9/15/2006

n. "man, Is everyone bullish these days or what" 9/26/2006

o. "yea, we are doing everything on credit cards nationally, the bills are coming in soon and the euphoria will be over. We are exporting our assets to China and India. and importing poverty and crime from Mexico." 9/15/2006 (sound bullish to you?)

p. "ok, thanks for your efforts, I am totally ok" 9/26/2006

q. "ok, luckily I have made about the same amount (talking about the losses his account has incurred) I am down trading OTCBB stocks during the same time period but it would be nice to break even if you know what I mean" 10/6/2006

r. "this () has gone up steadily every day since WE (emphasis added) went short on sept

l, I am not going to have an account left at the rate this is going, especially with what's left of **MY** (emphasis added) account all expiring oct. options. I don't want to lose the whole account, already lost a third" 10/12/2006

s. "The problem is **WE** (emphasis added) have thought the bulls were wrong now for about **six** (only been doing options for 4 weeks), if they are right one more week my whole damn account is gone! Toast!!!" 10/12/2006

t. **"I don't want to lose MY whole account...WE (emphasis added) have been wrong about the market direction and the strength of the bull market every day now since I opened the account"**. Complainant tells me to sell calls he doesn't want to sweat over the weekend. 10/13/2006 (Friday) (Footnote: Actually it wasn't we it was complainant. Complainant was determined the markets were going down. On September 7, email above respondent said to complainant, "I'm unsure of market direction". )

u. "ok, nothing we can do about it now I guess" 10/14/2006

v. ok thanks, I did misunderstand, Keep me posted 10/14/2006

w. "**MY** (emphasis added) account is now 50% gone" (yes, after complainant forced me to sell his options on the prior Friday after-hours ((very thin market and market makers will take advantage of sellers))). 10/16/2006 9:16 am

x. **GET ME** (emphasis added) **OUT NOW!!! MY** (emphasis added) account is almost gone 10/16/2006 1:37 (strange on 10/16/2006 at 4:52 you said it has 14,500)

y. **MY** (emphasis added) account 10/16/2006 1:48

z. "I guess **WE** (emphasis added) keep the nov options." 10/16/2006 2:01

aa. "**MY** (emphasis added) account shows a value of 14,500 right now 10/16/2006 4:52

ab. "FYI, in the same period of time I (emphasis added) have made money in MY (emphasis added) other accounts on my own" 10/16/2006 4:52

ac. "keep me posted, thanks" 10/16/2006 4:52

ad. "Finally a down day! Have I died and gone to heaven?" 10/17/2006 7:51

ae. "Jensen emails to C.J., yes a down day. To bad your out of all your positions. Qs are up \$.30 (211 X .30 = \$6,330) and the DNA puts are up \$.50 (30 x \$.50 = \$1,500), thus you'd be up 7,830 from where you forced me out right now." 10/17/2006 8:00 a.m.

af. "I know, I pushed the panic button yesterday, you have my permission to come over here and kick my ass." 10/17/2006 8:23 a.m.

ag. "ok, I will do that, I just can't afford to lose my (emphasis added) whole account so bear that in mind, thanks" 10/17/2006 1:19 p.m.

ah. "ok" (Cal's reply, after I said anytime you want to shut it down, let me know)  
10/17/2006 1:42 PM

ai. "ok thanks,.... all I ask is don't toast my (emphasis added) account" 10/19/2006 9:45 AM

On or about 10/19/2006, complainant changed the password to his account and there were still several trades open, several of which were profitable. I didn't have access to the account, but I'm sure Ameritrade would have an exact record of when the password to the account was changed by complainant. I was emailed later by Cal we were finished. His final comment to me was, "Thanks".

Does the above dialog between complainant and respondent help the Court understand

how actively involved, how sophisticated and how knowledgeable complainant was and how he constantly knew and approved of what was going on in his account? He also told me to come over and kick his ass for his irrational and panic behavior, that created substantial losses in his account per his own actions undisciplined actions. Respondent expect the market would change quickly business days after complainant demanded me to close out trades in no uncertain terms. I opened those trades for the very reason, complainant was telling me to get out. Who was calling the shots? Complainant.

Complainant was a broker-dealer. Complainant knew exactly what was going on in his account. Complainant had full control, access, sophistication and knowledge of his account and was not unprotected in any way, which is why dealings with broker dealers are exempt from the Investment Advisors Act. Complainant was not some unsophisticated investor who needed protection from an “alleged” investment advisor.

Accordingly, a broker-dealer exemption applies and in actuality respondent had zero clients in Utah.

### **NOT A FINANCIAL PLANNER**

Division keeps making little subtle references to the Court about respondent being some sort of financial planner (again showing how Division is using the shotgun approach in this case regardless of what the facts are). Such is the furthest thing from the truth and there isn't one single fact listed in Division's Order to Show Cause regarding such. I have never done anything in the financial planning business, nor do I have an office, nor have I ever receive one penny of compensation in financial planning activities. Accordingly the financial planner inclusion as an investment advisor is not applicable to me.

## CONCLUSION

Division is woefully lacking jurisdiction in this matter, let's summarize their deficiencies;

1. "Alleged" investment adviser for one other person won't work. Others (plural) are required by Utah and Federal law.
  2. One needs to be compensated for investment advisor services. There was no compensation paid from complainant to respondent for any investment services.
  3. Respondent doesn't have a regular business.
  4. The Utah De Minimis Exemption applies;
    - a. Respondent had assets under management of \$30,000 (thirty thousand). The State of Utah allows under \$25,000,000 (twenty five Million) for de minimis to apply.
    - b. Respondent (alleged Investment advisor) can't have more than 5 clients in Utah within the last year, which respondent didn't even come close to.
    - c. Respondent has no place of business in Utah.
    - d. Respondent doesn't have a firm in Utah.
    - e. There is nothing in Utah law that requires any of 4. a., b., c. or d., shown above are only allowed for out of state investment advisers.
  5. The broker-dealer exemption exists. Complainant has been a principal and President of several broker-dealer firms. Dealings with a broker-dealers exempts a person from being license as an Investment Adviser under Utah law.
  6. Respondent is not in any way a financial planner.
- For the foregoing reasons, Division's claims should be dismissed, with Prejudice, for



Exhibit 1

utah

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## Licensing

### Investment Advisers

#### DEFINITION

"Investment Adviser" is defined, in section 61-1-13(1)(o) of the Utah Uniform Securities Act ("Act"), as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation."

#### TYPE OF INVESTMENT ADVISORY FIRM

- State Covered Investment Adviser:
  - Has assets under management of less than \$25 million
  - Required to license as an investment adviser with the state if they meet either of the following criteria:
    - Firm has more than 5 clients who are Utah residents
    - Firm has a place of business in Utah
- Federal Covered Investment Adviser:
  - Has assets under management of \$25 million or more
  - Required to register as an investment adviser with the Securities and Exchange Commission (SEC)
  - Required to notice-file with the state before acting as a federal covered investment adviser in the state (see NOTICE FILING below)

#### INITIAL LICENSING

To become a licensed Investment Adviser in the state of Utah, you must submit a complete application, which includes all of the following:

- The applicant must apply through the Investment Adviser Registration Depository (IARD), an online database administered by the NASD. To access to the IARD system, you must complete the Entitlement process, which you can begin by clicking [HERE](#).
- Once entitled to use the IARD system, you must electronically file the following through the IARD, pursuant to [R164-4-2](#):
  1. [SEC Form ADV](#) - Uniform Application for Investment Adviser Registration. This form has two parts that must be filed through the IARD. While Form ADV Part 1 is simply an online form, Part 2 (or a brochure that contains at least the same information) is filed by submitting a text-searchable PDF copy of the form (or brochure). To learn more about filing Form ADV or to access Form ADV resources, click [HERE](#).
  2. [FINRA Form U-4](#) - Uniform Application for Securities Industry Registration or Transfer. This form must be filed electronically for the designated official and all investment adviser representatives to be licensed with the Division. The designated official must be a partner, officer, director, or a person occupying similar status. Instructions for the Form U-4 can be found by clicking [HERE](#).
  3. [Exams](#) - Proof that designated official and each investment adviser representative have passed either of the following exams:
    - A) Series 65 Exam - Uniform Investment Adviser Licensing Exam (UIALE); or
    - B) Series 66 Exam - Uniform Combined State Law Exam.

B) Series 66 Exam - Uniform Combined State Law Exam.

Refer to Section 7 of the Form U-4 Instructions by clicking [HERE](#).

1. **Filing Fee(s)** - All Investment Adviser fees are submitted electronically through the IARD payment system, not the state.
  - o **State Covered Investment Adviser:** \$100.00 covers both the firm and the designated official; \$50.00 for each investment adviser representative.
  - o **Federal Covered Notice Filer:** \$100.00 covers the firm; \$50.00 for each investment adviser representative with a place of business in Utah.

- In addition, the following must be submitted directly to the Division:

1. **Designated Official Information**—A State Covered Investment Adviser must identify its designated official in a letter submitted to the Division.
2. **Custody Information**—A State Covered Investment Adviser must state in a letter submitted to the Division whether they will have custody over clients' assets. If so, [R164-4-4](#) and [R164-4-5](#) outline the minimum financial requirements of either:

A) Providing the Division with proof of a bond in the amount of at least \$35,000; or

B) Providing the Division with an audited balance sheet demonstrating a minimum net worth of at least \$35,000, which must be maintained at all times.

3. **Discretionary Authority Information** – A State Covered Investment Adviser must state in a letter to the Division whether they will have discretionary authority in a clients' accounts. If so, [R164-4-4](#) and [R164-4-5](#) outline the minimum financial requirements of either:

A) Providing the Division with proof of a bond in the amount of at least \$10,000; or

B) Providing the Division with an audited balance sheet demonstrating a minimum net worth of at least \$10,000, which must be maintained at all times.

4. **Audited Financial Statements** – Regardless of the requirements for custody or discretionary authority, if the Investment Adviser must submit audited financial statements if required under Item 14 of Form ADV Part 2.
5. **Division Form 4-5BIA** – Corporate Indemnity Bond of Investment Adviser. If the Investment Adviser is required by custody or discretionary authority to be bonded, it must be on or in substantially the same form as Division Form 4-5BIA (see [R164-4-2](#), [R164-4-4](#) and [R164-4-5](#)). Click [HERE](#) for a PDF copy of the Form 4-5BIA if there is discretionary authority. Click [HERE](#) for a PDF copy of the Form 4-5BIA if there is custody authority. If the Applicant is not required to be bonded or chooses to demonstrate a minimum net worth instead, Form 4-5BIA is not required.

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#### LICENSE RENEWAL

All licenses expire on December 31 of each year. To renew a license as an Investment Adviser or Investment Adviser Representative, submit the following to the IARD:

1. **SEC Form ADV** - Each year you must file an annual amendment to the Form ADV.
2. **Renewal Fees**
  - **State Covered Investment Adviser:** \$100.00 covers both the firm and the designated official; \$50.00 for each investment adviser representative.
  - **Federal Covered Investment Adviser:** \$100.00 covers the firm; \$50.00 for each investment adviser representative with a place of business in Utah.

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#### LICENSE WITHDRAWAL

To withdraw an application or terminate an Investment Adviser license, the firm must file with the IARD [SEC Form ADV-W](#).

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#### NOTICE FILING REQUIREMENTS FOR FEDERAL COVERED ADVISORS

Click [HERE](#) for notice filing requirements for Federal Covered Investment Advisers registered with the SEC.