

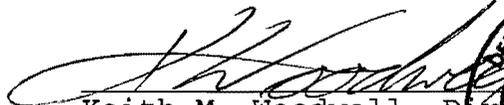
BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

In the Matter of : ORDER
DAVID STERLING JENSEN :
CRD #11095958 : Case No. SD-01-0065

BY THE DIVISION:

The foregoing Recommended Order on Pending Motions is hereby adopted by the Division of Securities.

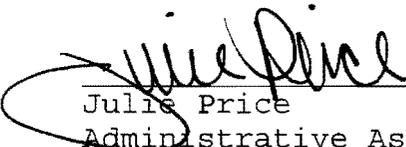
Dated this 15th day of June 2010.


Keith M. Woodwell, Director
Division of Securities
Department of Commerce



CERTIFICATE OF MAILING

I hereby certify that on the 10th day of June 2010, a copy of the Recommended Order on Pending Motions and this Order was sent, by certified mail, return receipt requested, to David Sterling Jensen at 75 East 1860 North, Tooele, Utah 84074. A copy of the Recommended Order on Pending Motions and this Order was hand delivered to Charles M. Lyons Jr., Division of Securities, Utah Department of Commerce, 160 East 300 South, Second Floor, Salt Lake City, UT 84114-0872.


Julie Price
Administrative Assistant
Department of Commerce

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

IN THE MATTER OF	:	
DAVID STERLING JENSEN	:	RECOMMENDED ORDER
CRD #11095958	:	ON PENDING MOTIONS
	:	Case No. SD-09-0040

APPEARANCES:

David Sterling Jensen for Respondent

Charles M. Lyons Jr. for the Division of Securities

BY THE ADMINISTRATIVE LAW JUDGE:

This adjudicative proceeding was initiated pursuant to the issuance of an August 5, 2009 notice of agency action and order to show cause. Respondent filed a September 8, 2009 response. The Court conducted a September 22, 2009 prehearing teleconference and thus scheduled the Division's disclosure of the relevant and non-privileged contents of its investigative file and an initial witness and exhibit list.

Respondent filed a September 16, 2009 motion to dismiss this proceeding or, in the alternative, a motion for summary judgment. Respondent thus asserted this case is barred by a statute of limitation. The Division filed an opposing memorandum to that motion on September 28, 2009. Respondent filed a reply memorandum on October 8, 2009.

The Court conducted oral argument on the motion during an October 19, 2009 teleconference. During the early stages of such argument, the Court informed the parties that the Court would entertain Respondent's motion, even though it was filed after his response in this proceeding. Due to the potentially dispositive nature of Respondent's motion, the Court concluded it would be appropriate to address that motion, even though the Division asserted the motion was untimely and should thus be denied.

At the conclusion of oral argument, the Court informed the parties that it would recommend Respondent's motion be denied, the terms of which are stated below. The Court also informed the parties that the Court would submit its Recommended Order on Respondent's motion to Keith M. Woodwell, Director of the Division of Securities.

Respondent next filed three (3) more motions to dismiss or, in the alternative, for summary judgment in this proceeding. Those motions were filed October 31, 2009. One of those motions asserts this proceeding should be dismissed because Respondent has not been treated equally as to other Utah residents or other citizens of the United States. That motion includes Respondent's assertion that the Division has arbitrarily abused its discretion in conflict with the U.S. and Utah Constitutions.

Another motion is based on Respondent's assertion that an individual (referred to herein as C.J.) had full control,

knowledge, access and approval of the various securities transactions made by Respondent with funds provided by C.J. Respondent asserts C.J. assumed the risk of potential financial loss from those transactions. Respondent thus claims this proceeding should be dismissed.

Respondent's next motion is founded on his assertion that the Division lacks jurisdiction to initiate and/or proceed with this case. Respondent contends he is a certified public accountant and he was thus not required to be licensed as an investment advisor to engage in the securities transactions now under review.

Respondent also contends he received no compensation for his efforts as to those transactions and he did not hold himself out as an investment advisor. Accordingly, Respondent asserts this case should be dismissed.

The Court conducted a November 10, 2009 prehearing teleconference with the parties. The Division informed the Court and Respondent that scarce legal resources are available to the Division as to respond to the pending motions.

The Court stated it has initially reviewed the three pending motions and, if possible as to any given motion, the Court could submit a Recommended Order to the Division without requiring the Division to file a written response to the motion. The Division informed the Court and Respondent that such a procedure would be

very helpful and most appropriate.

The Court then directed various inquiries to each party regarding Respondent's first two (2) motions set forth above. Based on those motions and the oral argument conducted thereon, the Court informed the parties that no written response from the Division would be necessary or beneficial as to those motions.

The Court also informed the parties that a Recommended Order would be submitted to the Division, denying Respondent's motions to dismiss on both equal protection and assumption of risk theories.

Based on the Court's review of Respondent's third motion, the Court informed the parties that the Division should file a written response to that motion. Such a response was to be submitted by November 24, 2009.

The Court also granted Respondent leave until November 17, 2009 to submit any affidavit from Wallace Boyack (a local attorney) regarding those matters represented in Respondent's motion as they pertain to Mr. Boyack. Finally, the Court scheduled oral argument on Respondent's third motion to be conducted December 10, 2009.

The Division filed its opposing memorandum to Respondent's motion on November 24, 2009. Respondent filed a December 4, 2009 final reply on that motion. Further, the Division noted - and Respondent agreed - that the latter had filed no affidavit from

Mr. Boyack.

Specifically, Respondent informed the Court and the Division that it would not be possible to obtain any such affidavit. Consistent with the above-described scheduling order, oral argument on Respondent's motion to dismiss alleging a lack of jurisdiction was conducted by the Court with both parties during a December 10, 2009 teleconference.

During that teleconference, the parties offered argument on the pending motion and the Court directed various inquiries to the parties in that regard. At the conclusion of oral argument, the Court took Respondent's motion under advisement. The Court informed the parties that a Recommended Order on that motion would be submitted to Mr. Woodwell for his review and action.

The Court anticipated the Recommended Order on the above described motions would be submitted to Mr. Woodwell by early to mid January 2010. However, that submission did not occur within the just-stated time. Following the passage of additional time, the Court conducted a June 3, 2010 prehearing teleconference with the parties.

During that conference, the Court informed the Division and Respondent that the Court has concluded each of Respondent's motions should be denied and the Recommended Order in that regard would be submitted to Mr. Woodwell by June 7, 2010. However, the order in question was not finalized by that date.

Accordingly, the Court conducted a June 10, 2010 prehearing teleconference with the parties. The Court explained the reason for the delay in the submission to Mr. Woodwell. The Court and the parties then addressed various procedural matters and a possible schedule for a hearing in this proceeding if the Court's Recommended Order on each motion were adopted by the Division.

Specifically, the Division confirmed it expects to present testimony from the four (4) witnesses identified in its initial witness list. The Division estimates four (4) hours may be required to offer such testimony on direct examination.

The Court granted Respondent until July 1, 2010 to submit his witness and exhibit list to the Division. The Court informed Respondent that the witness list should identify any possible witnesses who could be expected to testify in Respondent's behalf on direct examination and the witness list should also generally summarize the anticipated nature of testimony thus expected from each possible witness.

The Court then informed Respondent that his submission of an exhibit list shall identify any potential exhibits which he may intend to offer during the hearing. The Court notes herein that, if Respondent expects to introduce exhibits which have not been previously identified by the Division, Respondent shall provide a copy of any such exhibit to the Division concurrent with the filing of Respondent's exhibit list.

The Court acknowledged Respondent has not yet filed any witness list in this proceeding. Nevertheless, the Court inquired of Respondent as to his estimate of the time which may be necessary to present testimony in his behalf through any witnesses on direct examination.

Respondent informed the Court and the Division that he may present testimony from 6-12 witnesses in the hearing. Respondent estimates it could require one and a half days for that presentation.

The Court informed the parties that it would await the filing of Respondent's witness and exhibit list. Based on a review of the issues set forth in the order to show cause and the response thereto, the Court informed the parties that it seriously questions whether a two day hearing is warranted in this proceeding.

Respondent then suggested the parties could possibly identify the undisputed facts in this proceeding and execute a stipulation in that regard to reduce the length of any hearing. The Court readily agreed such a process should be pursued and a schedule for the submission of such a stipulation should be established.

During the June 10, 2010 prehearing teleconference, the Court informed the Division and Respondent that the hearing date in this proceeding would be identified after Respondent had filed

his witness and exhibit lists. The Court and the parties then scheduled another prehearing teleconference to be conducted at 9:00 a.m. on July 8, 2010.

During that teleconference, the Court will schedule the submission of any stipulation of undisputed facts and review the witness lists of both parties as to make a better informed assessment of the appropriate duration of the hearing before the Securities Commission in this proceeding.

The Court now submits its Conclusions of Law and Recommended Order on Respondent's motions to the Division for its review and action:

CONCLUSIONS OF LAW

Utah Code Ann. §63G-4-102(4) provides as follows:

This chapter does not preclude. . . the presiding officer during an adjudicative proceeding from:

.
(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party.

Rule 12(b) provides:

. . . the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter

.
(6) failure to state a claim upon which relief can be granted
.

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Utah Court of Appeals has set forth the nature of a Rule 12(b)(6) motion and the manner in which a trial court should address such a motion. In **Tuttle v. Olds**, 155 P.3d 893 (2007), the Court stated as follows:

A rule 12(b)(6) motion to dismiss is not an opportunity for the trial court to decide the merits of a case: 'Rule 12(b)(6) concerns the sufficiency of the pleadings, not the underlying merits of a particular case.' **Alvarez v. Galetka**, 933 P.2d 987, 989 (Utah 1997). A reviewing court is "obligated to construe the complaint in a light most favorable to the plaintiff and to indulge all reasonable inferences in its favor." **Heiner v. S.J. Groves & Sons Co.**, 790 P.2d 107, 109 (Utah Ct. App. 1990).

Id. at 897-98.

The **Tuttle** Court also described when it is proper for a trial court to convert a Rule 12(b)(6) motion to one for summary judgment. That Court thus stated as follows:

"If a court does not exclude material outside the pleadings and fails to convert a rule 12(b)(6) motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents."

Oakwood Vill., L.L.C. v. Albertsons, Inc.,
104 P.3d 1226 (2004). . .Rule 12(b)(6)
dismissals are appropriate only where
the court concludes that the plaintiff
has failed to state a claim upon which
relief can be granted, after accepting
all of the factual allegations made in
the complaint as true and drawing all
reasonable inferences in a light most
favorable to the plaintiff.

Id. at 895-96.

Finally, the **Tuttle** Court identified what is considered to
be material outside the pleadings. That Court thus stated:

Our rules provide that complaints
and answers constitute pleadings. . .
a matter outside the pleadings "include[s]
any written or oral evidence. . . which
. . . substantiat[es]. . .and does not
merely reiterate which is said in the
pleadings." **Oakwood Vill., L.L.C. v.**
Albertsons, Inc., Id.

Respondent submitted a declaration and various exhibits with
his October 8, 2009 motion as to his claims pertaining to a
statute of limitation. He also submitted various exhibits with
his October 31, 2009 motion as to his claimed violation of equal
protection. Respondent also submitted an exhibit with his
December 4, 2009 motion as to his claims pertaining to whether he
was required to be licensed as an investment advisor.

Many - if not all - of the memoranda filed by Respondent as
to his various motions include his recital of "facts". None of
the responsive memoranda filed by the Division include any
similar recitation of "facts". This Court did not exclude the

declaration or any exhibits submitted by Respondent.

Given the nature of this Court's Recommended Order, as set forth below, the Court concludes whether Respondent's motions are considered under Rule 12(b) or Rule 56 represents a legalistic distinction without a difference in this proceeding. Based on Respondent's election to alternatively seek a dismissal of this proceeding under either of those rules, the Court has set forth both rules and the governing case law thereto.

However, this Court concludes its Recommended Order can be adequately cast as one ruling on motions to dismiss under Rule 12(b)(6). The Court notes Respondent is acting on a pro se basis in this proceeding, which may explain why Respondent filed his various motions in the alternative.

Rule 56(c) of the Utah Rules of Civil Procedure provides:

. . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. . . .
(Emphasis added.)

Summary judgment is only proper if the pleadings, affidavits and other submissions establish there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Beehive Brick Co. v. Robinson Brick Co.**, 780 P.2d 827, 831 (Utah App. 1989); **Rich v. McGovern**, 551 P.2d 1266 (Utah 1976).

When addressing a motion for summary judgment, the Court must carefully scrutinize all the evidence and the reasonable inferences drawn therefrom in a light most favorable to the party opposing summary judgment. **Conder v. A.L. Williams & Associates, Inc.**, 739 P.2d 634, 637 (Utah App. 1987); **Rich v. McGovern**, *supra*, at 1268.

Since summary disposition of a case denies the benefits of a trial on the merits, any doubt or uncertainty concerning questions of fact should be resolved in favor of the opposing party. **Beehive Brick Co. v. Robinson Brick Co.**, *supra*; **Bowen v. Riverton City**, 656 P.2d 434, 436 (Utah 1982). Thus, summary judgment should only be granted when it appears "there is no reasonable probability that the party moved against could prevail". **Frisbee v. K. & K. Const. Co.**, 676 P.2d 387 (Utah 1984).

Respondent's September 16, 2009 motion is based on his assertion that this proceeding is barred by a statute of limitation. Respondent asserts that limitation period is provided by Utah Code Ann. §61-1-22(7)(a), which states as follows:

An action may not be maintained to enforce any liability under this section unless brought before the earlier of:

(i) the expiration of five years after the act or transaction constituting the violation; or

(ii) the expiration of two years after

the discovery by the plaintiff of the facts constituting the violation.

Respondent contends C.J. knew all of the facts pertinent to the claims set forth in this proceeding by January 8, 2007. Respondent thus asserts this action should have been commenced no later than two (2) years from that date, but that the Division did not initiate this proceeding until August 5, 2009. Accordingly, Respondent asserts this proceeding should be dismissed because it was not timely commenced consistent with the above quoted statute.

The Division initially contends this administrative proceeding is not an "action", as that word is used in §78B-2-101(1). The Division thus asserts the statutes of limitation set forth in that title do not apply in this proceeding.

Moreover, the Division contends §61-1-22(7)(a) only governs a private cause of action between parties seeking redress for conduct relating to the purchase or sale of a security. The Division argues the limitation period in that statute only applies to such a private cause of action and has no application to an adjudicative proceeding initiated by the Division pursuant to §61-1-20. Accordingly, the Division asserts Respondent's motion should be denied.

The Court readily concurs with the arguments made by the Division. Generally, adjudicative proceedings initiated pursuant to the Utah Administrative Procedures Act are not governed by the

various limitation periods set forth in Title 78B. See **Rogers v. Division of Real Estate**, 790 P.2d 102, 106 (Utah App. 1990).

Further, a cursory review of §61-1-22(7)(a) confirms the Division's contention that the just-quoted statute only applies to a private action between a purchaser and seller of a security. Nothing in that statute supports Respondent's assertion that the Division should be bound in this proceeding as a party in interest seeking any relief under that statute.

Finally, the Court also notes §61-1-20, which governs enforcement actions by the Division as directed toward any person who has engaged, is engaging, or is about to engage in any act or practice which constitutes a violation of that chapter. Subsection (1) of §61-1-20 reflects the process for issuance of an order to show cause by the Division. Such an adjudicative proceeding is precisely what the Division has commenced as to Respondent.

However, §61-1-20 contains no limitation period as to when such an adjudicative proceeding must be initiated. Absent an express provision in that regard, and the inapplicability of any limitation period established by another statute as to govern this proceeding, the Court readily concludes Respondent's motion should be denied.

One of Respondent's October 31, 2009 motions is grounded in his assertion that there are other individuals in this state who

have engaged in the conduct of which the Division now complains regarding Respondent, yet the Division has not initiated enforcement action as to those individuals. Respondent thus contends this case represents a prosecutorial abuse of discretion or, in other words, a selective prosecution of Respondent.

The Court now restates the matters discussed with the Division and Respondent regarding this motion as addressed during the November 10, 2009 teleconference. Initially, the Court concludes Respondent has made no adequate factual submission as a basis to support his claim that this case represents an excessive prosecutorial abuse of discretion. Further, Respondent's motion is a matter in avoidance which does not address whether a sufficient factual and legal basis exists to proceed with this case as to Respondent.

Moreover, the Court duly notes Respondent has presented a motion which raises a claim of a constitutional violation of equal protection. Respondent has adequately preserved that issue for possible subsequent review. However, neither this Court nor the Division has the authority to rule on issues of constitutional import. Thus, the Court concludes Respondent's motion to dismiss this case due to any alleged violation of equal protection should be denied as not cognizable in this forum.

Respondent's second October 31, 2009 motion sets forth - in detail - matters pertaining to C.J. and his wife, and the nature

of the securities transactions in question. Respondent asserts C.J. was very experienced in financial investment matters and he clearly understood - and could thus evaluate - the risks and merits of the securities transactions under review.

Respondent acknowledges that assumption of risk "is a defense in the law of torts". Respondent also acknowledges that such a defense bars a plaintiff "from recovery against a negligent tortfeasor if the latter can demonstrate that the plaintiff voluntarily and knowingly assumed the risks at issue to the dangerous activity in which he was participating at the time of his injury".

Respondent claims C.J. voluntarily and knowingly assumed the risks incident to the securities transactions under review. Respondent asserts the defense of assumption of risk does not allow "irrational denial, meritless claims and allegations or frivolous actions" by either C.J. or the Division "for people who knowingly and intentionally assume risks" and would later "ignore or deny such behavior".

The Court now restates its conclusions on this motion, as initially described during the November 10, 2009 prehearing teleconference. This Court squarely rejects Respondent's contention that this adjudicative proceeding should be dismissed based on an assumption of risk by C.J. regarding the securities transactions under review or that the Division is likewise bound

by any such assumption of risk.

The claim interposed by Respondent - while potentially available in any civil action involving C.J. and Respondent - clearly has no application in this adjudicative proceeding. Simply put, Respondent's purported defense may not be properly interposed to either challenge or bar the Division's attempts to pursue this enforcement action under §61-1-20. Accordingly, the Court readily concludes Respondent's motion to dismiss this proceeding on the basis of any assumption of risk should be denied.

Respondent's third October 31, 2009 motion is generally based on his assertion that the Division lacks subject matter jurisdiction to initiate this proceeding. Specifically, Respondent asserts he never received any compensation for the securities transactions in question, he did not hold himself out as an investment advisor and he is not a financial planner.

Respondent also contends he is exempt from required licensure as an investment advisor because he had less than six (6) clients, he had less than 25 million dollars under management and he did not maintain a firm to engage in securities transactions. Respondent further asserts he maintains no business address or telephone as either an investment advisor or financial planner and he has no place of business in this state in either of those capacities.

Respondent has also filed a related motion to dismiss, dated December 4, 2009. Therein, Respondent contends he was a licensed certified public accountant in this state for a lengthy time. Moreover, Respondent asserts he and C.J. have discussed several accounting matters at various times and Respondent's involvement in the securities transactions under review was incidental to accounting services which Respondent provided to C.J. Respondent thus asserts he is exempt from any registration as an investment advisor.

The Division contends Respondent acted as an unlicensed investment advisor regarding the securities transactions under review. The Division notes that the written contract between Respondent and C.J. provides the latter employed Respondent to manage and direct the investment and reinvestment of certain assets and Respondent accepted such employment for the compensation identified in that contract.

The Division also asserts the contract provided that, as compensation for his services, Respondent would be paid on a monthly basis, his fee would be computed by determining the profits in the account during each month and Respondent was to thus receive a certain percentage of the gain in the account.

The Division thus contends Respondent was entitled to receive compensation consistent with the foregoing agreement. The Division acknowledges Respondent did not actually receive

compensation because his services did not result in any profit realized during the one (1) month that securities transactions were effected relative to the account in question.

However, the Division argues the pivotal issue is not whether Respondent actually received compensation. Rather, the Division notes Respondent was engaged in an activity with an expectation to receive compensation through any net trading profits.

The Division also contends there is no factual basis to establish that Respondent's activities as an investment advisor were incidental to any practice as an accountant. The Division asserts Respondent has never filed tax returns or prepared other documents as an accountant on behalf of either C.J. or his wife.

The Division also asserts Respondent has never entered into any contracts with C.J. whereby Respondent agreed to provide accounting services for him or his wife. Further, the Division notes that the written contract, as referenced herein, is silent regarding any accounting services to be provided by Respondent under that agreement.

The Division next asserts §61-1-3(3)(c), which it has characterized as a "de minimis exemption", does not apply in this proceeding because Respondent maintains a place of business in this state. More significantly, the Division contends the "de minimis exemption" only applies to out of state investment

advisors who are licensed elsewhere and maintain a limited number of Utah residents as clients.

Since Respondent is not licensed in any state as an investment advisor nor registered with the United States Securities and Exchange Commission as such an advisor, the Division argues the licensing exemption under §61-1-3(3)(c) does not apply in this proceeding.

§61-1-3(3) provides as follows:

It is unlawful for any person to transact business in this state as an investment advisor

. . . 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:

(D) a broker-dealer. . . .

(c) the person has no place of business in this state and during the preceding twelve-month period has had not more than five clients, . . . who are residents of this state.

§61-1-13(15)(a) provides that an investment advisor means 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. . . .

§61-1-15(c)(iii) provides "Investment advisor" does not include:

. . . a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of the profession . . .

§61-1-14.5 further provides:

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under Section 61-1-14 or an exception from a definition under §61-1-13 is upon the person claiming the exemption or exception.

It is undisputed that Respondent did not actually receive compensation for services he provided to C.J. pursuant to the contract in question. The Court readily acknowledges that the definition of investment advisor, as set forth in §61-1-13 (15)(a), applies to a person engaged in the activities identified in that definition "for compensation".

However, the Court also notes that statute does not expressly require the actual receipt of compensation for performing such services as an investment advisor. If that statute were intended to only apply upon actual receipt of compensation, the phrase "for compensation" should have been so clarified.

Significantly, §61-1-2(1) provides certain acts are unlawful for any person "who receives any consideration from another person" primarily for advising the other person as to the value of securities or their purchase or sale. . . . That statute

expressly requires the actual receipt of consideration, whereas the definition of investment advisor under §61-1-13(15)(a) merely recites the phrase "for compensation".

The Court concludes the critical issue is thus whether Respondent rendered services as an investment advisor with an expectation of compensation and not whether he actually received compensation for his services. Given the provisions of the written contract between Respondent and C.J., and with due regard for the language actually employed in §61-1-13(15)(a), this Court concludes Respondent could be found to have acted as an investment advisor even though there is no evidence Respondent received any compensation due to his participation in the securities transactions under review.

The Court next readily concludes Respondent has failed to establish that his participation in the securities transactions under review constitutes accounting services to C.J. or, more importantly, that Respondent's actions were solely incidental to providing such services.

Respondent has similarly failed to establish there was an accountant/client relationship between himself and C.J. Thus, there is no basis to find and conclude the services which Respondent provided pursuant to the written contract with C.J. were solely incidental to any practice of Respondent as an accountant.

Rather, the services Respondent agreed to provide through the contract in question were entirely distinct from any accounting practice by Respondent. Accordingly, the exception set forth in §61-1-13(15)(c)(iii) has no application in this proceeding.

The Court had duly reviewed the submissions made by the Division and Respondent as to whether §61-1-3(3)(c) applies in this proceeding as to conclude Respondent was not required to be licensed as an investment advisor. Based on those submissions, the Court concludes Respondent has failed to satisfy his burden to establish that the just-referenced statute applies as to divest the Division of jurisdiction to initiate and pursue this proceeding.

The Court acknowledges it appears C.J. is a broker-dealer. The Court readily concludes a factual dispute clearly exists between the parties as to whether Respondent has a place of business in this state. The submissions made by the Division facially support its contention that the "de minimus exception" only applies to an out of state resident who is licensed elsewhere as an investment advisor.

However, the just-stated matters raise either disputed questions of fact and/or law which this Court can not resolve in the context of Respondent's motions to dismiss or, in the alternative, his motions for summary judgment.

Unless resolved by the parties, such factual disputes or contested issues raised as a dispositive matter of law require that those matters be submitted for resolution by the Securities Commission in an evidentiary hearing. In any event, the Court concludes no dismissal of this proceeding or entry of Respondent's request for summary relief is warranted on the basis of this record.

One final procedural matter should be addressed. During the June 10, 2010 prehearing teleconference, Respondent inquired of any process which may be available as to file a motion to reconsider any order entered on a prior motion. The Court and the parties briefly addressed that inquiry.

The Court informed Respondent that the Court would not entertain any motion to reconsider a prior ruling. However, the Court acknowledged it would be appropriate to present a motion to the Commission which had been previously presented to this Court if the motion was initially denied due to a factual dispute or could not be resolved as a matter of law.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's September 16, 2009 motion to dismiss this proceeding based on any statute of limitation is denied.

IT IS FURTHER ORDERED Respondent's October 31, 2009 motion to dismiss this proceeding based on an equal protection claim is

denied.

IT IS FURTHER ORDERED Respondent's October 31, 2009 motion to dismiss this proceeding based on an assumption of risk is denied.

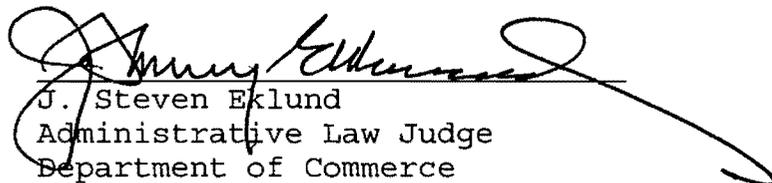
IT IS FURTHER ORDERED Respondent's December 4, 2009 motion to dismiss this proceeding, based on a claimed lack of jurisdiction that he received no compensation as to the securities transactions under review, is denied.

IT IS FURTHER ORDERED Respondent's December 4, 2009 motion to dismiss this proceeding, based on a claimed lack of jurisdiction that his participation in the securities transactions under review was solely incidental to his alleged accountant/client relationship with C.J., is denied.

IT IS FURTHER ORDERED Respondent's October 31, 2009 and December 4, 2009 motion to dismiss this proceeding, based on a claimed lack of jurisdiction that a "de minimus exemption" applies and Respondent was thus not required to be licensed as an investment advisor, is denied.

IT IS FURTHER ORDERED Respondent's December 4, 2009 motion to dismiss this proceeding, based on a claimed lack of jurisdiction that a "broker-dealer exemption" applies and Respondent was not required to be licensed as an investment advisor, is denied.

I hereby certify the foregoing Recommended Order on Pending Motions was submitted to Keith M. Woodwell, Director of the Division of Securities, on the 15th day of June, 2010 for his review and action.


J. Steven Eklund
Administrative Law Judge
Department of Commerce