1991

ONG International Inc., D&D Management, and David L. Alldredge v. 11th Avenue Corporation, f/k/a Salt Lake Memorial Mausoleum; and Keith E. Garner : Brief of Appellant

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual,	BRIEF OF APPELLANTS
Plaintiffs and Appellees,	(Subject to Assignment to Utah Court of Appeals)
v.	
11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; and KEITH E. GARNER, an individual,	Appellate Case No. 910522
	Priority Category No. 16
Defendants and Appellants.	

APPEAL FROM JUDGMENTS OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH,
JUDGE J. DENNIS FREDERICK

Robert S. Campbell, Jr.
Clark W. Sessions
Dean C. Andreasen
Joann Shields
CAMPBELL MAACK & SESSIONS
Attorneys for Plaintiffs
and Appellees
13th Floor, One Utah Center
201 South Main
Salt Lake City, Utah 84111

Arthur H. Nielsen (A2405)
Gary A. Weston (3435)
John K. Mangum (2072)
NIELSEN & SENIOR, P.C.
60 East South Temple Street
1100 Eagle Gate Tower
Salt Lake City, Utah 84111

Clark R. Nielsen (2406)
HENRIOD, HENRIOD & NIELSEN
185 South State Street, #500
Salt Lake City, Utah 84111

Attorneys for Defendants
and Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs and Appellees, v. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; and KEITH E. GARNER, an individual, Defendants and Appellants.	BRIEF OF APPELLANTS (Subject to Assignment to Utah Court of Appeals) Appellate Case No. 910522 Priority Category No. 16

APPEAL FROM JUDGMENTS OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH,
JUDGE J. DENNIS FREDERICK

Robert S. Campbell, Jr.
Clark W. Sessions
Dean C. Andreasen
Joann Shields
CAMPBELL MAACK & SESSIONS
Attorneys for Plaintiffs
and Appellees
13th Floor, One Utah Center
201 South Main
Salt Lake City, Utah 84111

Arthur H. Nielsen (A2405)
Gary A. Weston (3435)
John K. Mangum (2072)
NIELSEN & SENIOR, P.C.
60 East South Temple Street
1100 Eagle Gate Tower
Salt Lake City, Utah 84111

Clark R. Nielsen (2406)
HENRIOD, HENRIOD & NIELSEN
185 South State Street, #500
Salt Lake City, Utah 84111

Attorneys for Defendants
and Appellants

TABLE OF CONTENTS

ADDENDUM

APPENDIX OF TRIAL EXHIBITS
(Separately Bound)

Table of Contents

These exhibits appear in the order listed below.
The tabs correspond to the Exhibit No. as used at trial.

Exh. No.	
51	Building Permit Inspection Print-out
89	Plaintiffs' Rescission Claim Computations
91	Garner Financial Statement - April 26, 1991
317	Summary of Garner Income Allocation
318	Summary of Garner Tax Returns
140	Alldredge Financial Analysis of Salt Lake Memorial Mausoleum - February 1988
28	Salt Lake Memorial Mausoleum General Partnership Agreement - dated May 13, 1988
31	Partnership Redemption Agreement - dated February 28, 1989
183	March 2, 1989 Letter from David L. Alldredge to Ong Ka Thai regarding Redemption Agreement

TABLE OF AUTHORITIES

CASES: Page:

STATUTES: Page:

SECONDARY AUTHORITIES: Page:

LEGISLATIVE HISTORY: Page:

RULES:

JURISDICTION OF THE APPELLATE COURT

The Utah Supreme Court has jurisdiction of these consolidated appeals pursuant to the provisions of Utah Code Ann. §78-2-2(3)(j) (1953), as amended, pertaining to final orders of any court of record over which the Utah Court of Appeals does not have original appellate jurisdiction.

STATEMENT OF ISSUES FOR REVIEW

The issues on appeal and applicable standards of review are:

Issue 1: Whether an unambiguous and comprehensive written release of all claims, known and unknown, voluntarily and knowingly agreed to with assistance of counsel, is enforceable as a matter of law to bar all claims for Defendants' prior conduct.

Standard of Review: The interpretation of a contract and its application to the parties, as determined by the words of the agreement, is a question of law. 50 W. Broadway Assoc. v. The Redevelopment Agency of Salt Lake City, 784 P.2d 1162, 1171 (Utah 1989). The trial court's legal determinations are allowed no deference and are reviewed for correctness. Eskelson v. Town of Perry, 819 P.2d 770, 771 (Utah 1991); Frontier Foundations v. Layton Construction, 818 P.2d 1040, 1041 (Utah App. 1991)

Issue 2: Whether the failure of Defendants, during partnership buyout negotiations, to disclose prior conduct which the Plaintiffs now claim was fraudulent, voids the specific release of both "known and unknown" claims.

Standard of Review: The issue of whether a release agreement that releases all possible claims is void because of a claimed failure to disclose prior conduct is an interpretation of law. This Court will not defer to the trial court's interpretation of the release or to the application of the law to the facts of this case. Morton Int'l, Inc. v. Auditing Division, Utah State Tax Comm'n, 814 P.2d 581, 585-6, 589 (Utah 1991).

Issue 3: Whether Plaintiffs were entitled to refer to or submit evidence regarding Defendants' financial condition during the jury trial before any finding was made that Defendants were liable, in total disregard of Defendants' right to a fair trial and Utah Code Ann. §78-18-1(2) (Supp. 1992).

Standard of Review: This Court will review the trial court's refusal to apply §78-18-1(2) as a "correction of error," disregarding the trial court's interpretation of the statute. State v. James, 819 P.2d 781, 796 (Utah 1991). Also, no deference is accorded the trial court's determinations regarding the admissibility of evidence. State v. Ramirez, 817 P.2d 774, 781-2, n.3 (Utah 1991).

Issue 4: Whether the award of $1.8 million in punitive damages is excessive and/or influenced by passion or prejudice.

Standard of Review: Under Crookston v. Fire Insurance Exchange, 817 P.2d 789 (1991), the trial judges' responsibility is to review the punitive damage award and its amount, and to insure that the jury has acted within its proper bounds. This Court will reverse the trial court's refusal to grant Defendants'

motion under Rule 59(a), U.R.Civ.P., only for an abuse of discretion. 817 P.2d at 805-6. The trial court has abused or "exceeded" its "discretion" when its finding is "clearly erroneous," or it acts "unreasonably" or misapplies the law. Tolman v. Salt Lake County Attorney, 818 P.2d 23, 27 (Utah App. 1991); Cf. Crookston, 817 P.2d at 805, n.20.

Issue 5: a. Were Defendants denied a fair trial because of the cumulative effect of the numerous erroneous evidentiary and other rulings, and the prejudicial comments by the trial court?

b. Were the jury's findings a result of its bias, prejudice, and/or confusion indicating a lack of understanding as to what it was supposed to do, necessitating a new trial?

Standard of Review: Whether Defendants were denied a fair trial is an issue of law. Whether the jury's verdict is a result of passion, prejudice and/or confusion is an issue of law and the appellate court will give no deference to the trial court and will review its rulings for correctness. Eskelson v. Town of Perry, 819 P.2d 770, 771 (Utah 1991); Tolman v. Salt Lake County Attorney, 818 P.2d 23, 27-8 (Utah App. 1991).

Issue 6: Were Plaintiffs entitled, under U.R.Civ.P. 54(b), to an award of costs that included the cost of every deposition of every person deposed during discovery and witness fees in excess of the statutory rate?

Standard of Review: The appellate court will review the trial court's cost award under Rule 54(b) for "abuse of

discretion." Frampton v. Wilson, 605 P.2d 771, 773-4 (Utah 1980); Nielson v. Nielson, 818 P.2d 1043, 1046 (Utah App. 1991). An award outside the limits and bounds set by this Court and the rule will be reviewed under a correction of error standard. No deference is accorded the trial court's legal determination. Tolman v. Salt Lake County Attorney, 818 P.2d 23, 27-8 (Utah App. 1991).

DETERMINATIVE STATUTE

Utah Code Ann. §78-18-1(2) is determinative of Appellant's argument, Point IIB herein on punitive damages. The statute is attached as Addendum "L" to this brief.

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

Defendants refer herein to the Record on appeal as follows:

References to the Court's file and to the transcript of proceedings include the volume and the page number as paginated by the clerk for this appeal

Pleadings and District Court File as "R. [Vol.]:[Page]"

Transcript of Proceedings as "Tr. [Vol.]:[Page]"

Trial Exhibits as "Exh. [#]"

Addendum attached to brief as "Add. [#]"

The "Appendix" is a separately bound volume containing various trial exhibits. Exhibits reproduced in the Appendix are also designated with "App."

The Complaint was filed on July 26, 1990. (R. 1:2-18) It

alleged claims for fraud, constructive fraud and negligent misrepresentation based primarily on alleged misrepresentations as to the composition of individual crypts in the outdoor garden pavilions of the Salt Lake Memorial Mausoleum. The Complaint sought rescission of a Partnership Agreement and a later Redemption Agreement by which Defendants' interest in the partnership was acquired by Plaintiffs. Alternatively, Plaintiffs sought damages of $2.5 million. The Complaint also alleged that Defendants breached their fiduciary duty by their alleged misrepresentations and by failing to disclose material facts concerning the outdoor garden crypts. The Complaint also alleged that Defendants had wrongfully converted several crypts. There was no claim that the financial condition or history of any mausoleum property was misrepresented. (Tr. III:3221-22)

Defendants answered, denying all allegations of wrongdoing. (R. 1:34-46) Among other affirmative defenses, Defendants alleged that the release provisions of the Redemption Agreement (Exh. 31 - App.) barred all the claims of the Complaint.

After considerable discovery, Defendants filed a motion for summary judgment based on Plaintiffs' release of all their claims against Defendants under the terms of the Redemption Agreement. (R. 1:267-369) The trial court denied the motion on the ground that "there are sufficient issues of fact bearing upon the conduct of the parties incident to the execution of the dissolution and release agreement [the Redemption Agreement, Exh. 31] . . ." (Tr. Apr. 8, 1991:2859)

The case was tried to a jury in a 10-day trial in August 1991. The parties called 26 witnesses, creating almost 2,000 pages of trial transcript. Over 100 exhibits were received at trial. (R. 5:1770-91) On Monday morning, August 26, 1991, the jury returned a verdict after only 2-1/2 hours of total deliberations. (R. 4:1414-15) The special verdict form contained 14 questions to be answered by the jurors, including the amount of any compensation to which Plaintiffs might be entitled under their rescission theory, as well as actual damages under their alternative claim for damages. (R. 5:1872-76 - Add. "F") The jury found in favor of Plaintiffs on their claims of fraud and negligent misrepresentations, but found no constructive fraud.

The jury found the damages under Plaintiffs' fraud theory to be $447,034.00. The jury also found that Plaintiffs were entitled under their rescission theory to "consequential damages" of $1,165,022.00 in addition to the $1,240,220.00 Plaintiffs had invested initially in the partnership and under the Redemption Agreement. The jury also assessed punitive damages of $1.8 million against Defendants.

The jury further found that Plaintiffs were entitled to $70,000.00 for breach of Defendants' fiduciary duties and an additional $512,098.00 for Defendant Garner's conversion of assets. (R. 5:1872-76; Tr. XI:4826-37)

The trial court entered its Judgment on September 26, 1991, incorporating therein the entire special verdict of the jury.

The Judgment rescinded the Partnership and the Redemption Agreements for fraud and negligent misrepresentation and awarded Plaintiffs $2,405,242.00 in restitution and $1.8 million in punitive damages. (R. 5:1923-36 - Add. "F")

Defendants' timely motions for judgment N.O.V. or for new trial, and for remittitur of punitive damages, were denied by the trial court on November 13, 1991. (R. 5:1920-22; 6:2532-38 - Add. "G")

On October 8, 1991, on Plaintiffs' motion, the court entered a supplemental judgment against Defendants in the amount of $29,648.00 for Plaintiffs' interim operating costs between the time of trial and the date of judgment. (R. 6:2165-67 - Add. "H")

Defendants filed their notice of appeal on November 14, 1991, appealing from both judgments. (R. 7:2690-92) An amended notice of appeal was filed December 4, 1991, merely correcting the date of the supplemental judgment. (R. 7:2810-12)

Meanwhile, following a hearing before this Court on November 20, 1991, the parties worked out a stipulation for an interim and permanent supersedeas bond pending appeal. (R. 7:2758-2809)

Plaintiffs filed a verified memorandum of costs on October 3, 1991. (R. 5:2073-84 - Add. "I") Defendants objected and moved to tax costs. (R. 6:2265-2302 - Add. "J") The trial court taxed costs by a Minute Entry ruling on December 23, 1991. (R. 7:2854) A judgment for costs was entered January 2, 1992,

awarding Plaintiffs $11,503.60 for deposition fees, witness fees of $631.75, and the filing fee of $125.00, a total of $12,260.35. (R. 7:6495-96 - Add. "K")

Defendants appealed from that judgment on January 24, 1992. (R. 7:6511-12) That appeal was docketed in this Court as Appeal No. 920066. (R. 7:6524) Thereafter, this Court consolidated the various appeals taken by Defendants in this case under Appellate Case No. 910522.

STATEMENT OF FACTS

A. The Plaintiffs

Plaintiff David L. Alldredge graduated from Brigham Young University in 1969 in Asian Studies and Political Science and then obtained an M.B.A. at Harvard University in 1971. (Tr. I:2935-36) Alldredge then spent over 14 years as a commercial banking officer with the First National Bank of Chicago developing business for the bank. (Tr. I:2936-37) Alldredge was General Manager of the bank's Singapore Branch, residing there. He was later promoted to be the bank's area head for North Asia and resided in Hong Kong. (Tr. I:2938)

One of the routine responsibilities Alldredge had was to bring potential investments to the attention of his clients, and the Ong family was one of his best clients. (Tr. I:2943A; II:2974) At one time, he had authority to authorize bank loans as high as $20 million. (Tr. II:3119)

In 1985, Alldredge joined the International Bank of Asia in Hong Kong and was appointed its General Manager for the Hong Kong area. He directly supervised about 40 employees in the business development division, but was also responsible for all 700 bank employees in his area. (Tr. I:2938-9)

Plaintiff D & D Management is a Utah corporation organized and owned entirely by Alldredge individually. (Tr. III:3237)

Mr. Ong Ka Thai was raised in Singapore. He received a college education in California, graduating from UCLA in 1974. (Tr. V:3796-7) Mr. Ong described his professional occupation as

"businessman and a company director." (Tr. V:3797) Mr. Ong is the Executive Director of Ong Holding Co., which is a publicly-held investment company based in Hong Kong and listed on the Hong Kong Stock Exchange. (Tr. V:3798-99) Mr. Ong became acquainted with Plaintiff Alldredge in the late 1970's when Alldredge was a banker for the various Ong family businesses and Mr. Ong worked in "financial services" for his family company in Singapore and Jakarta. (Tr. V:3799-800)

Plaintiff Ong International (U.S.A.), Inc., a Nevada corporation, is a wholly-owned subsidiary of the Ong Holding Company and was formed in 1987 to invest in United States' business. Both Mr. Ong and Mr. Alldredge have served as the President of Ong International and Mr. Ong is now its Chairman of the Board. (Tr. VI:3880-81; V:3798)

B. The Defendants

Defendant Keith E. Garner is a Utah resident who has developed commercial, residential and industrial properties since 1956. (Tr. V:3644-47) He is the principal shareholder of Defendant 11th Avenue Corporation, a Utah corporation. (Tr. V:3645; Tr. III:3235) 11th Avenue Corporation owned the Salt Lake Memorial Mausoleum located on the Salt Lake City north bench above the City cemetery. (R: 1:0003-4; Exh. 1) Garner purchased his stock in the corporation in about 1979. (Tr. V:3649) 11th Avenue Corporation was originally known as "Salt Lake Memorial Mausoleum," but changed its name to "SLMM" when the parties

formed their partnership herein. (Tr. V:3645; II:3016; R. 1:0003) The corporation again changed its name to 11th Avenue Corporation after the 1989 Redemption Agreement by which Plaintiffs acquired total ownership of the partnership, which then owned the Mausoleum. (Tr. IX:4582; R. 1:0003; Exh. 31)

Defendant Garner supervised and controlled the operation of the Mausoleum facility from 1979 until the partnership in 1988, when David Alldredge came to Salt Lake to manage the facility in July. (Tr. V:3649-51)

C. The Salt Lake Memorial Mausoleum

The Salt Lake Memorial Mausoleum ("Mausoleum") is in the business of providing facilities for the above ground interment of the dead. (Exhs. 12, 13, 16 - App.) The Mausoleum consists of a large main building of indoor burial compartments called crypts, five outdoor garden pavilions to the east (Exhs. 6-8, 110 - App.), and a smaller office building to the west. The property also includes four building lots known as the Skyway Heights lots. (Exh. 1 - App.)

The indoor, or main, mausoleum building was constructed in the late 1920's. The crypts therein were constructed of concrete, with pipes providing ventilation to the outside. (Tr. I:2958-59; II:2997) Construction of the main mausoleum and its crypts is not at issue.

From 1984 through 1987, Defendants constructed five outdoor

garden pavilions adjoining each other. (Exh. 51 - App.)[1] As shown in the pavilion footprint, each outdoor pavilion structure contains 102 crypts. (Exh. 110 - App.)

At the entrance to each outdoor pavilion is a wrought iron gate in the south side, which opens to an inner patio flanked on the remaining three sides by the crypts. Each crypt is faced with marble. (See Exhs. 7, 8 - App.) The outer walls, ceiling and floor of each pavilion are of reinforced concrete, and each pavilion is roofed with Bartile shingles. (Exhs. 253 - App.) The roof overhangs the entrance and sides of each pavilion by several feet. (Exh. 6 - App.) Plaintiffs did not dispute the structural integrity and adequacy of the pavilion shell structures at trial. (Tr. VII:4271)

The interlocking crypt compartments in the three center pavilions (see Exh. 110) are constructed of wood, except where they abut the outer concrete walls of the pavilion and where the marble facings appear. (This method of construction is illustrated in Exhs. 255, 259, 11, 16 - App.) The crypts of the other two remaining pavilions are made of a combination of wood and concrete or all concrete. (Exhs. 12, 13 - App.)

These garden pavilion crypts are vented by holes beginning in the ceiling of the lowest crypt, to the floor of the one above and on into the attic above each bank of crypts. (Exh. 19 - App.) Ventilation is provided from the attic to the outside. The

---

[1] Photograph exhibits and architectural drawings of the pavilion shells (Exhs. 1, 6-8, 11, 49-50) are all contained in the separate Appendix.

outdoor crypts do not have a drainage system to handle any fluid drainage that might occur from a body in a casket. (Tr. IV:3472) However, Plaintiffs' expert said there might be fluid drainage only once in every several hundred entombments. (Tr. IV:3618)

When a body is entombed, the marble facing of the crypt is removed and the burial casket is inserted into the crypt space. For higher crypts, the casket is first lifted onto scaffolding at the appropriate level to facilitate the entombment. (Exh. 260 - App.) The open front of the crypt is then sealed with a thick plate of plexiglass and the marble facing is placed back on. (Exh. 21 - App.)

The outer concrete shells of the pavilions were constructed in 1984 and 1985. The crypt compartments were built during late 1985 and early 1986. (Exh. 51 - App.; Tr. VIII:4445) In the fall of 1986, marble facings were placed over the openings of a majority of the outdoor garden pavilion crypts, but 12 to 18 crypts in each pavilion remained open and unfaced until October of 1987. (Tr. VIII:4445-46; Exh. 11 - App.) During these two years, each open crypt was exposed to public view. The wooden framework construction was readily apparent to anyone in the near vicinity, even from as far away as the roadway of 11th Avenue. (Tr. VIII:4387, 4454-56; Exh. 11 - App.)

D. Acquaintance of the Parties

Defendant Garner and Plaintiff Alldredge first became acquainted in 1965 in Hong Kong, where Plaintiff Alldredge was an

L.D.S. missionary when Mr. Garner arrived as the new president of that mission. (Tr. I:2928-30) Plaintiff Alldredge left Hong Kong in 1965, and the two had no further communication or association until 20 years later, in November 1986, when they met by chance at a B.Y.U. football game in Provo, Utah. (Tr. I:2935, 2940) Mr. Alldredge was then living in Hong Kong, where he was the Manager of the Asian Bank. (Tr. I:2938, 2943A)

That encounter led to discussions between Defendant Garner and Plaintiff Alldredge concerning possible joint ventures between Mr. Garner and Mr. Alldredge's client, Mr. Ong, or entities with which they were associated. (Tr. I:2940, 2943, 2947, 2952; V:3803)

E. Inspections of the Mausoleum

In April 1987, while in Salt Lake City negotiating another joint venture, Alldredge and Ong received a tour of the Mausoleum from Mr. Garner. (Tr. VIII:4321-2, V:3675, I:2954) Garner showed Alldredge and Ong the indoor mausoleum building, including a "model" crypt therein faced with a glass front and made of concrete. (Tr. I:2958-59) Unlike all the other crypts, however, that indoor "model" crypt is lighted inside and is plastered and painted. (Tr. VIII:4328-29, V:3676, VIII:4364) Alldredge claimed that when he was shown this "model" crypt he was told that it was "representative" of all of the crypts throughout the mausoleum property. (Tr. II:2971)

Alldredge testified that they then walked outside and were shown the outdoor pavilions from the sidewalk that runs in front of them, but that he was close to the curb of the driveway and does not recall just how far down the sidewalk he went. (Tr. II:3142) Alldredge testified that Garner told them that the outdoor crypts in the pavilions were built to the same "high quality" as the indoor mausoleum. (Tr. II:2971)

Mr. Alldredge's testimony was not corroborated by Mr. Ong, who did not recall visiting the Mausoleum on that occasion. (Tr. V:3805-06)

In his testimony, Mr. Garner described how he took both Mr. Ong and Mr. Alldredge around the Mausoleum in April 1987. They visited the indoor mausoleum and Mr. Garner testified that he showed them the "model" crypt to illustrate just what a crypt is. (Tr. VIII:4322)

Exiting the main building, Ong and Alldredge then walked outside to the front of the five outdoor pavilions. Mr. Garner testified that he told them that he had designed the outer shell of the pavilions with reinforced concrete and steel so as to make it appropriate to use wood inside for the crypts and that the first outdoor crypts were built of concrete but the rest were of wood or concrete and wood. (Tr. VIII:4323-4)

Mr. Garner further testified that in July 1987, he again took Mr. Alldredge on a tour of the Mausoleum. (Tr. VIII:4325, 4327-31) After lunch that day with Dr. Burtis Evans, Garner's friend, the three returned to the Mausoleum where they again

viewed the outdoor pavilions. (Tr. VIII:4333-34) Dr. Evans testified that they saw the interior of the crypts with 2x4's and plywood visible where marble facing had not yet been installed. (Tr. IX:4653-55) Alldredge specifically commented "that the wood proposition in the crypts was an interesting innovation." (Tr. IX:4652, 4655, 4680) Dr. Evans also recalled that Alldredge called Mr. Garner an "innovator" for his design of the pavilions. (Tr. IX:4655, 4680)

Susan Stewart, 11th Avenue's Corporate Secretary, was present in Mr. Garner's office in July 1987 when Mr. Garner showed Mr. Alldredge a model of the outdoor pavilions and told him about the properties of the wood used. (Tr. IX:4592, 4639)

Mr. Alldredge admitted that he may have visited Mr. Garner in his mausoleum office in July of 1987, but claimed that he did not see any other areas of the premises. (Tr. II:2983, 3153-56) He also testified that it was "possible" he visited with Dr. Burtis Evans at the Mausoleum, but he could not recall it. Alldredge did recall a lunch with Dr. Evans and Mr. Garner, but claimed that was in 1988. (Tr. II:3157-59)

Until October of 1987, 84 of the outdoor crypts had no marble facing covering their front and they were open to public view. Forty-eight of those eighty-four crypts (18 in each of the 3 middle pavilions), were made entirely of wood. (Tr. VIII:4446; IX:4595)

Mr. Alldredge claimed that the parties did not discuss Plaintiffs investing in the mausoleum property until November

1987. (Tr. II:2984) However, he also testified that from that time forward all financial and other information about the Mausoleum which Plaintiffs requested from Defendants was provided. (Tr. II:3187; III:3215, 3224) Such information included the number of outdoor crypts that had been sold; the number of burial spaces, both indoor and outdoor, available for sale; and the fact that there had been a financial loss from operation of several hundred thousand dollars for several years preceding the negotiations. (Tr. II:3168)

Unknown to Defendants, Alldredge prepared a financial analysis of the Mausoleum and also commissioned an independent survey and analysis of the business, and furnished both to the Ong family for its review. (Tr. II:3006; Exh. 139, 140 - App.)

Mr. Alldredge testified that he met with Mr. Garner at the Mausoleum in December 1987 and received "a much more detailed tour." (Tr. II:2993) He stated that Mr. Garner gave more detail on the construction of the indoor mausoleum and pointed out a valve in the model crypt used for ventilation and drainage. (Tr. II:2996) Mr. Alldredge claims that Mr. Garner told him that all of the crypts on the mausoleum property were concrete, waterproof, and fireproof. (Tr. II:2997-98)

Mr. Garner denied that he gave such a "tour" of the Mausoleum to Mr. Alldredge in December 1987, but agreed that he did talk with Alldredge about the Mausoleum. (Tr. VIII:4339) Susan Stewart testified that in December 1987 she overheard Alldredge and Garner in Garner's office discuss Mausoleum

finances, but never heard any discussion regarding crypt construction. (Tr. IX:4597-8)

During the first week of April 1988, Alldredge and Ong, with Mrs. Ong, received a tour of the mausoleum property with Mr. Garner. Mr. Alldredge claimed that Mr. Garner then made the "same" representations concerning the construction of the outdoor crypts that had been made to Alldredge previously. (Tr. II:3024; III:3325)

Mr. Garner recalled having "toured" the mausoleum property with Mr. Alldredge and Mr. and Mrs. Ong in April 1988, but said that he did not discuss with them the construction of the outdoor crypts or the materials used therein in April 1988 when they visited the property. (Tr. VIII:4340-41; V:3675) Mrs. Ong did not testify.

F. The Partnership

Mr. Garner visited the Plaintiffs in Hong Kong in March 1988. There, the parties reached a preliminary agreement for Ong to acquire a 50% stock interest in the Mausoleum, including the outdoor garden pavilions and other adjoining premises. (Tr. II:3104; III:3229; VI:3875-76; Exh. 111)

The parties finally agreed to a partnership and executed a Partnership Agreement dated May 13, 1988. (Exh. 28 - App.) Plaintiffs Ong International, D&D Management, and Salt Lake Memorial Mausoleum (the corporation, now 11th Avenue Corporation) became the partners. The mausoleum corporation, contributed the

property and business. Plaintiff Ong International contributed $800,000.00. Alldredge received a 12% interest, even though he contributed nothing but his experience. (Tr. VI:3878-9; II:3014; III:3232)

Plaintiff Alldredge returned to Utah from Asia in June 1988 as the manager of the Mausoleum and took an office in the indoor mausoleum building in July 1988. (Tr. II:3032; III:3247-48)

Once in the fall of 1988, Plaintiff Alldredge assisted, at the request of Defendants, in entombing a casket in a wood crypt in an outdoor pavilion. Specifically, Mr. Alldredge helped lift the casket onto scaffolding in front of the crypt which was open to his view. Alldredge admitted that no one prevented him from seeing the crypt, but claimed that he did not see or even look at the crypt at that time. (Tr. VIII:4344-46; III:3287-92)

Soon after Mr. Alldredge began officing at the Mausoleum in July 1988, various disputes arose between the parties. (Tr. II:3035-41; III:3252-55; VIII:4470) Alldredge claimed that Garner refused to relinquish control and management of the business. (Tr. II:3035)

The friction between Alldredge and Garner over their relationship increased until, by November of 1988, Plaintiffs "had lost all trust" in Defendant Garner. (Tr. III:3252-54; VI:3880; V:3826)

During the time that 11th Avenue was in partnership with Plaintiffs, from May 1988 through February 1989, Mr. Garner did not make any statement to Mr. Alldredge or to Mr. Ong concerning

the construction, design, or composition of the crypts in the outdoor pavilions. (Tr. II:3050-51; III:3276)

G. The Redemption Agreement and Release

Because Plaintiffs had "lost all trust" in Garner, the parties discussed and finally agreed to terminate their relationship as partners. (Tr. II:3049; III:3271-73, 3276-79) In their final negotiations, Ong's interests were represented by their attorney, Edward Djang of California. (Tr. V:3839) Defendants were represented by a Salt Lake attorney, James Richards. (Tr. VIII:4475; III:3277)

In March 1989, the parties each signed the Redemption Agreement dated February 28, 1989 (Exh. 31 - App.), pursuant to which Ong agreed to pay an additional $440,220.00 over a period of time to 11th Avenue Corporation to redeem the latter's interest in the Mausoleum partnership. (Exh. 31, Tr. II:3054-5)

In the Redemption Agreement (Exh. 31), the Plaintiffs each released Defendants from any and all claims, known or unknown, as follows:

> 13.2 Release by the Partnership. Except as otherwise provided in this Agreement, the Partnership, its partners, their respective agents, officers, employees, successors, assigns and heirs, and each of them, forever discharge SLMM its agents, officers and employees from any and all claims, demands, rights of action or causes of action, whether known or unknown, howsoever arising, which in any way are based upon or related to SLMM's association with the Partnership.

This "release" and "discharge" language was drafted by Ong's attorney and was inserted by him in the Agreement.

(Tr. VIII:4474) Even the trial court found this language to be clear and unambiguous. (Tr. VIII:4460)

Plaintiffs knew and understood at the time they signed this Redemption Agreement that it contained this broad, inclusive language quoted above. (Tr. III:3277, 3280-82; V:3838-40) Plaintiffs further believed then that Defendants had committed various wrongs against Plaintiffs, many of which were referred to by Alldredge, as well as others they assumed had occurred but were not aware of. (Tr. II:3059)

Although Alldredge and Ong later contended at trial that they never intended to release claims for fraud, they never discussed this claimed "intent" with or communicated it to anyone, either at the time the Redemption Agreement was prepared or when they signed it. (Tr. III:3279-81) At the time, Alldredge knew Plaintiffs were releasing Defendants from "unspecified liabilities," and told Ong that "the deal is done" and "it is a reasonable deal." (Exh. 183 - App.) The Redemption Agreement does not mention reserving any claim whatever. (Exh. 31 - App.)

By the end of March of 1989, Defendants' partnership interest having been redeemed by Ong, Defendants removed their offices from the Mausoleum premises. (Tr. V:3650, II:3059) Plaintiff Alldredge remained to manage the mausoleum facility and business for the remaining partners -- his personal corporation and Ong International. (Tr. II:3059-60)

H. Plaintiffs' Operation of the Mausoleum

Over one year later, by June 1990, Plaintiffs had stopped selling outdoor crypts. (Tr. II:3096) After the March 1989 Redemption Agreement and through June of 1990, Plaintiffs operated the Mausoleum business at an operating loss of $219,000.00. (Tr. IX:4518) During this period, Alldredge's personal corporation, D&D Management, was paid over $11,500.00 a month out of the Mausoleum for management. (Tr. II:3017-18) Plaintiffs sold not more than three outdoor crypts during this period. Plaintiffs' loss was 212% of their sales. (Exh. 247; Tr. IX:4517-19, 4572)

I. Plaintiffs' Claimed Discovery of Wood Crypts

In July of 1989, Plaintiff Alldredge was told by his secretary, Jeri Stevens, that she was informed that there was or might be wood in the crypts of the outdoor garden pavilions. (Tr. II:3062-63) He commented to her that "the Mausoleum deal has been concluded" and he did not want to be bothered with it. (Tr. III:3308) At that time, Mr. Alldredge was in the middle of addressing another dispute with Mr. Garner and took no action to verify this information from Mrs. Stevens. (Tr. III:3305-08)

In April of 1990, when Plaintiff Alldredge decided to "catalog" all of the grievances he harbored against Mr. Garner, he suddenly "remembered" what his secretary had told him the year before and decided to check it out. (Tr. III:3306-07)

On May 2, 1990, under the direction and supervision of Plaintiff Alldredge, a small crew removed marble facings from approximately 15 crypts in the outdoor garden pavilions. Most of the crypts were observed to be made of wood. (Tr. II:3064-66) Alldredge professed that he had no knowledge that the crypts were made of wood until that date. (Tr. II:3065) This led to the filing of the Complaint in the instant matter in late July 1990.

J. The Lawsuit

Before trial, Defendants filed a motion in limine to exclude evidence of the financial assets of Mr. Garner until after a jury finding of liability for punitive damages was made, pursuant to Utah Code Ann. §78-18-1(2) (1992). (R. 2:845-58) Defendants' motion was denied. (R. 4:1398)

From the beginning moments of trial, and over the continued objection of Defendants, the Court permitted Plaintiffs' counsel to refer to the purported wealth of Defendant Garner. (Tr. V:3700-03; VII:4124-25) In the opening statement, counsel claimed that Mr. Garner was "a multi-millionaire," with "a net worth of over -- way over seven million dollars." (Tr. I:2919) Plaintiffs then called Mr. Garner to testify and introduced his financial statement showing net assets of $7,350,883.80. (Exh. 91 - App.; Tr. V:3711-13)

Plaintiffs also introduced summaries of Mr. Garner's joint tax returns which included his wife's income (Exhs. 317, 318 - App.; Exh. 92-98) Mrs. Garner is not a party in this case but

she owns substantial assets and has substantial income in her own right, which appeared on the exhibits received in evidence. (Id.)

The trial court allowed witnesses to describe sales presentations made to crypt purchasers years before the representations that Plaintiffs claim were made in 1987 and 1988. (Tr. VI:3915, 4014)

At trial, Plaintiffs claimed that they were entitled to damages, as well as rescission. No adequate election of remedies was ever made, except in the judgment itself. (R. 3:1208-11, 1288-99, 1398; Tr. VI:3958-9)

SUMMARY OF ARGUMENT

The two principal issues in this case center on (1) whether a complete release in clear and unambiguous language of all "known and unknown" claims will be given effect and enforced by the court; and (2) when in the course of the trial may a plaintiff "parade" before the jury the alleged wealth of a defendant in a case where the plaintiffs seek to recover punitive damages.

Defendants maintain the release provision of the Redemption Agreement was executed by the parties after they had determined they could no longer continue to work together and Plaintiffs had lost all trust and confidence in Defendant Garner. The wording of the release portion was drafted by Plaintiffs' counsel, and was intended to and did absolutely release the respective parties from all claims of the other -- known and unknown. It completely absolved Defendants from liability for any past conduct, except as otherwise may have been specifically reserved in the agreement.

The subsequent filing of the Complaint by Plaintiffs alleging fraud in the inducement of the original Partnership Agreement after over a year of operation of the Mausoleum by them at a substantial loss, which merely served to revive their hostility toward Defendants, could not serve to avoid the release which they had knowingly and intentionally executed.

The trial court should not have permitted Plaintiffs to talk about Defendant Garner's alleged wealth and introduce evidence of

his assets prior to a finding that Defendants were liable. (§78-18-1(2) (Supp. 1992). Nor did the trial court follow the guidelines set forth by this Court in Crookston v. Fire Ins. Exchange, 817 P.2d 789 (1991), which was decided before the trial in this case and which had been tried before the same judge.

By its rulings and its comments during the course of the trial, the lower court created an atmosphere which had the effect of confusing the jury and engendering passion and prejudice which prevented Defendants from having a fair trial. This was evident from the special verdict returned by the jury on the issue of punitive damages, as well as the issue relating to conversion of assets; among others. The treatment of the court of the issue relating to the election of remedies and submitting the issue of damages for fraud to the jury further added to the jury's confusion.

Finally, the court failed to follow the law in respect to awarding costs to Plaintiffs, if indeed the Plaintiffs were entitled to costs, and awarded Plaintiffs all costs incurred in connection with all depositions taken by either party.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE UNAMBIGUOUS RELEASE LANGUAGE OF THE REDEMPTION AGREEMENT THAT BARS ALL OF PLAINTIFFS' CLAIMS

A. The Release Language of the Redemption Agreement is Clear, Unambiguous, and Comprehensive, and Barred all of Plaintiffs' Claims, "Known and Unknown."

After operating in the partnership with Defendants for several months in 1988, Plaintiffs determined they could no longer continue as Defendants' partners. After the parties negotiated the terms of terminating their business relationship with each other, the attorneys for each side drafted the final "Redemption Agreement" (Exh. 31 - App.), whereby Plaintiff Ong redeemed Defendants' partnership interest.

The Redemption Agreement included a specific, unambiguous, and comprehensive release, the language of which was supplied almost entirely by Plaintiffs' attorney. Paragraph 13.2 of the Agreement provides that Plaintiffs release and discharge

> . . . SLMM, its agents, officers, and employees [e.g. Mr. Garner] from any and all claims, demands, rights of action or causes of action, whether known or unknown, howsoever arising, which in any way are based upon or related to SLMM's association with the Partnership. (Emphasis added.)

(Exh. 31, pp.9-10)[2]

---

[2] Paragraph 17.2 of the Redemption Agreement also contains an "entireties clause" that provides, in relevant part:

> This Agreement is one of a series of agreements that constitute one integrated transaction between the parties thereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings of the parties. There are no

It would be difficult to imagine release language more encompassing or comprehensive than this. The agreement's release language is clear. It is not in any way ambiguous under any reasonable construction. The trial court's interpretation and failure to enforce these terms is accorded no deference on appeal. An appellate court will read the language for itself and then will construe and apply the unambiguous and all-encompassing release provision according to its plain and simple language. Winet v. Price, Slip. Op. 3-4, 1992 W.L. 55288 (Cal.App. Mar. 23, 1992); accord Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979) (Interpreting the language of a conveyance of mineral rights); Palmer v. Davis, 808 P.2d 128, 132 (Utah App. 1991).

The release language clearly encompasses all four factual claims of the Complaint, to wit: (1) alleged misrepresentation as to the manner of construction of the outdoor pavilion crypts; (2) the alleged failure of the pavilion construction to comply with applicable building codes and ordinances; (3) payment of real property taxes; and (4) the alleged conversion of partnership property by reservation of various crypts in the indoor mausoleum building. (R. 1:7-16) These matters were clearly "based on or related to SLMM's association with the Partnership" because the Mausoleum was the object of the

---

warranties, representations or other agreements between the parties in connection with the subject matter hereof except as described herein. (Exh. 31, p.15) (Emphasis added.)

partnership and the crypts were contributed by Defendants to the partnership.

Alldredge himself apparently believed that the Redemption Agreement and release cut off Plaintiffs' claims in this case. In 1989, when he claims he was first told by his secretary that pavilion crypts were constructed of wood, he replied that the deal "had been concluded" and he did not want to be bothered further. (Tr. III:3308) Plaintiff Alldredge further admitted that he was aware of allegations that crypts had been improperly gifted by Mr. Garner at the time he signed the Redemption Agreement. (Tr. II:3097)

Moreover, the language of paragraph 13.2 specifically releases "all claims, demands, rights of action or causes of action, whether known or unknown, . . ." (Emphasis added.) With the phrase "whether known or unknown," it is immaterial whether Plaintiffs consciously held in their minds all of the acts or omissions they were releasing when they signed the Redemption Agreement. This language even shows that the parties realized then that there might well be other claims, not then known to one or more of them, which were being released.

This is further reinforced by what Mr. Alldredge said to Mr. Ong in a handwritten faxed letter dated March 2, 1989, regarding the Redemption Agreement, as follows:

> I will also courier a separate release for you to sign. Basically, the idea is that our three corporations and we three individuals will mutually release each other from unspecified liabilities. KEG and I will sign both corporate and personal releases in the agreement itself, while your corporate release will be in the

agreement and your personal release will be outside and separate from the agreement. (Emphasis added.)

To excuse Plaintiffs from their release because ". . . we didn't know" negates the express language of the Redemption Agreement.

In Winet v. Price, Slip. Op. 1992 W.L. 55288 (Cal.App. Mar. 23, 1992), the California Court of Appeal affirmed the enforcement of an agreement "releasing all claims against a party, including unknown and unsuspected claims" that barred the plaintiff's claim that the defendant breached his duty as a general partner. (Slip. Op. at 1-2) In enforcing an accord and satisfaction to bar an unasserted attorney fee claim under a contract, this Court has stated that "[u]nknown claims and liability may be extinguished if the parties so intend." Quealy v. Anderson, 714 P.2d 667, 669 (Utah 1986).[3]

Plaintiffs' self-serving disclaimers at trial that they did not "intend" to release any claim for past misrepresentations cannot be countenanced by this Court. Where the release language is clear, effect must be given to the intent of the parties as indicated by the language they employed in the agreement. Lucio v. Curran, 2 N.Y.2d 157, 161, 139 N.E.2d 133, 135-6 (1956). Even if their unexpressed and uncommunicated "intent" not to release their present claims were considered credible, "[i]t is the outward expression of the agreement, rather than a party's

---

[3] See also Kolar v. Ray, 97 Ill.Dec. 240, 492 N.E.2d 899, 902 (1986) (Court enforced a release of any and all claims, "known and unknown, foreseen and unforseen"); Paradisco v. Colonial Townhouses, Inc., 138 Misc.2d 1002, 526 N.Y.S.2d 308, 312-13 (1988) (Plaintiff's claim was embraced by the release whether specifically known or not).

unexpressed intention which the court will enforce." Winet, Slip. Op. at 4.[4]

There was no mistake as to the nature or effect of the document being signed. Plaintiffs knew that they were signing releases, the important language of which was provided and approved by their own attorney. They understood what the language meant. Plaintiffs fully and voluntarily agreed to this release language, and that language should be enforced to bar all of their claims.

In Horgan v. Industrial Design Corp., 657 P.2d 751 (Utah 1982) this Court held that a release is a contract and should be enforced, or rescinded, on the same grounds as any other contract. The "encouragement" and "preservation" of settlements of claims constitutes "strong arguments for enforcing releases." Id. at 753 (quoting Witt v. Watkins, 579 P.2d 1065, 1068 (Alaska 1978)). Horgan's comprehensive mutual release barred later claims even though Horgan protested he had signed the release only under duress and coercion.

It is apparent that after signing the Redemption Agreement and release Plaintiff Alldredge continued to brood over his earlier association with Defendants until his dissatisfaction with them took on proportions larger than life. Just as in

---

[4] See also Kolar v. Ray, 492 N.E.2d at 902 ("We look to the release itself to determine its scope. Where a written agreement is clear and explicit, a court must enforce it as written."); Paradisco v. Colonial Townhouses, Inc., 526 N.Y.S.2d at 312 ("Full effect must be given to the intent of the parties as reflected by the language used by them.)

Horgan and the other authorities cited herein, his "feeling of latent discontent" is an insufficient basis upon which to allow Plaintiffs' claims. Horgan, 657 P.2d at 754. The release provision of the Redemption Agreement is clear and unambiguous. Its plain language encompasses and bars all of Plaintiffs' claims. The release must be enforced and the judgment below reversed as a matter of law.

B. Execution of the Redemption Agreement was not Induced by Fraud.

Plaintiffs scurry to avoid the strong, all-encompassing release in the Redemption Agreement by arguing that the release was procured by Defendants' fraud. Plaintiffs' contentions of fraud rest solely upon their claims that the construction of the outdoor garden crypts was misrepresented by Mr. Garner and that such misrepresentations were so critical and substantial that they were not affected by the knowing and voluntary release provisions of the Redemption Agreement.

The evidence was sharply divided as to whether or not the crypts were misrepresented before the partnership. However, the evidence was undisputed that the representations were made in 1987 and 1988, before the parties' partnership and well before that partnership was terminated when each side released the other from all liability and responsibility. The record is entirely devoid of any evidence that Mr. Garner represented or concealed the nature of the crypts after the partnership commenced in May 1988.

Both before and at the time Plaintiffs signed the Redemption Agreement, they believed that they had been wronged by Defendants in several respects. Nonetheless, with full knowledge of the content of the release language, and acting upon the advice of their attorney, they signed the Redemption Agreement without ever having communicated any qualification or intended limitation pertaining to the release provisions thereof.

Attorney James Richards, who advised Mr. Garner, testified that he reviewed the release language proposed by Plaintiffs' attorney. Mr. Richards was aware of Plaintiffs' intense feelings of hostility toward Mr. Garner. The Plaintiffs' proposed release language was intended to end all disputes between the parties. (Tr. VIII:4465-75, 4491; III:3282)

Even if one accepts that Plaintiffs knew nothing of the wood crypts when they signed the Redemption Agreement, there is no evidence that, within the partnership or thereafter, Defendants ever gave Plaintiffs any false information concerning the construction of those crypts. Nor were Plaintiffs discouraged or prevented from inspecting or otherwise investigating those crypts during the nine-month partnership when Alldredge officed at the Mausoleum. And, considering the complete lack of trust between the parties and their separate legal representation in negotiating the Redemption Agreement, there could not be any misplaced reliance by Plaintiffs. These undisputed facts simply cannot support a claim of a "continuing concealment" of the

pavilion construction or that Defendants fraudulently "induced" the Redemption Agreement.

In Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983), plaintiff Ingram agreed to sell its assets in the marine construction industry to a major competitor, McDermott. When numerous disputes arose between the parties concerning Ingram's unfinished construction work, a settlement agreement was reached in which Ingram agreed to pay McDermott a sum in excess of $1.2 million with an exchange of releases.

Ingram agreed to release McDermott "from all manner of actions, causes of actions, suits, . . . claims and demands whatsoever in law, in admiralty, or in equity, . . . including without limitation of the generality hereof, any past, present or future claims, matters, causes or things that [Ingram] has or may hereafter have arising out of, based upon or in any way related to" the various prior agreements between the parties. Id. at 1302, n.11.

Ingram later sued, claiming that its earlier releases were vitiated due to McDermott's fraud. The trial court refused to grant McDermott's summary judgment on the plain language of the encompassing release.

The Fifth Circuit Court of Appeals reversed and remanded for judgment against Ingram, concluding that the "unmistakably clear language" of the releases "negotiated by commercial parties with substantially equal bargaining power," meant exactly what they

said and extinguished Ingram's claims as a matter of law. Id. at 1312.

> . . . It does not matter that Ingram may not have known of or articulately considered all the possible claims it was relinquishing against McDermott . . . when a release provides that "any and all claims," "past, present, or future" are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims. Id.[5]

Both Messrs. Ong and Alldredge were and are intelligent businessmen, highly sophisticated in finance and business ventures, and, indeed, in the international operations of business. (Tr. V:3793, 3797-99; I:2936-43; II:2974, 3119) In releasing Defendants, Plaintiffs were represented and advised by experienced and sophisticated legal counsel of their own choosing from California. (Tr. V:3839-40; VI:3888-89) Their arguments that Mr. Garner's pre-partnership misrepresentations constituted fraudulent inducement of the release are void of merit.

The Ingram court was mindful that releases might be vitiated by "fraudulent inducement." However, ". . . Ingram has never been able to prove that McDermott mislead it in the negotiation of the releases." (Emphasis added.) 698 F.2d at 1315.

Plaintiffs Ong and Alldredge did not prove any act of deception or misrepresentation by any Defendant during the

---

[5] See also Shelton v. Exxon Corp., 921 F.2d 595, 602 (5th Cir. 1991) (Claims unknown to the releasor at the time it gave a release are barred when covered by the release language.); Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Circle, Inc., 915 F.2d 986, 989-91 (5th Cir. 1990) (Release of a claim valued at over $200,000 was not objectively absurd, even if unwise, where the value of the released claim was both unknown and unknowable at the time the release was given.)

negotiation and conclusion of the Redemption Agreement and its release. The only evidence of misrepresentation by Defendants is Plaintiffs' testimony that they were not told of wooden crypts before the partnership in 1988. Any argument that the Plaintiffs' release of claims was procured or induced by Defendants' misrepresentation is wholly premised on that evidence alone. Such evidence led only to a partnership agreement and is far too collateral and removed in time to have affected the validity of a comprehensive release thereafter knowingly and voluntarily given, without coercion or duress, and with counsel's advice.[6]

Plaintiffs would have this Court, as well as the trial court and jury, believe that to construct a garden pavilion mausoleum with wooden crypts is inherently fraudulent and deceptive. At the time, however, Mr. Alldredge was said to have extolled Mr. Garner as an "innovator." (Tr. VIII:4331; IX:4652, 4655, 4680) There was no building or other code that was violated merely by constructing the crypts of wood. (Tr. VIII:4437; IV:3491-2)

---

[6] Bakamus v. Albert, 1 Wash. 2d 241, 95 P.2d 767, 771 (1939) (appellant unsuccessfully asserted her ignorance of the claim at the time she signed the release that barred the claim); Houston v. Trower, 297 F. 558 (8th Cir. 1924); Barbour v. Poncelor, 203 Ala. 386, 83 So. 130, 132-33 (1919) (recently followed in Regional Health Services, Inc. v. Hale Co. Hospital Bd., 565 S.2d 109, 113-14 (Ala. 1990).); Accord Pettinelli v. Danzig, 722 F.2d 706, 710 (11th Cir. 1984) ("When negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties.").

Consequently, Defendants submit that, as a matter of law, there was no duty affirmatively to disclose the crypt construction information after the partnership began, particularly where Plaintiff Alldredge spent virtually every day at the Mausoleum for over eight months before signing the Redemption Agreement. During that time, he had unlimited access to the crypts and could have inspected the interior of any or all of them. Indeed, he was requested by Mr. Garner to assist in the entombment of a body in one of them. (Tr. VIII:4344-46; III:3287-92) He could easily have discovered the facts if he chose to do so, or could have made inquiry.[7]

The burden of establishing any duty to disclose the manner of crypt construction rested upon Plaintiffs. First Security Bank of Utah, N.A. v. Banberry Development Corp., 786 P.2d 1326, 1329-33 (Utah 1990). Whether that burden has been carried is a question of law for the Court to decide. Id. Defendants submit that, under the above authorities, during the existence of their partnership with Plaintiffs, Defendants had no clear duty to volunteer to Plaintiffs information concerning the nature of the outdoor crypts' construction.

---

[7] Burke v. Farrell, 656 P.2d 1015 (Utah 1982) (A financing partner did not breach his fiduciary duty to the managing partner by failing to voluntarily disclose the value of the managing partner's partnership interest sold to the financing partner, as the managing partner had access to information concerning this value); Utah Code Ann. §48-1-17 (1989) (A partner is obliged to provide "true and full information of all things affecting the partnership" to another partner upon demand.)

Defendants further submit that whether the crypts within the concrete pavilions were made of wood or of reinforced concrete is immaterial, as long as they were built structurally sound and in a reasonable workmanlike manner. As pointed out in section III.B.2., below, Defendants were precluded from fully presenting their expert evidence that such was the case. Plaintiffs' evidence utterly fails to establish the legal or factual materiality of any misrepresentation of wooden crypts.

Plaintiffs' "expert" critics were James Milne and Cramer Stiff. Mr. Milne, an engineer who had built concrete mausoleums in other states (but not in Utah), addressed such matters as whether the recesses for marble facing were aesthetically desirable or whether the ventilation system might have been better. (Tr. IV:3581, 3599-600) He opined that the crypts should have a "drainage system," although he admitted such a system was really needed for only one in every several hundred crypts. (Tr. IV:3618)

Mr. Stiff claimed expertise as a "sales consultant." He did not believe that the wood crypts could be sold if customers had been informed that they were wood. (Tr. VI:3971) Stiff admitted that he had no experience selling wooden crypts and had never tried. (Tr. VI:4007) In fact, before he was told that the outdoor crypts were partially constructed of wood, he specifically praised the outdoor garden pavilions and their design. He considered them aesthetically pleasing and secure.

(Tr. VI:3993) Mr. Stiff never addressed the strength or durability of the wood crypts.

Mr. Stiff's claim that the wooden crypts were unsalable was directly contradicted by Dr. Virgil Kovalenko, who had purchased a crypt knowing it was wood. (Tr. VIII:4387-88) Robert Wilcoxen, the manager of an Ogden mausoleum, had education, training and experience as an embalmer, mortician and sales manager, and had sold wooden compartments for cremated remains and wood caskets. (Tr. VIII:4403) He testified that from his experience, the wood crypts are very salable and very marketable. (Tr. VIII:4397-4418)

Defendants' expert, Dr. Schroeder, a professor of wood chemistry at Colorado State University, testified that the wood used in the construction "is durable." (Tr. VII:4257) He would have elaborated on this testimony as to what he meant by "durability" if he had been permitted by the court to do so. (See Defendants' Proffer of Proof; Tr. Aug. 21, 1991:4495-4499) Dr. Reaveley also testified that "the wood used in this application inside a closed pavilion would last indefinitely and would carry those loads for an indefinite period of time. I mean, it could go on for centuries, really." (Tr. VIII:4288) This testimony of structural integrity was never controverted by Plaintiffs.

There was no evidence that anyone who had purchased a wooden crypt at the Mausoleum had ever sought to rescind the sale because of the wood construction. During the years the crypts

were constructed there was never any attempt to conceal the nature of the construction from public view. And, Plaintiffs failed to prove that the wood construction of the crypts was ever a material fact either to Plaintiffs' investment or to their release of claims.

"[I]n order to overcome the effect of a release or other written instrument, the contrary evidence must be clear and convincing." Maxfield v. Denver and Rio Grande Western R.R. Co., 8 Utah 2d 183, 330 P.2d 1018, 1019 (1958). Here, there simply was no evidence that the Redemption Agreement itself was procured by any fraud, let alone evidence that might be considered to meet the higher standard of clear and convincing evidence.

Plaintiffs wish to bind Defendants to the obligations and to the benefits which Plaintiffs derived from the Redemption Agreement. Yet, Plaintiffs are unwilling to accept their responsibilities which they voluntarily undertook and the legal obligations and liabilities resulting from the release in that agreement.

By the release language of this agreement, Plaintiffs released all claims against Defendants, including all the claims in this case, known and unknown. The trial court particularly erred by refusing to enforce the release provisions and voiding the Redemption Agreement, but still purporting to enforce some of its other provisions. (Judgment, p.10 - Add. "F") This Court should enforce the release according to its plain language and reverse the judgment below.

POINT II

THE AWARD OF PUNITIVE DAMAGES IS FATALLY FLAWED BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER MR. GARNER'S WEALTH AND EXERCISE UNSTRUCTURED CAPRICE

A. The Trial Court Improperly Allowed the Jurors to Hear and Consider Claims and Evidence of Defendant Garner's Wealth.

1. No Relevant Purpose is Served by Allowing the Jury to Consider Evidence of a Defendant's Financial Wealth.

Punitive damages are a powerful weapon in the administration of justice. Imposed wisely and with restraint, they have the potential to advance legitimate interests. Imposed indiscriminately, however, they have a devastating potential for harm.[8]

Apparently recognizing the recent spiraling transformation of punitive damage awards, this Court recently voiced its dissatisfaction with the inconsistent state of the law regarding punitive damages and attempted to "bring some order to the processes used in determining and reviewing damage awards." Crookston v. Fire Insurance Exchange, 817 P.2d 789, 802 (Utah 1991).[9]

The Crookston decision was issued barely more than one month before the trial began in this case. Both Crookston and this case were tried before the same trial judge. In the present

---

[8] Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032, 1056 (1991) (O'Connor, J., dissenting).

[9] See also Tuckfield, "Punitive Damages in Utah -- Time For a Clear Standard," 1989 B.Y.U. L. Rev. 217 (Utah judges are left to struggle with conflicting precedent when instructing the jury on punitive damages).

action the jury awarded Plaintiffs $1.8 million in punitive damages. The trial judge refused to ameliorate the jury's "over indulgence." (Memorandum Decision; R. 6:2532)

Crookston fixes the primary responsibility for review of punitive damage awards and provides a "mechanism" for "further development of the law." Crookston, 817 P.2d at 813. The instant matter is such a case for "further development." However, Crookston provides little or no guidance to a trial judge or jury as to the means or methods to be employed in the initial consideration and determination of an amount of damages to be awarded, if any, to achieve the valid purposes of deterrence or retribution. Such guidance is most critical to a "sounder law" of punitive damages which Defendants, and, we believe, this Court seek.

From the opening moments of the trial, Plaintiffs were allowed to parade before the jury Mr. Garner's financial condition and ostensible wealth as a "multi-millionaire." (Tr. I:2919; V:3700-13; VII:4124-5) Jurors were also later instructed that they must consider Defendants' wealth in assessing an amount of punitive damages. (Instr. 51; R. 5:1852) This Court has recognized that a permissible factor employed in assessing the amount of punitives to be awarded includes the "relative wealth of the Defendant." Id. at 808; Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985). However, as Crookston observes, no objective Utah analysis has ever considered whether, in fact, the issue of a defendant's "wealth" is a legitimate factor. "No relative

weights have been assigned [the factors], and no standards or formulas have been established for properly evaluating them when making an award or when reviewing the propensity of a jury award . . . The finder of fact has no guidance on how much weight to give each factor or even how the factors should be assessed." Crookston, 817 P.2d at 808.

The jury instruction mandate in this case (Instr. 51, R. 5:1852), that they "must consider" the "relative wealth of the Garner Defendants," was "scarcely better than no guidance at all. . . . [Such an] instruction reveals a deeper flaw: The fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."[10]

Although this Court has accepted, without considered, developed analysis, the common argument[11] that assessment of a defendant's wealth furthers the purposes to punish wrongdoers and to deter future conduct, many legal scholars seriously question that conclusion.[12] Consideration of Mr. Garner's financial

---

[10] Browning - Ferris Industries, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J. and Marshall, J., concurring).

[11] Annotation, "Punitive Damages: Relationship to Defendant's Wealth," 87 A.L.R. 4th 141 (1991).

[12] Abraham and Jeffries, "Punitive Damages and the Rule of Law: The Role of Defendant's Wealth," 18 J. Legal Studies 415 (June 1989) (wealth is irrelevant to the goals of assessing retribution or deterring socially undesirable conduct); Case Note, "The Use of Evidence of Wealth in Assessing Punitive Damages in New York: Rupert v. Sellers," 44 Alb.L.Rev. 422 (1980); Chapman and Trebilcock, "Punitive Damages: Divergence in Search of a Rationale," 40 Ala.L.Rev. 741, 777-829 (Spring 1989).

condition in the instant matter encouraged jurors to focus upon his "status," with sugar-plumed visions of his wealth, and not upon his conduct. Jurors were invited to speculate on what else may have occurred in Defendant's past that resulted in his financial success.[13] The actual and prejudicial harm to Defendants from allowing jurors to consider such irrelevant evidence is obvious.

Defendants submit that upon a thoughtful, objective analysis, evidence of Defendants' financial condition should clearly be seen as irrelevant, either to compensate the Plaintiffs for their claimed wrongs or to serve any legitimate purpose of punishment or deterrence from conduct. This Court should no longer blindly accept the unevaluated notion that jurors must consider a defendant's wealth when assessing the liability for or the amount of punitive damages. The mandatory nature of the instruction, without flexible guidelines, invites virtual bankruptcy of a defendant, particularly in this case.

2. The Trial Court Improperly Refused to Require a Finding of Liability for Punitive Damages Before Admitting Evidence of Defendant's Wealth Under Utah Code Ann. §78-18-1(2) (1992).

Utah Code Ann. §78-18-1(2) (1992) requires that:

> Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

From the beginning of the trial, including Plaintiffs' opening statement, the jurors were repeatedly advised that

---

[13] 18 J. Legal Studies at 416.

Mr. Garner was a "multi-millionaire". (Tr. I:2919; II:3700-13; VII:4124-5) Even if such evidence is perceived relevant to affixing exemplary punishment, Defendants' financial ability to pay has absolutely no relevance whatever to the jury's consideration of Defendants' liability in the first instance. The prejudice to Defendants in allowing allegations and evidence of Mr. Garner's wealth to be repeatedly paraded before the jurors is obvious. "Rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare."[14]

Having denied Defendants' pre-trial motion in limine, the trial court also repeatedly denied their trial objections to the numerous references to Defendants' financial condition. (Tr. V:3700-03; VII:4123-25) Calling Mr. Garner as their own witness, Plaintiffs were allowed to lead a virtually unrestricted exploring foray into Mr. Garner's private finances, including his previous divorce from his wife. (Tr. V:3703-16, 3732-36) Indeed, the Court even allowed Plaintiffs to introduce financial summary exhibits, detailing not only the assets of Mr. Garner (which were primarily of a non-liquid nature), but also those of his wife, a non-party who owns substantial assets in her own right. (Tr. V:3703-10; VII:4122-26; VII:4235-37)

---

[14]Morris, "Punitive Damages in Tort Cases," 44 Harv. L. Rev. 1173, 1191 (1931); See also Campen v. Stone, 635 P.2d 1121, 1127-8 (Wyo. 1981), Cf. Ellis, "Punitive Damages, Due Process, and the Jury," 40 Ala.L.Rev. 975, 1001, (Spring 1989) ("The risks confronting a defendant from whom punitive damages are sought are daunting, especially where the case is complex and the defendant is not popular . . .").

All of this evidence of finances and "ability to pay" were prominently interwoven with Plaintiffs' cries of fraud and deceit, and all before the jury had made any determination or finding of any liability. Defendants' wealth was obviously and prejudicially displayed by Plaintiffs to jurors who were requested to rectify Plaintiffs' claimed wrongs and find that this multi-millionaire Defendant should "pay" for those wrongs.

In enacting §78-18-1 in 1989, the Legislature recognized a defendant's legitimate privacy and due process interests to be heard by an impartial, unprejudiced jury and to have liability and any compensation fixed without reference to his wealth. "The jury should determine whether there has been a breach in the standard first without looking at any assets, and then after that they should have a right to look at the assets." Senator H. Barlow, Senate Debate, SB24, Feb. 2, 1989, Day No. 25, 48th Legislature, Tape No. 25.

Refusing to apply §78-18-1(2), the trial court considered the statute "not applicable" but "prospective only" for "reasons" argued by the Plaintiffs. (M. Entry, R. 4:1398) On appeal, this Court gives no deference to the trial judge's interpretation of either the statute or to the admissibility of the evidence of Mr. Garner's wealth. These questions of law are reviewed by this Court under a "correctness standard." City of West Jordan v. Utah State Retirement Bd., 767 P.2d 530, 532 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Section 78-18-1 was enacted, effective May 1, 1989, and "applies to all claims for punitive damages that arise on or after that date." 1989 Utah Laws 717, §4. Plaintiffs argued, and the judge agreed, that their claims "arose" prior to the statute's effective date. However, Plaintiffs' own trial testimony was clear that while the mausoleum and partnership agreements were fashioned in 1987 and 1988, other dealings complained of and Plaintiffs' alleged "discovery" of the claimed "fraud" and misrepresentations occurred in May 1990, well after the effective date of the act. And, Plaintiffs' complaint was not even filed until July 1990.

Defendants submit that in order for Plaintiffs to avoid the release provisions of the Redemption Agreement, which was executed in March 1989, Plaintiffs must establish that their claims did not arise until their alleged discovery of the facts in 1990. If, as Plaintiffs argued to the trial court to avoid bifurcation, their claims "arose" before May 1989, then such claims also arose prior to and were released by Plaintiffs in their March 1989 Redemption Agreement. If, as Plaintiffs now contend, their claims were still undiscovered when the March 1989 Release of Claims was given and Plaintiffs could not have released claims they did not discover until May 1990 or later, then these punitive damage claims are subject to the bifurcated trial procedure mandated by §78-18-1.

Subsection (2) of §78-18-1 is also "procedural" in nature because it prescribes a bifurcated trial <u>procedure</u> by

which Plaintiffs' substantive fraud and damage claims are to be considered. Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475, 478 (Utah 1986). Accord Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909). There is nothing "substantive" or "prospective-only" in this statute that would enlarge or eliminate Plaintiffs' right to show exemplary damages. To require Plaintiffs to recognize Defendants' right to a fair consideration of Plaintiffs' claims by a jury, untainted by irrelevant evidence of wealth, should not be applied "prospective-only." Because a procedural statute applies not only to future actions but to accrued and pending actions as well, §78-18-1(2) was in effect during the entire pendency of this action and should have governed the trial procedure.[15] Liability for punitive damages should have been first determined before any reference to or evidence of Defendants' wealth was presented to the jury.

We submit that this bifurcated trial statute, which was effective over one year prior to the filing of the Complaint in this action, was specifically intended to apply to trials, such as this case, involving complex business transactions and investments and strong emotions. Plaintiffs seek damages astronomical to an average juror, and taint Defendant as a "multimillionaire" before the first witness even takes the stand. Any contention that the jury would not be influenced by

---

[15] Docutel Olivetti Corp., 731 P.2d at 478; Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948).

Defendants' wealth when they later considered Plaintiffs' parroting cries of fraud is incredulous.

Before the trial, Plaintiffs indignantly insisted that "profound reasons" of policy, "pragmatic realities," and "past practice" precluded the application of this statutorily-mandated bifurcation. (Mem. Opp., R. 3:1266-67) Instead of sound analysis and discussion of those "reasons" and "realities," Plaintiffs provided only derogatory invectives. Plaintiffs viewed their own selfish interests and refused to recognize that defendants also have legitimate rights and interests to be protected and balanced against plaintiffs'. The only substantive objections Plaintiffs voiced against bifurcating the substantive issues from the punitive damages were allegations of delay, piecemeal litigation and "past practice." These objections to bifurcation have been soundly rejected by both cases and commentators.

To require a jury first to find that a plaintiff is entitled to a punitive damage award before any evidence of wealth is considered does not materially delay or "piecemeal" the trial proceeding. Any such inconvenience is, at worst, minor, particularly when compared to the prejudice the defendant suffers from the current method the court employed.[16] There is no delay when discovery of wealth is allowed (after a prima facie showing)

---

[16] Campen v. Stone, 635 P.2d 1121 (Wyo. 1981). Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975); Cf. Miller v. O'Neill, 775 S.W.2d 56 (Tex.Ct.App. 1989) (quoting Campen with approval in upholding the trial court's ordered bifurcation).

at the pretrial discovery stage. There is no delay when a jury decides punitive damages should be awarded. A plaintiff can immediately submit evidence of a defendant's wealth before the same jurors and allow the jury immediately to deliberate further on the proper amount to be awarded. Powell and Leiferman, "Results Most Embarrassing: Discovery and Admissibility of Net Worth of the Defendant," 40 Baylor L.Rev. 527, 544 (1988).

Bifurcation of trial proceedings may well enhance "speedier" litigation overall because the original proceeding is quicker, with less disruption given to irrelevant matters. Any need to hear or consider evidence regarding the amount of punitives later is eliminated when the evidence shows that an award would be unjustified. A defendant's rights are recognized and a plaintiff's claims are still considered in their proper context. Balance between the competing interests is preserved. Bifurcation of punitive damage issues is "sound rationale."[17]

The bifurcation of punitive damage issues or other means of limiting the admissibility of a defendant's financial condition is neither novel or unique. Several states have enacted statutory provisions which similarly restrict the admissibility and/or discovery of a defendant's financial

---

[17] 44 Alb.L.Rev., at 442-3. See also 40 Ala.L.Rev. at 999-1007 (Bifurcation alleviates juries' confusions and is either required by statute or allowed by discretion in most jurisdictions).

condition where claims for punitive damages are asserted.[18] Other state courts have led the way in balancing and protecting both defendant's and plaintiff's interests in the absence of legislative action. See Campen v. Stone, 635 P.2d 1121 (Wyo. 1981); Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.Supp.2d 904 (1975); Gierman v. Toman, 77 N.J.Super. 18, 185 A.2d 241 (1962).[19]

Defendants submit that they are equally entitled to the same fair and unprejudicial hearing of the claims and defenses in this case as Plaintiffs. The trial court's refusal to bifurcate the proceeding and to preclude evidence of Defendants' financial condition until after a finding of liability was prejudicial error as a matter of law. The jury's verdict was clearly tainted

---

[18] Iowa Code Ann. §668A.1 (West 1991) (A prima facia case of "willful, wanton disregard" required to admit wealth evidence); Md. [Courts and Judicial Proceedings] Code Ann. §10-913 (1988) (Evidence of financial condition not admissible until liability found); Minn. Stat. Ann. §549.20 (West 1983) (Liability and damages shall be first awarded before admission of wealth evidence); Mo. Ann. Stat. §510.263 (Vernon 1987) (Wealth evidence admissible only in second proceeding); Mont. Code Ann. §27-1-221(7) (1978) (Wealth evidence not admissible in liability phase of trial and must be considered in a separate proceeding); Or. Rev. St. §41.315 (1989) (Prima facia evidence required before admission of wealth evidence).

[19] See also Miller v. O'Neill, 775 S.W.2d 56 (Tex.Ct.App. 1989) (The trial court did not abuse its discretion in bifurcating the issue of punitive damage and wealth evidence.); Hanners v. Balfour Guthrie, Inc., 589 So.2d 684 (Ala. 1991) (Evidence of wealth is inadmissible during the liability phase of a trial for the purpose of proving the amount of punitive damages to be assessed.)

by references to and evidence of the financial conditions of Defendants and of even a non-party.

B. **The Punitive Damages Awarded are Excessive and Result from the Jury's Passion and Prejudice.**

The jury awarded Plaintiffs $1.8 million in punitive damages. The sheer size of this award alone requires careful scrutiny consistent with the criteria for such awards. Crookston, 817 P.2d at 808-13. While Defendants did challenge the size of this award in a post-verdict motion for relief (R. 5:1920-22, 1937-67), the trial court upheld the award and denied the post-verdict motion, based only upon Plaintiffs' arguments in response to the motion. (R. 6:2181-2219, 2533-37)

Remittitur of a punitive damage award is appropriate when, inter alia, (1) the award exceeds the proper ratio, (2) there is a "lack of intent or a low degree of malice," or (3) "a substantial risk of bankrupting the defendant" exists. Id. at 811-12. Where the amount of punitives exceeds $100,000, then even a ratio less than three-to-one indicates "some inclination" by this Court to overturn or reduce the award. Id. at 810-11.

The jury measured the legal damages for the "fraud" at $447,034.00, the difference of the Mausoleum's value, as represented by Defendants, over the Mausoleum's actual fair market value. (Verdict, ¶ IV, A, 1; Add. "F") The $1.8 million punitive award is more than four times these legal damages assessed for the "fraud."

The trial court erroneously justified this award on the ground that the punitives were less than the $2.4 million awarded under Plaintiffs' rescission and restitution theory. However, Defendants submit that the only proper measuring stick for punitives is the amount of legal damages, and not the amount awarded as restitution. Plaintiffs' "restitution" included over $1 million in investment interest and costs of operating the Mausoleum while in Plaintiffs' exclusive control and possession. (Exh. 89 - App.) Given Defendants' lack of control over these expenditures, no legitimate, salutary purpose can be served by punishing Defendants for Plaintiffs' mismanagement decisions.

Even if one accepts Alldredge's self-serving testimony that the construction of wood crypts was misrepresented, there is no evidence of malice. Defendant Garner has had a long-standing preference for the natural warmth of wood as a construction material. (Tr.IX:4592) He was proud of wood and extolled its benefits, prompting reference to Mr. Garner as an "innovator." (Tr. IX:4652, 4655)

And, as already argued herein, the wood construction of the outdoor crypts was not a material issue. Defendants had earlier left the crypts open for public view for a period of almost two years during their construction. Defendants never prevented Plaintiffs from discovering the construction or composition, and had even invited Plaintiff Alldredge to participate in an entombment where the inner construction material was plainly evident. Mr. Garner's representations as claimed by Plaintiffs

could not have been "intended" to harm Plaintiffs or others when the plan at the beginning was to have Plaintiff Ong own 50% of the stock in the Mausoleum, Garner owning 25%, Alldredge 10%, and the corporation to continue to own and operate the mausoleum business. (Exh. 111) It was later changed to a partnership. (Exh. 28 - App.)

Finally, the total award in this case, including the component for punitive damages, comes very close to achieving not recompense, but Mr. Garner's financial bankruptcy.[20] At trial, Mr. Garner had less than $2 million in liquid assets. (Exh. 91 - App.) His non-liquid assets were not easily convertible to cash. Mr. Garner outlined his current financial situation to the trial court with his belief that he must pursue relief in the bankruptcy court if forced immediately to liquidate his assets. (R. 5:1980-84, ¶¶ 4, 6) Only with assistance of his wife was he ultimately able to post a supersedeas bond that saved him from forced execution sales of all his assets. Even so, he has had to pledge everything he has as security for the bond. (R. 7:2610-13) As this Court is aware, Plaintiffs rejected Mr. Garner's offer to pledge all of his assets to Plaintiffs as a supersedeas bond on appeal.

---

[20] See Ace Truck & Equipment Rentals, Inc., v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987) (A punitive award of 30 percent of defendant's net worth is far in excess of that reasonably necessary to punish defendant and deter others); National Bank of Monticello v. Doss, 141 Ill.App.3d 1065, 491 N.E.2d 106 (4th Dist. 1986), later proceeding 163 Ill.App.3d 1057, 517 N.E.2d 321 (1987) (The bankruptcy of the defendant serves no useful purpose and would smother the message that the jury intended to send by their punitive damage award).

If punitive damages serves any purpose of punishment, the award in this case is overkill. A punitive damage award should not have the vindictive result of destroying Defendants financially. The jury's punitive damage award could only have resulted from passion and prejudice against Defendants. The award should be vacated and a new trial ordered that will comply with §78-18-1(2) and this Court's decision in Crookston.

POINT III

THE VERDICT IS A PRODUCT OF PASSION AND PREJUDICE

A. Inconsistency of Verdict and Jury Confusion.

1. Conversion Claim.

When the jury first returned its verdict, it found no conversion of partnership assets (Tr. XI:4829). However, the jury also "found" $512,098.00 damages "as a natural and direct consequence of the conversion of assets by Keith E. Garner." (Tr. XI:4831) When this inconsistency was drawn to the jury's attention the jury foreperson tried to explain the inconsistency but could not. (Tr. XI:4833-35) At the court's suggestion the jury then went back to deliberate. (Tr. XI:4835) When it returned in a few moments the jury had changed its answer on the liability question to find conversion, thereby purporting to justify the awarded damages. (Tr. XI:4835-37 - Add. "E")

The only factual basis for Plaintiffs' claim of conversion regarded certain crypts in the indoor mausoleum that were allegedly converted by Garner for his own use during the existence of the partnership. (Complaint, ¶¶ 55, 56; R. 1:15)

At trial, Mr. Garner and Susan Stewart testified that prior to the partnership formation Mr. Garner owned a "family room" of crypts valued at $75,000.00. (Tr. VIII:4342-3; IX:4601-09) This was shown on the inventory of unsold crypts furnished to Plaintiffs. (Exh. 28, p.D1100082 - App.; Cf. Exh. 202) Garner had decided to return the family room to the unsold inventory in exchange for various other individual crypts

in the indoor mausoleum also having a value up to $75,000.00. (Tr. IX:4606-08) Garner further testified that this exchange was reviewed with Plaintiffs in March 1988 in Hong Kong. No objection to the exchange was ever raised. (Tr. VIII:4342-43; IX:4602-3) Plaintiffs claimed the exchange was never disclosed to them until just before the Redemption Agreement was signed. (Tr. II:3104-05)

Ms. Stewart testified that at Alldredge's request she prepared a list of crypts involved in the exchange, which specified those gifted and those not yet given. (Tr. IX:4616-17, 4619; Exh. 205)

Regardless of whether this exchange was ever approved by Plaintiffs, it is undisputed that Alldredge not only knew that Garner had transferred some of these crypts, but Alldredge had also confronted Garner about the matter before the Redemption Agreement was signed. (Tr. II:3097-98) The release language of the Redemption Agreement clearly covered this matter.

Plaintiffs' claim for conversion and the jury's verdict are not supported by the evidence. Defendants have no liability for any alleged conversion of crypts or any other partnership assets. When the jury changed that answer to find liability for conversion, it did so without any valid basis in the evidence.

The $512,098.00 conversion damage also is without any evidentiary support in the record. As noted, the only evidence concerning this matter was that, at most, there were one dozen crypts used by Garner. (Tr. II:3099) Their value would not have

exceeded $48,000.00. (Tr. II:3105) How then did the jury reach a figure of $512,098.00 if not by improper means of passion and prejudice? There was no evidence of any other partnership assets that Plaintiffs claimed were converted. Either this lack of evidence coupled with the evidence of Defendants' wealth impassioned and prejudiced the jury or else so sorely confused them that their verdict cannot stand.

2. Fiduciary Duty Claim.

A similar lack of material, relevant evidence defeats Plaintiffs' claims for breach of fiduciary duty. Mr. Alldredge testified he was not given the management authority he was entitled to during the early months of the partnership. (Tr. II:3035) Also, that when the "joint venture" was terminated and Defendants vacated the Mausoleum, they did not leave all the business records of operation. Susan Stewart testified that all partnership accounting information was available when Defendants left. (Tr. IX:4614) Plaintiffs fail to show how such can be a "breach of fiduciary duty." Notwithstanding any conflict of evidence, such evidence cannot in any way justify a claim of breach of a "fiduciary duty."

More importantly, there was no evidence by which the jury could determine any damages for any alleged breach of fiduciary duty. In short, the jury could only speculate as to the amount of such damages, if any. Their speculation is simply reversible error. Canyon Country Store v. Bracey, 781 P.2d 414,

418-19 (Utah 1989) (reversing award for lost profits for lack of adequate proof of the fact of loss, causation, and the amount lost).

3. "Consequential Damages"

The jury's award of $1,165,022.00 in connection with the rescission as the amount necessary to put Plaintiffs back in their position before entering the partnership includes $87,860.00 as a claimed "return on investment," in addition to interest allegedly paid on borrowed funds. (Exh. 89 - App.) Plaintiffs claimed $603,472.00 in "cash advances" to operate the Mausoleum and $473,690.00 for interest paid by Plaintiffs on those cash advances and other amounts invested in the Mausoleum. The balance of the jury's "restitutionary" award is $87,860.00, the amount speculated as a "reasonable rate of return" on the money borrowed in the event they would have borrowed it and invested it elsewhere. Such an award is hardly "restitution." It is a vindictive windfall to Plaintiffs.

We find no Utah authority that a party is entitled, as an element of rescission, to any more than what was actually paid and, when appropriate, interest thereon.[21] We do not find any Utah authority that can justify a speculated return on some speculated investment as a part of restitution damages.

---

[21] See Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986) (In rescission, the buyers are returned to the "status quo" and to recover the payments made on the contract, less the fair rental value of the premises for their time in possession.)

Defendants submit that this inquiry is so inherently speculative that it cannot support the award of $87,860.00 as "restitutionary" compensation. Canyon Country Store v. Bracey, 781 P.2d at 418-19.

B. The Verdict was Prejudicially Tainted by Erroneous Rulings and Comments by the Trial Court.

1. Inadequate and Untimely Election of Remedies by Plaintiffs.

The trial court never required Plaintiffs to elect either rescission or damages as their remedy. Although Plaintiffs finally and reluctantly purported to elect their remedies just prior to trial, they continued to claim rescission against Defendant 11th Avenue Corporation as well as the benefit of their bargain (e.g., "legal" damages) against Defendant Garner. (R. 3:1208-11) Their purported election was really no election at all. The trial court refused to enforce any choice of remedies and thereby advantaged Plaintiffs with the best of both worlds.

Plaintiffs were allowed to present the opinion of an appraiser, Mr. Lang, that the Mausoleum had a present negative net worth. (Tr. VI:4063) Such evidence would be irrelevant to rescission, had Plaintiffs really elected that remedy. Plaintiffs were also able to explore various economic theories as fraud damage awards through such witnesses as Cramer Stiff, the "sales consultant," and Grant Caldwell, and trial exhibits 82 and 90. This significant additional testimony of exploratory economic theories of damages undoubtedly confused the jury and

encouraged them to escalate the damage awards. Such evidence was irrelevant and inadmissible, yet Defendants' objections thereto were overruled by the trial court. The court allowed Plaintiffs to proceed with inconsistent remedies all through the trial.

To allow Plaintiffs to choose their remedy then ignore their election, and allow them to advance on both fronts, permits a "double recovery" and engendered the confusion and excess that permeates the verdict. "Election of Remedies" doctrine is intended to "prevent double redress for a single wrong" and "presupposes a choice between inconsistent remedies," foregoing all others. Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979).

2. Prejudicial Trial Rulings and Comments by Trial Court.

Numerous rulings and comments, as well as the demeanor of the trial judge during the trial, improperly influenced the jury with the court's bias and predilections. Individually, each situation may not appear significant, but as a whole they wove a tight curtain between Defendants and the jurors. This fabric underscores the prejudicial nature of the trial court's other errors argued in this brief. Some of those errors, listed in the order of their occurrence, are:

a. The court erred in refusing to receive as exhibits certain real estate listing agreements to sell the Mausoleum property signed by Plaintiff Alldredge in 1990-91, after his complaint was filed. (Proposed Exhs. 213-16) This evidence

showed that Plaintiffs continued to exercise dominion over the property and that their earlier rescission demand had been waived. (Tr. III:3299-3301)

b. The court unduly restricted Defendants' cross-examination of Roger Evans, the Director of Building and Housing Services for Salt Lake City. Evans supervised the issuance of building permits and inspections made pursuant thereto. He testified on direct examination by Plaintiffs' counsel that his office had voided a building permit for the outdoor garden pavilions in early 1987, and that such permit had not since been activated (Tr. IV:3485-86). The court refused to allow Defendants' counsel to cross-examine as to whether the wood construction of the crypts was any bar to having the building permit renewed. The court opined that Evans was not the right witness to answer that question. (Tr. IV:3491-93; VIII:4441)

c. Robert Ord, the licensed contractor engaged to build the outdoor garden pavilions and crypts, was not allowed to explain to the jury why he thought wood was an acceptable and appropriate building material for this construction. The court refused the evidence because Mr. Ord had never before built crypts, but then demeaned the witness and his experience and qualifications by adding: "Building a tree hut from wood might be one thing, but building crypts is quite another." (Tr. IV:3548) Mr. Ord's experience as a building contractor certainly qualified him to testify about the quality and durability of wood as a building material. Similarly, the court

demeaned the testimony of Mr. Lucero, who built the outdoor crypts, by stating, gratuitously: "This man is a cement worker or wood worker." (Tr. IV:3470-71)

d. When Mr. Garner testified on direct examination as an adverse Plaintiffs' witness, the court referred to the proceedings as a "three-ring circus" when Mr. Garner attempted to explain his answers to counsel's examination questions, and the court continued to interrupt Mr. Garner's answers. (Tr. V:3682, 3688, 3691)

e. When Defendants' attorney objected to Plaintiffs' Exhibit 105, a corporate tax return, the court of its own volition and without any prompting or prior foundation, queried whether "the thrust of this questioning is to establish an alleged under-reporting to the I.R.S.," implying to the jury that "multi-millionaire" Mr. Garner was also cheating the government. (Tr. V:3700) The court refused to receive the tax return (Tr. V:3701), but most certainly damaged Defendants more by the unrestrained comment.

f. During cross-examination of Steven Nielson, an insurance agent, and Ms. Lenois, a former employee of an independent sales group that had sold crypts in 1984 and 1985, the court refused to allow Defendants to show the bias and prejudice of these witnesses. (Tr. V:3795-96; VI:3946) This unjustified abridgement impinged Defendants' right of cross-examination. Utah Rules of Evidence 607, 608(c); Utah Code Ann. §78-24-1; State v. Leonard, 707 P.2d 650, 656 (Utah 1985).

Plaintiffs then argued to the jury in closing argument that Lenois and Nielson were neutral and unbiased witnesses, while Defendants' opposing witnesses were all friends of Mr. Garner and part of his "circus of fraud." (Tr. X:4731-32, 4739, 4741, 4761, 4764) However, when the shoe was on the other foot, the Court allowed Plaintiffs to pursue possible bias of Defendants' witnesses, even suggesting that the "credibility" of the witnesses was in doubt. (Tr. VIII:4317, 4359)

g. Plaintiffs' accountant expert was allowed to opine: "There's obviously legal obligations involved in connection with those who have purchased the dysfunctional crypts." (Emphasis added.) (Tr. VII:4161-62) Counsel's motion to strike the gratuitous characterizations was denied, suggesting to the jury that the trial judge agreed that the crypts were "dysfunctional."

h. The trial court received in evidence Exhibits 317 and 318, containing summaries of Mr. Garner's tax returns, filed jointly with his wife. The returns and the resulting summaries (Exhs. 317, 318 - App.) also reflected Mrs. Garner's separate income and assets. (Exhs. 317, 318 - App.; Tr. VII:4235-6)

i. When defense counsel asked Dr. Schroeder, a professor of wood chemistry at Colorado State University, to explain the properties of wood and its suitability for outdoor garden crypts, Plaintiffs objected to the testimony as "immaterial." The court challenged Defendants' counsel and captiously asked whether he was attempting to show that "when the

plaintiffs bought concrete and got wood, they got a bargain? Is that what you are telling me?" (Tr. VII:4258-60) Taking the court's cue, this "bargain" theme was later hammered home in Plaintiffs' closing argument. (Tr. X:4761-62)

j. Later during the direct examination of Dr. Schroeder, the court refused to allow him to describe what he meant when he said the wood in the crypts was "durable." (Tr. VII:4257-58) The court asserted that the "durable" nature of the wood was irrelevant, even though Defendants argued that Plaintiffs were required to show that the claimed misrepresentations were material. (Tr. VII:4257-58) Plaintiffs consistently attempted to suggest that wood crypts were not adequate. (Tr. II:3096; VII:4097-99; X:4738-39)

Materiality is an indispensable element of a claim of fraud and negligent misrepresentation. Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980); Price-Orem Investment Co. v. Rollins, Brown & Gunnell, Inc., 713 P.2d 55, 59 (Utah 1986). Defendants were allowed only to proffer the remaining testimony of Dr. Schroeder (Tr. VII:4260; Tr. Aug. 21, 1991:4495-99), which proffer was rejected by the court. (Tr. IX:4707-08)

k. The court improperly struck the testimony of Mr. Reaveley, a structural engineer, who explained that the crypts were constructed in a workmanlike manner. The court concluded that Mr. Reaveley's qualifications and experience as a structural engineer were insufficient foundation.

(Tr. VII:4276-77) Such a decision far exceeded the bounds of a reasonable exercise of discretion.

l. The court allowed Steve Nielson (an insurance agent who "toured" the Mausoleum while considering possible insurance coverage) to testify that Mr. Garner said the crypts were built like a "bunker." (Tr. V:3765, 3788) Conversely, the court struck "as irrelevant" the testimony of Mr. Landvatter, another insurance broker who was also present on the same "tour" as Mr. Nielson to the effect that Mr. Garner was referring to the older, main Mausoleum building when the statement was made. (Tr. VIII:4313-14)

m. After allowing Plaintiffs' attorney wide latitude in his examination of Mr. Garner, the court unduly restricted Mr. Garner's testimony on cross-examination and sustained Plaintiffs' objections. For example, in one such instance Mr. Garner was asked to describe how he was able to explain to Plaintiffs in the April 1987 tour of the premises that wood was an appropriate material for crypts:

> Q. [by Mr. Nielsen] Now, at that particular time, what was the stage of the outdoor pavilions?
>
> A. [Mr. Garner] They were all completed except we had a shortage of some 80-100 marble frontings and they had not been placed in the various pavilions.
>
> Q. What result did that have with reference to the observation or [of] the inside of these crypts?
>
> A. Well, I was able to explain to them I'd designed the outdoor pavilion, and that it was -- made it appropriate to use wood in the interior for the housing of the coffins.
>
> Q. Why was that? How was that accomplished?

A. Well, I told [them] the building -- I'd never seen one like this where we create a shell made out of reinforced concrete and steel and then put a Bartile roof on it, and I put a six-foot overhang on the one end of it and that protected the crypts on the inside, I called the crypts. It wasn't like a closed-in mausoleum. It was open. We had nature's air conditioning. We had fresh air. We had the weather. We had no electrical. And whenever I had seen outdoor crypts in the past, after a few years marble looses its luster and this way it would be beautiful forever, and I was proud of it. I still am.

Mr. Campbell: Just a minute. Wait a minute. Your Honor, I object to that. This is a speech. We're suppose to be talking about now some --

The Court: Non-responsive?

Mr. Campbell: It's non-responsive.

The Court: Objection is sustained.

(Tr. VIII:4322-23)

n. When Mr. James Richards, Mr. Garner's attorney in 1989, testified that the release language of the Redemption Agreement was supplied by Plaintiffs' California attorney, the court allowed Plaintiffs' counsel to quote from court decisions in cross-examining Mr. Richards as to whether he was aware of those specific statements of Utah law at the time he helped draft the Redemption Agreement. The court permitted Plaintiffs' counsel to continue reading, even after Mr. Richards said that he had not specifically researched the issue of releasing claims for fraud. (Tr. VIII:4483-4489)

o. Plaintiffs' attorney was permitted on cross-examination to inquire of Mr. Funk whether he had testified for Mr. Garner as an expert in prior cases. (Tr. IX:4536-8) Not

only did counsel intend to impugn Mr. Funk's credibility as an expert, but also to suggest that Mr. Garner had been a defendant in prior cases. However, on redirect, Defendants' counsel was not permitted to ask Mr. Funk further regarding the occasions in which he had previously testified as an expert witness. The court sustained Plaintiffs' objection as "irrelevant." (Tr. IX:4570)

Under similar circumstances, this Court has found such a ruling to be prejudicial error requiring a new trial. King v. Barron, 770 P.2d 975, 977-980 (Utah 1988). The same result and reasoning apply here.

p. Dr. Burtis Evans, a prominent local physician who was also a friend of Mr. Garner, testified that he had been with Mr. Garner and Mr. Alldredge in July 1987 at the outdoor garden pavilions when Mr. Alldredge was told by Mr. Garner about the wood crypts which Alldredge then observed. (Tr. IX:4650-55) During that examination, the court undermined Dr. Evans' credibility by several rulings and comments. (Tr. IX:4654, 4671-72, 4677-78, 4684-85) Plaintiffs' counsel was permitted to comment to the jury in closing argument on the court's "admonishments" to Dr. Evans:

> [a]nd then we have this bizarre piece of evidence from Burtis Evans, and I submit to you this is [a] man that came into this courtroom yesterday and he was going to set the record straight, he was going to tell us all about this question. He couldn't answer a question, no matter how simple it was, I think virtually if his life depended on it. The Court admonished him at least a half a dozen times. We took twice as long examining because most of the time it simply was to ask him the same question twice.

(Tr. X:4745-46)

q. Finally, the trial court's hostility toward Defendants, or his own confusion of the evidence, is well exemplified in his Memorandum Decision denying Defendants' motion for new trial. The court's comments therein express the court's view of the evidence that cannot be supported by the record herein. First, the Court stated:

> Certain of Garner's assets were misrepresented at trial which misrepresentation was established by cross-examination. Garner testified on direct examination that his wife was awarded the La Jolla, California residence in their 1982 divorce. When confronted with the original divorce file showing Garner was awarded the property, his original statement was retracted.

(R. 6:2534; Add. "G")

At trial, Mr. Garner truthfully answered that the La Jolla home was in his wife's name. When asked whether she received it in the divorce proceeding, Mr. Garner answered "I think it was, yes." (Tr. V:3714) Then, after a lunch break, Plaintiffs were allowed to recall Mr. Garner to the witness stand to further pursue the matter. Upon further examination Mr. Garner agreed that the original divorce decree had awarded the La Jolla home to him. (Tr. V:3734) When given an opportunity to explain himself, Mr. Garner testified that he had assumed certain liabilities in the divorce which had not materialized. To help even out the stipulated property division in the divorce, he had assigned the La Jolla home to his former and again current spouse, in a later property agreement.

(Tr. V:3736) Yet, the trial court claimed Mr. Garner's answers were "misrepresentations."

r. On a subsequent page of his decision, the court stated that "Garner misrepresented the nature of the plywood crypts to everyone necessary to advance his fraud, including customers, insurance agents, building inspectors, his own staff, and his partners." (R. 6:2535 - Add. "G") The record is devoid of any evidence that Garner misrepresented the wood nature of the outdoor crypts to any customer, his own staff or building inspectors. The only testimony of any misrepresentation by Mr. Garner came from Plaintiffs and Steve Nielson. The latter testified that in May or June, when he saw the outdoor pavilion, the crypts were all covered with marble, which could not physically have occurred because the marble did not arrive until August 1987. (Tr. V:3773-74; VIII:4446) Moreover, Nielson acknowledged having earlier seen the wood crypt frameworks. (Tr. V:3794-95)

s. The trial court continued, commenting on "the effect on the lives of the hundreds of crypts owners who believed they had purchased cement rather than plywood crypts for themselves and loved ones. This case presents a serious fraud on the public as well as Ong." (R. 6:2535-36) The only purchasers of outdoor crypts who may have received something different than what they believed were Mr. and Mrs. James Cummings. (Tr. VI:4023-25) They did not receive any representation from Mr. Garner, but learned what they did from an independent

salesperson in 1984, as supplemented by a letter from Sandy Lenois in 1985. (Tr. VI:4017-18, 4023-27; Exh. 70) Ms. Lenois likewise did not get her information from Mr. Garner. (Tr. VI:3939-40) For that reason, Defendants had earlier filed a motion in limine to exclude such testimony (R. 2:830-43) which was denied. (R. 4:1398) In any event, two people are not "hundreds." Dr. Kovalenko and his wife, both crypt purchasers, were told they were getting crypts to be constructed of wood before they were even built and later saw the wood crypts during their construction. (Tr. VIII:4387-88)

There is no evidence that any crypt purchaser was ever prevented from similarly viewing the crypts during the course of construction, even if any original explanation of the crypts' nature at the time of purchase was ambiguous, which the evidence did not show. The court's hostility to Defendants was just as readily apparent to the jury during the trial as it is apparent in the hyperbole of the Memorandum Decision. (Add. "G" - R. 6:2532-38)

The trial court allowed itself to be taken in by Plaintiffs' abundant innuendo. The court's jaundiced view was undoubtedly a significant factor in its rulings and in the jury's perception of those rulings. Such rulings, collectively if not individually, could only have influenced the jury against Defendants, notwithstanding a jury instruction that the jurors were the "sole judge of the facts." (Jury Instr. 3; R. 5:1795)

POINT IV

THE COURT'S SUPPLEMENTAL JUDGMENT IMPROPERLY AWARDS PLAINTIFFS' LITIGATION EXPENSES WHICH ARE NOT TAXABLE COSTS

A trial court abuses its discretion when it awards as costs expenses which are not allowed by statute, rule, or case law, no matter what the necessity was for such expense. Frampton v. Wilson, 605 P.2d 771 (Utah 1980). Most recently, in Cornish Town v. Keller, 817 P.2d 305, 316 (Utah 1991), this Court held that such necessary trial expenses as the cost of photographic exhibits, maps, and pre-trial hearing transcripts are not costs to be awarded to a prevailing party. Accord Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980) (Expert witness fees may not be taxed above the statutory rate).

In a "Supplemental Judgment" entered January 2, 1992, the trial judge awarded Plaintiffs "costs" of $12,260.00, which included deposition costs of $11,503.00, witness fees of $631.75, and Plaintiffs' $125.00 filing fee. (Cost Judgment, Add. "K") A significant portion of the cost award is allocated to "depositions" which Plaintiffs claimed were necessary for trial. However, under Frampton, deposition costs must be both (1) "taken in good faith and, in the light of the circumstances, appear to be essential for the development and presentation of the case," and (2) said depositions must also "relate to the examination of witnesses whose testimony is deemed essential to the trial, and

taken for potential uses testimony in the trial, . . ." Frampton, 605 P.2d at 774.[22]

In this case, a total of 43 people were deposed by both sides prior to trial. The court awarded Plaintiffs their expenses for every one of the depositions taken. At trial, Plaintiffs only called eight witnesses who were deposed at the Plaintiffs' request. (R. 6:2302, ¶7 - Add. "J") The depositions of three of those witnesses, Roger Evans, Steve Nielson and Sandra Lenois, were not at all necessary because Plaintiffs had already interviewed those witnesses prior to their depositions. The cost of these three depositions was $921.95.

As to the remaining five witnesses, Plaintiffs did not establish the essential use of those depositions at trial. Four of the remaining five were noticed for deposition even before Plaintiffs served their first set of interrogatories. (R. 6:2293-99 - App. "J") The cost of these four depositions was almost $2,000.00. (R. 6:2302, ¶ 7b - Add. "J")

Plaintiffs are not entitled to the expenses of taking depositions where they could have first sought what information

---

[22] See also Highland Constr. Co. v. Union Pacific R.R. Co., 639 P.2d 1042, 1051 (Utah 1984); Stratford v. Wood, 11 Utah 2d 251, 253, 358 P.2d 80, 81 (1961) (Survey costs in preparation of trial are not recoverable); Morgan v. Morgan, 795 P.2d 684, 686-87 (Utah App. 1990) (Witness fees, travel expenses and service of process expenses are chargeable only in accordance with statutory fee schedules); Redevelopment Agency of Salt Lake City v. Daskalas, 785 P.2d 1112, 1124 (Utah App. 1989) (Expert witness fees are not recoverable costs); Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988) (The costs for depositions not used at trial are not recoverable); Hatanaka v. K.E. Struhs, 738 P.2d 1052, 1055 (Utah App. 1987) (Survey costs are not recoverable).

they needed by way of other less expensive discovery request. Highland Constr. Co., 639 P.2d at 1051.

Plaintiffs requested and were granted costs of taking 14 depositions by them when the witness never testified in court, nor was the deposition used (R. 6:2302; Add. "J," ¶ 5) These costs amounted to $3,480.35. It was a clear abuse of discretion for the trial court to award Plaintiffs their deposition costs, as it did, for every person deposed by either side. The award of deposition costs should be vacated.

The trial court also allowed $631.75 in witness fees. (R. 7:6496; Add. "K") At least 21 of the witness fees paid by Plaintiffs exceeded the statutory rate of Utah Code Ann. §21-5-4 (1990). (R. 5:2078-79 - Add. "I") The court also awarded witness fees paid to ensure a deponents attendance at his or her deposition. A great many of these subpoena fees were not necessary, nor were the depositions, either because Plaintiffs had interviewed the witnesses before deposing them, because the witnesses would have appeared without subpoena and witness fee, or because the witnesses were never called to testify at trial. It is insufficient merely to cry that "oh, we might have had to use the deposition at trial had the witness not then appeared." As a matter of fact, they did not use the depositions "as testimony." Frampton, 605 P.2d at 774; see also Defendants' Memorandum Objecting to the Witness Fees, R. 6:2271-77.

Obviously the trial court did not properly scrutinize the costs Plaintiffs claimed. The court abused its discretion in not

more cautiously and judiciously examining the itemization of Plaintiffs' litigation expenses to eliminate all but those compensable under Utah law. The award of witness fees should be vacated, and if Plaintiffs are entitled to any costs whatever, they should receive only the costs in accordance with Rule 54(d) and the cases cited herein.

CONCLUSION

Because the release language of the Redemption Agreement was fairly negotiated at arms-length with the assistance of legal counsel, and it is clear and comprehensive enough to bar all of Plaintiffs' claims, the judgments entered below should be vacated and reversed, with an instruction to the trial court to dismiss all of Plaintiffs' claims with prejudice.

Alternatively, for any or all of the reasons specified, the judgments entered below should be reversed and the case remanded for a new trial with instructions to bifurcate the issue of punitive damages as required by law.

RESPECTFULLY SUBMITTED this 24th day of April, 1992.

Clark R. Nielsen
of HENRIOD, HENRIOD & NIELSEN
185 South State Street, #500
Salt Lake City, Utah 84111

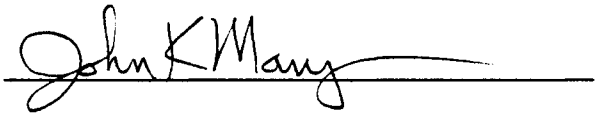
Arthur H. Nielsen
Gary A. Weston
John K. Mangum
of NIELSEN & SENIOR, P.C.
60 East South Temple, #1100
Salt Lake City, Utah 84111

Attorneys for
Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 1992, I served upon Plaintiffs/Appellees four true and correct replacement copies of the foregoing BRIEF OF APPELLANTS with attached Addendum by causing the same to be hand-delivered to the following:

Robert S. Campbell, Jr., Esq.
Clark W. Sessions, Esq.
Dean C. Andreasen, Esq.
CAMPBELL MAACK & SESSIONS
13th Floor, One Utah Center
201 South Main Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs/Appellees



Addenda

APPENDIX R

SHUPE WHITE

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST CO.
201 Bloomfield Avenue
Vernon, NJ 07044

RE: DELIVERY OF STOCK CERTIFICATES AND ESCROW ACCOUNT

Dear Mr. Manger:

Pursuant to the ten (10) enclosed opinion letters for Mssrs. Goldberg; Hammond; Jacobson; Lake; Lieberman; Mauro; Pagano; Rinaldi; Rosenthal; and Zipern (the **"Shareholders"**), I will inform you that the share certificates you issued to the Shareholders will be delivered to my escrow account. As soon as the shares represented by the share certificates are sold, Mr. Yagi will arrange for payment therefor in the amount of thirty-five thousand dollars ($35,000).

Your cooperation is assisting the Shareholders is greatly appreciated.

Very truly yours,

William R. Shupe

WRS/bk

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Bernard C. Zipern; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Bernard C. Zipern (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Bernard C. Zipern which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Zipern's knowledge, no members of Mr. Zipern's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Zipern paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Zipern is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Zipern on July 25, 1985, and have been held by Mr. Zipern in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Zipern's knowledge, no members of Mr. Zipern's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Zipern is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Zipern's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Seymour Rosenthal; Number of Shares held: 44,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Seymour Rosenthal (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Seymour Rosenthal which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Rosenthal's knowledge, no members of Mr. Rosenthal's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Rosenthal paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Rosenthal is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Rosenthal on July 25, 1985, and have been held by Mr. Rosenthal in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Rosenthal's knowledge, no members of Mr. Rosenthal's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Rosenthal is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Rosenthal's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Frank Rinaldi; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Frank Rinaldi (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Frank Rinaldi which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Rinaldi's knowledge, no members of Mr. Rinaldi's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Rinaldi paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Rinaldi is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Rinaldi on July 25, 1985, and have been held by Mr. Rinaldi in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Rinaldi's knowledge, no members of Mr. Rinaldi's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Rinaldi is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Rinaldi's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Frank X. Pagano; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Frank X. Pagano (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Frank X. Pagano which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Pagano's knowledge, no members of Mr. Pagano's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Pagano paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Pagano is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Pagano on July 25, 1985, and have been held by Mr. Pagano in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Pagano's knowledge, no members of Mr. Pagano's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Pagano is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Pagano's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Salvatore Mauro; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Salvatore Mauro (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Salvatore Mauro which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Mauro's knowledge, no members of Mr. Mauro's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Mauro paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Mauro is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Mauro on July 25, 1985, and have been held by Mr. Mauro in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Mauro's knowledge, no members of Mr. Mauro's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Mauro is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Mauro's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Daniel L. Liberman; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Daniel L. Liberman (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Daniel L. Liberman which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Liberman's knowledge, no members of Mr. Liberman's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Liberman paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Liberman is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Liberman on July 25, 1985, and have been held by Mr. Liberman in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Liberman's knowledge, no members of Mr. Liberman's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Liberman is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Liberman's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Walter J. Lake, Sr.; Number of Shares held: 46,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Walter J. Lake, Sr. (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Walter J. Lake, Sr. which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Lake's knowledge, no members of Mr. Lake's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Lake paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Lake is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Lake on July 25, 1985, and have been held by Mr. Lake in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Lake's knowledge, no members of Mr. Lake's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently onemillion sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Lake is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Lake's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Marc Jacobson; Number of Shares held: 50,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Marc Jacobson (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Marc Jacobson which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Jacobson's knowledge, no members of Mr. Jacobson's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Jacobson paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Jacobson is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Jacobson on July 25, 1985, and have been held by Mr. Jacobson in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Jacobson's knowledge, no members of Mr. Jacobson's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Jacobson is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Jacobson's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Richard Hammond; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Richard Hammond (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Richard Hammond which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Hammond's knowledge, no members of Mr. Hammond's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Hammond paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Hammond is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Hammond on July 25, 1985, and have been held by Mr. Hammond in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Hammond's knowledge, no members of Mr. Hammond's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Hammond is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Hammond's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Harvey M. Goldberg; Number of Shares held: 46,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the **"Company"**), you have requested our opinion (this **"Opinion"**) as to whether the shares of stock held by Mr. Harvey M. Goldberg (the **"Shares"**) under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Harvey M. Goldberg which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

3. That to the best of Mr. Goldberg's knowledge, no members of Mr. Goldberg's immediate family or others have sold any shares of the Company within the three (3) preceding years;

4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Goldberg paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Goldberg is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Goldberg on July 25, 1985, and have been held by Mr. Goldberg in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Goldberg's knowledge, no members of Mr. Goldberg's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

8. That Mr. Goldberg is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Goldberg's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

ADDENDUM

Addendum A

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

25 cy
1436015

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual,	COMPLAINT
Plaintiffs,	(Demand for Jury Trial)
vs.	
11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; and KEITH E. GARNER, an individual,	Civil No. 900904288CN Judge JUDGE J. DENNIS FREDERI
Defendants.	

Plaintiffs claim against the Defendants and for causes of action allege:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Ong International (U.S.A.), Inc. ("Ong, Inc.") is a Nevada corporation doing business in Salt Lake County, State of Utah.

2. Plaintiff D&D Management ("D&D") is a Utah corporation with its principal place of business in Salt Lake County, State of Utah.

3. Plaintiff David L. Alldredge ("Alldredge") is a resident of Salt Lake County, State of Utah, and is an officer, director and shareholder of D&D, and an officer of Ong, Inc.

4. Defendant 11th Avenue Corporation is a Utah corporation, formerly known as Salt Lake Memorial Mausoleum ("SLMM"), with its principal place of business in Salt Lake County, State of Utah.

5. Defendant Keith E. Garner ("Garner") is a resident of Salt Lake County, State of Utah, and is or was an officer, director or shareholder of SLMM.

6. Garner is the alter ego of SLMM and *vice versa*.

7. Subject matter jurisdiction of this action is present pursuant to Utah Code Ann. § 78-3-4(1). This Court has *in personam* jurisdiction.

8. Venue is properly laid in this Court pursuant to Utah Code Ann. § 78-13-1, 4 and 7.

BACKGROUND ALLEGATIONS

The Construction of the Mausoleum Pavilion

9. From at least 1984 through May 13, 1988, SLMM or its predecessor-in-interest, Utah Memorial Park Mausoleum (collectively "SLMM"), operated and conducted a mausoleum business located at 1001 East 11th Avenue, Salt Lake City, Utah. The business included entombment services in the mausoleum located at that address as well as crematory services.

10. On or about April 30, 1984, SLMM, by and through its agent, Arnold Fluckiger ("Fluckiger"), filed a Request for Variance from the Terms of the Zoning Ordinance (the "Request") with the Board of Adjustment of Salt Lake City, Utah, for the construction of an outdoor garden mausoleum pavilion consisting of five pods of concrete crypts containing 102 crypts per pod or a total of 510 crypts (the "Pavilion"). Fluckiger was also the architect retained by SLMM to design the Pavilion. SLMM represented in the documents and building plans submitted with the Request that the individual crypts of the Pavilion would be constructed of concrete.

11. On or about May 14, 1984, the Board of Adjustment granted the Request.

12. The Findings and Order of the Board of Adjustment specifically require that the construction plans conform to the

requirements of the Uniform Building Code and all other Salt Lake City ordinances applicable thereto and that SLMM comply with all conditions imposed by the Board before a certificate of occupancy or final inspection certificate would be issued.

13. On or about July 10, 1984, SLMM, by and through its agent, Robert M. Ord ("Ord"), filed a Building Permit Application (the "Application") with the Building and Housing Services Department of Salt Lake City Corporation (the "Building Department"), for the construction of the Pavilion. Ord was also the general contractor retained by SLMM to construct the Pavilion. SLMM represented in the documents and building plans submitted with the Application that the individual crypts of the Pavilion would be constructed of concrete.

14. On or about July 10, 1984, the Building Department approved the Application and issued SLMM Building Permit No. 30641 for the construction of the Pavilion.

15. Construction of the Pavilion commenced in or about August, 1984, but was not completed until sometime in approximately 1987.

16. On or about September 4, 1986, a Salt Lake City building inspector inspected the construction of the Pavilion and cited SLMM for a violation for the reason that individual crypts in the Pavilion were constructed of wood rather than pre-fabricated or

poured-in-place concrete as required by the zoning variance, the building permit and the construction plans. The citation required that SLMM obtain the approval of the Salt Lake City/County Board of Health for the construction and proposed use of wooden crypts before a certificate of occupancy or final inspection certificate would be issued.

17. On or about September 4, 1986, the building inspector filed a complaint with the Salt Lake City/County Board of Health alleging that SLMM's construction and proposed use of wooden crypts was in violation of the ordinances of Salt Lake City.

18. On or about January 9, 1987, the building inspector revoked the building permit previously issued, due in part to the fact that SLMM had not received approval from the Board of Health for the construction and proposed use of wooden crypts.

19. Contrary to ordinances of Salt Lake City and the law, SLMM and Garner or their agents, including Fluckiger and Ord, subsequently completed construction of the Pavilion with crypts constructed of either (1) all concrete, (2) all wood, or (3) horizontal concrete surfaces and vertical wood surfaces.

20. Salt Lake City has not issued a certificate of occupancy or a final building inspection certificate relative to the construction of the Pavilion. The building permit initially issued for the construction of the Pavilion is void.

21. Standards and practices in the mausoleum and crypt construction industry dictate that crypts be constructed of concrete, steel, stone or other materials not subject to decay or leakage of corrosive materials or fluids. Said standards and practices preclude crypts being constructed in whole or in part of wood.

The Salt Lake Memorial Mausoleum General Partnership Agreement

22. On May 13, 1988, SLMM, Ong, Inc. and D&D entered into a general partnership (the "Partnership") as memorialized in the Salt Lake Memorial Mausoleum General Partnership Agreement (the "Partnership Agreement").

23. The purpose of the Partnership was and is to operate, develop, manage and conduct the business presently known as the Salt Lake Mausoleum and Memorial Park.

24. Pursuant to the Partnership Agreement, Ong, Inc. made an initial capital contribution of $800,000.00 to the Partnership. SLMM contributed certain assets and liabilities having an assigned net value of $875,000.00. The assets and liabilities contributed by SLMM were the business assets and real property used in the mausoleum business including the Pavilion.

The Partnership Redemption Agreement.

25. On or about February 28, 1989, the Partnership, SLMM, Ong, Inc., D&D, Alldredge and Garner entered into a Partnership

Redemption Agreement (the "Redemption Agreement"). 26. Pursuant to the terms of the Redemption Agreement, including the specific representations and warranties of SLMM and Garner as specified in paragraph 12 thereof, the Partnership purchased SLMM's interest in the Partnership for $440,220.

27. Subsequent to the parties entering into the Redemption Agreement, Ong, Inc. has been required to make additional capital contributions to the Partnership in excess of $500,000 to fund obligations of the Partnership.

REPRESENTATIONS AND OMISSIONS

28. During the negotiation of the Partnership Agreement and the Redemption Agreement and as material inducements to the Plaintiffs to enter into such Agreements, SLMM and Garner represented to the Plaintiffs the following:

(a) The individual crypts in the Pavilion were of standard concrete construction, the same standard concrete construction as the "model crypt" in the indoor mausoleum of the Partnership as shown to the Plaintiffs and potential third party purchasers;

(b) The individual crypts in the Pavilion were constructed as required by industry standards and practices;

(c) The individual crypts in the Pavilion were constructed as required by the zoning, building, health and other applicable ordinances of Salt Lake City.

(d) SLMM and Garner were in the process of negotiating with Salt Lake County to reduce SLMM's real property tax liability in the amount of $38,000.00.

29. Each of the representations made by SLMM and Garner as described in the preceding paragraph were false in that:

(a) Substantially all of the crypts in the Pavilion are constructed entirely or substantially of wood.

(b) Industry standards and practices for the construction of mausoleum crypts require that the individual crypts be constructed of concrete, steel, stone or other materials not subject to decay or to leakage of corrosive materials or fluids.

(c) The construction of the Pavilion is in violation of the zoning, building, health and other applicable ordinances of Salt Lake City.

(d) SLMM and Garner were not in the process of conducting and did not subsequently conduct any negotiations with Salt Lake County which resulted in a reduction of SLMM's real property tax liability. The Partnership was required to pay Salt

Lake County taxes, penalties and interest in the amount of approximately $63,000.00.

30. During the negotiation of the Partnership Agreement and the Redemption Agreement and as material inducements to the Plaintiffs to enter into such Agreement, SLMM and Garner omitted and otherwise failed to disclose to the Plaintiffs the following:

(a) The building permit for the construction of the Pavilion had been revoked, the Certificate of Occupancy had not been issued and Board of Health approval for the use of wooden crypts had not been obtained.

(b) Substantially all of the crypts in the Pavilion were constructed entirely or substantially of wood.

(c) The construction of wooden crypts is precluded by and in violation of industry standards and practices.

(d) The construction and proposed use of wooden crypts is in violation of the zoning, building, health and other applicable ordinances of Salt Lake City.

31. SLMM and Garner have never disclosed to the Plaintiffs the facts alleged in the preceding paragraph, concealed such facts from the Plaintiffs and knew individual crypts in the Pavilion were not readily available for inspection by the Plaintiffs.

COUNT I

RESCISSION

(Predicated On Constructive Fraud)

32. Plaintiffs restate and incorporate by reference paragraphs 1 through 31, inclusive, of the Complaint.

33. During the negotiation of the Partnership Agreement and the Redemption Agreement, SLMM and Garner owed a fiduciary duty to the Plaintiffs and had a duty of good faith, fairness and honesty in dealing with the Plaintiffs due to the confidential relationship between the parties.

34. As a general partner of the Partnership, SLMM owed a fiduciary duty to Ong, Inc. and D&D. As the alter ego of SLMM, Garner owed a fiduciary duty to Ong, Inc. and D&D.

35. The representations of SLMM and Garner as alleged in paragraph 28 and the failure to disclose facts as alleged in paragraph 30 (hereinafter collectively the "Representations") concerned presently existing facts.

36. The Representations were material to the Plaintiffs relative to their respective decisions to enter into the Partnership Agreement and/or the Redemption Agreement.

37. The Representations were false or constituted an omission to state a material fact necessary in order to make the

statements made, in light of the circumstances under which they were made, not misleading.

38. SLMM and Garner made the Representations for the purpose of inducing the Plaintiffs to rely and act upon them and enter into the Partnership Agreement and the Redemption Agreement.

39. The Plaintiffs acted reasonably and in ignorance of the falsity of the Representations.

40. The Plaintiffs did, in fact, rely upon the Representations to their detriment and were thereby induced to enter into the Partnership Agreement and the Redemption Agreement to their injury and damage.

41. The Partnership Agreement, the Redemption Agreement and all ancillary agreements, releases, and waivers incident thereto, are null, void and are of no force and effect whatever by reason of Defendants' breach of fiduciary duties, misrepresentations and omissions as aforesaid.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

COUNT II

RESCISSION

(Predicated On Fraud)

42. Plaintiffs restate and incorporate by reference paragraphs 1 through 41, inclusive, of the Complaint.

43. SLMM and Garner acted with scienter by intentionally making the Representations knowing that the Representations were false, or recklessly making the Representations knowing that they had insufficient knowledge upon which to base the Representations.

44. The Plaintiffs did, in fact, reasonably rely upon the Representations to their detriment and were thereby induced to enter into the Partnership Agreement and the Redemption Agreement to their injury and damage.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

COUNT III

RESCISSION

(Predicated On Negligent Misrepresentation)

45. Plaintiffs restate and incorporate by reference paragraphs 1 through 44, inclusive, of the Complaint.

46. SLMM and Garner had a duty to use reasonable diligence and competence in ascertaining the veracity of the Representations.

47. SLMM and Garner breached their duty by making the Representations to the Plaintiffs without having used reasonable diligence or competence in ascertaining the veracity of the Representations.

48. The Plaintiffs did, in fact, rely upon the Representations to their detriment and were thereby induced to enter into the Partnership Agreement and Redemption Agreement to their injury and damage.

49. The injury and damage suffered by Plaintiffs were proximately caused by the breach of SLMM and Garner of said duty.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

COUNT IV

BREACH OF FIDUCIARY DUTY

50. Plaintiffs restate and incorporate by reference paragraphs 1 through 49, inclusive, of the Complaint.

51. SLMM and Garner breached their fiduciary duty by misrepresenting material existing facts and failing to disclose material existing facts as alleged herein.

52. The Plaintiffs did, in fact, rely upon the Representations to their detriment and were thereby induced to enter into the Partnership Agreement and the Redemption Agreement to their injury and damage.

53. The injury and damage suffered by Plaintiffs was proximately caused by the breach of SLMM and Garner of said duty.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

COUNT V

CONVERSION

54. Plaintiffs restate and incorporate by reference paragraphs 1 through 53, inclusive, of the Complaint

55. During the term of the Partnership, SLMM and Garner conveyed and transferred ownership of certain crypts to Garner and approximately 12 third parties, for which the Partnership received no consideration.

56. Neither the Partnership, Ong, Inc. nor D&D knew of or authorized said actions of SLMM or Garner in conveying and transferring said crypts.

57. The actions of SLMM and Garner as alleged in paragraphs 54 through 55 were intentional.

58. The actions of SLMM and Garner as alleged in paragraphs 54 through 55 have damaged the Plaintiffs in an amount to be proven at trial.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

COUNT VI

INDEMNIFICATION

59. Plaintiffs restate and incorporate by reference paragraphs 1 through 58, inclusive, of the Complaint.

60. Pursuant to the terms of the Redemption Agreement, SLMM agreed to indemnify the Partnership from all demands, liabilities, losses, damages including attorneys' fees and costs which the Partnership may sustain by virtue of acts which were done or omitted to be done by SLMM, prior to the date of the Redemption Agreement.

61. SLMM and Garner knew or should have known that the Partnership would sell and market crypts in the Pavilion to the general public.

62. SLMM and Garner knew or should have known that when it was discovered by purchasers of crypts in the Pavilion that the crypts were constructed of wood and in violation of the zoning, building, health and other applicable ordinances of Salt Lake City, claims would be made against the Partnership and the Plaintiffs relative thereto.

63. On information and belief such claims will be made for which indemnification is sought.

WHEREFORE, Plaintiffs pray for the relief set forth in the PRAYER FOR RELIEF.

PRAYER FOR RELIEF

Plaintiffs pray for the following relief:

1. On Counts I, II, and III, for rescission of the Partnership Agreement, the Redemption Agreement and all ancillary agreements, releases, and waivers incident thereto, and for restoration of Plaintiffs to their status quo prior to entering into the Agreements, including judgment against the Defendants for damages in an amount to be proven at trial to fully and completely restore Plaintiffs to their *status quo ante*.

2. In the alternative, on Counts I through VI inclusive, for an award of compensatory damages in an amount to be proven at trial but not less than $2.5 Million Dollars.

3. On all Counts, for indemnification of the Plaintiffs by the Defendants from any claim, demand, cause of action or liability as the result of Plaintiffs' involvement in or ownership of the Partnership or the mausoleum business conducted by the Partnership, including the sale of crypts in the Pavilion.

4. For punitive damages in an amount to be proven at trial of not less than $5 Million Dollars.

5. For reasonable attorney's fees and costs in prosecuting this action as proven at trial for all counts and causes of action.

6. For such further and additional relief as the Court deems equitable in the premises.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Utah Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues triable of right, common law and the Utah Constitution.

DATED this 15th day of July, 1990.

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL

CLARK W. SESSIONS

Attorneys for Plaintiffs

Plaintiff's Address:

1001 East 11th Avenue
Salt Lake City, Utah

00018

210409B.PL2

Addendum B

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual; Defendants.	**PLAINTIFFS' NOTICE OF ELECTION OF REMEDIES** Civil No. 900904288CN Judge J. Dennis Frederick

Plaintiffs, by and through their counsel of record herewith give Notice to the Defendants of their determination with regard to remedies as to each of the Defendants.

The Plaintiffs Ong International (U.S.A.), Inc., D & D Management, Inc., and David L. Alldredge herewith elect their remedies against the Defendants as follows:

1. Against Salt Lake Memorial Mausoleum, now called 11th Avenue Corporation, or against its alter-ego Keith E. Garner for rescission, consequential damages and punitive damages in accordance with the law of the case arising out of fraudulent misrepresentations of the Defendants;

2. Against Keith E. Garner, an individual, and inducer of the fraudulent misrepresentations for fraud, for direct benefit of the bargain damages, consequential damages and punitive damages;

3. Against Keith E. Garner and 11th Avenue Corporation for breach of fiduciary duties in the performance of the partnership, the damages thereof being the reasonable and natural injuries that are foreseeable arising from said breaches;

4. Against Keith E. Garner for conversion, embezzlement and misappropriation of partnership assets and properties, the damages being the fair market value of said assets to the partnership together with punitive damages.

5. Although not a matter of remedies, against the Defendants Keith E. Garner and/or 11th Avenue Corporation, for

recovery of reasonable attorneys fees and costs as to each of the claims, where appropriate and pursuant to law.

DATED this 22nd day of August, 1991.

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.

CLARK W. SESSIONS

Attorneys for Plaintiffs

01213

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that on the 5th day of August, 1991, a true and correct copy of the foregoing PLAINTIFF'S NOTICE OF ELECTION OF REMEDIES was hand-delivered to:

Arthur H. Nielsen, Esq.
Gary A. Weston, Esq.
John K. Mangum, Esq.
NIELSEN & SENIOR
Attorneys for Defendants
60 East South Temple, #1100
Salt Lake City, Utah 84111

Kathleen Logsdon

01211

Addendum C

Arthur H. Nielsen, USB No. A2405
Gary A. Weston, USB No. 3435
Richard M. Hymas, USB No. 1612
John K. Mangum, USB No. 2072
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, v. 11th AVENUE CORPORATION, a Utah corporation, fka SALT LAKE MEMORIAL MAUSOLEUM; and KEITH E. GARNER, an individual, Defendants.	DEFENDANTS' OBJECTION AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' NOTICE OF ELECTION OF REMEDIES Civil No. 900904288CN Judge J. Dennis Frederick

Defendants, by and through their counsel of record, hereby submit their Objection and Memorandum in Opposition to Plaintiffs' Notice of Election of Remedies.

STATEMENT OF MATERIAL FACTS

A. Relevant Business Dealings Between the Parties

From 1984 through May 13, 1988, Defendant 11th Avenue Corporation, which was formerly known as Salt Lake Memorial

Mausoleum ["SLMM"], operated and conducted a mausoleum business at 1001 East 11th Avenue, Salt Lake City, Utah. Defendant Keith E. Garner ["Garner"] is, and at all relevant times was, an officer, a director, and a shareholder of SLMM. [Complaint at ¶9.]

On May 13, 1988, SLMM, Plaintiff Ong International (U.S.A.), Inc. ["Ong, Inc."], and Plaintiff D&D Management ["D&D"] entered into a general partnership [the "Partnership"] as memorialized in the Salt Lake Memorial Mausoleum General Partnership Agreement [the "Partnership Agreement"]. The purpose of the Partnership was to operate, develop, manage and conduct the mausoleum business. [Complaint at ¶¶ 22-23.]

On or about February 28, 1989, the Partnership, SLMM, Ong, Inc., D&D, Plaintiff David L. Alldredge ["Alldredge"] and Garner entered into a Partnership Redemption Agreement [the "Redemption Agreement"]. Alldredge is an officer, director and owner of D&D, and an officer of Ong, Inc. Pursuant to the terms of the Redemption Agreement, the Partnership purchased SLMM's interest in the Partnership. [Complaint at ¶¶ 3, 25-26.]

B. Nature of the Lawsuit

On July 25, 1990, Plaintiffs commenced this action against Defendants. Plaintiffs allege in their complaint that Garner is the alter ego of SLMM, and vice versa. [Complaint at ¶6.] They further allege that SLMM and Garner made false representations, and failed to make complete disclosure, regarding the materials

used in the construction of the individual crypts in the outdoor portion of the mausoleum. [Complaint at ¶¶ 28-31.] Plaintiffs claim that the the alleged representations and omissions were made to induce them to enter into the Partnership Agreement and the Redemption Agreement, that Plaintiffs reasonably relied on the representations, and that they were thereby induced to enter into the Partnership Agreement and the Redemption Agreement to their damage. [Complaint at ¶¶ 38-40, 44, 48.]

1. Claims for Relief

Plaintiffs' complaint asserts the following six counts against Defendants:

Count I:	Rescission predicated on alleged constructive fraud.
Count II:	Rescission predicated on alleged fraud.
Count III:	Rescission predicated on alleged negligent misrepresentation.
Count IV:	Breach of fiduciary duty
Count V:	Conversion
Count VI:	Indemnification

The first four counts of Plaintiffs' complaint are based upon the alleged representations and omissions referred to above.

2. Prayer for Relief

Plaintiffs' Prayer for Relief seeks, in part, the following relief:

> 1. On Counts I, II, and III, for rescission of the Partnership Agreement, the Redemption Agreement and all ancillary agreements, released, and waivers

incident thereto, and for resoration of Plaintiffs to their status quo prior to entering into the Agreements, including judgment against the Defendants for damages in an amount to be proven at trial to fully and completely restore Plaintiffs to their status quo ante.

2. In the alternative, on Counts I through VI inclusive, for an award of compensatory damages in an amount to be proven at trial but not less than $2.5 Million Dollars.

C. Order Requiring Defendants To Make Election Of Remedies

At the pre-trial conference held on July 29, 1991, the Court ordered Plaintiffs to make and give notice to Defendants of their election of remedies. On August 5, 1991, Defendants received Plaintiffs' Notice of Election of Remedies, which provides in pertinent part:

> The Plaintiffs Ong International (U.S.A.), Inc., D&D Management, Inc., and David L. Alldredge herewith elect their remedies against the Defendants as follows:
>
> 1. Against Salt Lake Memorial Mausoleum, now called 11th Avenue Corporation, or against its alter-ego Keith E. Garner for rescission, consequential damages and punitive damages in accordance with the law of the case arising out of fraudulent misrepresentations of the Defendants;
>
> 2. Against Keith E. Garner, an individual, and inducer of the fraudulent misrepresentations for fraud, for direct benefit of the bargain damages, consequential damages and punitive damages;
>
> 3. Against Keith E. Garner and 11th Avenue Corporation for breach of fiduciary duties in the performance of the partnership, the damages thereof being the reasonable and natural injuries that are foreseeable arising from said breaches;
>
> . . . . [Emphasis added.]

D. **Defendants' Stipulation.**

Defendants deny that Garner is the alter ego of SLMM, as alleged by Plaintiffs. However, Garner hereby stipulates and agrees that any judgment entered against SLMM in this action, including a judgment of rescission against SLMM, may also be entered against him personally.

ARGUMENT

I

PLAINTIFFS HAVE FAILED PROPERLY TO ELECT THEIR REMEDIES WHERE THEIR NOTICE SETS FORTH AN INTENT TO PURSUE THE INCONSISTENT REMEDIES OF RESCISSION AND DAMAGES

The doctrine of election of remedies is a technical rule of procedure. Its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983); Royal Resources, Inc. v. Gibralter Financial Corp., 603 P.2d 793, 796 (Utah 1979). The doctrine of election of remedies presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others. Royal Resources, Inc. v. Gibralter Financial Corp., 603 P.2d 793, 796 (Utah 1979). It is based upon principles of equity and justice, and prevents a party from recovering more than once for the same loss. Brigham City Sand & Gravel v. Machinery Center, Inc., 613 P.2d 510, 512 (Utah 1980).

Plaintiffs' Notice of Election of Remedies indicates that Plaintiffs have elected to pursue the remedy of rescission against SLMM and Garner. It also indicates that Plaintiffs seek to recover damages against Garner for fraud and for breach of fiduciary duty. The election by Plaintiffs of two alternative and inconsistent remedies--rescission and damages--is not an appropriate or adequate election of remedies.

It is well-established that the remedies of rescission and damages for fraud are inconsistent.[1] Gentemann v. Sunaire Systems, 665 P.2d 875, 877 (Or.App. 1983). Rescission, on the one hand, is a restitutionary remedy which attempts to restore the parties to the status quo to the extent possible or as demanded by the equities in the case. Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 731 (Utah App. 1990). On the other hand, damages in an action for fraud are determined under the "benefit of the bargain" rule, which provides for damages in an amount equal to the difference between the value of the property purchased and the value it would have had if the representations were true. Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980).

---

[1]Damages for breach of fiduciary duty, like damages for fraud, are not designed to restore a plaintiff to the status quo, but instead attempt to compensate the plaintiff for the damages which proximately result from the defendant's tortious conduct. Such damages are inconsistent with the remedy of rescission, and, where rescission is sought, are precluded under the doctrine of election of remedies.

The plaintiff in an action for fraud has the option (1) to elect to rescind the transaction and recover the purchase price or (2) to affirm the transaction and recover damages. Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980). Plaintiffs in this action may elect one of those two remedies, but not both. To allow Plaintiffs to obtain a judgment for both rescission and damages would result in a double recovery to Plaintiffs which is not allowed under the law.

II

PLAINTIFFS' MAY NOT SEEK TO RECOVER "BENEFIT OF THE BARGAIN" DAMAGES FROM GARNER WHERE THEY HAVE ELECTED RESCISSION AS THEIR REMEDY, EVEN THOUGH, IF SLMM IS HELD LIABLE TO PLAINTIFFS, GARNER MAY BE REQUIRED TO SATISFY SLMM'S OBLIGATION TO RESTORE PLAINTIFFS TO THE STATUS QUO

Plaintiffs argue that even though they seek to recover a judgment of rescission against SLMM, the doctrine of election of remedies does not prevent them from seeking to recover "damages" against Garner, the person who allegedly made the fraudulent statements to Plaintiffs. The law is clear, however, that the "damages" which may be imposed upon the inducer of the fraud in such a case are not "benefit of the bargain" damages, or the damages proximately caused by the tortious conduct, but rather the amounts of restitution which the corporation is unable to pay.

In Meredith v. Ramsdell, 384 P.2d 941 (Colo. 1963), the principal case relied on by Plaintiffs herein, the plaintiff's

claims against the corporate defendant were for rescission of two instruments which he had been induced to sign by reason of the fraudulent representations of the individual defendant. The plaintiff also sought to recover "damages" from the individual defendant in an amount equal to the consideration paid by him in the transaction. Meredith, at 943. The issue in the case was whether the plaintiff was foreclosed from recovering "damages" from the individual defendant under the doctrine of election of remedies where his claim against the corporate defendant was for rescission.

The court in Meredith acknowledged that the plaintiff cannot have two satisfactions for the same injury. The court noted, however, that the corporate defendant had been out of business for some time and had no assets, and thus could not restore the plaintiff to the position he had been in prior to the transaction. In view of the plaintiff's inability to obtain satisfaction from the corporate defendant for his injury, the court ruled, it would not be a violation of the doctrine of election of remedies for the plaintiff to recover "damages" from the individual defendant. As stated by the court:

> The rescission of a contract for fraud does not prevent a recovery of damages from one who participated in the fraud but was not a party to the contract. At least such is the rule where the complaining party has "failed to obtain satisfaction" "either by a restoration or recovery of the consideration or otherwise." 24 Am.Jur. p. 39, §211.
>
> . . . .

> [T]he plaintiff's rescission or attempt to rescind the contract on account of the fraud does not defeat his right to recover damages from a third party so long as he has failed to obtain satisfaction for his injury, either by a restoration or recovery of the consideration, or otherwise.

Meredith, 384 P.2d at 945 (emphasis added).

The Colorado Supreme Court in Meredith did not enter judgment against the individual defendant for damages based upon the "benefit of the bargain" rule. Instead, the plaintiff was allowed to recover "damages" against the inducer of the fraud in an amount sufficient to restore the plaintiff to his former position. The court stated:

> It should be observed that a defrauded party may proceed against the principal and the agent, seeking rescission against the principal and damages against the agent who procured the execution of the contract. Such defrauded party can have one satisfaction, and failing to obtain restitution either wholly or partly from the principal, may recover from the agent such sum as will constitute restoration to status quo. Such will constitute the damages recoverable against the agent.

Meredith, 384 P.2d at 946 (emphasis added). See also Popov v. Ladd Brothers, 474 P.2d 151, 152 (Colo. 1970).

In McAllister v. Charter First Mortgage, Inc., 567 P.2d 539, 543 (Or. 1977), another case cited by Plaintiffs in their trial brief, the Oregon Supreme Court rejected the argument that the election of remedies doctrine barred an award in damages against the inducer of the fraud after judgment of rescission had already been obtained against the corporation, which was the party to the contract. The Court went on to state that the measure of damages

against the fraudulent inducer is not the benefit of the bargain, but rather, "the extent to which the rescission decree has failed to restore the status quo (because of [the contracting party's] insolvency or otherwise)." McAllister, 567 P.2d at 543 (emphasis added).

Similarly, in Strout Realty, Inc. v. Burghoff, 718 S.W.2d 469 (Ark. App. 1986), another case relied upon by Plaintiffs, the court ruled that the inducer of the fraud could properly be held liable for restitutionary damages, even though the plaintiffs had elected to rescind the contract in question. Id. at 471.

The cases cited by Plaintiffs support the proposition that, in an action seeking to obtain a judgment of rescission against a corporation who was a party to a contract, based upon a claim of fraudulent inducement, the inducer of the fraud may be held liable for "damages" for whatever restitution the corporation is unable to pay. See, e.g., Meredith v. Ramsdell, 384 P.2d 941, 946 (Colo. 1963). Such damages do not include "benefit of the bargain" damages or other amounts intended to compensate the plaintiffs for the damages proximately caused by the defendant's conduct.

The issue of whether Utah law will allow Plaintiffs to seek "damages" from Garner for any restitution obligation SLMM is required, but unable, to pay need not be determined by the Court. That issue is rendered moot by reason of Garner's agreement that

any judgment entered against SLMM also may be entered against him personally.

Plaintiffs having elected rescission as their remedy, the law is clear that Plaintiffs may not seek judgment against either Defendant 11th Street Corporation or Garner for "benefit of the bargain" damages or other similar types of recovery. If Plaintiffs are successful and prevail on their claim for rescission, Defendants agree that the judgment of rescission may be entered against both Defendants, instead of just against 11th Avenue Corporation. Accordingly, the Court should strike the second paragraph of Plaintiffs' Notice of Election of Remedies. Moreover, the Court should rule that no evidence may be presented regarding "benefit of the bargain damages," as they are not recoverable and thus not relevant to this action.

DATED this 6th day of August, 1991.

Arthur H. Nielsen
Gary A. Weston
Richard M. Hymas
John K. Mangum
of NIELSEN & SENIOR, P.C.
Counsel for Defendants

[redacted]

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1991, I served upon Plaintiffs a true and correct copy of the foregoing Defendants' Objection and Memorandum in Opposition to Plaintiffs' Notice of Election of Remedies, by causing the same to be hand-delivered to the following:

Robert S. Campbell, Jr.
Clark W. Sessions
Dean C. Andreasen
Campbell Maack & Sessions
Attorneys for Plaintiffs
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101

[redacted]

RMH:PLDG:13604.GA750.20

Addendum D

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL INC., et al, Plaintiff,	:	MINUTE ENTRY RULING
vs.	:	
11TH AVENUE CORPORATION, et al, Defendant.	:	CASE NO. 900904288

The Court having reviewed the pleadings submitted rules as follows:

1. Defendants' objection to plaintiffs' Notice of Election of Remedies is denied for the reasons set forth in plaintiffs' Trial Brief, points II and III.

2. Defendants' first Motion in Limine is denied for the reasons set forth in plaintiffs' memorandum in opposition thereto.

3. Defendants' second Motion in Limine is denied for the reasons set forth in plaintiffs' memorandum in opposition. Title 78-18-1 et.seq. U.C.A., effective May 1, 1989 is not applicable, the events involved in the instant proceeding having occured prior to said effective date, and the statutory scheme having prospective application only. Expert opinions if pertinent and helpful to the trier of fact will be allowed if proper foundation is laid.

4. Plaintiffs' Motion in Limine is denied as to witness Mary D. Taylor for the reasons specified in defendants' memorandum in opposition. As to the balance of the listed fact witnesses the motion is taken under advisement. The testimony of expert witness Harry Arneson will be limited to that given in his deposition only.

5. Plaintiffs' Motion to Substitute Expert Witness is granted under certain terms and conditions relayed to counsel in the telephone conference August 6, 1991.

Addendum E

P R O C E E D I N G S

THE COURT: I understand we have a verdict in this matter.

MR. CAMPBELL: That's what I understand, your Honor.

(Whereupon, the jury entered the courtroom.)

THE COURT: You may be seated.

In this matter the record may show that all jurors are now present and in place, that the parties and counsel are present.

Ladies and gentlemen, I'm Judge Sawaya taking Judge Frederick's place for the purpose of this part of the proceeding. It's the Court's understanding that you have a verdict.

Have you reached a verdict in this matter?

MS. THOMAS: Yes.

THE COURT: And I assume -- I don't know your name.

MS. THOMAS: Linda Thomas.

THE COURT: Are you forelady of this panel?

MS. THOMAS: Yes.

THE COURT: Would you hand the verdict forms to the Bailiff so that he can bring them to the Clerk, please?

The Special Verdict and the Interrogatories all seem to be answered. I don't know what effect they'll have, but I will ask the Clerk to read the Special Verdict answers.

THE CLERK: Ong International (U.S.A.) Inc., a Nevada corporation; D & D Management, a Utah corporation; and David L. Alldredge, an individual, v. 11th Avenue Corporation, a Utah corporation, f/k/a Salt Lake Memorial Mausoleum, Keith E. Garner, an individual. Special Verdict of the Jury, Case No. 900904288.

We the jury, duly impaneled in the above-entitled action, find the issues of fact and return our special verdict as follows: I. Claims of Ong International, U.S.A. Inc., and D & D Management against SLMM/11th Avenue Corp. and Garner: 1. Did SLMM/11th Avenue Corp. and Keith E. Garner commit fraud, as that term is defined in the Court's Instructions, against Ong International and D & D Management in the sale of the Salt Lake Memorial Mausoleum under the Purchase Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: Yes.

2. Did SLMM/11th Avenue Corp. and Keith E. Garner commit constructive fraud as defined in the Court's Instructions, against Ong International and D & D Management in the sale of Salt Lake Memorial Mausoleum under the Purchase Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: No.

Did SLMM/11th Avenue Corp. and Keith E. Garner

negligently misrepresent, as that term is defined in the Court's Instructions, to Ong International and D & D Management the Salt Lake Memorial Mausoleum properties and assets in the sale under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: Yes.

If your answer is yes to any of the questions 1, 2 or 3 above, then the Court, as part of the judgment entered on the Special Verdict, will order a rescission of the Partnership Agreement and the Redemption Agreement, including releases in accordance with these instructions.

II. Claims of Ong International against Keith E. Garner, individually: Did Keith E. Garner, acting as an individual, commit fraud, as that term is defined in the Court's Instructions, against Ong International in the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: Yes.

Did Keith E. Garner, acting as an individual, commit constructive fraud, as that term is defined in the Court's Instructions, against Ong International in the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: No.

Did Keith E. Garner, acting as an individual, negligently misrepresent, as that term is defined in the Court's Instructions, to Ong International the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Answer: Yes.

III. Claims of Ong International for breach of one or more fiduciary duties: Did SLMM/11th Avenue Corp. and Keith E. Garner breach a fiduciary duty as a partner to Ong International in the course of the performance of the Partnership Agreement between the date of the Partnership Agreement, May 13, 1988, and the date of the Redemption Agreement, February 28, 1989?

Answer: Yes.

Did Keith E. Garner convert partnership assets to his own use or purposes during the term of the partnership between May 13, 1988 and February 28, 1989?

Answer: No.

If, under Section I or II above, you have answered yes to any of the questions 1, 2 or 3, then you should proceed to answer the questions under Section IV. If you have not so answered the questions under Sections I and II, then you should now proceed directly to Section V.

Section IV. Damages to Ong caused by fraud, constructive fraud or negligent misrepresentations of SLMM/ 11th Avenue Corp. and Keith E. Garner, and as to Keith E. Garner, individually: If you have answered yes to any of the questions 1, 2 or 3 of Section I or II, then answer this question.

Fraud damages as to Keith E. Garner: What was the difference between the fair market value of the corporate assets of the Salt Lake Memorial Mausoleum as represented at the time of the Partnership and Redemption Agreements and the fair market value of said corporate assets in the condition it was actually in as of the same dates?

$400,047 -- no, $447,000. I'll just read the numbers. Four four seven comma zero three four.

Consequential damages: What are the amount of consequential damages, as defined in the Court's Instructions, which Ong International has sustained as a result of the fraud, constructive fraud, or negligent misrepresentation by SLMM/11th Avenue Corp. and Keith E. Garner?

$1,165,022.

Answer the following question only if you have determined that SLMM/11th Avenue Corp. and Keith E. Garner, or Keith E. Garner, individually, committed fraud upon Ong International.

C. Punitive damages: 1. Should SLMM/11th Avenue

Corp. and Keith E. Garner pay punitive damages to Ong International in consequence of the fraudulent misconduct?

Answer: Yes.

a. If you have answered yes to this question, what is the amount of punitive damages that SLMM/11th Avenue Corp. and Keith E. Garner should pay to Ong International?

$1,800,000.

If you have answered yes to question 1 or 2 under Section III, then proceed to Section V. If you have answered no to question 1 of Section III, then proceed no further, sign your Special Verdict as instructed, and notify the Bailiff that you are ready to return to open court.

V. Damages to Ong International for breach of fiduciary duty: 1. What are the damages which Ong International has sustained as a consequence of the SLMM/11th Avenue Corp.'s breach of fiduciary duties in the course of the performance of the Partnership Agreement?

Answer: $70,000.

2. What are the damages sustained by Ong International as a natural and direct consequence of the conversion of assets by Keith E. Garner?

Answer: $512,098.

Dated this 26th day of August, 1991, Linda Thomas, Foreperson of the Jury.

THE COURT: Gentlemen, do you have any questions

with regard to the verdict as it's been read by the Clerk? Mr. Campbell?

MR. CAMPBELL: Your Honor, the Plaintiff doesn't have any questions at this time.

THE COURT: Would you request that the jury be polled with regard to their verdict?

MR. CAMPBELL: No, we don't, your Honor, but we have no objection of that being done.

THE COURT: Counsel?

MR. MANGUM: Yes, your Honor, Defendants do have a question, particularly with regard to the last answer read as it relates to question number 2 of Section III, and if we might have a bench conference on that matter.

THE COURT: Section III, claims of Ong International for breach of one or more fiduciary duties? Is that the one?

MR. MANGUM: Yes, your Honor.

THE COURT: Subsection or subquestion 2, did Keith E. Garner convert partnership assets to his own use or purposes during the term of the partnership -- is that how it starts?

MR. MANGUM: Yes.

THE COURT: The answer to that was no and you have some question about that?

MR. MANGUM: Well, the question I have, your

Honor --

MR. CAMPBELL: I think we ought to confer at the bench.

MR. WESTON: If we could approach the bench, your Honor.

THE COURT: All right.

(Whereupon, discussion was held at the bench out of the hearing of the jury and the Reporter.)

THE COURT: Ladies and gentlemen, there's a bit of confusion with regard to the verdict that has been read, particularly with Section III and question number 2 to that particular question and interrogatory. Let me just read it to you and I'll inquire of -- your name again? I'm sorry.

MS. THOMAS: Linda Thomas.

THE COURT: Linda Thomas. Thank you.

Ms. Thomas, as the foreperson of the jury, I'm going to direct this question to you so that I don't need to go through everyone. Roman numeral III is entitled Claims of Ong International for breach of one or more fiduciary duties, and with particular attention to question number 2 under that heading, the question was, did Keith E. Garner convert partnership assets to his own use or purposes during the term of the partnership between May 13, 1988 and February 28, 1989? You have answered that no. Is that the answer to which you intended to --

MS. THOMAS: Yes, it is.

THE COURT: -- reply?

Subsequently you awarded damages for that particular breach and that's the inconsistency that we need to resolve.

My question to you, did the jury unanimously intend to answer subparagraph 2 to paragraph Roman numeral III, did you intend to answer that no?

MS. THOMAS: We did and we took that only as the actual transferring of property which is why we answered no.

THE COURT: If you answered that no, then it is my understanding that Plaintiff is not entitled to recover damages for that breach. Do you understand that?

MS. THOMAS: I do, I understand what you're saying. We did not take it into consideration as being total fiduciary responsibilities. We only took it into consideration as being crypts.

THE COURT: And yet you assessed damages for that breach.

MS. THOMAS: Yes, we did.

THE COURT: Did you understand that the Plaintiff cannot recover those damages even though you assessed them?

MS. THOMAS: No, we did not. We figured he could, so we do have an error in there. Do you want us to go back in and discuss it?

THE COURT: Would you like to go in and correct this error as you see it?

MS. THOMAS: Yes, I do think that would be appropriate.

THE COURT: Counsel, do you feel that would be the way to handle it?

MR. CAMPBELL: We do, your Honor.

THE COURT: Let me send you out again for the time that it will take you to correct the verdict and as you correct it, will you initial what you correct?

MS. THOMAS: Yes, sir, I will.

THE COURT: All right.

(Whereupon, the jury exited the courtroom.)

THE COURT: I don't think we need to recess. My expectation is that it won't take but a moment.

MR. CAMPBELL: Right.

(Whereupon, after a period of time, the jury entered the courtroom.)

THE COURT: You may be seated.

The record may again show that all jurors are now present and in place, parties and counsel are present, and Ms. Thomas, have you made the corrections on the verdict form that you intended to make?

MS. THOMAS: Yes.

THE COURT: Is that by majority vote?

MS. THOMAS: Yes.

THE COURT: And unanimous vote of the members of the jury?

MS. THOMAS: Yes, it was.

THE COURT: You can bring that up.

Counsel, the verdict form has been amended by the members of the panel with regard to Roman numeral III, question number 2. The answer to that has been changed from no to yes, and I'll ask, Ms. Thomas, is that the amendment and the correction that you intended to make?

MS. THOMAS: Yes, it was.

THE COURT: Is that a correction based on the fact that you made a mistake in marking the answer no previously?

MS. THOMAS: We did discuss it in full.

Am I not answering your question?

THE COURT: I'm not sure that you did. Try it again.

MS. THOMAS: What was your question again?

MR. CAMPBELL: It's hard to hear.

THE COURT: Is it hard to hear? I'm so soft-spoken in my old age.

Ms. Thomas, that answer now is yes. Is that the answer that you and the panel intended to give previously?

MS. THOMAS: Yes, we believe it was.

THE COURT: And based on further deliberation and

discussion in the jury room, you've determined that you had marked the wrong answer? Is that what happened?

MS. THOMAS: Yes, that is correct.

THE COURT: Now, you have marked the answer as yes and initialled it; is that correct?

MS. THOMAS: Yes, sir, I did.

THE COURT: Counsel, is that satisfying you?

MR. CAMPBELL: Are there any other changes, your Honor?

THE COURT: Are there any other changes?

MS. THOMAS: No, sir, there are not.

THE COURT: All right, the damage portion in Roman numeral V indicating the damages for that breach are $512,098. Is that to remain unchanged?

MS. THOMAS: Yes, sir, that's correct.

THE COURT: All right, now, Counsel, do you want the jury polled with regard to any of these answers?

MR. MANGUM: Yes, your Honor, counsel for Defendants would as to all answers.

THE COURT: Do you want them polled on each question?

MR. WESTON: Yes, your Honor, we do with regard to the affirmative answers.

THE COURT: A simple way of doing that is just to read each question and ask whether there were any members of

Addendum F

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, UT 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH

IN AND FOR SALT LAKE COUNTY

2168652
9-26-91 8:27am

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual, Defendants.	**JUDGMENT AND DECREE OF RESCISSION ON SPECIAL VERDICT OF THE JURY** Civil No. 900904288 CN Judge J. Dennis Frederick

The above-entitled matter came on regularly for trial on the merits of plaintiffs' claims against the defendants before the Court, the HONORABLE J. DENNIS FREDERICK, District Judge presiding, on Thursday, August 8, 1991, the plaintiffs being represented by their counsel, Robert S. Campbell, Jr. and Clark W. Sessions of Campbell Maack & Sessions of Salt Lake City, and the defendants

being represented by their attorneys, Arthur H. Nielsen, Gary A. Weston and John K. Mangum of Nielsen & Senior of Salt Lake City.

The Court proceeded to impanel a jury of eight (8) men and women, along with two alternates, to try the issues of fact under plaintiffs' complaint, opening statements of counsel were thereupon made and evidence in the form of sworn testimony, exhibits and stipulations were submitted by the parties, respectively, and received by the Court on the days of August 8, 9, 13, 14, 15, 16, 20, 21, 22, and 23, 1991. On Friday, August 23, 1991, the Court instructed the Jury as to the law to be applied to the facts and closing summations were thereafter made by counsel whereupon at the approximate hour of 4:30 p.m. on said date, one juror having been dismissed by stipulation and the first alternate having been seated with the second alternate dismissed, the case was submitted to and the Jury retired under the charge of a sworn officer to deliberate on the issues under the Special Verdict Of The Jury.

After due deliberation, the Jury returned into open Court its Special Verdict on Monday, August 26, 1991, as follows:

SPECIAL VERDICT OF THE JURY

"We the Jury, duly impaneled in the above-entitled action find the issues of fact and return our special verdict as follows:

I. **CLAIMS OF ONG INTERNATIONAL, (U.S.A.), INC. AND D&D MANAGEMENT AGAINST SLMM/11TH AVENUE CORP. AND GARNER:**

1. Did SLMM/11th Avenue Corp. and Keith E. Garner commit fraud, as that term is defined in the Court's Instructions, against Ong International and D&D Management in the sale of the Salt Lake Memorial Mausoleum under the Purchase Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes X

No _____

2. Did SLMM/11th Avenue Corp. and Keith E. Garner commit constructive fraud as defined in the Court's Instructions, against Ong International and D&D Management in the sale of the Salt Lake Memorial Mausoleum under the Purchase Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes _____

No X

3. Did SLMM/11th Avenue Corp. and Keith E. Garner negligently misrepresent, as that term is defined in the Court's Instructions, to Ong International and D&D Management the Salt Lake Memorial Mausoleum properties and assets in the sale under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes X

No _____

If your answer is "Yes" to any of the questions 1, 2, or 3 above, then the Court, as part of the judgment entered on the Special Verdict, will order a rescission of the Partnership Agreement and the Redemption Agreement, including releases in accordance with these Instructions.

II. **CLAIMS OF ONG INTERNATIONAL AGAINST KEITH E. GARNER, INDIVIDUALLY:**

1. Did Keith E. Garner, acting as an individual, commit fraud, as that term is defined in the Court's Instructions, against Ong International in the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes X

No _____

2. Did Keith E. Garner, acting as an individual, commit constructive fraud, as that term is defined in the Court's Instructions, against Ong International in the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes _____

No X

3. Did Keith E. Garner, acting as an individual, negligently misrepresent, as that term is defined in the Court's Instructions, to Ong International the sale of the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989?

Yes X

No _____

III. **CLAIMS OF ONG INTERNATIONAL FOR BREACH OF ONE OR MORE FIDUCIARY DUTIES:**

1. Did SLMM/11th Avenue Corp. and Keith E. Garner breach a fiduciary duty as a partner to Ong International in the course of the performance of the Partnership Agreement between the date of the Partnership Agreement, May 13, 1988 and the date of the Redemption Agreement, February 28, 1989?

Yes X

No _____

[redacted]

2. Did Keith E. Garner convert partnership assets to his own use or purposes during the term of the Partnership between May 13, 1988 and February 28, 1989?

Yes X L.T.

No _____

If, under Section I or II above, you have answered "Yes" to any of the questions 1, 2 or 3, then you should proceed to answer the questions under Section IV. If you have not so answered the questions under Sections I and II, then you should now proceed directly to Section V.

IV. **DAMAGES TO ONG CAUSED BY FRAUD, CONSTRUCTIVE FRAUD OR NEGLIGENT MISREPRESENTATIONS OF SLMM/ 11TH AVENUE CORP. AND KEITH E. GARNER, AND AS TO KEITH E. GARNER, INDIVIDUALLY:**

If you have answered "Yes" to any of the questions 1, 2 or 3 of Section I or II, then answer this question.

A. Fraud Damages as to Keith E. Garner:

1. What was the difference between the fair market value of the corporate assets of the Salt Lake Memorial Mausoleum as represented at the time of the Partnership and Redemption Agreements and the fair market value of said corporate assets in the condition it was actually in as of the same dates?

$447,034

B. Consequential Damages:

1. What are the amount of consequential damages, as defined in the Court's Instructions, which Ong International has sustained as a result of the fraud, constructive fraud, or negligent misrepresentation by SLMM/11th Avenue Corp. and Keith E. Garner.

$1,165,022

Answer the following question only if you have determined that SLMM/11th Avenue Corp. and Keith E. Garner, or Keith E. Garner, individually, committed fraud upon Ong International.

C. Punitive Damages:

1. Should SLMM/11th Avenue Corp. and Keith E. Garner pay punitive damages to Ong International in consequent of the fraudulent misconduct?

Yes X

No _____

a. If you have answered "Yes" to this question, what is the amount of punitive damages that SLMM/11th Avenue Corp. and Keith E. Garner should pay to Ong International?

$1,800,000

If you have answered "Yes" to question 1 or 2 under Section III, then proceed to Section V. If you have answered "No" to question 1 of Section III, then proceed no further, sign your Special Verdict as instructed, and notify the Bailiff that you are ready to return to open Court.

V. **DAMAGES TO ONG INTERNATIONAL FOR BREACH OF FIDUCIARY DUTY:**

1. What are the damages which Ong International has sustained as a consequence of the SLMM/11th Avenue Corp.'s breach of fiduciary duty[ies] in the course of the performance of the Partnership Agreement?

$70,000

2. What are the damages sustained by Ong International as a natural and direct consequence of the conversion of assets by Keith E. Garner?

$512,098

DATED this 26th day of August, 1991.

S/ Linda Thomas
FOREPERSON OF THE JURY

At the request of the defendants, the Court polled the Jury as to their answers to the Special Verdict and determined that each of the questions were answered by unanimous vote of the Jury and upon further inquiry of counsel having determined that all questions under the Special Verdict were answered, the Court received the Special Verdict, discharged the Jury from service and ordered that the Special Verdict be filed with the Clerk.

And the Court, upon review of the Jury's Special Verdict, having concluded that several of the questions thereunder were submitted based upon alternative theories of recovery and that in light of the Jury's Special Verdict on several of the issues, recovery on other alternative issues will not be further pursued by plaintiffs or granted by the Court; and the Court having now considered all and singular the law appertaining in the matter and having concluded that a decree of rescission and damage judgment should be accordingly entered upon the Special Verdict of the Jury,

NOW THEREFORE, upon motion of plaintiffs, good cause appearing,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

I. COUNT II - RESCISSION AND ANCILLARY DAMAGES AND RELIEF PREDICATED ON FRAUD.

1. Under Count II of plaintiff's Complaint against 11th Avenue Corporation and Keith E. Garner for fraudulent misrepresentations against both defendants as determined by the Jury in its Special Verdict in the sale of inter-

ests in the Salt Lake Memorial Mausoleum under the Partnership Agreement dated May 13, 1988, and the Redemption Agreement dated February 28, 1989, said Agreements in their entireties as to all parties, along with all individual Releases incident thereto, BE AND THE SAME ARE HEREBY RESCINDED, SET ASIDE AND DECLARED VOID AB INITIO, AND OF NO FORCE AND EFFECT.

As an inherent part of said Rescission, 11th Avenue Corporation and Keith E. Garner jointly and severally be and they are hereby ORDERED to pay over and remit to Ong International, Inc., within twenty-four (24) hours of the entry hereof, the sum of One Million Two Hundred Forty Thousand Two Hundred Twenty Dollars ($1,240,220.00), paid by Ong International, Inc. to purchase the Salt Lake Memorial Mausoleum Partnership under the Partnership and Redemption Agreements. Simultaneously, Ong International and D&D Management be and they are hereby ORDERED to set over and convey to 11th Avenue Corporation and Keith E. Garner all right, title and interests previously purchased in and to the Salt Lake Memorial Mausoleum Partnership inclusive of the four (4) Skyway Heights lots and all assets and liabilities of the Salt Lake Memorial Mausoleum.

To the end of effectuating this Order, in the event that 11th Avenue Corporation and Keith E. Garner fail to

pay over and remit said sum at the time of transfer and conveyance set out above of the Mausoleum Partnership and properties, in addition to all other remedies available to Ong International, it shall have JUDGMENT against 11th Avenue and Keith E. Garner jointly and severally as of the date of transfer and conveyance for the sum Ordered, namely One Million Two Hundred Forty Thousand Two Hundred Twenty Dollars ($1,240,220.00), together with interest thereon at the rate of twelve percent (12%) per annum from and after the date of entry until the total of such sum is paid and satisfied as by law provided.

IT IS FURTHER ORDERED that all necessary documents to forthwith effect the payment to Ong International and the transfer hereunder to 11th Avenue Corporation and Keith E. Garner shall be forthwith executed by the respective parties;

2. For further relief under Count II and pursuant to the Special Verdict of the Jury, JUDGMENT BE AND THE SAME IS HEREBY ENTERED in favor of Ong International, Inc. and against 11th Avenue Corporation and Keith E. Garner, jointly and severally, for consequential damages as a result of the fraud in the sum of One Million One Hundred Sixty-Five Thousand Twenty-Two Dollars ($1,165,022.00), together with interest thereon at the rate of twelve percent (12%) per annum from and after the date of entry

until the total of such sum is paid and satisfied as by law provided;

3. Under Count II and Paragraph 4 of Ong International's Prayer of the Complaint and pursuant to the Special Verdict of the Jury, JUDGMENT BE AND THE SAME IS HEREBY ENTERED against 11th Avenue Corporation and Keith E. Garner, jointly and severally, for punitive damages as a result of the fraud in the sum of One Million Eight Hundred Thousand Dollars ($1,800,000.00), together with interest thereon at the rate of twelve percent (12%) per annum from and after the date of entry until the total of such sum is paid and satisfied as by law provided.

II. **COUNT VI - ANCILLARY RELIEF OF INDEMNIFICATION**

Under Count VI and as an ancillary aspect of the relief under Count II of plaintiffs' Complaint, 11th Avenue Corporation, Salt Lake Memorial Mausoleum Partnership and Keith E. Garner jointly and severally be and the same are HEREBY ORDERED TO INDEMNIFY AND HOLD HARMLESS Ong International, Inc., D&D Management and David L. Alldredge from and against any and all claims, demands, liabilities, losses, and damages of third parties against the Salt Lake Memorial Mausoleum Partnership, its partners or David L. Alldredge, which may have arisen or developed before or during the Partnership up to the date of reconveyance to 11th Avenue Corporation and Keith E. Garner of the

Partnership interests pursuant to Paragraph I hereof, and which are hereafter made regarding the sale or marketing of wooden crypts or other conduct determined as fraudulent by the Jury under its Special Verdict incident to the Partnership or Redemption Agreements or the operation of the Partnership between May 13, 1988 and February 28, 1989.

III. **COUNT III - RESCISSION AND DAMAGES PREDICATED ON NEGLIGENT MISREPRESENTATION.**

Under Count III of plaintiffs' Complaint, the Jury determined in its Special Verdict that 11th Avenue Corporation and Keith E. Garner both as the alter ego of the Corporation and individually, made negligent misrepresentations in the Partnership Agreement dated May 13, 1988 and the Redemption Agreement dated February 28, 1989. The Court has determined that the relief of Rescission and compensatory damages under Count III is the same and duplicative of that under Count II of plaintiffs' Complaint and that as a matter of law, no additional compensable damages may be recovered by Ong International, Inc. against 11th Avenue Corporation or Keith E. Garner, either individually or as the alter ego of 11th Avenue Corporation. Accordingly, JUDGMENT BE AND THE SAME IS HEREBY ENTERED in favor of Ong International, Inc. and against 11th Avenue Corporation and Keith E. Garner, jointly and severally for

negligent misrepresentation with no additional relief or compensable damages beyond that set forth in this Decree and Judgment under Paragraph I, subparagraphs 1 and 2 immediately preceding.

IV. **COUNT II - FRAUD AGAINST GARNER, INDIVIDUALLY.**

Under Count II of plaintiffs' Complaint, pursuant to the Jury's Special Verdict finding fraud as to Keith E. Garner, individually, JUDGMENT BE AND THE SAME IS HEREBY ENTERED in favor of Ong International and against Keith E. Garner, an individual, in the sum and amount of Four Hundred Forty-Seven Thousand Thirty-Four Dollars ($447,034.00) and punitive damages of One Million Eight Hundred Thousand Dollars ($1,800,000.00); **Provided However**, that this Paragraph IV shall be and is enforceable only to the extent that it ensures recovery by Ong International of the restitutional damages (purchase price and consequential damages) awarded to it under Paragraph I of this Decree and Judgment. It shall not be enforced in addition to or independently of the consequential damages and punitive damages under Paragraph I.

V. **COUNT I - CONSTRUCTIVE FRAUD.**

Under Count I of plaintiffs' Complaint, the Jury having found no constructive fraud under the Special Verdict as to 11th Avenue Corporation and Keith E. Garner or Keith E.

Garner, individually, said Count be and the same is hereby dismissed with prejudice.

VI. **COUNTS IV AND V - BREACH OF FIDUCIARY DUTY AND CONVERSION.** Under the breach of fiduciary duty and conversion allegations of Counts IV and V of plaintiffs' Complaint, even though the Jury found under its Special Verdict in favor of Ong International and against 11th Avenue Corporation and Keith E. Garner on both Counts, because of the potential inconsistencies of recovery under said Counts with Rescission and consequential damages under Paragraph I of this Decree and Judgment, Ong International has moved to dismiss voluntarily said Counts IV and V and accordingly, said Counts be and the same are dismissed with prejudice.

VII. **CERTAIN CLAIMS OF DAVID L. ALLDREDGE AND D&D MANAGEMENT.** The claims of the plaintiffs David L. Alldredge and D&D Management, except for their claims for rescission and indemnification, be and the same are hereby dismissed with prejudice.

VIII. **ATTORNEYS FEES.** The claim of the plaintiff Ong International, Inc. for attorneys fees was bifurcated pursuant to the parties' pretrial stipulation for separate hearing and determination following the verdict of the Jury. In light of the rescission relief and accompanying damages entered in this

Decree and Judgment and pursuant to stipulation of the parties, the Court concluded that the recovery of attorneys fees by the prevailing party is unavailable under controlling law. Accordingly, the claims of all parties to recovery of attorneys fees are dismissed with prejudice, each of the parties to pay and discharge their own attorneys fees.

IX. COSTS AND EXPENSES.

Plaintiffs are awarded their costs and expenses of suit in the matter.

DATED this 26th day of September, 1991.

BY ORDER OF THE COURT:

J. Dennis Frederick
District Judge

APPROVED AS TO FORM:

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.
CLARK W. SESSIONS
Attorneys for Plaintiffs

NIELSEN & SENIOR

ARTHUR H. NIELSEN
GARY A. WESTON
JOHN K. MANGUM
Attorneys for Defendants

Addendum G

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual,	:	MEMORANDUM DECISION
	:	CIVIL NO. 900904288
Plaintiffs,	:	
vs.	:	
11th AVENUE CORPORATION, a Utah corporation, fka SALT LAKE MEMORIAL MAUSOLEUM; AND KEITH E. GARNER, an individual,	:	
Defendants.	:	

The defendants having filed their Notice to Submit for Decision in the instant proceeding related to their Motions for Judgment N.O.V., New Trial or Remittitur of Punitive Damage Award, and for Stay of Execution (filed September 26, 1991), being herewith fully advised in the premises, now therefore the Court rules as follows:

1. Defendants' conditional request for hearing is denied. The Memoranda sufficiently set forth the respective

positions of the parties. Oral argument accordingly is not deemed necessary.

2. Defendants' Motion for Judgment N.O.V. is denied for the reasons set forth in plaintiffs' Memorandum in opposition thereto.

3. Defendants' Motion for New Trial or Remittitur of Punitive Damage Award is denied for the reasons specified in plaintiffs' Memorandum in opposition thereto.

4. Defendant's Motion for Stay of Execution filed September 26, 1991 is denied for the reasons set forth in plaintiff's Memoranda in opposition thereto.

5. Defendants' requests for new trial or remittitur are in part founded on Utah Rules of Civil Procedure 59(a)(6) (insufficiency of the evidence) and Utah Rules of Civil Procedure 59(a)(5) (excessive damages under influence of passion or prejudice). This Court is of the view that the award of punitive damages was warranted by the evidence which was sufficient to support a lawful jury finding of defendant Garner's requisite mental state for the reasons delineated in plaintiffs' Memorandum in opposition to plaintiffs' Motion. Moreover, the amount of punitives awarded, $1,800,000.00, when compared to the actual damages resultant from defendant

Garner's conduct, $1,165,022.00 consequential, and $1,240,220.00 for rescission (which is an award necessitated by Garner's fraud), for a total of $2,405,242, the ratio is approximately 1:1-1/2. There is a reasonable and rational relationship of punitives to actual damages. This ratio range falls within the rationale of Crookston v. Fire Insurance Exchange, 164 Utah Adv. Rep. 3 (June 28, 1991), thus eliminating the necessity of this Court to give a detailed explanation for its decision in affirming the award. However, this Court will articulate its views with regard to the so-called "seven factors" as follows:

A. Relative wealth of the defendant: Garner acknowledged at trial that he is a multi-millionaire, cf., Exhibits 91 & 317. Certain of Garner's assets were misrepresented at trial which misrepresentation was established by cross-examination. Garner testified on direct examination that his wife was awarded the LaJolla, California residence in their 1982 divorce. When confronted with the original divorce file showing Garner was awarded the property, his original statement was retracted.

B. Nature of alleged misconduct: The defendants' misconduct was fraudulent concealment and/or affirmative

misrepresentation of the classical type. He falsely represented the plywood crypts as concrete, for which Ong paid $1,240,220.00. After the misrepresentation came to light, the crypts were expertly appraised as worthless property having a negative value.

C. Facts and circumstances surrounding the misconduct: The facts and circumstances surrounding the fraud show that over a period of three to four years, Garner misrepresented the nature of the plywood crypts to everyone necessary to advance his fraud, including customers, insurance agents, building inspectors, his own staff and his partners. He believed he could sell the mausoleum and escape the consequences of his fraud through the general release of claims. Garner has shown no contrition for his acts; on the contrary, he persists in arguing that he cannot understand the dispute because wooden crypts ought to be good enough for anyone.

D. Effect on the lives of plaintiffs and others: The uncompensated loss the Garner defendants have caused to Ong through the time, money and resources devoted by Ong to this case is tremendous. But even as egregious, is the effect on the lives of the hundreds of crypt owners who believed they had purchased cement rather than plywood crypts for themselves and

loved ones. This case presents a serious fraud on the public as well as Ong. Moreover the influence peddling aspects of the case show Garner's continued willingness to traffic in and play upon people's trust and confidence in their religious leaders and in his religious stature.

E. Probability of future recurrence: It is impossible to tell what Garner defendants may do with the crypts after they retake possession of them. It is supposed they will either attempt to fill the crypts with those who seem to have no objection, or bring the crypts up to concrete standard. The punitive damage award will likely deter Garner from further fraud in connection with the mausoleum and might even silence the references to the L.D.S. Church in future sales pitches. Furthermore, the well-established basis for punitive damages is punishment as well as deterrence. Synergetics v. Marathon, 701 P.2d 1106 (Utah 1985), at 1112.

F. Relationship of the parties: The relationship of the parties was, as the jury found, that of general partners invoking a fiduciary relationship that requires dealing with the highest level of openness, trust and confidence. Garner's fraud was in part committed against people with whom he stood in the highest fiduciary relationship of trust.

G. Amount of actual damages: The actual damages resultant from Garner's misconduct amount to $2,405,242.00. ($1,165,022.00 consequential, $1,240,220.00 rescission). When compared to the punitive damage award of $1,800,000.00, results in a ratio of approximately 1:1-1/2. The actual damages supports the punitive damages award.

For the foregoing reasons, as well as those set forth in plaintiff's opposing Memoranda, defendants' Motions for Judgment N.O.V., New Trial or Remittitur of Punitive Damage Award, and for Stay of Execution are denied.

Defendant's Supplemental Motion Concerning Bond During Pendency of Post Judgment Motions and Any Appeal (filed October 17, 1991) will be ruled on upon timely receipt of request for decision per Rule 4-501, Code of Judicial Administration.

Counsel for plaintiff's to prepare an appropriate Order.

Dated this 13th day of November, 1991.

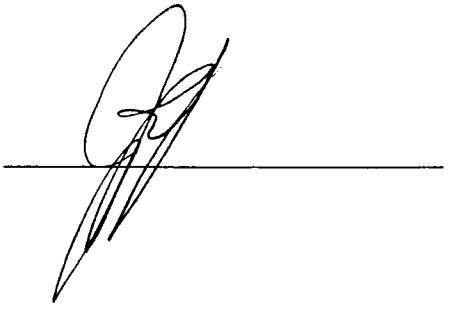
J. DENNIS FREDERICK
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 13 day of November, 1991:

Robert S. Campbell
Clark W. Sessions
Dean C. Andreasen
Joann Shields
Attorneys for Plaintiffs
201 S. Main Street, 13th Floor
Salt Lake City, Utah 84111-2215

Arthur H. Nielsen
John K. Mangum
Attorneys for Defendant
60 E. South Temple, Suite 1100
Salt Lake City, Utah 84111



Addendum H

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual; Defendants.	**SUPPLEMENTAL JUDGMENT** Civil No. 900904288CN Judge J. Dennis Frederick

The above-entitled matter came on regularly for hearing pursuant to notice before this Court, the Honorable J. Dennis Frederick, District Judge presiding, on the 26th day of September, 1991 at the Metropolitan Hall of Justice in Salt Lake City, Salt Lake County, State of Utah. The Plaintiffs appeared through and were represented by their attorneys, Robert S. Campbell, Jr., Clark W. Sessions of Campbell Maack & Sessions and

the Defendants appeared by and through Gary A. Weston and John K. Mangum of Nielsen & Senior. The Court heard and considered the Defendants' objections to the form of Judgment proposed by Plaintiffs including the arguments and statements of counsel and memoranda filed by the respective parties.

The Court further heard and considered the Application of Plaintiffs for a Supplemental Judgment for costs and expenses incurred in the operation of the Salt Lake Memorial Mausoleum for the period August through September, 1991, including the arguments and statements of counsel and an Affidavit of David M. Traveler, marked and received as Exhibit Supplemental P-1 and being fully advised in the premises, now therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Ong International (U.S.A.) Inc., a Nevada corporation be and the same shall have Judgment against 11th Avenue Corporation, a Utah Corporation f/k/a Salt Lake Memorial Mausoleum and Keith E. Garner, an individual, jointly and severally, in the sum of $29,648.00 together with interest thereon at the rate of 12% per annum from and after the date of entry until the total of such sum is paid and satisfied as by law provided.

DATED this 8th day of Oct 1991.

BY ORDER OF THE COURT:

J. DENNIS FREDERICK
District Judge

APPROVED AS TO FORM:

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.
CLARK W. SESSIONS
DEAN C. ANDREASEN

NIELSEN & SENIOR

ARTHUR H. NIELSEN
GARY A. WESTON
JOHN K. MANGUM

Addendum I

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual; Defendants.	2168652 **VERIFIED MEMORANDUM OF COSTS** Civil No. 900904288CN Judge J. Dennis Frederick

Pursuant to Rule 54(d) of the Utah Rules of Civil Procedure, Plaintiff Ong International (U.S.A.), Inc. ("Ong"), by and through its counsel of record, submits this Verified Memorandum of Costs in the amount of $27,737.85 incurred in obtaining its $4,205,242.00 Judgment against the defendants Keith E. Garner and 11th Avenue Corporation.

ITEMIZATION OF COSTS

The costs Ong seeks to recover in this action are summarized as follows:

1.	Filing Fees	$ 125.00
2.	Witness Fees	$ 768.75
3.	Deposition Fees	$11,588.60
4.	Travel for Depositions	$ 2,079.44
5.	Photocopies	$ 8,918.91
6.	Photograph Fees	$ 1,692.72
7.	Exhibits	$ 2,564.43
	Total	$27,737.85

Detail for each of the above-stated categories is attached hereto.

DATED this 31st day of October 1991.

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.
DEAN C. ANDREASEN

Attorneys for Ong International (U.S.A.), Inc.

VERIFICATION

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

DEAN C. ANDREASEN, being first duly sworn on oath, deposes and states that:

1. I am an attorney licensed to practice in the State of Utah and am one of the attorneys retained by Plaintiffs in this action.

2. I have reviewed the accounting records maintained by Campbell Maack & Sessions with respect to its representation of the Plaintiffs in this action and, in particular, the records relating to costs and expenses disbursed on behalf of Plaintiffs.

3. Pursuant to my review and to my knowledge, the items stated herein are current, and the costs and disbursements have been necessarily incurred in this action.

Dean C. Andreasen
DEAN C. ANDREASEN

Subscribed and sworn to before me this 3rd day of October 1991.

Kathleen P. Logsdon
NOTARY PUBLIC
Residing at:

My Commission Expires:

KATHLEEN P. LOGS...
Notary Public
STATE OF UTAH
My Commission...
Septe...
41 N. Vine...

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Campbell Maack & Sessions, 170 South Main Street, Suite 400, Salt Lake City, Utah, and that in said capacity and pursuant to Rule 5 of the Utah Rules of Civil Procedure, that on the 3rd day of October 1991 I caused a true and correct copy of the foregoing Plaintiff's Verified Memorandum of Costs to be hand-delivered to the following:

Arthur H. Nielsen
Gary A. Weston
John K. Mangum
NIELSEN & SENIOR
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111

Kathleen Loysdon

FILING FEES

DATE	PAYEE	AMOUNT
7-20-90	Third District Court	$ 125.00
	TOTAL	$ 125.00

WITNESS FEES

DATE	PAYEE	AMOUNT
8-23-90	Marion Hanks	$ 18.00
8-23-90	Arnold Fluckiger	$ 18.00
8-23-90	Robert Ord	$ 18.00
8-23-90	Keith Garner	$ 18.00
10-17-90	Roger Evans	$ 18.00
10-17-90	Kim Ekker	$ 19.00
10-17-90	Dennis Lucero	$ 20.00
10-17-90	Richard Ith	$ 19.00
11-15-90	David Brockbank	$ 20.00
11-19-90	Steve Nielsen	$ 28.00
2-25-91	Sherman F. Anderson	$ 19.00
3-18-91	Marion D. Hanks	$ 18.00
3-18-91	Robert Ord	$ 18.00
3-18-91	Arnold Fluckiger	$ 18.00
3-18-91	Keith Garner	$ 18.00
3-18-91	Susan Stewart	$ 20.00
3-18-91	Steve Neilsen	$ 27.00
3-18-91	Sandra Lenois	$ 18.00
3-25-91	Eugene Kimball	$ 17.00
4-2-91	Burtis Evans, M.D.	$ 18.00
4-2-91	Nielsen & Senior	$ 110.00
6-6-91	Alan Funk	$ 17.00
6-6-91	Lawrence Reaveley	$ 17.75
7-26-91	Cheryl Despain	[redacted]

7-26-91	James O. Cummings	$ 17.00
7-26-91	Lynne Godfrey	$ 17.00
7-26-91	Carol Bennett	$ 17.00
7-26-91	Clemens B. Waltz	$ 17.00
7-26-91	Eugene Kimball	$ 17.00
7-26-91	Dennis Lucero	$ 17.00
7-26-91	Sandra Lenois	$ 17.00
7-26-91	Marion Hanks	$ 17.00
7-26-91	Arnold Fluckiger	$ 17.00
7-26-91	Steve Neilson	$ 32.00
7-26-91	Roger Evans	$ 17.00
8-21-91	Brento Pack	$ 18.00
		$ 768.75

DEPOSITION FEES

DATE	PAYEE	AMOUNT
9-28-90	Merit Reporters	$ 325.50
10-08-90	Merit Reporters	$ 344.05
10-24-90	Merit Reporters	$ 319.20
10-26-90	Merit Reporters	$ 132.85
11-12-90	Merit Reporters	$ 226.50
11-15-90	Merit Reporters	$ 396.45
11-26-90	Merit Reporters	$ 1,589.50
12-13-90	Merit Reporters	$ 242.15
12-19-90	Associated Professional Report	$ 551.10
12-31-90	Merit Reporters	$ 210.50
1-18-91	Merit Reporters	$ 308.80
2-20-91	Merit Reporters	$ 255.20
2-26-91	Merit Reporters	$ 362.55
3-05-91	Kathleen Monaghan	$ 115.20
3-06-91	Merit Reporters	$ 274.05
3-12-91	Merit Reporters	$ 363.00
3-20-91	Merit Reporters	$ 291.20
4-05-91	Merit Reporters	$ 182.20
4-23-91	Merit Reporters	$ 887.60
4-25-91	Merit Reporters	$ 341.95
4-30-91	Merit Reporters	$ 471.35
5-07-91	Merit Reporters	$ 293.00
5-10-91	Merit Reporters	$ 177.70
5-13-91	Merit Reporters	$ 139.00

6-28-91	Merit Reporters	$ 622.15
7-01-91	Merit Reporters	$ 166.90
7-09-91	Merit Reporters	$ 917.20
7-11-91	Merit Reporters	$ 60.10
7-15-91	Merit Reporters	$ 253.75
7-17-91	Norman E. Mark	$ 545.30
7-17-91	Merit Reporters	$ 116.90
8-15-91	Merit Reporters	$ 93.20
8-26-91	Anna M. Bennett	$ 12.50
	TOTAL	$11,588.60

TRAVEL FOR DEPOSITIONS

DATE	PAYEE	AMOUNT
2-19-91	American Express Air Fare	$ 808.00
	Meals/Lodging	$ 89.03
	Travel Expense	$ 22.00
	Parking	$ 6.00
7-10-91	American Express Air Fare	$ 1,072.00
	Meals/Lodging	$ 82.41
		$ 2,079.44

PHOTOGRAPH FEES

DATE	PAYEE	AMOUNT
12/07/90	Howells One-Hour Photo	$ 94.83
08/01/91	Howells Photo Service	677.34
08/02/91	Howells Photography	920.55
	Total	$1,692.72

EXHIBITS

DATE	PAYEE	AMOUNT
07/25/91	Reuels	$ 37.23
08/02/91	Reuels	74.43
08/08/91	Jensen Reproductions	204.00
08/14/91	Jensen Reproductions	246.23
08/15/91	Jensen Reproductions	69.06
08/16/91	Jensen Reproductions	52.59
08/20/91	Jensen Reproductions	1,216.83
09/09/91	Executive Presentation Systems	664.06
	Total	$2,564.43

Addendum J

Arthur H. Nielsen (A2405)
Gary A. Weston (3435)
John K. Mangum (2072)
NIELSEN & SENIOR, P.C.
60 East South Temple
Eagle Gate Tower, Suite 1100
Salt Lake City, Utah 84111
Telephone No. (801) 532-1900

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC., a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, v. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; and KEITH E. GARNER, an individual, Defendants.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS TO TAX COSTS Civil No. 900904288CN Judge J. Dennis Frederick

Defendants, by and through their undersigned counsel, respectfully submit the following Memorandum of Points and Authorities in Support of the Motion of Defendants of even date herewith for the court to tax the costs in this action.

02287

EXHIBIT B

EXHIBIT "B"
DEPOSITION FEES

PAYMENT DATE	PAYEE/DESCRIPTION	Trans.		Exs.		Postage	AMOUNT
9-28-90	Merit Reporters Depo of Arnold Fluckiger Taken 9/24/90						$ 325.50
10-08-90	Merit Reporters Depo of Robert Ord, Vol. I Taken 10/1/90						$ 344.05
10-24-90	Merit Reporters Depo of Robert Ord, Vol. II Taken 10/17/90						$ 319.20
10-26-90	Merit Reporters Depo of Marion D. Hanks Taken 10/16/90						$ 132.85
11-12-90	Merit Reporters Depo of David Alldredge Taken 11/2/90						$ 226.50
11-15-90	Merit Reporters						
	Depo of Brian (Kim) Ekker Taken 11/8/90 -	$208.05	+	$0.40	+	$ 2.50	
	Depo of Roger Evans Taken 11/8/90 -	$182.20	+	$0.80	+	$ 2.50	$ 396.45
11-26-90	Merit Reporters						
	Depo of Sandra Lenois Taken 11/11/90 -	$346.70	+	$4.60	+	$ 3.30	
	Depo of David Brockbank Taken 11/1/90 -	$344.35	+	$0.40	+	$ 3.30	
	Depo of Richard Ith Taken 11/16/90 -	$273.85	+	$0.80	+	$ 3.30	
	Depo of Dennis Lucero Taken 11/16/90 -	$222.15	+	$1.60	+	$ 3.30	
	Depo of Steven Nielson Taken 11/21/90 -	$363.15	+	15.40	+	$ 3.30	$ 1,589.50
12-13-90	Merit Reporters Depo of Keith Garner, V. II Taken 12/5/90						$ 242.15
12-19-90	Associated Professional Report Depo of Keith Garner, Vol. I Taken 10/29/90						$ 551.10
12-31-90	Merit Reporters Depo of David Alldredge, V. II						$ 210.50

1-18-91	Merit Reporters Depo of Jeri Stevens, Vol. I Taken 1/8/91 Depo of Jeri Stevens, Vol. II Taken 1/9/91 -	$232.10	+	$20.80				
	Depo of Monty Stevens Taken 1/9/91 -	$ 49.50	+	6.40			$	308.80
2-20-91	Merit Reporters Depo of Lynne Godfrey Taken 2/7/91						$	255.20
2-26-91	Merit Reporters Depo of Susan Stewart Taken 2/20/91						$	362.55
3-5-91	Kathleen Monaghan Depo of James Milne Taken 2/13/91						$	115.20
3-6-91	Merit Reporters Depo of Sherman Anderson Taken 2/28/91 -	$164.55	+			$1.95		
	Depo of Clem Waltz Taken 2/28/91 -	104.60	+	$1.00	+	$1.95	$	274.05
3-12-91	Merit Reporters Depo of Ong Ka Thai Taken 9/18/89						$	363.00
3-20-91	Merit Reporters Depo of Ong Ka Thai Taken 3/14/91						$	291.20
4-05-91	Merit Reporters Depo of Gene Kimball Taken 3/27/91						$	182.00
4-23-91	Merit Reporters Depo of Sherman Anderson, V. II Taken 4/18/91 -	$231.50			+	$ 9.60		
	Copies of Depos of William Lang Taken 4/15/91, 6/28/91, and 7/1/91 -	$423.00	+			2.40		
	and Charles Foote Taken 4/18/91 and 6/28/91 -	$216.50	+			4.60	$	887.60
4-25-91	Merit Reporters Depo of Dell Jean Cook Taken 4/19/91						$	341.95

02281

4-30-91	Merit Reporters							
	Depo of Burtis Evans							
	Taken 4/25/91 -	$217.45	+			$ 1.95		
	Copies of Depos of Cramer							
	Stiff taken 4/23/91 -	$148.50	+	$ 1.40	+	$ 1.95		
	and David Alldredge, V. III							
	Taken 4/26/91 -	$ 97.90	+	2.20				$ 471.35
5-07-91	Merit Reporters							
	ZX Conversions	$175.00						
	Depo of Gerald Newlon							
	Taken 4/29/91	$ 59.70						
	Depo of David Alldredge, V.IV							
	Taken 5/1/91	$ 58.30						$ 293.00
5-10-91	Merit Reporters							
	Depo of Dr. Herbert Schroeder							
	Taken 5/6/91							$ 177.70
5-13-91	Merit Reporters							
	Depo of Carol Bennett	$ 66.00	+	$ 2.00				
	Taken 5/7/91							
	Depo of James Cummings							
	Taken 5/7/91	$ 68.20	+	$ 2.80				$139.00
6-28-91	Merit Reporters							
	Depo of Dennis Strong							
	Taken 6/19/91	$142.90						
	Depo of Stanley Snarr							
	Taken 6/20/91	$161.05	+			$ 3.00		
	Depo of L. Reaveley							
	Taken 6/25/91	$303.30	+	$ 8.00	+	$ 3.90		$622.15
7-01-91	Merit Reporters							
	Depo of Robert Wilcoxen							
	Taken 6/26/91							$166.90
7-09-91	Merit Reporters							
	Depo of Alan Funk							
	Taken 7/1/91	$246.55	+	$ 3.20	+	$ 3.75		
	Depo of Virgil Kovalenko							
	Taken 7/3/91	$131.65	+	$ 2.00	+	$ 3.75		
	Depo of Brent Pack							
	Taken 7/3/91	$122.25	+	$ 0.00	+	$ 3.75		
	Depo of Al Landvatter							
	Taken 7/3/91	$141.05	+	$ 2.20	+	$ 3.75		
	Depo of Charles Foote, V. II							
	Taken 6/28/91	$ 71.50	+	$ 5.60				
	Depo of William Lang, V. II							
	Taken 6/28/91	$ 85.80	+	$ 5.40				$917.20
7-11-91	Merit Reporters							
	Depo of Cheryl Despain							
	Taken 7/1/91							$ 60.10

7-15-91	Merit Reporters Depo of Ed Andrus Taken 7/2/91	$ 253.75
7-17-91	Norman E. Mark Depo of Harry Arneson Taken 7/5/91	$ 545.30
7-17-91	Merit Reporters Depo of Maxine Hanks Taken 7/9/91	$ 116.90
8-15-91	Merit Reporters Depo of Grant Caldwell Taken 8/14/91	$ 93.20
8-26-91	Anna M. Bennett Transcript of Trial Proffer of testimony of Herbert Schroeder	$ 12.50
	TOTAL:	$11,588.60

02292

EXHIBIT C

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual; Defendants.	AMENDED NOTICE OF DEPOSITIONS Civil No. 900904288CN Judge J. Dennis Frederick

PLEASE TAKE NOTICE that Plaintiffs' counsel, Robert S. Campbell, Jr. and Clark W. Sessions of Campbell Maack & Sessions, will be taking the depositions of Keith E. Garner, Arnold Fluckiger, Robert M. Ord, and Marion D. Hanks at the offices of Campbell Maack & Sessions, 170 South Main Street, Suite 400, Salt Lake City, Utah 84101 on the following dates:

EXHIBIT "A"

Name	Date and Time
Keith E. Garner (individually and as president of 11th Ave. Corporation)	October 18, 1990 10:00 a.m.
Arnold Fluckiger	September 24, 1990 10:00 a.m.
Robert M. Ord	October 1, 1990 10:00 a.m.
Marion D. Hanks	October 16, 1990 10:00 a.m.

Said depositions will be before a Certified Shorthand Reporter and will be upon oral interrogatories pursuant to Rule 30 of the Utah Rules of Civil Procedure.

DATED this 17 day of September, 1990.

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.
CLARK W. SESSIONS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of September, 1990, the foregoing AMENDED NOTICE OF DEPOSITIONS was served on Defendants by mailing a true and correct copy thereof to:

Arthur H. Nielsen, Esq.
John K. Mangum, Eaq.
NIELSEN & SENIOR
Attorneys for Defendants
60 East South Temple, #1100
Salt Lake City, Utah 84111

Kathleen Loyd

2104090.PL2

[redacted]

02296

EXHIBIT D

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
JOANN SHIELDS (4664)
CAMPBELL MAACK & SESSIONS
First Interstate Plaza, Suite 400
170 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual, Plaintiffs, vs. 11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual; Defendants.	DISCOVERY CERTIFICATE Civil No. 900904288CN Judge J. Dennis Frederick

I HEREBY CERTIFY that on the 10th day of September, 1990, PLAINTIFF'S FIRST SET OF INTERROGATORIES TO THE DEFENDANTS and PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS were served on Defendants by hand-delivering true and correct copies of the same to Arthur H. Nielsen, Esq. and John K. Mangum, Esq.,

[redacted]

EXHIBIT "D"

Nielsen & Senior, Attorneys for Defendants, 60 East South Temple, #1100, Salt Lake City, Utah.

DATED this 10th day of September, 1990.

CAMPBELL MAACK & SESSIONS

DEAN C. ANDREASEN
Attorneys for Plaintiffs

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 10th day of September, 1990, a true and correct of the foregoing DISCOVERY CERTIFICATE was hand-delivered to:

Arthur H. Nielsen, Esq.
John K. Mangum, Esq.
NIELSEN & SENIOR
Attorneys for Defendants
60 East South Temple, #1100
Salt Lake City, Utah 84111

[redacted]

00000

02300

EXHIBIT E

EXHIBIT "E"

Schedule of Deposition Fees Claimed by Plaintiffs As Grouped by Defendants

1.	Reporter fee not attributable to this case. Fee for deposition of M. Norman 6-26, mistakenly included on invoice 4526B dated July 3, 1991		$ 85.00
2.	Reporter fee for computer disc conversions to ZX format invoice dated May 7, 1991, from Merit Reporters (part of payment made by Plaintiffs on May 7, 1991)		$ 175.00
3.	Court reporter fee to Anna Bennett on August 26, 1991, for copy of Defendants' proffer regarding testimony of Dr. Herbert Schroeder		$ 12.50
4.	Reporter fees for copies of deposition transcripts for depositions taken only at request of Defendants		
	a. 1989 deposition of Ong Ka Thai taken in a separate action, and transcribed in 1991 at request of Defendants - expedited rate	363.00	
	b. Deponents not called to testify at trial by either side (M. Stevens, C. Foote, C. Despain, and C. Bennett)	482.20	
	c. Fact witnesses at trial called by Plaintiffs (D. Alldredge, Ong Ka Thai, J. Cummings, and J. Stevens)	1,210.50	
	d. Experts called at trial by Plaintiffs (Newlon, Milne, Stiff, Lang and Caldwell)	936.55	
	Total of Items a. through d. above		$ 2,992.25

5.	Reporter fees for depositions of 14 people deposed by Plaintiffs but who never testified at trial and whose depositions were not used at trial (S. Anderson, E. Andrus, H. Arneson, D. Brockbank, D.J. Cook, K. Ekker, L. Godfrey, Maxine Hanks, R. Ith, E. Kimball, B. Pack, S. Snarr, D. Strong, and C. Waltz)		$ 3,480.35
6.	Reporter fees for depositions of 8 people deposed by Plaintiffs, called to testify at trial only by Defendants		
	a. Defendants' Experts (Schroeder, Reaveley, Wilcoxen, and Funk)	913.30	
	b. Fact Witnesses (S. Stewart, B. Evans, A. Landvatter, and V. Kovalenko)	866.35	
	Total of items a. and b. above		$ 1,779.65
7.	Reporter fees for depositions of 8 people deposed by Plaintiffs and called to testify at trial by Plaintiffs		
	a. Interviewed by Plaintiffs before deposition (R. Evans, S. Lenois, and S. Nielson)	921.95	
	b. Depositions noticed before Plaintiffs served first set of interrogatories on Defendants (A. Fluckiger, R. Ord, K. Garner, and Marion Hanks)	1,914.85	
	c. Remaining witness (D. Lucero)	227.05	
	Total of items a. through c. above		$ 3,063.85
8.	Grand Total of Items 1-7 above		**$11,588.60**

02302

Addendum K

ROBERT S. CAMPBELL, JR. (0557)
CLARK W. SESSIONS (2914)
DEAN C. ANDREASEN (3981)
CAMPBELL MAACK & SESSIONS
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
Telephone: (801) 537-5555

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ONG INTERNATIONAL (U.S.A.) INC, a Nevada corporation; D&D MANAGEMENT, a Utah corporation; and DAVID L. ALLDREDGE, an individual,	171347 1-17-92 8:26AM **ORDER AND JUDGMENT**
Plaintiffs,	
vs.	
11th AVENUE CORPORATION, a Utah corporation, f/k/a SALT LAKE MEMORIAL MAUSOLEUM; KEITH E. GARNER, an individual;	Civil No. 900904288CN Judge J. Dennis Frederick
Defendants.	

The Motion of Defendants for Taxation by the Court of Costs came on regularly for determination on December 23, 1991. After considering the Motion, Plaintiffs' Verified Memorandum of Costs, the memoranda of the parties filed in support and in opposition to the Motion, and being fully advised in the premises, it is HEREBY ORDERED, ADJUDGED AND DECREED that

1. Defendants' motion for taxation of costs be and the same is hereby granted.

2. Witness fees for the scheduled trial date in May, 1991, be and the same are hereby disallowed as costs of this action.

3. Travel expenses for depositions, together with expenses for photocopies, photograph fees and exhibits be and the same are hereby disallowed as costs of this action.

4. All other costs as prayed for in Plaintiffs' Verified Memorandum of Costs (except the $85.00 erroneous deposition fee) be and the same are hereby allowed and taxed as costs of the action, detailed as follows:

Filing Fees	$ 125.00
Witness Fees	631.75
Deposition Fees	11,503.60
TOTAL	$12,260.35

Pursuant to the foregoing, JUDGMENT be and the same is hereby awarded against 11th Avenue Corporation and Keith E. Garner, jointly and severally, and in favor of Ong International (U.S.A.), Inc. in the amount of Twelve Thousand Two Hundred Sixty Dollars and Thirty-Five Cents ($12,260.35).

DATED this 21 day of June, 1992.

BY THE COURT:

J. DENNIS FREDERICK
District Court Judge

APPROVED AS TO FORM:

CAMPBELL MAACK & SESSIONS

ROBERT S. CAMPBELL, JR.
CLARK W. SESSIONS
DEAN C. ANDREASEN
Attorneys for Ong International (U.S.A.), Inc.

NIELSEN & SENIOR

ARTHUR H. NIELSEN
GARY A. WESTON
JOHN K. MANGUM
Attorneys for Defendants

Addendum L

CHAPTER 18
PUNITIVE DAMAGES AWARDS

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

History: C. 1953, 78-18-1, enacted by L. 1989, ch. 237, § 1; 1991, ch. 6, § 4.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, made a stylistic change in Subsection (1)(b) and added Subsection (1)(c).

Applicability. — Laws 1989, ch. 237, § 4 provides that the act applies to all claims for punitive damages that arise on or after May 1, 1989.

Effective Dates. — Laws 1989, ch. 237, § 4 makes the act effective on May 1, 1989.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Tort Law, 1990 Utah L. Rev. 269.

CHAPTER 237
S. B. No. 24
Passed February 21, 1989
Approved March 14, 1989
Effective May 1, 1989

PUNITIVE DAMAGES AMENDMENTS

By Haven J. Barlow
LeRay L. McAllister
Lorin N. Pace
Richard B. Tempest
Arnold Christensen
Stephen J. Rees
Dix H. McMullin
David H. Steele
Lane Beattie
Omar B. Bunnell
Glade Nielsen
Craig A. Peterson
Alarik Myrin
John P. Holmgren
Dixie L. Leavitt
Eldon A. Money
Cary G. Peterson
C. E. Peterson
Boyd K. Storey

AN ACT RELATING TO PUNITIVE DAMAGES; PROVIDING CERTAIN STANDARDS FOR AWARDING PUNITIVE DAMAGES.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

ENACTS:
78–18–1, UTAH CODE ANNOTATED 1953
78–18–2, UTAH CODE ANNOTATED 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Enacted.

Section 78–18–1, Utah Code Annotated 1953, is enacted to read:

78–18–1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41–6–44.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

Section 2. Section Enacted.

Section 78–18–2, Utah Code Annotated 1953, is enacted to read:

78–18–2. Drug exception.

(1) Punitive damages may not be awarded if a drug causing the claimant's harm: (a) received premarket approval or licensure by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et. seq. or the Public Health Service Act, 42 U.S.C. Section 201 et. seq.;

(b) is generally recognized as safe and effective under conditions established by the Federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) This limitation on liability for punitive damages does not apply if it is shown by clear and convincing evidence that the drug manufacturer knowingly withheld or misrepresented information required to be submitted to the Federal Food and Drug Administration under its regulations, which information was material and relevant to the claimant's harm.

Section 3. Severability Clause.

If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act is given effect without the invalid provision or application.

Section 4. Effective Date.

This act takes effect on May 1, 1989, and applies to all claims for punitive damages that arise on or after that date.