

1985

Home Abstract and Title Company Inc. v. Mivhael V. Lewis : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

HOME ABSTRACT AND TITLE)	
COMPANY, INC.,)	
)	
Plaintiff)	
and Appellant,)	
vs.)	Case No. 20427
MICHAEL V. LEWIS,)	
)	
Defendant)	
and Respondent.)	

BRIEF OF RESPONDENT

Appeal from the Decision of the
Second Judicial District Court of
Weber County, State of Utah
Honorable Ronald O. Hyde, Judge

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Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES

In addition to the issues stated by Home, implicit therein, and addressed in Home's appeal brief, are the following:

1. Whether the covenant not to compete in the employment contract between Home and Lewis is void for failure of consideration.

2. Whether Home is guilty of bad faith; and, therefore, is not entitled to enforcement of the covenant not to compete.

3. Whether the covenant not to compete in the employment contract between Lewis and Home contains unreasonable time and area restrictions.

4. Whether the anti-competitive provisions of the contract between Lewis and Home violate public policy.

STATEMENT OF THE CASE

Home Abstract and Title Company, Ogden, Utah, brought an action against Michael V. Lewis, a former employee of Home Abstract and Title Company, to enforce the provisions of a covenant not to compete in an employment contract between Lewis and Home Abstract.

Other than discovery, there were no pretrial proceedings in the District Court, and the matter was tried to the Honorable Ronald O. Hyde, presiding Judge of the Second Judicial District Court, on October 31, 1984. At the trial, the defendant, Michael V. Lewis, and the principals of Home Abstract and Title Company, including Franklin S. Maughan, Sr., its President, Franklin S. Maughan, Jr., Russell Maughan, and Richard Maughan, testified and introduced documentary evidence. Trial memoranda were submitted to the Court by both parties.

Judge Hyde issued his Memorandum Decision in favor of Lewis on November 28, 1984, and executed a Judgment of Dismissal, together with Findings of Fact and Conclusions of Law consistent with said Memorandum Decision on December 20, 1984.

Home Abstract and Title Company filed its Notice of Appeal to the Utah Supreme Court with the Second Judicial District Court in and for Weber County on January 16, 1985.

STATEMENT OF FACTS

Plaintiff and Appellant, Home Abstract and Title Company, Inc. ("Home"), is a Utah corporation authorized to and doing business in the State of Utah. Defendant and Respondent, Michael V. Lewis ("Lewis") is a former employee of Home and is currently employed by Associated Title Company, in Ogden, Utah. The corporate officers and directors of Home include Franklin D. Maughan, Sr., H. Randall Hillyard, Richard T. Maughan, Franklin D. Maughan, Jr. and Russell C. Maughan, who are also full time employees of Home.

On or about March 1, 1976, Lewis became employed by Home. While Lewis had no prior experience working for a title company, he quickly learned the basic skills involved in title work. Approximately three months after his employment with Home, Lewis was presented with an employment contract, the terms of which are the subject matter of this litigation. Lewis executed the contract, which was backdated to March 1, 1976. (APP. "A" to Home's Brief).

Among other things, the contract provided that Lewis was presently employed in the abstract business by Home and that "both parties are desirous of continuing the said employment, on the same terms as exist presently." The contract further provided that Lewis agreed "not to engage, on the termination for any cause whatever p.f. [sic] his employment hereunder, in the same or

similar line of business as that now carried on by [Home Abstract] or engage to work for any individual firm or corporation engaged in such line or similar line of business in Weber, Davis, Morgan or Box Elder Counties within a period of Five years from the time the employment under this contract ceases." Notwithstanding Home's statement of facts in its Brief, there is nothing in the contract or the transcript reference "which guaranteed [Lewis] employment for a year."

The contract contains no provision for injunctive relief, either preliminary or final, or for damages in the event of a breach by Lewis.

Just prior to Lewis' employment with Home, another employee, one Frank Hammond, having signed an agreement identical to the one signed by Lewis, voluntarily terminated his employment with Home and immediately went into direct competition with Home in Weber County. Neither Home, nor any of its officers or directors ever sought to enforce that covenant despite Hammond's direct competition with Home. In addition, Home, in its Brief, suggests that the Frank Hammond incident was an isolated incident and/or an exception to the policy of Home with reference to enforcement of the noncompete provisions of the employment contract. The evidence taken at trial, however, clearly shows that the Frank Hammond incident not only evidenced a policy of

selective enforcement; but was, indeed, consistent with Home's policy of selective enforcement.

When Franklin D. Maughan, Sr. was asked, "Do you have a policy of enforcement of these employment contracts . . .?", Mr. Maughan responded, "Depending on the circumstances." (Emphasis added.) In response to a follow-up question regarding enforcement of the contract, Franklin D. Maughan, Sr. said, "So we assess each case separately, and if we, in our judgment, think that it's proper not to enforce it, we don't." (Emphasis added.) (Tr. p. 72). Mr. Maughan then went on to identify some of the factors taken into consideration by Home in determining whether to enforce the provisions of the contract, such as the effect on Home's business, "human elements", reasons for a person leaving and starting their own business, and efforts to disrupt office force. (Tr p. 73). The evidence also suggests that Home determined to enforce the terms of the contract against Lewis because of a dispute that arose between Lewis and Home over vacation pay which was ultimately resolved in favor of Lewis by the Industrial Commission. (Tr. Pp. 78-79).

Further, although there was some uncertainty with reference to Russ Maughan, the testimony of Home's witnesses at the trial revealed that most, if not all, of the Maughans, who are officers, directors and employees of Home, did not sign an employment agreement, even though their competing with Home for

another employer or otherwise constituted a much greater threat to the well-being of Home than anything Lewis could do. (Tr. Pp. 90-91).

While employed by Home, Lewis fulfilled all of his obligations under the contract; and, in addition to performing title work, Lewis, together with other officers, directors and employees of Home was encouraged to socialize with existing and potential customers. To that end, Lewis was given an expense account, and expended the sum of \$796.71 the calendar year next prior to his termination entertaining existing and potential customers of Home. (Tr. Pp. 14, 15, Home's Trial Ex. 3). Home's fact statement in its Brief would suggest to the court that Lewis's primary responsibilities as an employee of Home involved the creation and maintenance of Home's goodwill. That assertion is very simply not supported by the evidence.

Although it is not clear just exactly at what point during his employment Lewis began spending more time than some other employees of Home taking customers to lunch, it is clear that all of the employees of Home Abstract Company were charged with the responsibility of entertaining clients and building goodwill. (Tr. Pp. 35, 36, 104, 105). It is equally clear that there is absolutely no evidence that Lewis was hired for the purpose of engaging in any sort of "public relations" work. Indeed, Lewis, right up to the time of his termination, was

involved in fulfilling his primary responsibilities to Home as an abstractor. (Tr. p. 172, See also Tr. p. 82). In this regard, a closer examination of Home's Exhibit 3 covering the calendar year next prior to Lewis' termination is in order. (Home's trial Exhibit 3 is attached hereto as Respondent's Appendix 1). According to that Exhibit, and as hereinbefore stated, Lewis spent the sum of \$769.71 entertaining customers of Home. The Exhibit further reveals that that sum was expended on only 35 separate occasions during the year, apparently involving the purchase of a meal. Thus, Home's Exhibit 3 (Appendix 1 hereto) shows that Lewis made customer contacts and expended funds for the purpose of entertaining customers only a little more than once every two weeks. Notwithstanding Home's assertions on page 7 of its Brief with reference to the time consumed by Lewis, there does not appear to be anything on page 14 of the Transcript standing for that proposition.

While it is obvious from the foregoing analysis that Home's trial Exhibit 3 hardly supports the proposition that Home's goodwill depended exclusively upon the efforts of Lewis, the testimony of Franklin S. Maughan, Sr., President of Home, reveals that the goodwill of Home depended a great deal upon the "considerable reputation" of Mr. Maughan and the other officers and employees of Home. (Tr. p. 49). In that regard, Mr. Maughan further testified that Home was the largest title company in the

Ogden area employing over 50 percent of all of the registered abstracters in Ogden and that business actually improved subsequent to Lewis' departure. (Tr. Pp. 51, 52). Mr. Maughan agreed that Associated Title would have picked up business in the Ogden area whether or not Lewis had been employed by Associated (Tr. Pp. 56-57), that major customers of Home typically spread their business among all title companies (Tr. p. 57), and that factors such as geographic proximity between the customer and title company, rotation and replacement of customers' personnel, and other business relationships between the customer and title company such as lessor-lessee, or bank depositor, are all factors which determine whether or not a customer will place an order with any given title company. (Tr. Pp. 48, 57). Finally, Mr. Maughan testified that Home has absolutely no commitment of any sort from any of its customers providing that those customers will deal exclusively with Home or any other title company. (Tr. p. 57).

Most compelling, however, is Mr. Maughan's testimony on p. 58 of the trial transcript,

Q. So as Mr. Browning said then in his opening remarks, we are not in a position to determine whether or not an order that was placed with Associated by one of Home's customers was the same order that Home otherwise would have gotten from that customer? There is no way to determine that; is there?

A. That's right.

Q. And that's why Mr. Browning in his opening remarks is talking about things like threatening harm, and that sort of thing, because there is just no way to tell that the orders currently being serviced by Associated would otherwise have been placed with Home Abstract?

A. That's right.

Mr. Maughan further testified at p. 59 of the trial transcript,

Q. . . . there's no way to establish the fact that there were less orders that may have been the result of economic fluctuations, other business relationships, you know, where you have your checking account or who you happen to lease from? There's no way to establish that if you got one or two less orders from First Security in any given month, that that was because of the presence of Associated Title?

A. I guess that's fair.

Notwithstanding Mr. Maughan's testimony, Home's brief places great emphasis upon the information contained in Home's Exhibit 1, portions of which are attached hereto as Respondent's Appendix 2. Home's Exhibit 1 consists of numerous sheets of raw data compiled by Home showing recording activity at the Weber County Recorder's Office by the major title companies in the area for the major customers of those title companies, together with a summary of the raw data for March, April, May and June, 1983, for Home, and March, April and June, 1984, for Home and Associated Title. As can be seen from the portion of the Exhibit summarizing the raw data, Home enjoyed 22 percent of the "business" as reflected by the County Recorder's records in March of 1983, the

month that Lewis resigned. Home's share of the "business" in April of 1983 increased to 28 percent and 35 percent in the months of May and June of 1983. It is interesting to note at this point, that Home did not present the Court with any information regarding the percentage of the "business" enjoyed by Associated for the months of April, May and June, 1983, although the portion of Home's Exhibit 1 containing the applicable raw data shows that as early as March, 1983, Associated had a 2 percent share of the "business".

In 1984, according to the Exhibit, Home enjoyed 22 percent of the "business" in March, 24.6 percent in April, and 22 percent in June, while Associated enjoyed eight percent of the "business" in March, six percent in April, and six percent in June. For some reason, Home presented no information for the month of May, 1984.

Perhaps most compelling, however, is that portion of Exhibit 1 to which Home makes no reference in its Brief showing that in July, 1984, the share of the "business" enjoyed by Home had risen to 32 percent, even as the Exhibit graphically illustrated that Associated's miniscule share had declined prior thereto.

During the last year of his employment with Home, Lewis was advised by Russ Maughan, a personal friend, that he would be wise to seek employment elsewhere because of difficult business

conditions and the return of other members of the Maughan family to the company. (Tr. p. 107). Lewis received similar advice from other sources. (Tr. p. 148). Subsequent thereto, Lewis was contacted by Associated Title Company ("Associated") and offered a position. Although Associated had previously maintained an office in Roy, Utah, as well as other areas of the state, and had a large number of statewide contacts with various major lending institutions, its office in Ogden opened roughly contemporaneous with Lewis' employment in the Spring of 1983. (Tr. p. 47).

Lewis believed that Home would not seek to enforce the covenant not to compete based on Home's history of selective enforcement, the fact that more important employees may or may not have signed a similar contract, and the fact that he had been advised to seek work elsewhere. Lewis also believed the covenant not to compete was unreasonable with reference to geography and time, and, therefore, was unenforceable. (Tr. Pp. 142-148).

Upon termination, Lewis took with him no customer lists, no trade secrets, no documentation whatsoever, but only the general knowledge and skills he acquired doing basic title research which he acquired while working for Home. Indeed, there are no trade secrets in the title business and customers for the services of a title company in any given area are common knowledge. (Tr. p. 61).

SUMMARY OF ARGUMENTS

The appeal of Home Abstract and Title Company from the decision of the Honorable Ronald O. Hyde to the Utah Supreme Court is little more than a general challenge to the findings of Judge Hyde, upon which Judge Hyde determined that the noncompete covenant in an employment agreement between Home and Michael V. Lewis against Lewis was unenforceable against Lewis.

Lewis' arguments primarily address the evidentiary basis for the findings and the legal effect thereof; together with legal points implicit in the issues as stated by Home Abstract in its appeal brief.

Based upon the findings of the trial court, the instant case is clearly and unequivocally distinguishable from the fact situations that existed in the leading Utah cases of Allen v. Rose Park Pharmacy, 237 P.2d 823 (Utah 1951), and System Concepts, Inc. v. Dixon, 669 P.2d 421 (Utah 1983), both heavily relied upon by Home Abstract.

Thus, when the principles set out in Allen and System Concepts are applied to the facts of the instant case, Home Abstract is clearly not entitled to the relief sought.

The findings of the trial court which clearly distinguish the instant case from the cases relied upon by Home Abstract are supported by the weight of the evidence, and, in addition, the noncompete covenant of the employment contract that Home Abstract

is seeking to enforce against Lewis is not enforceable by injunction, is void for failure of consideration, is not enforceable because of Home Abstract's bad faith, contains unreasonable area and time restrictions and violates public policy.

ARGUMENT

POINT I

THERE WAS NOTHING SPECIAL, UNIQUE OR
EXTRAORDINARY ABOUT LEWIS' DUTIES
AS AN EMPLOYEE OF HOME.

In order for a covenant not to compete to be enforceable against a former employee by his former employer, the services rendered by the employee must be special, unique or extraordinary. System Concepts v. Dixon, 669 P.2d 421 (Utah 1983).

In System Concepts, the Utah Supreme Court reversed and remanded a trial court's denial of preliminary injunctive relief. The action involved a suit by System Concepts, a company engaged in the manufacture and sale of sophisticated cable television equipment, against defendant Dixon, System Concepts' former national sales manager, to enforce a covenant not to compete contained in a "proprietary information agreement" entered into by the parties for the purpose of protecting the company's goodwill and preventing competitors "from acquiring, appropriating or discovering the distinctive characteristics and design features of the company's products and to maintain a protective competitive advantage of its products in the industry." The restrictive

provision at issue in the agreement prohibited the defendant from rendering certain types of services to competitors within two years from the date of termination of her employment with System Concepts. The agreement also provided that System Concepts' rights under the agreement would be enforceable by injunction in the event of a breach by Dixon.

Defendant Dixon voluntarily terminated her employment with System Concepts approximately three years later, and accepted employment with MetroData, a competitor of System Concepts in the production of cable television equipment. Her position with MetroData was that of National Sales Manager, just as it had been with System Concepts. Thus, as a representative of MetroData, Dixon was required to contact the same customers as she did as an agent for System Concepts. System Concepts brought suit and immediately sought preliminary injunctive relief. In reversing and remanding the trial court's denial of preliminary injunctive relief, the Utah Supreme Court noted with particularity the extent to which System Concepts substantially developed its goodwill through the defendant in her capacity as National Sales Manager. Not only was the defendant's name, picture, and role as National Sales Manager promoted extensively through advertising media in connection with the company's products, but she also had become intimately involved with the operational design, specification and

technical development of a number of System Concepts' products. She also had access to proprietary information.

Although not specifically addressed in the System Concepts case, the issue of whether an employee's services are "special, unique or extraordinary" requires a two pronged analysis. In order for the noncompete agreement to be enforced, do the services rendered by the employee have to be special, unique or extraordinary only to the employer; or do the services rendered by the employee have to be special, unique or extraordinary in the broader sense, to the extent that those services would be special, unique or extraordinary to any potential employer or competitor? Because of the nature of System Concepts' business, together with the intimate involvement therein by Dixon, it would appear that the Utah Supreme Court is focusing upon the concept of "special, unique or extraordinary" in the broader or absolute sense (although the concept could be adapted to a circumstance such as that confronting the Court in Allen v. Rosepark Pharmacy, 237 P.2d 823 (Utah 1951), where, for all practical purposes, the departing employee was the business).

In the instant case, Home does not even contend that Lewis' duties as an abstracter were "special, unique or extraordinary". Instead, Home's case focuses exclusively upon the so-called "public relations" responsibilities that Lewis, together with each and every other employee of Home had; although Lewis and

Russell Maughan engaged in somewhat more "public relations" activity than other general employees.

Although no specific authority could be located bearing on the general proposition that taking customers to lunch or dinner 35 times each year involves in and of itself a special, unique or extraordinary function, common sense dictates that taking a customer to lunch or dinner can hardly be considered a special, unique or extraordinary function in and of itself.

Nor can taking a customer to lunch or dinner 35 times over a calendar year be considered special, unique or extraordinary in the context of Home Abstract's business where all 14 employees, officers and directors of Home Abstract were charged with a "public relations" function, and Lewis' activities resulted in the modest expenditure of \$796.71.

It is equally obvious that the instant case is a far cry from the circumstances that existed either in System Concepts or Allen. First, the instant case does not involve trade secrets on the part of Home that might be considered worthy of protection. Second, the services rendered by Lewis were not special, unique or extraordinary. Third, the covenant between Lewis and Home was a broad restraint against competition, rather than a narrowly drawn restraint tied to special, unique or extraordinary abilities or skills of the defendant, as was the covenant in System Concepts. Fourth, Lewis had no knowledge of highly technical products, as was

true of defendant Dixon in System Concepts, nor did Lewis have any involvement in design specifications or access to proprietary information, as did Dixon. Fifth, in System Concepts, the Court placed some emphasis on the fact that the departing employee had no alternative but to contact the very same customers whom she had contacted on behalf of System Concepts. Obviously, in the instant case, there are many customers for the services of a title insurance company other than those currently served by Home, and the customers served by Home typically place business with all other title companies in the area. Sixth, Lewis' name was not placed before the public with the same intensity as was Dixon's in System Concepts, nor was Lewis entirely or substantially responsible for the goodwill of Home, as was the case with Dixon, the National Sales Manager in System Concepts and the pharmacist in Allen. Indeed, in both of those cases, for different reasons, the departing employee was the only contact the employer had with customers. Finally, it is important to note that the contract between Home and Lewis does not provide that the same may be enforced by injunction, as was the case in System Concepts.

Defendant Lewis's position as a general abstracter for Home is more closely analagous to the "common calling" occupied by the salesman in Robbins v. Finlay, 645 P.2d 623 (Utah 1982). In Robbins, the court held that although Finlay "was a sophisticated sales person, well versed and knowledgeable in the occupation

which he pursued," the covenant not to compete was unenforceable, because, among other things, his services were "[not] special, unique, or extraordinary, even if their value to this employer was high." Robbins, 645 P.2d at 627 and 628. The court noted:

The case is clearly distinguishable from Allen v. Rose Park Pharmacy, supra, where a covenant not to compete was enforced because all the goodwill of the employer was associated with, and created by, the employee. In this case, the covenant serves no purpose other than restricting an employee from competing with a former employer. There is nothing to indicate that Finlay was largely responsible for plaintiff's goodwill, and there is no contention or proof that Finlay was privy to any trade secrets plaintiff may have possessed. Nor is there any indication that his competition (except for the use of the customer leads) had any greater effect on plaintiff's goodwill, or other legally protectable interests, than the competition of any other salesman employed by a competitor of plaintiff. Robbins, at 627-28.

Finally, both Robbins and System Concepts can fairly be read to require not only that the employee's services be "special, unique or extraordinary," but also, that the language of the contract itself, be restrained by limitations keyed to uniqueness of the employee's services, trade secrets, confidentiality, or even competitive unfairness. Robbins, 645 P.2d at 628; see, also, System Concepts, 669 P.2d at 424.

Of course, the limitations in the contract between Home and Lewis are in no way tied to any elements of uniqueness of Lewis' skills, services, or tied to trade secrets or otherwise.

Indeed, the covenant in the instant case sounds indictingly similar to the covenant involved in Robbins, 645 P.2d at 624-25, as well as the covenant quoted therein from Columbia Ribbon, infra, 369 N.E.2d at 6, as an example of a broad, sweeping covenant that "baldly restrains competition." Robbins, 645 P.2d at 628.

The broad sweeping language in Lewis' contract can in no way be said to measure up to the specificity of the "proprietary information agreement" signed by defendant Dixon in System Concepts and which was narrowly tailored to protect only legitimate interests of System Concepts. The agreement there, as executed, was for the purpose of preventing competitors from "acquiring, appropriating or discovering the distinctive characteristics and design features of the company's products and to maintain and protect the competitive advantage of its products in the industry." Among the restrictive provisions of the agreement was an "anticompetition covenant" which prohibited employees from rendering certain types of services to competitors (defined in the agreement as "conflicting organizations") within two years from the date of termination of their employment with System Concepts. System Concepts, 669 P.2d at 424. Thus, the noncompetition covenant in System Concepts was tied directly to the special, unique, and extraordinary aspects of the services rendered by defendant Dixon which included "management of sales

activities and customer referral on a national level, extensive personal promotions in advertising media, products development and design consultation, development of sales methods and general promotion of products." System Concepts, 669 P.2d at 426 n.11. The covenant also protected System Concept's products. Finally, in certain circumstances the "proprietary information agreement" allowed defendant Dixon to work for competing organizations. Brief for Appellant at 14, System Concepts, 669 P.2d 421. The covenant not to compete signed by Lewis is not narrowly tailored to protect only legitimate interests of Home, but rather, is nothing more than broad restraint against competition; and, even if Home had demonstrated that Lewis' services may have had a high value to Home Abstract, that is simply not enough. Robbins, 645 P.2d at 628.

POINT II

LEWIS TOOK WITH HIM ONLY THE GENERAL SKILLS THAT HE GAINED DURING THE COURSE OF HIS EMPLOYMENT WITH HOME AND HOME'S GOODWILL STAYED WITH HOME AFTER LEWIS' DEPARTURE AND WAS NOT DEPENDENT UPON LEWIS' EMPLOYMENT.

Based upon an examination of Home's Brief, it is readily apparent that it is relying almost exclusively upon Lewis' testimony to the effect that he did, indeed, contribute to the goodwill of Home.

Home put on no evidence whatsoever even remotely relating to the quantum of goodwill generated by other employees, officers and directors of Home nor made any sort of effort to quantify the goodwill allegedly "taken" by Lewis.

In addition, Home totally ignores the testimony of Franklin S. Maughan, Sr., Home's President, to the effect that the goodwill of Home depended a great deal upon other people and other factors having nothing to do with Lewis, such as the fact that Home's business actually increased subsequent to Lewis' departure; that there is absolutely no way to determine whether an order serviced by Associated would otherwise have been serviced by Home; the size, reputation and longevity of Home itself; the fact that, because of its prior operations in Weber County and Salt Lake City connections, Associated Title would have served customers in the Ogden area from its Ogden office whether or not Lewis had been employed thereby, that there are many factors which determine whether or not a customer may use one title company or another; and that customers of a title company have no commitments of any sort to any particular title company.

Most compelling, however, is the raw data contained in Home's trial Exhibit 1 which graphically illustrates that, subsequent to Lewis' departure, Home has been doing very well indeed, to the point where, in July, 1984, some three months prior to the trial of the instant case, Home's share of the "business"

in the Weber County area equalled approximately 32 percent, compared to 22 percent at the time of Lewis' departure. The Exhibit speaks for itself with reference to the number of orders processed by Home during the periods represented.

Thus, while there is no question that Lewis, together with all of the other officers, directors and employees of Home contributed to Home's goodwill, it is readily apparent from the testimony of Franklin S. Maughan, Sr., President of Home, together with the documentary evidence, that Lewis, quite literally, "took" no measurable goodwill with him when he departed; and that the goodwill of Home remained with Home.

Finally, as more specifically analyzed in Point I herein, the System Concepts and Allen cases involve facts so radically different than those in this case, that they have, for all practical purposes, no applicability hereto.

POINT III

THE COURT'S FINDINGS OF NO MATERIAL CHANGE IN HOME'S SHARE OF THE TITLE BUSINESS AND LACK OF INJURY TO HOME BY LEWIS' EMPLOYMENT BY A COMPETING COMPANY ARE SUPPORTED BY THE EVIDENCE.

As pointed out herein in Point II, supra, Home, in its Brief, continues to ignore the clear and unequivocal testimony of Franklin S. Maughan, Sr., President of Home, relative to the ability of Home to demonstrate damage had occurred by Lewis' departure and employment with a competing company. (See Lewis' Statement of Facts, Pp. 7-8, supra).

Also, Home continues to focus upon the fact that Lewis' company, Associated Title Company, was doing little or no business in the Weber County area prior to Lewis' employment therewith. This position, obviously, begs the question, since Associated had no recent presence in the Weber County area except contemporaneous with Lewis' employment therewith. Also, as hereinbefore set out, there is no question that Associated Title, because of its statewide contacts, was already servicing many potential customers who had a presence in Weber County and would have given much of their business to Associated in Weber County whether Lewis had been employed by Associated or not.

Of course, as hereinbefore discussed, the information set out in Home's trial Exhibit 1 simply does not stand for the proposition urged upon the Court by Home; and, instead, supports the findings and conclusions of the trial court.

POINT IV

THE FINDING OF THE COURT RELATIVE TO HOME'S SELECTIVE ENFORCEMENT OF THE NONCOMPETE COVENANT OF THE EMPLOYMENT CONTRACT IS SUPPORTED BY THE EVIDENCE.

In its Brief, Home persists in its effort to suggest to the Court that the "Frank Hammond incident" was an isolated incident when, in fact, the incident graphically demonstrated the selective enforcement policy of Home.

Again, Home chooses to ignore the clear and unequivocal testimony of Franklin S. Maughan, Sr., Home's President, wherein Mr. Maughan not only testified that enforcement (and, indeed, execution) of the employment contract was selective, but discussed many of the factors considered by Home in determining whether or not enforcement would be pursued. (See Statement of Facts, Pp. 3-5, supra).

It is also interesting to note that the employment contract, Appendix A to Home's Brief, contains no language whatsoever to the effect that failure to enforce the terms of the agreement does not constitute a waiver of any prior or subsequent determination to enforce.

POINT V

HOME IS NOT ENTITLED TO INJUNCTIVE RELIEF.

The specific grounds upon which an injunction may be granted are set forth in Rule 64A(e) of the Utah Rules of Civil Procedure, which states:

An injunction may be granted:

(1) When it appears by the pleadings on file that a party is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act complained of, either for a limited period or perpetually;

(2) When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the party seeking injunctive relief;

(3) When it appears during the litigation that either party is doing or threatens, or is about to do, or is procuring or suffering to be done some act in violation of the rights of another party respecting the subject matter of the action, and tending to render the judgment ineffectual;

(4) In all other cases where an injunction would be proper in equity.

This case is not governed by the System Concepts' analysis of Rule 65A(e) since this case was not concerned with the issue of entitlement to temporary injunctive relief, as was the situation in System Concepts. As the authorities cited in System Concepts indicate, the question of temporary injunctive relief involves different considerations than does the matter of final injunctive relief. Although the Utah Supreme Court determined in System Concepts that a party need only show probable entitlement to relief and threatened irreparable injury in order to obtain preliminary injunctive relief, the Court in System Concepts purported to modify Rule 65A(e) with respect to final injunctive relief, which requires that a party seeking relief "is entitled to the relief demanded". (Emphasis added).

The authorities cited by the Utah Supreme Court in System Concepts draw distinctions between preliminary and final injunctive relief in support of allowing the plaintiff in System Concepts to get by on a showing of probable entitlement to relief, the Supreme Court cited 2 Moore's Federal Practice, ¶¶ 65.04(1), 65.04(4). Paragraph 65.04(4) reads in part:

At a hearing on application for a temporary injunction it is not necessary to establish to a certainty that the plaintiff is entitled to relief on the merits, but rather that his success is probable. A plaintiff putting on his case for temporary relief may hold back evidence, or indeed his case may not be fully developed. Thus, it is important to know that when he puts on his evidence he is having his final day in court.

Indeed, the Appellant's brief in System Concepts points out at page 11, "Time constraints on a hearing on a motion for preliminary injunction may preclude a full, final hearing on the merits." That brief further notes the protection of security granted one against whom a preliminary injunction is issued. Appellant's brief at 11, System Concepts, 669 P.2d 421. The instant case does not involve a determination of whether Home should be granted temporary injunctive relief in order to protect its rights until such time as a full, final hearing on the merits can be had; rather, this case involved a final hearing on the merits at least 19 months after Lewis departed. Having had ample time to prepare its case, Home now asserts that probable entitlement to relief should be the standard. Nevertheless, as the foregoing analysis indicates, Home's claim that the restrictive covenant is enforceable should fail even under the relaxed "probable entitlement" standard.

The same rationale applies to the second and "most important element of Rule 65A(e)", that of irreparable harm. System Concepts relaxed the irreparable harm standard with respect

to temporary injunctive relief, requiring only a showing of threatened harm, and the irreparability thereof, rather than a showing of actual, irreparable harm. Again, if this Court were to apply the relaxed standard used in System Concepts, it would seriously deride the inherent distinctions between temporary injunctive relief and final injunctive relief after a full hearing on the merits. In fact, Home had sufficient time and opportunity to prepare its case, with available, ample records; and Home cannot now be permitted to complain of a conjectured, threatened injury when it can show no actual injury occurred during the 19 months that had lapsed between Lewis' departure from Home and the trial.

In System Concepts, the Utah Supreme Court cited Columbia College of Music and School of Dramatic Art v. Thunberg, 116 P.2d 280 (Wash. 1911), as support for the proposition that a party seeking temporary injunctive relief need not show actual injury. The language of Thunberg supports such a proposition. Again, however, the procedural context of the case (a motion for non-suit) suggests that the case was more closely analogous to a pretrial hearing for temporary injunctive relief, rather than final injunctive relief, and therefore, should not be extended in its application to reach cases involving the latter. The Washington Supreme Court in Thunberg reversed and remanded the decision of the trial court granting a motion for non-suit.

POINT VI

THE COVENANT NOT TO COMPETE IS VOID FOR FAILURE OF CONSIDERATION.

While there is little question that an offer of continued employment may sometimes be adequate consideration for an employee's submission to the terms of a covenant not to compete, that offer of continued employment must be accompanied by a sufficient change in the terms of the agreement or an alteration of the employee's status such that the court may find sufficient consideration on the part of the employer to support the covenant, above and beyond the terms already agreed upon.

The instant case is clearly distinguishable from System Concepts and Allen in this regard. In each of those cases, the court found that, although the employees signed the contracts after commencement of employment, sufficient consideration existed to support the covenant not to compete. Of significance in each of those cases is the fact that changes in the employee's status or benefits accompanied the employee's signing of the new contract containing the restrictive covenant.

In System Concepts, defendant Dixon was promoted to National Sales Manager and was given a substantial increase in salary. Thus, System Concepts was not unreasonable in requiring Dixon to sign the "proprietary information agreement" in light of the increased exposure as a result of her new responsibilities to

her employer as National Sales Manager and her access to highly technical and proprietary information regarding the complex products sold by System Concepts.

In Allen the pharmacist worked for the employer four to five weeks before going on payroll, after which he worked approximately one more month before executing the written contract which provided for his weekly salary plus a bonus of 10 percent of the net profits to be credited to a stock purchase option also provided for in the contract. Although the issue of consideration was raised, it was framed in terms of mutuality of obligation, rather than whether additional consideration was required at the time of signing the contract in light of the previous employment relationship in order to support of restrictive covenant. In any event, the court most likely would have found sufficient consideration for the covenant in view of the bonus and stock purchase option provided for in the written contract had the issue been considered in Allen.

The written contract entered into between Home Abstract and Lewis some three months after Lewis commenced work under an oral agreement contemplated no change in employee status, gave Lewis no additional compensation or benefits, but added only the covenant not to compete.

Among other things, the pertinent portion of the contract entered into between Lewis and Home provides:

. . . whereas party of the second part [Lewis] is presently employed in the abstract business of the party of the first part [Home], in Ogden City, Utah, and both parties are desirous of continuing the said employment on the same terms as exist presently, to make more certain of the terms of said employment, the parties hereto agree that the terms of said employment are as follows:

.

7. This agreement constitutes and expresses the whole agreement of said parties hereto in reference to any employment of second party by first party and in reference to any of the matters or things herein provided for or herein before discussed or mentioned in reference to such employment, all promises, representations and understandings relative thereto being herein merged. (Emphasis added).

The contract between Home Abstract and Lewis expressly states that it is merely continuing the same terms as then existed between the parties. The only additional obligation imposed on either party as a result of the agreement, is the covenant not to compete. No new consideration for such a covenant is found on the face of the agreement. The parties agreed that the contract between them constituted and expressed the whole agreement between the parties.

The Pennsylvania Supreme Court considered the precise issue raised by defendant Lewis in Maintenance Specialties, Inc. v. Gottus, 314 A.2d 279 (Pa. 1974). In Gottus, the court in finding a restrictive covenant unenforceable held that when a covenant not to compete is executed subsequent to the initial

employment, it will not be enforced unless the restricted employee receives a corresponding benefit or change of status. Without such change of status, the new contract fails not only because it is not "ancillary" to the taking of employment, but also because of lack of consideration to support the additional covenant of the employee.

Gottus represented a fact situation almost identical to that found in the instant case. Defendant Gottus entered into an oral employment contract in 1968 and thereafter, in April, 1969, entered into a written employment contract without altering the terms of the oral contract with the exception, of course, of the restrictive covenant.

The case of Jacobson & Co. v. International Environment Corp., 235 A.2d 612 (Pa. 1967), cited and distinguished by the court in Gottus, bears out the distinctions raised by Lewis in the instant case and System Concepts and Allen. An employee in Jacobson had been hired under an oral contract in 1957 which provided for a \$10,000 salary and contained no restrictive covenant. In 1959 the employee signed a written contract which contained a restrictive covenant not to compete with his employer after termination of his employment. The 1959 contract also changed the employee's compensation scheme to a \$11,000 salary plus a share of the profits. As a result of this new contract, the employee's salary increased dramatically. In 1963 the employee

earned in excess of \$24,000. The employee argued that the subsequent written contract adding the restrictive covenant was unsupported by consideration, but the court found the modified compensation arrangement was consideration for the execution of the restrictive covenant.

In the lower court proceeding in Jacobson the situation of a fellow employee, however, presented the precise facts of the Gottus case and of the instant case. The restrictive covenant there was struck. In distinguishing that ruling from the Jacobson case, the Jacobson court stated:

However, the findings were that Kassner was permanently hired in February, 1962, under an oral contract without a restrictive covenant, and in June required to execute a written employment contract identical to that under which he had been working, except that it contained a restrictive covenant. Clearly, here is a case of no consideration for the covenant. (Emphasis added).

The present case clearly fits within the rule applied by the Pennsylvania Supreme Court in Gottus, and this court should find Lewis' covenant not to compete void for failure of consideration. Schneller v. Hayes, 23 P.2d 272 (Wash. 1934) dealt with an almost identical situation. The defendant in that case was employed by the plaintiff at the time that he signed the agreement. The Supreme Court of Washington held that there was no new consideration for the agreement because defendant was already employed.

The Allen court emphasized in finding sufficient consideration, the fact that the pharmacy "was purchasing the goodwill which might accrue to the business by reason of the plaintiff's personal attributes." The court further emphasized the many close friendships that Allen had in the neighborhood, and the immediate goodwill which would accrue to the business as a result thereof.

In the instant case, Home had no expectation at the time of contracting with Lewis that it was purchasing goodwill which might accrue to it because of Lewis' reputation or extraordinary skill. Lewis possessed neither the reputation of the pharmacist in Allen, nor the extraordinary knowledge and skill possessed by the National Sales Manager in System Concepts, both of which characteristics presented the immediate prospect of the acquisition of goodwill by the employer, just as the sale and purchase of an established business presents a likelihood of an immediate accrual of goodwill to the purchase. Indeed, in Lewis' case, the hiring of an inexperienced employee without any contacts in the community wherein the business is located presents no prospect of an immediate accrual of goodwill. Thus, the rationale applied by the Utah Supreme Court in Allen and System Concepts is inapplicable in the instant case.

POINT VII

HOME IS GUILTY OF BAD FAITH, AND, THEREFORE, IS NOT ENTITLED TO RELIEF.

The Allen test requires that the party seeking to enforce a noncompetition covenant not be guilty of bad faith. Under the circumstances of the instant case, Home is guilty of conduct that not only amounts to bad faith, but also satisfies the elements of equitable estoppel.

In Custom Drapery Company v. Hardwick, 531 S.W.2d 160 (Tex. Civ. App. 1975), a Texas court of appeals held that an employer that was guilty of unclean hands due to conduct which amounted to his bringing about the breach of contract rather than the employee was not entitled to enforce a covenant not to compete signed by the employee. The evidence adduced at trial in that case indicated that the company substantially reduced benefits to the employee and attempted to avoid its obligations altogether in certain circumstances.

In Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979), the Utah Supreme Court set out the requirements of equitable estoppel as follows:

Equitable estoppel requires:

- (1) An admission, statement, or act inconsistent with the claim afterwards asserted;
- (2) Action by the other party on the faith of such admission, statement or act; and

- (3) Injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Numerous acts and statements were committed and made by Home Abstract and its agents, which were relied upon by defendant Lewis in accepting and continuing other employment in competition with Home, and which will result in serious injury to Lewis if Home were allowed to contradict and repudiate such acts and statements.

Included among those acts and statements are: (1) Home Abstract's failure to enforce a similar non-competition covenant with Frank Hammond just prior to the time Lewis began working for Home, together with Hammond's direct competition with Home since his termination; (2) Russell Maughan's statement to Lewis advising him that Russell, an officer and director of Home, was seeking work elsewhere and suggesting that Lewis do the same, in as much as Lewis was employed at Home at a result of Russell's friendship; (3) the arrival of other members of the Maughan family as officers and directors, thus precluding the ability of Lewis to move up; (4) that business was had and Lewis had little future with Home; and (5) that the policy of Home was to selectively require the execution of a enforcement of the employment contract.

POINT VIII

THE COVENANT NOT TO COMPETE CONTAINS UNREASONABLE TIME AND AREA RESTRICTIONS.

Standards defining the reasonableness of time and area restrictions have typically been determined on an ad hoc basis. In Allen the Utah Supreme Court expressed its displeasure with a five year restriction as follows: "We think that the defendant might have made the reasonableness of the restriction more certain by prescribing a shorter period of time." However, the court upheld the five year restriction in Allen, since the geographical restriction encompassed a mere two-mile radius, and the court found compelling the reasons to protect the goodwill of the business involved. In the instant case, Home has shown no entitlement to protection of its goodwill; But, more importantly, the geographic restriction found in Lewis' contract, if upheld, will preclude Lewis from pursuing his chosen trade. This is not a case of an individual having to move outside a two-mile radius to pursue his trade, but includes Weber County and all of the counties immediately surrounding Weber County

The importance of carefully drawn geographical restrictions is readily shown by Pancake Realty Co. v. Harbor, 73 S.E.2d 438 (W. Va. 1952), cited in System Concepts, where the West Virginia Supreme Court held that a one-year covenant not to compete was invalid because it failed to include a territorial

limitation. Although System Concepts may be interpreted to relax the territorial restriction element, the business there involved a nationwide industry, and it was reasonable to restrict the defendant from working as a nationwide sales manager for a competitor. In the title industry, the larger competitors often maintained offices in every town with a reasonable population. Should the covenant be upheld in the instant case, however, Lewis would be forced to travel to Salt Lake County or Cache County, the nearest counties in which he could pursue his trade, assuming he would be in a position to find comparable employment at a comparable salary. The hardship imposed on defendant Lewis as a result of the restraint in this case far exceeds the nature of the interest Home seeks to protect by enforcing the covenant. See Robbins v. Finlay, 645 P.2d 623, at 627.

POINT IX

THE ANTI-COMPETITIVE PROVISION OF THE CONTRACT BETWEEN LEWIS AND HOME VIOLATES PUBLIC POLICY.

Public policy considerations militate against sanctioning the loss of a man's livelihood. Columbia Ribbon & Carbon Manufacturing Company v. A-1-A Corporation, 42 N.Y.2d 496, 398 N.Y.S.2d 1004, 369 N.E.2d 4 (1977). Utah statutory law disfavors restrictive covenants such as this:

It is hereby declared to be the public policy of the State of Utah that the right of persons to work, whether in private employment or for the State, its counties, cities, school districts, or

other political subdivisions, shall not be denied or abridged on account of membership or nonmembership in any labor union, labor organization or any other type of association; and further, that the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. § 34-34-2, Utah Code Ann. (1953) (Emphasis added).

Because of the strong public policy favoring the right to work, restrictive covenants which would prevent an employee from pursuing a similar vocation or trade after termination of employment are disfavored by the law. Columbia Ribbon, 369 N.E.2d at 6.

States such as California have declared contracts such as this one void. Section 16600 of the Business and Professions Code of the State of California provides:

Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is, to the extent, void.

Muggill v. Reuben H. Donnelly, Corp., 398 P.2d 147 (Cal. 1965).

The Supreme Court of Hawaii has held that a restrictive covenant is not reasonable if it is greater than the restriction required for the protection of a person for whose benefit it is imposed or if it imposes undue hardships on the person restricted. Technicolor, Inc. v. Traeger, 551 P.2d 163 (Hi. 1976); see also, Robbins, 645 P.2d at 627.

The policy of the law in the State of Utah as expressed in the "Utah Right to Work Statute" and the California statute clearly favor the unrestricted right of an employee to work, and suggests that anti-competitive covenants should be stricken as contrary to the public policy of the State of Utah unless the employer can clearly show by convincing evidence that such protection is necessary to prevent irreparable harm to his business caused either by the employee's misappropriating the employer's trade secrets or his use of special, unique or extraordinary skills to detach the employer's goodwill from the business. Home has shown neither; and the findings and conclusions of the trial court to the general effect that it is unreasonable under the circumstances, to prevent Lewis from working at his chosen field for a period of five years in Weber, Davis, Box Elder and Morgan Counties is unreasonable.

POINT X

THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED
BY THE EVIDENCE AND NOT CLEARLY ERRONEOUS.

It is a well established principle in Utah that the Supreme Court will not disturb findings of fact made by the trial court unless those findings appear to be clearly erroneous or against the weight of the evidence. Indeed, even in situations where the evidence may be conflicting, the Supreme Court will defer to the trial court. Dang v. Cox Corp., 655 P.2d 658 (Utah 1982).

In the instant case, Home's appeal amounts to little more than a general challenge to the findings of the trial court. Even a cursory reading of the trial transcript and examination of trial exhibits shows that little of the critical evidence in support of the trial court's findings is in conflict, but, more importantly, overwhelmingly supports the findings of the trial court.

CONCLUSION

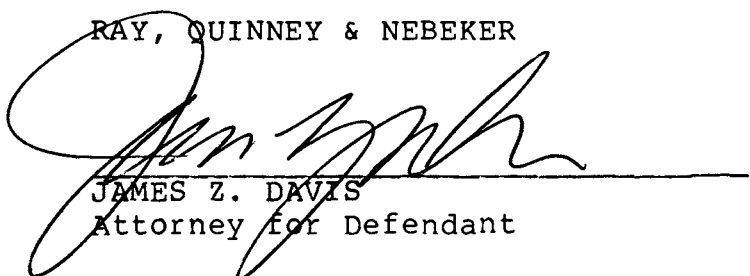
All of the findings of the trial court challenged by Home in this appeal are supported by the weight of the evidence.

In addition, Home is not entitled to injunctive relief, is guilty of bad faith and in violation of public policy as a matter of law based upon the facts and circumstances of this case.

Thus, the findings and conclusions of the trial court are not clearly erroneous or contrary to the weight of the evidence and must not be disturbed on appeal.

Respectfully submitted this 18 day of April, 1985.

RAY, QUINNEY & NEBEKER



JAMES Z. DAVIS
Attorney for Defendant

0966v

A D D E N D U M

APPENDIX 1

Home's trial Exhibit 1, showing dates
and sums expended by Lewis in
connection with his employment by Home.

APPENDIX 2

Portions of Home's trial Exhibit 3 showing
and/or summarizing title company activity
according to the records of the Weber County
Recorder's Office

APPENDIX 1

Mike Lewis Mastercard
lunches + dinners

Date	where	amt	Monthly Total
12-31-81	Brass Rail	998	
1-29-82	Hayloft	1749	
1-29-82	Utah Noodle	1780	45.27
2-3-82	Hayloft	2718	
2-7-82	Belgian Waffle Inn - Midvale	2242	
2-9-82	Brattens Sea food	1488	
2-12-82	Lions Den	1400	
2-16-82	Brass Rail	1284	
2-24-82	Anthony's	1297	104.29
3-14-82	Desert Inn - Las Vegas	12075	
3-23-82	Brass Rail	1633	13708
4-27-82	Mr Steak	1282	1282
5-3-82	Francisco's	651	
5-24-82	Hayloft	3020	3671
6-6-82	The Mexican Place	1513	
6-14-82	Warehouse	2292	3805
7-9-82	Waldo's	2308	
7-13-82	Mr Steak	1492	3800
8-5-82	Mr Steak	1432	
8-12-82	Hilton Hotel	1938	
8-17-82	" "	2358	
8-26-82	Brass Rail	604	
8-28-82	JB Big Boy - Clearfield	1495	7827
9-10-82	Hilton Hotel	4622	
9-20-82	Mr Steak	1529	
9-29-82	Hilton Hotel	3390	9541
10-6-82	Layton Noodle	1482	
10-8-82	Hilton Hotel	4034	
10-21-82	Berconi's Pasta	2515	9031
11-05-82	Hilton Hotel	1859	
11-05-82	Utah Noodle	1570	
11-16-82	Hilton Hotel	2616	
11-16-82	" "	1587	
11-19-82	" "	1844	
11-24-82	Layton Noodle	1874	11350
			769.71

83'' Home At
71
312
 (229)

122
432
 (289)

76
214
 (356)

88
248
 (350)

Mar

84
Home
82
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110
447
 (24.69)

June

80
361
 (929)

Assoc

30
375
 (86)

28
447
 (69)

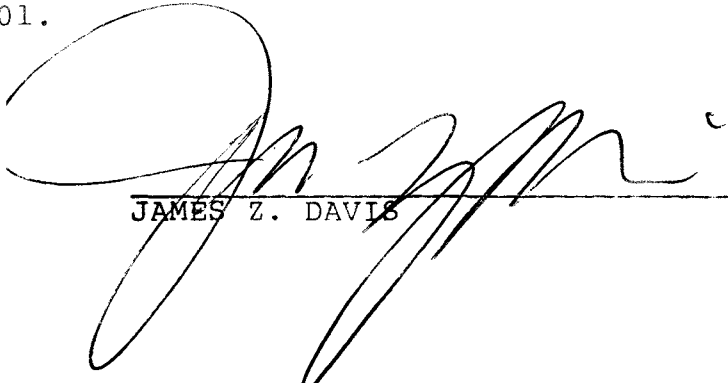
22
361
 (69)

AMERIC. S&L							1			1
BANK OF UTAH			1			1		3	1	6
CITY CONSUMER										0
CITY MORTG.										0
CITICORP			5	3		1				9
CITIZENS		1	2			1	1	1	8	14
CLEARFIELD SB							1			1
COMM. CREDIT										0
CSB					1		1	1	1	4
ESCROWS INC.									2	2
ESCROWS SPEC.							2			2
FAMILY BANK								1		1
FECU			24		2		1			27
FIDELITY FINAN.							2			2
FSB			5		1		1			7
1st SEC. REALTY										0
GE MORTGAGE		1								1
INDIVIDUAL	4	1	2	3	2	4		1	1	21
LOCKHART	1			2			1		1	5
MTN. WEST	3		2		1		1	2		9
NORWEST										0
OGECU			1							1
OGDEN 1st FED.		2	1	2		1	4			10
OMECU						1				1
ORCU			6							6
PEOPLES FINAN.							1			1
TRANSAMERICA			2							2
USECU								1		1
U S & L				1		1				2
UTAH MORTG.										0
WEBER VALLEY						3		3		6
WSOCU										0
WESTERN MTG.		1			1					2
ZIONS						1			1	2
Lincoln Serv.										0
	8	6	53	12	8	13	17	12	7	149

	AMERIC	CARDON	HATC	MVT	OGDEN	SECUR	US	UTAH	WEBER	CUNDICK	TOTAL
ASSOCIATES											
AMERIC. S&L		1		3				3			7
BANK OF UTAH									4		4
CITY CONSUMER											0
CITY MORTG.			2	1	2						5
CITICORP			2	1			1				4
CITIZENS	1							1	1		3
CLEARFIELD SB								1			1
COMM. CREDIT											0
CSB		1			1			1	1		4
ESCROWS INC.										4	4
ESCROWS SPEC.					1		3				3
FAMILY BANK											3
FECU			25	1							26
FIDELITY FINAN.							1				1
FSB		2	1	1	6	1	1				12
1st SEC. REALTY											0
GE MORTGAGE		2									2
INDIVIDUAL	4	8	4	3	4		3	5	1	1	33
LOCKHART			1				1	4	4		10
MTN. WEST		2	1		1	1		3	2		10
NORWEST			3								3
OGEU								1			1
OGDEN 1st FED.		2		1	2						5
ONECU								2			2
ORCU			3								3
PEOPLES FINAN.											0
TRANSAMERICA			3								3
USECU											0
U S & L		1	1	1		1					4
UTAH MORTG.											0
WEBER VALLEY					1		2				13
WSOCU											0
WESTERN MTG.											0
ZIONS											0
Lincoln Serv.											0
	5	19	46	12	17	3	10	19	15	6	152

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of April, 1985, a true and correct copy of the foregoing Brief of Respondent was mailed, postage prepaid, to Dale T. Browning, of Browning, Blackburn & Baldwin, Bank of Utah, Suite 320, 2605 Washington Boulevard, Ogden, Utah 84401.



JAMES Z. DAVIS