2001

S and F Supply Co, Burger-In-The-Round, Andrew W. Souvall, Toula P. Souvall, Peter W. Souvall, Mary Souvall and Zions First National Bank v. S. Craig Hunter : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

S & F SUPPLY COMPANY, a Utah corporation; BURGER-IN-THE-ROUND, a Delaware corporation, ANDREW W. SOUVALL, TOULA P. SOUVALL, his wife; PETER W. SOUVALL, MARY SOUVALL, his wife,

Plaintiffs-Respondents,

ZIONS FIRST NATIONAL BANK, a National Association,

Intervening Plaintiff-Respondent,

vs.

S. CRAIG HUNTER,

Defendant-Appellant.

Case No. 12686

Reply Brief of Defendant-Appellant

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Marcellus K. Snow, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JPPLY, a Utah :ion, et. al.,	)	
Plaintiffs,	)	Case No. 12686
vs.	)	
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tervening Plaintiff,	)	
vs.	)	
G HUNTER,	)	
Defendant.	)	

I

BRIEF OF DEFENDANT-APPELLANT

Page 9 -- Citation to 345-346 should be to 396-39

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Appellant's Reply Brief

The statement of the nature of the case, the disposition in the lower court, and the relief sought on appeal have heretofore been set forth in appellant's brief, and are not, therefore, set forth herein. However, appellant does desire to clarify some of the facts set forth in the brief of intervening plaintiff-respondent. In addition thereto, appellant desires to respond to certain of the legal arguments raised in the brief of intervening plaintiff-respondent.

PRELIMINARY STATEMENT

In its brief, intervening plaintiff-respondent has challenged appellant's version of the record as set forth in appellant's Statement of Facts. As part of the challenge, Zions

First National Bank has prepared its own Statement of Facts and introduced much new material in its brief. Considerable time has elapsed and plaintiffs-respondents have failed to file a brief, apparently relying upon the brief filed by the Bank. In the interim, appellant has retained the law firm of Strong & Hanni, as associate counsel, for the purposes of filing this reply brief and presenting oral argument to this Honorable Court. It is not appellant's intention to restate the various facts and arguments which were set forth in his original brief. However, appellant recognizes the complexity of the facts involved in this case and deems it imperative to reply to intervening plaintiffs-respondents within the limitations of Rule 75 (p) (2) of the Utah Rules of Civil Procedure.

To accomplish this purpose, appellant will stand upon the statement of the facts in his original brief. It is appellant's contention that the same represents a fair reading of the record and that they are adequately and fully documented. There are numerous statements in the Bank's brief which appellant contends are incorrect and not supported in the record. They will be discussed under the various appropriate points of argument.

ARGUMENT

POINT I

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY TO DETERMINE WHETHER THE BANK WAS THE AGENT OF THE PLAINTIFFS FOR THE GIVING OF INFORMATION ABOUT UNIVERSAL LEASING TO THE DEFENDANT, AND FURTHER THAT A PRINCIPAL IS LIABLE FOR THE ACTS AND OMISSIONS OF ITS AGENT ACTING WITHIN THE SCOPE OF THAT AGENCY.

The Lower Court's refusal to allow the jury to consider the alleged agency relationship between Zions First National Bank and the plaintiffs was highly prejudicial and amounted to significant error. There was sufficient evidence to raise a jury question on appellant's theory of agency, but the Court ignored such evidence in its instructions to the jury and in the manner in which it submitted the case on special interrogatories. The instructions and interrogatories treated the parties as completely separate and had the effect of telling the jury that there was nothing unusual about this banking transaction This attitude of the Court was manifested early in the proceedings in the highly restrictive rulings on the admissibility of evidence. Appellant was prevented from presenting considerable additional evidence which was probative on the issue of agency and other material relationships of the plaintiffs and the Bank officers. (See point II of this brief). The net effect of the Court's rulings and instructions was that the jury had to consider the plaintiffs and the Bank as standing only in the relationship of debtor and creditor and that one was not responsible for the acts of the other. Also, the jury was forced to view the acts of omissions of either as independent from the acts or omissions of the other. As a result, appellant was effectively denied the right to present the heart of his case to the jury. The issue of agency was properly raised in the pleadings by appellant, there was evidence to support the same, and the defendant requested an instruction on agency. As stated on page 22 of the Bank's brief, it is the duty of the Court to present the theories of both parties to the jury. This the Court failed to do.

The Bank has misunderstood and misstated Mr. Hunter's position on the question of agency as contained in his brief.

On Page 8 of its brief, the Bank interprets the appellant's position in the following manner:

> ". . . Defendant argues that Zions First National Bank, intervening plaintiff in this action, became the agent of the plaintiffs for the sale of a security under Utah Code Annotated, Section 6-1-22 (1) (b) (1953), because it required express consent of the stockowner before releasing any information about the stock in question."

Such is not the position of Mr. Hunter and no such argument is contained in his brief.

It is Mr. Hunter's position that the Bank became the agent for the plaintiffs for the specific purpose of providing appellant with the information on the stock of Universal Leasing Company and in that capacity, liability could be found against both the Bank and the plaintiffs under the cited Utah law. It is not contended that the Bank became the agent because it required the consent of the plaintiffs before giving such information, but rather that it became the agent when the plaintiffs directed it to give the information to the defendant and vested in it the corresponding authority to act and it so acted.

Appellant has no real quarrel with the general conclusions of the legal authorities cited on the issue of agency in the Bank's brief, although they certainly are not a full recitation of the law of agency. It is appellant's contention that these authorities are consistent with his position and that the question of agency should have been submitted to the jury. While consent of the parties is necessary to the creation of an

agency relationship, such consent may be expressed or implied. Thus, we see in 2A C.J.S., Agency, Section 52, the following language:

> "The relation of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. The law creates a relationship of principal and agent if the parties, in the conduct of their affairs actually place themselves in such a position as requires the relationship to be inferred by the courts, and if, from the facts and circumstances of the particular case, it appears that there was at least an implied intention to create it, the relation may be held to exist, notwithstanding a denial by the alleged principal, and whether or not the parties understood it to be an agency."

In the case of *Presta v. Monnier,* 146 A.2d 404, 145 Conn. 694, the Supreme Court of Connecticut held that a vendor of an apartment building who referred a purchaser to a woman to answer purchaser's questions as to certain material facts made the woman his agent for the purpose of answering the specific questions. This is closely analogous to what the plaintiffs and Bank did. The evidence shows that when Mr. Hunter contacted Mr. Peter Souvall, one of the plaintiffs, regarding the possible purchase of Universal Leasing Company's securities, Mr. Souvall agreed that they wanted to sell the stock, but informed Mr. Hunter that it was being held by the Bank as collateral on a loan and that he would have to go there to get the information he was seeking concerning the stock (R 43, 44, 47, 396, 397). Mr. Souvall told Mr. Donald Bennett, one of the officers of the Bank, to give Mr. Hunter whatever information about the stock the Bank had

(R 183). Mr. Hunter went to the Bank for said information and consulted about the stock with Mr. Bennett and also Mr. John Langeland, Senior Vice-President of the Bank (R 183, 396, 397).

While there is conflict in the evidence as to the information received by Mr. Hunter, the proper resolution of this conflict was for the jury. There is no question that Mr. Hunter went to the Bank for the purpose of getting whatever financial information the Bank had on the stock. He was sent there by the sellers of the stock and it is incredible that the Bank now takes the position that its role in the entire transaction was immaterial to the culminated sale. Mr. Souvall and the other plaintiffs knew the Bank had information to give Mr. Hunter and they relied upon the Bank to do so. This placed upon the Bank the duty to give accurate information to the appellant and to make full disclosure of all the information it had. Whether or not the Bank complied with this duty is a question which the jury should have decided. There was sufficient evidence introduced in the lower court to show that the Bank played a material role in the sale and to submit the question of "whether or not the Bank violated the Statute" to the jury. That evidence is discussed under Point VI of this brief. It is reasonable to conclude that a fair minded jury would find that the plaintiff directed and the Bank consented to act as an agent for the purpose of giving financial information to Mr. Hunter. It is also reasonable to assume that in giving such a direction, plaintiffs retained a certain amount of control over the Bank in this limited agency relationship. Had the plaintiffs changed their minds and directed the Bank not to give any such information to Mr. Hun-

ter, the Bank would have followed such a direction which is evidence that it was subjecting itself to the control of plaintiffs. It only acted upon the authority vested in it by the plaintiffs.

The failure of the Court to submit this issue to the jury deprived appellant of the basic part of his statutory defense and counterclaim against both the plaintiffs and the Bank. It is appellant's contention that the plaintiffs should be charged not only for their own material omissions, but also for the misrepresentations and material omissions of the Bank. It is also Mr. Hunter's position that the Bank is primarily liable under Section 61-1-22(1)(b) as an agent who materially aided in the sale of the security.

The Bank has responded on Pages 13 and 14 of its brief by saying, "Under any theory, the jury's decision would have foreclosed the judgment in defendant's favor." The Bank bases its conclusion upon the answers the jury gave to Interrogatories 11 through 14. These interrogatories were submitted on the question of the commission of common law fraud by the Bank. They were submitted under the qualifying instruction that Hunter had the burden of proving the issues answered therein by clear and convincing evidence. As pointed out in appellant's brief, the elements of statutory fraud and common law fraud and the burden of proof in each is different and it cannot be said that the jury ever considered the elements of statutory fraud as it related to the Bank in its individual or agency capacity. In addition to this, as will be seen in Point II of the brief, the Court's erroneous rulings excluding material evidence prevented the jury from properly considering the elements of Mr. Hunter's common law defense against the

Bank and the Souvalls. Other errors of the court considered under this Point and in Points II, III and IV will show that the court made it impossible for the jury to properly try the issues in appellant's statutory defense against the Souvalls. Therefore, contrary to the position of the Bank, under no theory were the issues properly directed to or considered by the jury. Further discussion on this matter and also the right of appellant to amend the pleadings to conform to the evidence will be discussed hereafter.

POINT II

SUBSTANTIAL AND PREJUDICIAL ERROR WAS COMMITTED BY THE LOWER COURT IN EXCLUDING FROM THE EVIDENCE DEFENDANT'S PROPOSED EXHIBIT 7-D, ENTITLED "SBA LOAN APPLICATION."

The Respondent-Bank argues that proposed Exhibit 7-D was irrelevant and immaterial and was not probative of any fact in issue and therefore, the court properly excluded it from evidence. The Respondent further argued that there was nothing improper about the SBA loan. In order to support those points, the Bank made numerous misstatements of fact that are not supported by the record and incorrectly stated the Defendant's arguments as to its admissibility.

The facts show that the SBA loan application (proposed Exhibit 7-D is the application that included the Universal Leasing stock as part of the loan collateral) was prepared in August of 1969 and not in June as contended by the Bank (R35-36). John Langeland and Donald Bennett of the Bank assisted Pete Souvall in the preparation of the Loan application (R-88). At the time, John Langeland and T. Bowering Woodbury, a Vice-President of the Bank, were both officers,

members of the Board of Directors, and members of the Executive Committees of both borrowing corporations (R-28, 80-83). For these and other reasons, the Bank was charged with knowledge of the contents of the SBA loan application. It formed the basis upon which the loan to the plaintiffs was ultimately made. The appellant's agreement to purchase the securities of Universal Leasing Company was the culmination of a series of transactions that started with the SBA loan. It is the appellant's position that these transactions cannot be isolated from one another as the Bank contends. The defendant-appellant will point out how those transactions, beginning with the joint participation of the plaintiffs and Bank officers in the fraudulent procurement of the SBA loan, became a significant part of the circumstances that led up to and surrounded their sale of certain items of the loan collateral to Hunter.

To begin with, the Bank incorrectly stated in its brief that it is not contended that there was anything illegal or improper about the SBA loan. Apparently, the Bank has chosen to ignore Pages 14 through 16 of the appellant's brief. The loan was granted on the basis of numerous misstatements and omissions that were jointly made by the plaintiff and the Bank in the application R-28, 80, 83-84, 88, 144-145, 148 Ex. 7-D. It is contended that those misstatements and omissions in the application were of such a gross nature as to possibly subject the preparers thereof to the criminal sanctions of 15 15 U.S.C. 645 which makes it unlawful to prepare and present a false loan application to the Small Business Administration.

Following their fraudulent procurement and use of the SBA loan, the plaintiff corporations made only one monthly payment of $4,798.00 and went into bankruptcy R-92, 219. The joint participation of the plaintiffs and Bank officers in the above described activities left them with substantial mutual problems to solve. The Bank Officers were deeply concerned that their prior involvement in illegal activities might be uncovered and create other severe problems for them. They were aware that the values of the assets, as shown in the SBA application, were grossly overstated. Their analysis of Universal Leasing to determine if it was worthy of credit revealed that the only way that Universal Leasing would qualify for financing was strictly on the strength of the lessee. That fact, along with their awareness of the effect that Dinner Table's going broke would have on Universal Leasing, gave them knowledge that Universal Leasing was in serious financial trouble. They were also aware that some of the other assets were improperly valued, including some of the leases that they had pledged on the SBA loan that were very delinquent when the application was submitted. Souvalls were also concerned about those problems and that they might lose their homes if a solution couldn't be found.

When Hunter appeared on the scene inquiring about Universal Leasing stock, the plaintiffs and Bank officers devised a plan whereby Hunter would become the solution to their problems. The plan provided the way for Souvalls to get back their homes and have their loan paid back to Zions and the SBA with funds derived from the sale of the Highland Drive property and the worthless Universal Leasing stock. The success of the plan required material misstatements and omissions on the part of the Bank officers as well as the Souvalls.

The willingness of the Bank Officers to make misstatements and material omissions to solve problems which would mutually benefit the plaintiffs and themselves and to make further misstatements and omissions to prevent those prior illegal activities from coming to light is amply demonstrated by their inconsistent and conflicting testimonies concerning their knowledge of and participation in the SBA loan. It is the defendant-appellant's contention that the loan application and related testimony should have been admitted as evidence and that he should have been able to use the application in impeaching their testimonies. In addition to that, it is submitted that the appellant should have been allowed to develop further evidence about their true participation in the activities involving the SBA loan. Some of the irregularities of the SBA loan and examples of their related conflicting testimonies are discussed below and should have been admitted as circumstances of the Bank Officers that had a bearing on their credibility as witnesses.

1. The failure to set forth in ITEM 2 of "Appellant's Statement" of the SBA loan application, the fact that both Langeland and Bennett of the Bank assisted in the preparation of the loan application R88. Pete Souvall testified that both Bennett and Langeland assisted him in filling out that application R88. Langeland testified in his deposition that Bennett assisted Souvall but in court said that the Bank can't assist in filling out an application to the SBA p. 19 of deposition R220-221. In court, both Langeland and Bennett denied that they assisted in the preparation of the SBA loan application R 220-221, 144.

2. The failure to disclose in ITEM 3 the fact that Mr. T. Bowering Woodbury and Mr. John Langeland of the Bank were officers, directors and members of the Executive Committees of both borrowing corporations R 28, 80, 83-84, 143-145. Bennett testified in his deposition that he was aware of only one relationship that Langeland had with Dinner Table. He testified that Langeland was a small stockholder of Dinner Table and that fact was shown in the SBA loan application. p. 8 of deposition. That fact was not shown in the application Exhibit 7-D. In court, Bennett further contradicted his deposition and testified that he was aware that Langeland was a director of Dinner Table when the loan was made R 143. He couldn't explain why that wasn't shown in the application R 144-6.

The responding Bank has incorrectly cited portions of the testimony of Mr. Peter Souvall as evidence for the statement in their brief that the Bank admits that certain of its officers were also officers of the borrowing corporations at the time they procurred the SBA loan p. 16 of their brief. However, the testimony of the Bank officers at the trial contradicted Pete Souvall's testimony. Langeland, Senior Vice-President of the Bank, emphatically denied being an officer or on the Executive Committee of either Dinner Table or S & F Supply Company, or being a director of S & F R 220.

It is appellant's contention that the Bank officers were very concerned about their heavy involvement in irregular and illegal banking practices and attempted to convey the impression to the court that their only interests and motives in seeing the stock sold were those of a bankers. The only relation-

ship besides debtor-creditor that Langeland admitted to was being a reluctant director of Dinner Table R 220-222.

3. The failure to disclose the actual use of the loan proceeds in ITEM 8 or in Exhibit B of the application R 148. Exhibit 7-D shows that in excess of $175,000.00 of the $200,000.00 loan proceeds were to be used as working capital Ex. 7-D item 6. Bennett admitted that $73,000.00 of the loan proceeds went to pay off other unrelated loans at Zions Bank which loans were personally guaranteed by the Souvalls R 147, 148. Bennett admitted that this was not revealed to the SBA in the loan application R 148. This was contrary to his deposition in which he testified that the use of those proceeds were shown in the SBA loan application p. 7 deposition. Langeland's testimony in his deposition was inconsistent on the use of proceeds as well p. 11, 16-18 deposition. When the appellant attempted to go further to show that the balance of the loan proceeds were also misused for their mutual benefit, the matter was objected to by counsel for the plaintiffs and the Court sustained the objection and in effect ruled that the use of the loan proceeds was not material to the issues of the present case R 149-151.

4. The improper evaluation of the assets which were pledged as collateral on the loan. The Bank used Swenson's offer to place a value of $100,000.00 on the stock to procure the SBA loan R 159, 167, 186. Souvall testified that the Universal Leasing stock was a material consideration in the SBA approving the loan R 36. The plaintiffs and the Bank officers stated that the only information that was significant at any time, in their assessment of the value of the Universal

Leasing stock, was Swenson's offer. Both the plaintiffs and Bank officers testified that it was a valid offer and would have been valid even at the time the stock was sold to Hunter. If it was valid, it was much better than Hunter's offer, since Swenson's offer was for $100,000.00 for the stock and they had Psarras' offer of $35,000.00 for some of the other items. Therefore, they would have had $135,000.00 and still have the restaurant inventory to sell R 199-200. Yet, no one ever approached Mr. Swenson about accepting his offer even though the evidence showed: (1) they had contact with Mr. Swenson at times when the loan was in default and the collateral was for sale R 187, 200-202, 208-209, 226, 229, 250; and (2) if the Swenson offer was valid, it would have been a much more lucrative offer than given by Mr. Hunter R 199.

The truth of the matter is that because of their involvements with the plaintiff corporations, they were aware that Universal Leasing was in serious financial trouble. They were also aware that Mr. Swenson was an officer, director, sizable stockholder and on the payroll of Universal Leasing and was, therefore, very much aware of the financial problems of Universal R 208, 605-609, 617-618. This explains the reason that they never attempted to sell the stock to Mr. Swenson.

The Bank contended in its brief that the court properly excluded proposed Exhibit 7-D from evidence because it was not probative of any fact in issue. The defendant-appellant maintains that the admission of proposed Exhibit 7-D was absolutely essential to allow the jury to properly consider numerous disputed facts and issues that were material to his defense of fraud.

The SBA application and related testimonies were material to numerous disputed facts and issues including the following:

(1) *Relationships between Plaintiffs and Bank Officers.* One of those facts in dispute is "what were the true relationships that existed between the plaintiffs and Bank officers that motivated their actions in the sale of assets to Hunter." It is the defendant-appellant's contention that Exhibit 7-D should have been admitted to establish those relationships since they were far different than the debtor-creditor relationship claimed and gave rise to motivations and knowledge far different from what would be expected from a normal debtor-creditor, i.e., banker-client, relationship. The loan application, combined with the limited inquires that the defendant was able to make, established their relationship to be one of joint participants in illegal and fraudulent activities in their procurement and use of the SBA loan and were heavily involved in the affairs of the borrowing corporations. That relationship left them with substantial mutual problems to solve and the plaintiffs and Bank officers worked together to solve those problems in the fraudulent sale to Mr. Hunter. Their willingness to solve those problems by means of material misstatements and omissions is demonstrated by their material misstatements and omissions in the SBA loan application and further misstatements and omissions in their depositons and testimonies in the trial.

(2) *Scienter.* The fact is that the borrowing corporation had substantial intervening business relationships and adverse financial dealings with Universal Leasing. It will be shown under Point III of this brief that those relationships and

dealings were the major factor that caused Universal Leasing to go broke. Therefore, the extent to which the Bank officers were involved with the borrowing corporations in relationships other than debtor-creditor, is significant in establishing their knowledge of said dealings.

(3) *Agency.* The relationship discussed above provided additional reasons why the plaintiffs might use, and have, the cooperation of the Bank officers in providing information on the Universal Leasing stock to Hunter.

(4) *Intentional misstatements and omissions.* In the pleadings, the defendant pleaded that the plaintiffs and Bank officers worked together in a plan to defraud him. It was necessary for the jury to understand the relationships, involvements and mutual problems of the plaintiffs and Bank officers in order to understand the circumstances that motivated their actions in their fraudulent sale to Hunter.

This is not merely a breach of contract action, but involves serious allegations of mutual participation in fraudulent practices. It is a well accepted rule of law that great latitude is permitted in the introduction of evidence in cases involving fraud 37 C.J.S. Fraud, Section 104. In the 1955 Idaho case of *Cooper v. Westco Builders,* 281 P. 2d 669, it was held to be error in a fraud action to deny the admissibility of a document which would only be pertinent to showing a course of conduct bearing on the issue of scienter and intent and would not be directly otherwise relevant to the transaction in question. The Idaho Court then cites the general rule that much latitude should be allowed in the admission of evidence tending to show fraud.

The Court committed further error when it refused admission of the SBA loan application after the subject had been introduced by the testimony of Mr. Peter Souvall R 31-37. The Bank has stated that Mr. Souvall's testimony went only to the existence and execution of the document and did not go into any of the particular thereof. On the contrary, the record clearly shows that Mr. Souvall testified in detail concerning the applicants, the identification and valuation of much of the collateral of the loan, and to the fact that the proceeds were to be used for working capital R 31-37. Thus, the plaintiffs were allowed to use the information contained in the loan application for their purposes without subjecting themselves to the evidentiary liability of the proposed exhibit.

These errors are but further examples of the way Mr. Hunter was prevented from presenting his defense. Not only did the Court, in effect, tell the jury that the plaintiffs and the Bank were independent of one another, but it prevented the appellant from producing evidence that would show they were clearly motivated to work together to protect their mutual business interests and to conceal highly irregular and even illegal activities. Appellant was also prevented from showing how the individual plaintiffs and the individual Bank officers mutually benefited by their deception. These are legitimate areas of inquiry which certainly have relevance in this type of a case. Perhaps the attitude of the trial judge is best reflected by a statement he made after the voir dire of the jury,

> "I know that guy that said they didn't keep their records straight, Brother, I've never found the Bank was wrong yet. I have been wrong, but not the Bank." R 7.

Proposed Exhibit 7-D and related testimony was material to numerous disputed facts and issues and the court committed substantial and prejudicial error by excluding it from evidence.

POINT III

THE LOWER COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTIONS NO. 17 AND 19 WHEN IT FAILED TO INSTRUCT THE JURY THAT LIABILITY UNDER THE UTAH UNIFORM SECURITIES ACT CAN BE PREDICATED UPON AN OMISSION AS OPPOSED TO A MERE HALF-TRUTH.

The Lower Court failed to properly instruct the jury that silence when one has the duty to speak is actionable under the cited statute. The Court only partially quoted the statute in Instruction No. 15 and then improperly interpreted the same in Instructions 17 and 19. In Instruction No. 15, the Court failed to cite the portion of the statute which refers to the liability of an agent for material misrepresentations and omissions. This was discussed fully in Point I. In Instruction No. 17, the Court improperly stated the elements of the statute which will be explained under Point IV of this brief. Subsection A that follows will show the Respondent's claim that, "the Court properly instructed the jury on omissions, when the instructions as a whole were considered" is incorrect. Subsection B is a response to the Respondent's incorrect claim that the defendant-appellant does not claim that the Souvalls were guilty of any material omissions.

A

The Bank appears to have recognized the problems with Instruction No. 17, but states that the Court's instructions should not be judged by isolated statements contained in them, but must be considered as a whole. That being the case, we

next refer to Instruction No. 19 which is the other instruction interpreting the statute. Instruction No. 19 defines what is meant by material facts. The Court failed to explain how material facts may be either material misstatements or material omissions, but rather defined them as:

> ". . . Those fundamental, important facts concerning the financial condition of the corporation or particular reasons why such stock should be purchased."

The clear inference of such language is that a material fact must be an affirmative statement about a material matter.

In Instruction No. 19, the Court also stated,

> "Mere opinions or conclusions which do not incorporate material facts are considered to be sales talk, or irrelevant and immaterial to the part forming his opinion as to whether or not he should buy or sell the stock."

In effect, the jury was told to disregard any representations which did not constitute material facts. However, the clear language of the statute states that if one makes such statements which are misleading under the circumstances there is a duty to disclose all of the material facts about the securities in question.

The case law referred to in both appellant's original brief and the Bank's brief supports the proposition that the construction of the language of the Federal Act which is comparable to the Utah statute, should not be technical and restrictive, but should be flexible to effectuate the remedial purposes of the statute. See cases cited in appellant's and respondent's brief under Point III and also *SEC v. Capital Gains Research Bureau,* 375 U.S. at 195, 84 S.Ct. at 284.

In most of the cases referenced above, the fact situations were such that it was not really necessary to determine whether mere omissions, standing alone, were sufficient to support a finding of liability under the Federal statute. In any transaction, it is almost always possible to find some representation which when considered in the light of the other circumstances of the case (including important omissions), would have to be considered misleading. It could be well argued that such is the case with the plaintiffs and the Bank in their dealings with Mr. Hunter. Certainly Mr. Souvall by implication made statements which, standing alone, were misleading. The very fact that he represented the stock was for sale infers that it has value when in fact it did not. His act of sending Mr. Hunter to the Bank to get information about the stock was misleading and Mr. Hunter had the right to rely upon the reasonable inference that he would get accurate and reliable information from the bank.

B

The Bank's representation in its brief that Mr. Hunter does not claim that the Souvalls made any omissions as to any material fact is not true. There are two major categories of Souvalls omissions claimed by the appellant. The first is that with which Souvall was charged by Law. The facts show that Mr. Peter Souvall was a Director of Universal Leasing when all of the financial statements were prepared on Universal Leasing and Universal Rockwell that could have been available to Mr. Hunter up through the time of sale R 118, 13P, 14P, 18P, 23D. He is charged under the law with knowledge of those statements. The three conflicting 8-31-69 statements (13P, 14P, 18P) and the 11-30-69 statement (23D)

were false, misleading, and did not represent the true financial condition of the Company as of their respective dates R 268-270, 375-377 & 25P, 26P. A financial statement purports to reflect the status of the company on the books and records of the corporation. These statements didn't since the books of the company from 3-31-69 forward were not even posted until May, 1970 R 376. Those statements showed that the company was making money and had sufficient current assets to meet their current liabilities. The books of the company, after posting, showed that they had lost $2,000.00 by 8-31-69 and $34,000.00 by November and that their true net worth was not even 60% of the net worth shown on most of the false statements R 375, 377, Exhibit 31P. The three 8-31-69 statements (Exhibits 13P, 14P & 18P) were prepared for management (including Peter Souvall, a director at that time) because management knew that Universal Leasing was in dire trouble and they needed a financial statement to use in making an acquisition in hopes of bailing themselves out of the water R 604-605, 609-610. At least one of those false financials were subsequently delivered to Zions to obtain additional financing R 606, 607. Hunter got 23D from Eames and 18P from the Bank and used them in concluding that Universal Leasing was in good shape and progressing in a good manner R 397-398.

The second area of omissions claimed against the Souvalls are those which put Souvall under a duty to speak. The plaintiffs had substantial adverse financial dealings and business relationships with Universal Leasing which were not disclosed to the appellant. In November, 1969, Mark Eames (who was president of Universal Leasing and director of Dinner Table), attended a Dinner Table meeting at which Peter

Souvall and John Langeland were present. Eames presented a letter from Universal Leasing's Attorney to Dinner Table demanding the $50,000.00 that Dinner Table had taken from the working capital of Universal Leasing be returned to Universal Leasing R 672. Souvall said that $50,000.00 was paid back to Universal Leasing R 205. The facts show Universal Leasing requested its $50,000.00 back but Dinner Table was bankrupt R 684, 685. Therefore, instead of giving the money back, they gave Universal Leasing the rights to franchise Burger-in-The-Round which proved to be worthless R 684, 685. At that meeting, Langeland and Eames had a heated discussion in which John Langeland explained: (1) that Universal Leasing was not financially capable of handling any more of the leases that Dinner Table was generating; and (2) the current financial condition of Universal Leasing. Eames concluded from that discussion that Langeland appeared to have knowledge of the financial condition of Universal Leasing at that time R 672, 673. Universal Leasing was in serious financial trouble, because their cash position was short and the delinquency position of their accounts receivable was very bad R 604-605, 609-610, 617.

Subsequently, Eames was informed that plaintiffs were going to declare bankruptcy. He kept in constant contact with them trying to collect the sizable receivable they had with Universal Leasing R 618. When Eames was informed that Hunter might buy Souvalls' stock, he felt that if Hunter did, it would be to the betterment of Universal Leasing since Hunter's bailing the Souvalls out at Zions Bank would put the Souvalls in a position where they could possibly honor their obligations to Universal Leasing. Eames said, "That was the whole incentive behind the whole program" R. 618,

619. It was this incentive that caused the Board of Directors of Universal to remove the legend on Souvalls' stock (R 673) and for Eames not to disclose to Hunter the business and financial dealings of Dinner Table and Universal Leasing and the resultant adverse effects on the financial condition of Universal Leasing R 618-620.

After Hunter purchased the stock, Eames was still motivated and resisted putting out any financial statements that would reflect the true condition of the Company R 365. Hunter threatened suit R 483. Finally in May, 1970, Universal Rockwell retained Robert Apgood for that purpose. He had to post the books from 3-31-69 forward R 375-377. He testified that the books showed that the leases that Dinner Table had with Universal Leasing were delinquent R 318-319. Eames testified that those leases which were in default amounted to approximately $300,000.00 R. 619-620. On one of these leases, he discovered that the equipment didn't exist R 683. By the end of May, Apgood had prepared a financial statement for their year end, which was March 31, 1970. The statement showed that Universal Rockwell had lost $126,000.00 and had $736,419.63 in current liabilities and only $445,913.00 in current assets R 548-549. Eames testified that the merger with North Star Marine Sales was rescinded because the working capital of Universal Rockwell had been depleted in Dinner Table and that put Universal Rockwell in a position where they could not make payments on any of the assets of North Star Marine Sales that were encumbered R 548, 361. The facts show that the plaintiffs not only knew Universal Rockwell was in serious financial trouble, they were the major factor that caused it.

Approximately one month before Mr. Hunter entered negotiations with the Souvalls and the Bank, they agreed to sell all of the items that Mr. Hunter purchased for $133,-500.00 to Mr. Psarras for $35,000.00 R 100. This agreement with Psarras for $35,000.00 included the shares of Universal Leasing stock R 100, 101. That sale to Psarras was being held up prior to the time Hunter entered the picture because Psarras needed a little time to come up with the $35,000.00 and when Souvall discussed the pending sale with the Bank and SBA, they told him that he needed to get a disclaimer from the Bankruptcy Court before the sale could be completed R 41-42, 59, 234-236. Therefore, when Mr. Hunter appeared on the scene inquiring about the Universal Leasing Stock, Souvall told Hunter that there were other assets for sale and that they had pending sales of those assets to Psarras and others R 47-48, 102. Hunter was told by Souvall and his attorney that the sale of the stock to him and the sale of other assets to others had to be combined in one sale to him to satisfy the Bank and allow the Bank to get a disclaimer from the Bankruptcy Court on the items that were to be purchased by Psarras (excluding the stock that he was getting) and the restaurant inventory R 109, 448, 454, 232, 234-236, 243-245. The Souvalls informed Hunter that the price that had been agreed upon in the pending sale they had with Psarras was $35,000.00. They did not inform Hunter that the sale they had pending with Psarras was to have included the Universal Leasing stock R 48-49. At the same meeting Hunter signed the 3-9-70 purchase contract (Exhibit 3P), he signed another contract selling all the assets he purchased, except for a nominal amount of inventory and the stock, to Psarras for $35,000.00 R 101, 102, 103, 398-400, 537.

The very fact that the plaintiffs and the Bank were willing to sell the stock and the other items to Mr. Psarras for $35,000.00 and then shortly thereafter sold essentially the same items to Mr. Psarras for $35,000.00 without the stock, indicates that they placed no value whatever on the stock. In addition to the omissions of the plaintiffs of not telling Hunter that they knew Universal Leasing was in serious financial trouble and the fact that they had financial dealings and relationships with Universal Leasing which could and did cause Universal Leasing to go broke, they were guilty of additional omissions that paved the way for Hunter's deception.

The only two sources from which Hunter received information were Mark Eames and the Bank. The Souvalls omitted to tell Hunter that (1) the relationship they had with the Bank went far beyond that of creditor-debtor as discussed in Point II of this brief and (2) that the relationships they had with Universal Rockwell included a substantial creditor-debtor relationship. This allowed a situation to be created in which Hunter was getting information from sources which Hunter had no reason to believe might be biased. However, these sources in reality, had very strong motives to provide Hunter with false information and to conceal the true financial condition of the company from Hunter.

The omissions of the plaintiffs combined with the omissions of and false information given by the officers of the Bank and Universal Leasing, left Hunter with a picture that Universal Leasing was in good financial condition and its stock was a good buy. The effect and legal consequences of those omissions under the statute should have been considered by the jury. The jury was precluded from so doing by the

following errors of the Court: (1) The Court failed to properly construe the evidence which was presented; (2) The Court failed to instruct the jury on the agency relationship between the plaintiffs and Bank officers; (3) The Court refused to allow the defendant to introduce additional material evidence on the question of agency and other relationships of the plaintiffs and Bank officers; (4) The Court failed to properly instruct the jury on the legal consequences of omissions under the statute where there is a duty of speak; (5) The Court failed to properly instruct on what is required in the way of a statement to make those omissions a violation of the statute. Thus because of the court's improper rulings, neither the omissions of the plaintiffs or the Bank were considered by the jury as having any consequence.

It has long been a principle at common law that silence may be actionable fraud under certain circumstances. As security transactions multiplied and as it became apparent that it was difficult to apply general common law fraud principles to those transactions, Congress and State Legislatures enacted liberal statutes to control security dealings. It would be a strange result indeed if construction of these statutes made it more difficult to enforce than even the common law. In the instant case, those important jury questions were never decided because of the numerous errors of the court. Those errors amounted to substantial and prejudicial error.

POINT IV

THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT IMPROPERLY INSTRUCTED THE JURY CONCERNING DEFENDANT'S STATUTORY DEFENSE AND CONCERNING THE BURDEN OF PROOF.

The respondent argued that there was no evidence presented to the Lower Court that tends to support a finding that the Bank was guilty of a violation of Section 61-1-22 (1) (b) because the Bank was not aware of any material information relating to the financial condition of Universal Leasing other than that provided to the defendant-appellant. The respondent has apparently chosen to ignore the facts that were presented at the trial and also to ignore the effect of the Court's exclusionary rulings. The facts that showed the creation of the agency relationship were fully discussed under Point I and will not be repeated hereunder. The liability of the Bank results from acts which they committed as an agent for the sellers. These acts constituted both material misrepresentations and material omissions. Not only do these acts attach directly to the Bank, but they also should be imputed to its principal, the plaintiffs, as a basis for liability on their part. The failure of the court to instruct on these points was prejudicial error. These acts and omissions of the Bank will be discussed under Subsection A and the errors in the instructions and interrogatories will be discussed under Subsection B.

A

The statute, would have required the Bank to sustain the burden of proof that it did not know, or in the exercise of reasonable care could not know, of the existence of the untruths or omissions claimed. The sole evidence presented to the lower court that would have gone towards sustaining that burden of proof were certain statements made by Langeland and Bennett of the Bank as discussed below. The facts regarding the creation of the agency relation were in dispute. The Souvalls told Hunter that their information on the stock

was at the Bank and sent Hunter there to get it R 396. Pete Souvall called Bennett and told the Bank to give "Hunter whatever information the Bank had" R 283. When Hunter arrived at the Bank, Bennett said that Hunter asked him for whatever financial information the Bank had on Universal Leasing R 160. The issue as to what information the Bank gave Hunter is a matter of heavy dispute and should have been presented to the jury under the guidelines of the statute.

Bennett claims that he discussed two conflicting 8-31-69 financial statements on Universal Leasing (13p & 14p) with Hunter and explained that the statements showed that Universal Leasing owned Universal Rockwell. He also discussed the difference in amounts in assets and that he didn't know which statement was correct R 160, 161, 162, 667. He said that was all he discussed because that was all Hunter was looking for R 667. He said that he was aware that Hunter asked for a financial statement but didn't recall whether he gave Hunter one or not R 153. Bennett testified that he told Hunter to audit the Company since the Bank was relying upon sources other than financial statements for their value R 162. He did not recall discussing Universal Leasing with Hunter thereafter R 184, 185.

Langeland said that he was aware that Hunter had a financial statement on Universal Leasing and that Hunter came into Langeland's office with the statement in his hand, and said to Langeland, "I know about the financial condition of Universal Leasing." When Langeland was asked what prompted Hunter to say that, Langeland said that he concluded from his conversation with Hunter that "Hunter was

concerned at that time about the financial condition of the Company that was a small part of the overall Company in which he was buying stock" R 633, 634. He said that he told Hunter that "the Bank has no reason to have a financial statement that they had to rely on in their files on Universal Leasing" R 638, 639. He claimed that he further advised Hunter to check the books and records to make sure the financial statement was correct R 638, 639. Langeland said Hunter returned two days later for a second meeting and told Langeland that he looked at the assets and the accounts of the Company and nothing was fundamentally wrong with the Company R 640. Langeland said that no one other than Hunter and himself were at those meetings R 637, 640. All of the above testimony of Langeland took place on the last day of the trial R 636-642.

Langeland had testified earlier in the trial and in his deposition that he did not have any meetings where he was alone with Hunter which contradicts the above testimony R 238, 239. He also testified that Hunter did not say anything about the merger wtih North Star Marine Sales which is also not consistent with the above testimony R 639-640.

Hunter claims that Bennett gave him one 8-31-69 financial statement on Universal Leasing (18p) and told him that was all the information they had and did not discuss 13p or 14p with him R 513. He also testified that neither Bennett nor Langeland gave him any other financial information on Universal Leasing and that the Bank officers did not advise him that the statement he received might be incorrect or that he should investigate it further R 507, 513, 550.

The claims by the two Bank officers and the claims by the defendant-appellant recited above represent the two sides of the issue as to what information was given to Hunter by the Bank. Those facts were in dispute and that issue would have been submitted to the jury to decide under the conditions prescribed by the statute. The Court failed to do so. The Court also failed to allow the jury to consider the legal consequences of the omissions of the Bank under either statutory or common law fraud. The claims of the Bank that "the Bank was not cognizant of any material information of the financial condition of Universal Leasing that they did not convey to Hunter" and "they answered all Hunter's questions about the stock" are not supported by the record p. 25 and 4 Bank's brief. Hunter asked the Bank for whatever financial information they had on Universal Leasing R 160. The only information that the Bank claimed to give Hunter was that which was discussed in the disputed facts above.

The record shows that the Bank was aware of a great deal more material financial information on Universal Leasing than even that which they claimed to have discussed with him. Universal Leasing was a customer of the Bank when Hunter first approached the Bank to inquire about the Universal Leasing stock. It had been a customer since prior to the summer of 1968. It had some loans outstanding and had applied for others when Hunter approached the Bank. R. 141-143, 195.

Bennett was head of the credit department for the Bank. He testified that he requested the Spanish Fork Branch of the Bank to send him some financial statements on Universal Leasing as additional information on the financing that Universal Leasing was requesting R. 142, 195. He testified that

he was concerned about what the value of the stock might be outside of Swenson's offer and called Eames to inquire about the same R 162. He wrote a memo to himself about that conversation which stated that Eames told him that the 8-31-69 financial statement sent up from Spanish Fork was inaccurately prepared R 163, Ex. 16p.

The value of the stock and the credit worthiness of Universal Leasing would have varied greatly, depending which, if either, of those financial statements were correct. Yet he did not ask Eames which 8-31-69 statement was correct and he was not concerned which, if either, was correct since he was relying on Swenson's offer for their source of value of the stock R 186. Bennett testified that he discussed two of the conflicting 8-31-69 statements with Langeland R 190.

Langeland testified that Bennett did not discuss those two conflicting statements with him, but that he was aware that the Spanish Fork Branch of the Bank had sent up one financial statement of Universal Leasing R 229, 230, 643. He later contradicted this and testified that he was not aware of where Bennett got any financial statements on Universal Leasing and knew that his office did not have any financial statements on Universal Leasing R 639.

The only way that the Bank would loan money to Universal Leasing was on the strength of the Lessee, not on the strength of Universal Leasing R 645, 646. The Bank officers had substantial involvement with the plaintiff corporations and those corporations had substantial adverse financial dealings with Universal Leasing which were the major factors that caused them to go broke. See Point III of this Brief. The Bank

was aware that Universal Leasing was in serious financial trouble. They omitted to convey the important financial information discussed above to Hunter. Those omissions amounted to a violation of the statute. There was sufficient evidence presented on this issue, but the court failed to submit it to the jury.

B

Even in the instructions which the Court did give, there were numerous errors which compounded the confusion in the jury. The following is an itemized discussion of these errors:

1. In Instruction No. 6, the Court gave the standard instruction on burden of proof being by the preponderance of the evidence. Preponderance of the evidence was defined in Instruction No. 5. In a case of this type, where there are various standards for burden of proof depending on the issue being considered, it was error to give Instruction No. 6 since it tells the jury that whenever it considers burden of proof it should consider it as meaning proof by a preponderance of the evidence.

2. In Instruction No. 21, the Court gives an opposite general instruction to the effect that the jury is required to assume that all men are fair and honest in their dealings until the contrary is clearly and convincingly proven by the evidence. Thus, we see the jury is given two general instructions on burden of proof, one being by a preponderance of the evidnce and the other being by clear and convincing evidence. The jury possibly thought that Hunter had to prove anything relating to the Souvalls lack of fairness or honesty by clear and convincing evidence.

3. In Instruction No. 31, the jury is instructed that Mr. Hunter has the burden of proving his statutory defense against the plaintiffs. The clear language of the statute is that the only burden which Mr. Hunter has with regard thereto is to prove that he did not know the truth of the misstatement or omissions claimed or in the exercise of reasonable care could not have known. He did this and the evidence to that effect was undisputed R 397-403. The statute placed a burden upon the Souvalls to prove by a preponderance of the evidence that they did not know or in the exercise of reasonable care, could not have known of the misstatement or omission claimed. The court did not require Souvall to meet that burden, instead they erroneously placed it on Hunter. Based on the evidence presented, Souvall would not have met the burden. This error alone would justify reversal or, at least, the granting of a new trial.

4. Instruction No. 17 states that intention and scienter is an element of statutory fraud which is clearly not the case. This point has been fully discussed in appellant's original brief.

5. Instruction No. 18, which is an instruction on the elements of common law fraud, completely overlooks the consideration that silence, when one has a duty to speak, may be the basis of actionable fraud.

6. Instruction No. 19 also fails to define the meaning of "misleading statements" and fails to show how they relate to "material facts" as defined in said instruction. It also fails to make clear that material facts may be either material representations or material omissions.

The above errors were individually and collectively prejudicial to appellant's right to fair trial. 5A C.J.S. Appeal and Error, Section 1763 (3) at page 1200 states as follows:

> "It is regarded as reversible error when the instruction places the burden on the wrong party, or places on the proper party a greater burden than the law requires, or fails to require the necessary degree of proof, or requires him to assume the burden of proving matters which he need not prove to establish his case or defense, or does not require him to carry the burden of proving all that is necessary."

In addition to the above mentioned mistakes in the instructions and the others referred to in other parts of the brief, the Court's interrogatories were highly confusing and misleading. The jury was not asked if the Bank made any material omissions either as it would apply to their statutory liability or the charge of common law fraud. There were no interrogatories on the question of agency and its varied ramifications upon the evidence as heretofore explained. In several of the interrogatories, there were multiple questions in one interrogatory which makes it difficult to know just what the jury was answering. Examples of these have been pointed out in appellant's original brief. Also, as pointed out in appellant's brief, there was no reason for the giving of Interrogatories Nos. 21, 22, 23, 24 and 25. It is difficult to really know what the jury did decide in the case because of the confusion in the instructions and the interrogatories and because of the failure to allow the appellant to develop his case. The Bank has contended that the interrogatories and instructions are clear when viewed as a whole, but it is appellant's contention that they are even more confusing in their entirety than when read individually.

The Court should have allowed appellant to amend his pleadings to conform to the evidence at the close of the case. It is recognized that as a general rule this is within the sound discretion of the Court, however, when viewed with the numerous other prejudicial errors of the Court, it can be seen as a definite abuse of discretion to not allow such an amendment. The Bank contends that it would not have been fair to subject them to the theory of statutory fraud since they had prepared only to meet the charge of common law fraud. The Bank can hardly claim to be surprised on this point, since the issues of statutory fraud were clearly part of the pleadings against plaintiffs and the pleadings did allege an agency relation between the plaintiffs and the Bank. If there was any such surprise, it can certainly be corrected by a new trial which is deemed necessary because of the other numerous errors aforementioned.

POINT V

THE COURT COMMITTED PREJUDICIAL ERROR IN DISMISSING DEFENDANT'S COUNTERCLAIMS FOR FRAUD AGAINST THE PLAINTIFFS AND INTERVENING PLAINTIFF UPON THE BASIS THAT "NO PROOF OF GENERAL DAMAGES OR PUNITIVE DAMAGES WERE SHOWN."

It was prejudicial error for the Court to dismiss appellant's counterclaims for fraud and the manner in which it was done seriously weakened appellant's affirmative defenses. The jury was advised at the outset that appellant was counterclaiming against both the Bank and the plaintiffs. When the Court dismissed the counterclaims without explaining to the jury the reason for the same, it is likely that the jury concluded that Mr. Hunter did not have valid claims for fraud either by way of counterclaim or by way of affirmative defense. Further, the Court merely struck out the word "counterclaim" in some

instructions, left it in in others, and told the jury that both counterclaims were dismissed. This must have made the jury feel that the Court concluded that Mr. Hunter's claims for fraud were not well founded.

The reason given by the Court for dismissing Mr. Hunter's counterclaims was that that there was no proof of general or punitive damages shown. There was certainly evidence of damage as pointed out in appellant's original brief. To those statements, the Bank has responded with statements that are false and not supported anywhere in the record. There is absolutely no evidence whatsoever that Mr. Hunter ever collected more than $9,000.00 on the sale of the Universal Rockwell stock which he transferred, Their brief p. 30. As a matter of fact, on many of the transactions, Mr. Hunter did not collect, after he thought the stock was worthless, because it would have been a violation of law to do so. The Bank stated that Hunter was trying to sell stock in September even though he knew it was worthless, Their brief p. 7, 30. After he learned the true condition of Universal Leasing, the only time Mr. Hunter attempted to sell the stock was when he was approached by an individual in September of 1970 who said that he represented a group that was interested in purchasing a corporate shell. He quoted some terms to Hunter. Mr. Hunter advised him that the stock was worthless and that the corporation had some serious problems and the individual never contacted him again. R 485-495, 585.

It is also false to say that he received a computer floor and air conditioner from Mark Eames in lieu of payment of $10,000.00. The facts are that Mr. Hunter did get possession

of said equipment and he had an oral agreement with Mr. Eames whereby Mr. Eames was to pay $10,000.00 to Mr. Hunter and give him said equipment for some of Mr. Hunter's stock in Universal Rockwell. Mr. Eames received the stock but would not pay the $10,000.00 unless Mr. Hunter signed leases on the equipment, which he refused to do. Therefore, that deal fell through and Mr. Hunter retained the equipment, although he had not yet received title to the same. Subsequently, the title was conveyed to him by Mr. Eames in return for Mr. Hunter conveying the balance of his shares in Universal Rockwell. At the time, Mr. Eames was attempting to get all of the shares of Universal Rockwell in order to sell the same as a corporate shell R 627-630, 580-582, 587.

The statement by the Bank that Mr. Hunter sold the inventory he received and retained the funds derived therefrom is absolutely false, Their brief p. 30. So is the statement that "all Hunter ever paid on the contract was $9,000.00," Their brief p. 6. As a matter of fact, the evidence is entirely to the contrary. Mr. Hunter continually worked with Mr. Souvall and others to liquidate the collateral that could be sold and the proceeds from all of these sales went to the Bank. This amounted to approximately $44,252.69 R 71, 127 10p 400. One of those payments in the amount of $4,778.00 was made prior to signing the note R 401, 402, Exhibit 10p. Hunter did not owe $133,500.00 at the time he signed the note and it was not signed to evidence his indebtedness R 401, 402. It was signed to evidence the fact that he had taken the stock out of the Bank and his willingness to pay interest on the SBA loan R 401, 402, 132, 133. The only motivation that Mr. Hunter can determine that the Bank has in

making such false and misleading statements concerning him is that they are continuing to attempt to cast him in a bad light while attempting to vindicate the actions of the plainiffs and the Bank officers.

Mr. Hunter contends that the 5,188,000 shares of Universal Rockwell stock which he caused to be conveyed back to the Bank was a fair exchange for the 10,000 shares of Universal Leasing stock which the Bank released to him. The Bank has responded by saying this is not so since the Universal Leasing stock was to be free trading while the Universal Rockwell stock which was conveyed back to the Bank was registered letter stock which could not be freely traded Their brief p 30. It is appellant's position that it doesn't really make much difference since the shares of stock he received from the Bank were worthless and the stock he returned to the Bank was at least that good.

The bank has continually maintained that Mr. Hunter received the shares of stock from the Bank by fraud and misrepresentation. This is based upon the allegation that he told the Bank that he had New York Stock Exchange listed stock which he would sell and use the proceeds therefrom to pay cash for the Universal Leasing stock. There is conflicting testimony in the record on this point. At one point in the testimony of Mr. Peter Souvall, he said that Mr. Hunter told him, in a meeting with Donald Bennett and John Langeland also present, that he had New York listed stock. Later in Pete Souvall's testimony and in all other testimony about that meeting, they claimed that Hunter said it was New York stock R 64, 107, 130, 201, 252, 258. The Bank's statements on

Page 7 of its brief to the effect that Mr. Hunter admitted that he had no New York stock or other securities is absolutely false. Mr. Hunter was asked the question if he had any New York listed securities and he truthfully answered that he did not R 499. However, the New York stock which he planned to liquidate was not referred to as being listed on the New York Stock Exchange, but rather as being traded in New York. There is a significant difference between stock listed on the New York Stock Exchange and shares of stock traded in New York which are not listed on the New York Stock Exchange. However, for reasons explained to the Bank, he did not liquidate them at the time R 65, 131. They could hardly have relied upon his liquidation of this stock at the time they delivered the Universal Leasing stock to him because he explained to them that he had not sold it. At any rate, in Interrogatory No. 9, the jury found that the plaintiffs and the Bank were not deceived by any such representations.

It is also a fact that prior to the time of the transaction, Mr. Hunter personally had loans which totaled $25,000.00 with the Bank and was serving as a guarantor for a third party who had a loan with the Bank R 201, 244. As part of these transactions, Mr. Hunter had securities pledged with the Bank and had given them financial information which gave them actual knowledge of the securities Mr. Hunter owned R 260. It is also a fact that early in the transaction, the Bank recommended Mr. Hunter to the Souvalls as a man of character and honor and one who was financially capable of handling the transaction R 201, 244, 252-257, 259, 710. It is incredible that the Bank can now argue that they were not aware of Hunter's financial condition and were deceived by Mr. Hunter's alleged misrepresentation.

CONCLUSION

Because of the numerous errors set forth herein, defendent-appellant is entitled to have this Court reverse the judgment of the Lower Court and direct entry of judgment for defendant-appellant, or in the alternative, remand the case for a new trial with appropriate instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing brief on Alvin I. Smith, Esq., Attorney for Plaintiffs-Respondents, J. C. Penney Building, Salt Lake City, Utah 84101; Richard H. Nebeker, Esq., Attorney for Intervening Plaintiff-Respondent, 400 Kennecott Building, Salt Lake City, Utah 84111, this ..... day of September, 1973.
