

1987

Winkel Distributing v. Elizabeth Dewsnap, dba Valley Twin Cinema and Citi Cinema : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870563-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

WINKEL DISTRIBUTING,

:

Court of Appeals

:

#870563-CA

Plaintiff/Respondent.

:

Tenth Circuit Court

vs.

:

#86-CV-1838

ELIZABETH DEWSNUP, dba VALLEY
TWIN CINEMA and CITI CINEMA,

:

Argument Priority #14b

Defendant/Appellant,

:

Brief of Defendant - Appellant

On Appeal from the Tenth Circuit Court of Sevier County, Utah

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Note: The court at trial, R126, allowed Affidavits of Elizabeth Dewsnap and Stanley Dewsnap as evidence to be submitted after trial with leave to counter or depose; these Affidavits therefore do not have a trial exhibit number. Attachments to each are designated Ex. A, B . . . K, etc.

Note: Underlining has been added for emphasis.

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I

JURISDICTION

Jurisdiction is pursuant to 78-4-11 Utah Code Annotated and Rules 3 and 4, Rules of the Utah Court of Appeals.

II

NATURE OF PROCEEDINGS

This is an appeal from a judgment for Plaintiff dated 11-2-87 by the Circuit Court without a jury.

Plaintiff, a confectionery supplier sued Defendant Elizabeth Dewsnap, purchaser and new owner of lease on theater, on open account for confectioneries, candy, popcorn, etc., all or part of which was sold to, and billed only to, predecessor owner of theater, Modern Cinema, Inc., a chain theater corporation, not joined in the action.

III

ISSUES PRESENTED

I. Whether purchaser of theater became liable for confectioneries purchased by, and delivered to, predecessor owner of theater -

- a. For confectioneries delivered to and charged only to predecessor before Defendant was ever on the scene;
- b. For confectioneries delivered to and charged only to predecessor after Defendant purchased theater but before she operated same.
 - (1) Before Plaintiff learned of Elizabeth Dewsnap's involvement.
 - (2) After Plaintiff learned of and telephoned Defendant Elizabeth Dewsnap.

II. Whether Defendant can be charged -

- a. Without agreement to stand good for debt or default of another;
- b. On Bulk Sales Act theory never claimed in pleadings or otherwise and Bulk Sales Act not applicable in instant situation*;
- c. On alter-ego theory (never plead and appears for the first time in Findings of Fact);

*Bulk sales act is not applicable except where principle business is sale of merchandise from stock. 78-6-103(3). Restaurants, Hotels, Bakeries, Pool halls, Shoe repair establishments, Theaters have been excluded from Bulk Sales application.

STATUTES AND LEGAL PRINCIPALS INVOLVED

Statute of Frauds -

25-5-4. Certain agreements void unless written and subscribed. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another.

Alter Ego Theory -

ALTER EGO. A Latin phrase which literally means a second I; a second self; specifically, a confidential friend; a bosom friend. It has been contrasted with "ego."

It is stated in C.J.S. Agency § 7 that where the principle of alter ego is invoked, the actual doer of the act is not an agent; he is an automation, a tool actuated by the will of the principal.

The term "alter ego" is applied to a doctrine of corporate law, and is to the effect that if the fiction of corporate entity is urged to an intent not within its reason or purpose, it may be disregarded, as discussed in C.J.S. Corporations § 6.

3 Am. Jur., Agency -

§ 274. Basis and rationale of general rule.

Although the courts are agreed upon the general rule which charges the principal with notice to or knowledge of his agent, they differ somewhat as to the reason for the rule or as to the theory upon which it is based. Some courts ascribe as the reason for the rule the theory of the legal identity of the principal with the agent - in other words, the agent, acting within the scope of his authority, is, as to the matters embraced therein, for the time being the principal himself or the alter ego of the principal.

Statutes and Legal Principles Involved (continued)

§ 284 - Where agent is sole representative in transaction.

A qualification of the rule that the knowledge of an agent engaged in an independent fraudulent act on his own account is not the knowledge of the principal has been made where the agent, although engaged in perpetrating such an act on his own account, is the sole representative of the principal. In such case, if the principal asserts or stands on the transaction, either affirmatively or defensively, or seeks to retain the benefits of the transaction, he is charged with the agent's knowledge. In such circumstances, the agent is said to be the alter ego of his principal, since he is merely the agency through whom the principal himself acted; and this "sole actor" or "alter ego" principle has been characterized as an exception to an exception - that is, it is an exception to the "independent fraudulent act" exception to the general rule that the agent's knowledge will be imputed to the principal - and it brings the governing principle back, full circle, to the imputation of knowledge to the principal.

§ 293. Generally; agent assuming personal responsibility.

Aside from the liabilities and responsibilities which an agent may incur by virtue of the intrinsic manner in which he executes a contract, certain liabilities may arise against an agent on a contract entered into by him depending upon the agent's authority to enter into the contract, the reliance of the third person upon the credit of the principal or agent, and the legal existence or residence of the principal.

It is always possible for an agent to pledge his individual responsibility and bind himself by engaging expressly to perform the principal's obligation, and under such circumstances, he will be personally liable even though he was known to be an agent and did not intend to bind himself. Thus, while an agent is not ordinarily liable on express or implied warranties on the part of the principal,

Statutes and Legal Principles Involved (continued)

he may, if he sees fit, for a good consideration, make a personal contract of warranty which will be binding and enforceable even though the principal has also made a similar warranty. Likewise, an agent may pledge his own credit for payment by an express undertaking or by a course of dealings which demonstrates an intention to do so. However, where a known agent contracts an account for his principal, a subsequent promise of payment by such agent is void for want of consideration.

§ 294. Liability on authorized contracts, generally.

§ 295. Where principal fictitious, nonexistent, or without legal status.

§ 296. Where principal is incompetent or under legal disability.

§ 298. Liability on unauthorized contracts.

§ 299. - Nature and theories of liability.

V

SYNOPSIS OF THE CASE

Plaintiff, confectionery supplier, sued Defendant, purchaser and new owner of theater lease, and got judgment for \$5,174.89 -

1. \$4,469.27 was for sales to predecessor, Modern Cinema, Inc., delivered to and billed to, and being paid on by predecessor, before Defendant was ever on the scene;
2. \$551.95 was for sales delivered to and billed only to predecessor and delivered after change of ownership, but before new owner operated theater and while predecessor still operated same;
3. Modern Cinema, Inc. was an account of Plaintiff of long standing.

Plaintiff's Complaint states:

"This debt arose during the year 1985;" however the invoices show otherwise and that 90% of it arose before 9-29-84 when defendant Elizabeth Dewsnap first became involved in any manner.

In brief Defendant is charged for predecessor's bills -

1. As to all but \$4,469.27
 - before 9-29-84 when Defendant first became involved;
 - without a written agreement to pay;
 - without consideration;
 - without Bulk Sales claim or status;
 - without estoppel type basis or claim;
 - without billing of any kind.

Synopsis of Case (continued)

2. As to the \$551.95, after 9-29-84 -
 - before the Defendant commenced operation July 1, 1985;
 - on purchases delivered to and billed to the predecessor;
 - admittedly while Defendant new owner intervened to the extent of becoming acquainted with old manager and seeing that he was paid in order to retain him, and intercepted (with predecessor's consent) theater receipts and transmitted to Modern Cinema, Inc., the predecessor.
3. Modern Cinema, Inc. was not unknown, nonexistent, etc. but a chain outfit with many theaters and an account of Plaintiff's with personnel known to Plaintiff.

VI

Calendar of Events

1-2-83 to 5-7-83	Purchases were by and billings to, Modern Cinema, Inc. owner of many theaters. Plaintiff also sold to Elizabeth dba Citi Cinema, for Beaver Theater which never had anything to do with Modern Cinema, Inc. <u>Affidavit of E. Dewsnap, Ex. M</u>
9-29-84	Defendant took Assignment of Lease. <u>Ex. 2</u> <u>Affidavit of E. Dewsnap, Ex. E</u>
9-29-84 to 6-30-85	Modern Cinema, Inc. continued to operate theaters;
To Nov. 8, 1984	Receipts were deposited to Modern Cinema, Inc. account.
After Nov. 8, 1984	Defendant collected, by agreement with Modern, receipts, deposited to separate account, and remitted balance to Modern Cinema, Inc. <u>E. Dewsnap Affidavit, Ex. D</u>
1-22-85	Defendant paid power bill. <u>E. Dewsnap Affidavit, Ex. A</u>
2-10-85	Defendant paid telephone bill. <u>E. Dewsnap Affidavit, Ex. F</u>
5-5-85	Defendant paid manager. <u>E. Dewsnap Affidavit, Ex. C</u>
5-23-85	Assignment of Lease, dated 9-29-84 was recorded. <u>E. Dewsnap Affidavit, Ex. E</u>
6-17-85	Notice of operation to film sellers of her commencement of operation. <u>Letter Ex. 6</u>
6-25-85	First film payment made by defendant. <u>E. Dewsnap Affidavit, Ex. E</u>
6-30-85	Elizabeth Dewsnap commenced operation of Twin Cinema.
7-1-85	First lease payment by defendant. <u>E. Dewsnap Affidavit, Ex. H</u>

VII

STATEMENT OF THE CASE

A. Background Information

Elizabeth Dewsnap was married to one Stan Dewsnap who was a theater operator since childhood when family operated theater at Delta, Utah. Elizabeth Dewsnap was divorced from Stan Dewsnap in 1961 and he shortly thereafter remarried. He was for many years an employee and manager of Modern Cinema, Inc., a chain outfit with theaters in Colorado, Utah, Nevada, Idaho and the midwest, and including the so-called Twin Cinema, at Richfield, Utah also two other theaters in Richfield, Utah, the Huish and Lyric.

Defendant Elizabeth Dewsnap is a full-time teacher at Carbon College, owns and operates a theater at Beaver and two theaters at Price; and until resale of same, the Twin Cinema at Richfield, only the latter having been purchased from Modern Cinema, Inc.

Defendant operates as Elizabeth Dewsnap dba Citi Cinema and without connections to Modern Cinema, Inc. except purchase from them of the Twin Cinema.

Defendant's theater at Beaver has never been involved with Modern Cinema, Inc., yet the account confused with and sued upon with, the account on Beaver theater and only at trial conceded by Plaintiff to have been paid.

The two theater companies, Elizabeth Dewsnap dba Citi Cinema and Modern Cinema, Inc. in Utah, buy film, confectioneries, supplies, etc. from the same suppliers.

With the Dewsnap name there has been confusion as to the companies and apparently a proclivity to bill Elizabeth Dewsnap on Modern Cinema, Inc. bills because of her apparent better solvency.

On 9-29-84, Elizabeth Dewsnap negotiated for and took assignment of Lease, Exhibit E (Exhibit 2) from Modern Cinema, Inc. of the Valley Twin Theater in Richfield. Before that time, she had nothing to do with the theater. She did not assume operation of that theater until 6-21-85 because of school employment and other theaters, and work on doctorate degree; and because of agreement with Modern Cinema, Inc. whereby Modern elected to continue operation of the Valley Twin in Richfield until disposition by Modern of the Huish Theater in Richfield which Modern also owned and operated. Nevertheless to become acquainted with the Valley Twin, Elizabeth Dewsnap periodically stopped in en route between Price and Beaver. She became acquainted with the manager who knew of the assignment of Lease, but apparently not of the arrangement to defer operation. Elizabeth Dewsnap saw to it that the manager was paid to ensure that she would have a manager to run the theater when she took over, but he was paid from Modern Cinema receipts and Modern Cinema account except May 1985 payment, Exhibit C of E. Dewsnap Affidavit.

Purchases of confectioneries for the theater in Beaver, Utah were delinquent but all paid before trial which the Plaintiff denied until a few minutes before trial.

B. Account Summary

Before 9-29-84 when Elizabeth Dewsnap became involved Modern Cinema, Inc. had been delivered and was billed for, the \$5174.89 (Ex. 1), except for additions of \$705.62 comprising deliveries after 9-29-84, \$643.35, and interest of \$62.27, balance \$4,469.27.

The 3-01-86 bill, (Ex. 1), to Modern not to Defendant, added invoices after 9-29-84 as follows:

#19196 dated 10-19-84	\$ 38.20	
#19691 dated 12-12-84	\$183.90	
#17048 dated 12-18-84	\$151.15	
#49524 dated 1-04-85	\$119.00	(date suspect)
#16374 dated	\$ 59.70	
# 8370 dated	\$ <u>91.40</u>	(invoice never produced, R53 L18)
	\$643.35	
Interest	\$ <u>62.27</u>	
		\$705.62

For the total revised 3-1-86 bill of \$5,174.89.

Invoice No. 8370 dated 5-7-85 for \$91.40 was never produced, R53 L18, and should be deducted from the \$643.35 leaving \$551.95 due Plaintiff for anything delivered after 9-29-84.

On July 1985 Elizabeth Dewsnap took over operation of the Twin Cinema and would be liable for any purchases thereafter, but there were none except for three as follows: 7-15-85 Invoice No. 13495, \$49.60; 7-2-85 Invoice No. 14048, \$45.45; 7-29-85 Invoice No. 14665, \$61.20, a total of \$156.25 check for which together with costs was paid counsel at pre-trial.

According to the Findings of Fact the court relied on two principal factors in charging Defendant for old debts -

Findings of Fact No. 14 Plaintiff's manager contacted Valley Twin manager who told Plaintiff's manager to "contact the Defendant" (Elizabeth Dewsnap).

and

Findings of Fact No. 15 Plaintiff's manager contacted Defendant regarding payment and Elizabeth Dewsnap supposedly "asked for time to pay."

Referring to the statement Exhibit 1 (Exhibit M of E. Dewsnap Affidavit) the top figure, \$4,904.79 is not an invoice charge but a balance, R54 L17, R31 L11 and 12; with business dating to 1983, R54 L13; and was variously paid on by Modern Cinema, Inc., R57 L13: but delinquent as of September 1984, R22 L23 and no charges after January 1985, R26 L24.

Winkel never made contact with Dewsnap until two months prior to January 1985, R27 L10 (his first contact, R27 L8 with two or three contacts altogether, R26 L2; all by telephone conversation, R23 L15, E. Dewsnap testified as to one call only, R96 L19.)

Elizabeth Dewsnap thought she was being dunned for Beaver deliveries knowing that Richfield deliveries were being paid by cash by the Modern manager Whitaker and not being dunned on old Modern bill on which she had never been billed.

The \$4,469.27 is thus established as old debt, prior to any involvement of Defendant Elizabeth Dewsnap and billing paid on by Modern, R54 L13, 21; R55 L8; R56 L1, 10.

Neither the \$4,469.27 nor the add-ons \$705.62 were ever "billed" to Defendant Elizabeth Dewsnap, only sued upon.

Asked what the claim was between 9-29-84 to 5-7-85, counsel answered \$1,417.82, R33 L12, and Plaintiff reiterated same R34 L15. However that crucial total was reduced to 6 invoices R52 L5-7, Invoices -

40524 dated 1-4-85 for \$119.00;

16374 dated 1-9-85 for \$59.70;

8370 dated 5-7-85 for \$91.40;

19196 dated 10-19-84 for \$38.20;

19691 dated 12-12-84 for \$183.90; and

10748 dated 12-18-84 for \$151.15;

Total \$643.35.

However No. 8370, contrary to the statement, was not produced, time was given for production R53 L18, and the same never produced hence that total from time of lease until all credit was cut off, becomes \$551.95.

The date of course as well as authenticity would have been crucial especially in view of the date change on No. 40524 for \$119.00 dated January 4, 1984 (before 9-29-84 Lease Assignment) and changed to 1985 and with number consistent with 1984.

Deducting the questionable Invoice No. 40452 would leave \$432.95 of credit purchases during the period from Defendant's purchase (though without operation) to last credit invoice, No. 16374 dated 1-9-85 for \$59.70.

Billing on the starting balance was to Modern Cinema, R19 L23 and in fact on all bills, to Modern Cinema, Inc., Ex 1.

Beaver bills were billed to Citi Cinema. E.Dewsnup Affidavit, Ex. K

Defendant does not claim lack of acquaintance with Modern Cinema, Inc., its officers, its place of business, or address.

C. Plaintiff's Basis for Trying to Charge Defendant.

Plaintiff's stated reason for seeking to charge Defendant was answered R55 L3 -

The reason that I am assuming that she owes the bills is that the manager of the theater told me that she did, the man doing the purchasing;

that he didn't bother to sue Modern Cinema because - R55 L24 -

I didn't learn that there was any difference until this action was commenced and any difference that anybody had sold out, or anybody had bought anything from anybody. We didn't know that. We were still getting checks and all of a sudden the checks stopped coming and . . .

Where did the checks come from . . . they did come from Delta (office of Modern Cinema, Inc.) Answer: Early, yes.

Plaintiff was asked by the court R58 L7 -

Besides your conversations with Mr. Whitaker and your conversations with Mrs. Dewsnap over the phone, what else is there, if anything, that makes you believe that Mrs. Dewsnap owes Winkel Distributing money . . . Answer: Well, I thought that was just enough. I didn't seek other sources . . . in your mind, was there any other reason? Answer (L19): No, there wasn't. I assumed the manager of her theaters knew where his pay checks were coming from, where he sent the bills to and . . .

The last clause is strange - Plaintiff did the billing not Modern's manager Whitaker; and bills were directed to Modern, not the manager.

The conversations relied on were in substance R28 L7 -

Question: . . . what did she say? Answer: That she was, was behind in her bills, and she would try to get me some money, nothing specific but she would be trying to make payments and she promised to do the best she could to get me a payment in the next few days and, on that assumption, then I let it go and nothing came in the mail.

. . . Well, it was a similar conversation as the first one in that she, it's the same excuse as I get from everybody in this situation, that she didn't have any money right now but would try to get me some as soon as she could and that type of conversation.

Counsel for Plaintiff R47 L23 sought to enlarge the testimony by "testifying" -

. . . she assured us she was the one who would pay it and we continued to contact her and she continued to assure us . . .

With that encouragement, on redirect examination as to specifics of conversations Plaintiff stated R59 L25 -

Yes, she acknowledged the fact that she got a statement . . . Question: Did you discuss amounts of money? Answer: Yes, each month she would have gotten a statement . . . The Court: That's not the question. In your telephone conversation with her, did you discuss amounts of money? Answer: Yes. Answer: The specific in voices, no, we didn't discuss specific invoices but it was the bottom line, this \$4,000.00 or whatever it was owing that we were talking about. We didn't happen to detail each specific invoice.

D. Analysis

As to the witness Whitaker, manager, manager for Modern Cinema, Inc., not for Defendant Elizabeth Dewsnap, he testified that Plaintiff approached him in the fall of 1984 and was told -

In the fall of '84 I suggested he probably contact Mrs. Dewsnap and ask her the questions there as far as the liability. [R65 110].

Whitaker did not talk with Elizabeth Dewsnap in 1984, he did talk with Stan Dewsnap, R65 L16 -

I honestly can't remember contacting her. I can remember before that time talking to Stan Dewsnap about his account. [Stan Dewsnap was at that time manager or some such position, of Modern Cinema, Inc.]

Asked if he assured Plaintiff that Mrs. Dewsnap would "take care of the account" he answered R65 L24 -

Question: No. Assuring him that the owner, Mrs. Dewsnap, would take care of the account?
Answer: Again I can't remember as far as taking care of the account. I can remember referring him to her to see about the account but as far as taking care of it, I am having problems with that.

Nowhere did Whitaker, Modern Cinema's manager, say what Plaintiff said he said.

Whitaker testified inconclusively that in the fall of '84 he received salary payments from Mrs. Dewsnap. R68, but documentation would indicate only Citi Cinema checks to Whitaker were May 1985. E. Dewsnap Affidavit, Ex. C

Whitaker knew of the sale of the lease to Elizabeth Dewsnap; he was managing the two theaters together, the Huish Theater and the Twin, for Modern Cinema, Inc. Salary of the Huish and the Twin was lumped together including the two checks paid by Citi Cinema in May 1985. E. Dewsnap Affidavit, Ex. C

Other help was paid by Modern Cinema, Inc., R76 L16.

Film for both theaters (the main theater expense) were booked through Modern Cinema, Inc. through Tom Phillibin, R74 L20 -

Question: Through Delta, [Delta, Colorado is office of Modern Cinema, Inc.], through Modern Cinema? Answer: He was the booker for Modern Cinema, yes. Question: Well, were those - were the shows booked through Modern Cinema for both theatres, the Huish and the Twin, after the Twin came into being? Answer: Yes.

Defendant never made a film payment until 6-29-85.

E. Dewsnap Affidavit, Ex. I

Whitaker makes it clear R73 L9, R75 L16 that he bought concessions for both the Twin and the Huish out of gross.

He had nothing to do with utilities, R75 L20. First utility payment by Citi Cinema was January 1985.

E. Dewsnap Affidavit, Ex. F

On repairs on equipment, he thinks between September 1984 and June 1985 Modern Cinema flew in parts and a technician, R77 L7.

Sometime in the fall of '84 Whitaker was informed by Elizabeth Dewsnap that she had purchased the Twin Cinema; after that he received pay checks from Cinema and deposited monies to a Twin Cinema account starting he believes October - November '84, R83 L17.

Defendant Elizabeth Dewsnap testified that June 17, 1985 she sent out notice to the film companies that she would be operating the Twin Cinema, Exhibit 6, that she and Modern Cinema, Inc. had agreed that her operation of

the Twin Cinema would be delayed because of Modern still operating the Huish and best interests in getting films and continuity of the films, R91 L20, and that Modern Cinema had asked her to pick up payroll because there were -

. . . some of their checks that weren't going through for the payroll . . . [R92 L2];

and that she kept manager and employees paid [none paid until May 1985] in order to "keep the operation going until I could take over", R94 L15; also that if there was a shut down the shopping center (where the Twin theater was located) would "get another lessee for sure," R94 L21.

Defendant states there was only one call from Plaintiff, R96 L19.

She stated she never agreed to pay Modern's bills, R97 L9; never agreed with Modern that she would pay their account either before or after she bought the Lease, R98 L23.

Defendant never commenced buying films until she took over operations July 1985, never booked any until June 1985, R99 L17.

The film rental alone takes half of the gross and all that was paid by Modern, R100 L9; some \$50,000.00 per year for films alone at Richfield Twin Cinema, R102 L13.

Defendant Dewsnap never gave any instructions to Brad as to operations or control, R109 L8. She never told Modern's manager Whitaker that she had purchased the Twin Cinema but assumed that Modern had told him and of course he knew when, by agreement between Modern and Defendant Elizabeth Dewsnap, funds were deposited to a local account out of which costs could be paid, R112 L20. Defendant stated that she thought the verbal agreement to defer operation was also written but she could not find such writing. We do know from the evidence that she neither bought nor booked films until takeover June 1985 when she gave notice by Exhibit 6.

Stanley Dewsnap, manager of Modern Cinema, Inc., indicates payroll for manager was reported to Modern Cinema's district office though some paid by Citi Cinema, to ensure payment and keep the theaters open; that such arrangement was by Modern Cinema's choice; that some deposits were made to Citi Cinema, that concessions were purchased for cash from both the Huish and Twin combined, but that Modern Cinema continued to pay films, Lease, repairs, overhead, utilities, (except for one telephone and power payment, January and February 1985, E. Dewsnap Affidavit, Ex. G), and that it, Modern Cinema, Inc., received the gross less sums as indicated paid to manager, help and confectioneries. Stanley Dewsnap Affidavit.

E. Alter Ego Theory

Though never mentioned in pleadings or trial, the findings conclude Elizabeth Dewsnap to have been the alter ego of Modern Cinema, Inc., a corporation, doing business in, and with theaters in various states.

Elizabeth Dewsnap was never a stockholder, officer, or employee of Modern Cinema.

She was, prior to divorce 26 years ago, wife of Stan Dewsnap, he now remarried, and who, though never an officer or stockholder of Modern Cinema was manager thereof.

Elizabeth Dewsnap became involved with Modern Cinema September 29, 1984 by contract to lease the Twin Cinema in Richfield, from Modern Cinema, Inc.

She agreed to take over operation later, after Modern, who still operated the Huish Theater in Richfield, disposed of the same, and after she, Elizabeth Dewsnap was out of school for summer and had ceased to work on doctorate at Carbon College so as to have more time.

But in going to and from Beaver theater and Price theaters which she did own, and home in Cedar, en route through Richfield she was in and out of the Twin Theater, in contemplation of operating, and met the manager and determined to, and did employ him later and in the mean time made sure he got paid.

Some time after the 9-29-84 lease assignment, Modern Cinema, Inc. to Elizabeth Dewsnap, the manager learned of the lease.

Some time after the 9-29-84 lease assignment, theater receipts were deposited to an account Elizabeth Dewsnap controlled and from same, the manager's salary was intermittently paid. Other employees were paid by Modern's manager by cash (except May 1985, E. Dewsnap Affidavit.) Balances were remitted to Modern Cinema, Inc. at its Colorado office.

Modern Cinema saw to repairs including flying repairman and parts in from Colorado, paid films, booked films, and received proceeds except as noted.

The manager was unaware of details of lease or of agreement for Elizabeth Dewsnap to take over operation until only at a later date.

Plaintiff Winkel was not aware of Elizabeth Dewsnap at all.

He merely learned of her later when he inquired of the manager regarding payment for concessions and was told to call Elizabeth Dewsnap and did and merely "referred" R65 L22 to "see about" the account R66 L3, not told she would "take care of" the account R65 L18.

They talked of delinquency and Elizabeth Dewsnap committed to get a payment in thinking Winkel was referring to the Beaver account.

At the time she personally owed Winkel on her Beaver theater.

At the time she personally owed Winkel no other debts.

At the time Winkel still knew nothing of her lease of, nor intention to operate, the Twin Cinema, other than what had come to him by conversations with the manager.

VIII

SUMMARY OF ARGUMENT

A. Regarding old debt, that for deliveries to Modern Cinema, Inc. before 9-29-84, date of Assignment of Lease to Defendant Elizabeth Dewsnap, the Defendant -

- Never assumed the debt;
- Never promised to pay the debt;
- Had no reason to;
- Received no consideration for so doing;
- Never led anyone to believe she would pay same; and

B. The Statute of Frauds would protect her from the proposition that she some how became liable for the debt of another, and this to protect her from fraud.

C. Failure to Allege or Prove Alter Ego Theory.

The record speaks for itself the complete absence of any reference to alter ego theory either in pleadings, pre trial, or trial.

D. Regarding deliveries to Modern Cinema between 9-29-84 and the telephone conversation between Defendant and Plaintiff.

Only Modern Cinema, Inc. could be liable since Defendant again never -

Promised to pay or held herself out as anyone authorized or obligated to pay.

She was never stockholder, employee, officer, or interest holder in Modern Cinema, Inc. and had no agreement with Modern Cinema, Inc., or with Plaintiff Winkel, or anyone else, to pay Plaintiff Winkel for deliveries to Modern Cinema at its Twin Theater.

Winkel never even knew of Defendant until Modern's manager Whitaker told Plaintiff to call Mrs. Dewsnap for information.

He asked about money owed. She owed on her Beaver account.

He never billed her. He revised his bill to Modern, dated it 1986, Exhibit 1, and either sent same to her or filed complaint.

Plaintiff cannot even claim confusion as to whom he had sold to, and was being paid by.

It is notable that Plaintiff Winkel billed by separate vouchers; therefore his statement does not reflect payments made along the way from Modern though he concedes he was being paid by Modern, R56 L5, 10.

Winkel had a long standing account with Modern, R54 L11, and separate account with Citi Cinema on Beaver theater.

E. Deliveries after telephone conversation.

Plaintiff offered to pay as settlement apparently conceding that at time of such deliveries she had made an appearance, intercepted theater monies (with consent of Modern) and saw to it that management was paid, and this to preserve continuity of management until July 1985 when she was scheduled to commence operating.

Consistent with her position is the ~~un~~refuted evidence that Defendant -

Notified film people in June 1985;

Paid receipts to Modern Cinema after deduction of sums advanced;

That even the confectioneries were not paid by Defendant but by cash by Modern's manager Whitaker, thus paid in fact by Modern.

F. Fraud requisite of Alter Ego Theory.

Plaintiff has never dared accuse Defendant of fraud and never plead same, nor suggested at trial either alter ego theory or fraud requisite thereto.

At the pre trial stage only sloppy billing documents of the Plaintiff, and confusion with the Beaver account, precluded settlement and payment by Defendant, to minimize costs, of sums owed after 9-29-84, owed by Modern, amounting to only \$551.95 at most.

Only at close of trial did Plaintiff revert back to its prayer of complaint asking for payment of the old Modern Cinema, Inc. bill.

At this point or later the court forgot even the failure of proof of part of the \$551.95, the \$91.40 Invoice No. 8370, and notified later of Judgment "as prayed".

IX

ARGUMENT

- A. Regarding Debts Before 9-29-84, Date of Lease and
- B. Statute of Frauds

One wonders how Elizabeth Dewsnap got to be "alter ego" and liable for \$4,469.27 which Modern Cinema, Inc. indisputably owed before 9-29-84, date of lease assignment to Elizabeth Dewsnap.

This could only be accomplished by an agreement to stand good for the debt or default of another.

The Utah Statute of Frauds reads as follows:

25-5-4:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(2) Every promise to answer for the debt, default or miscarriage of another.

In Sugar v. Miller 6 Utah 2d, 433, 1957 315 P.2d 862 the Utah court held an organizer and promoter of Deseret Uranium Company liable for a new printing bill of Deseret Uranium Company where - page 435 (of Utah Reports),

Before any work was undertaken and at the initial contact concerning the printing, Miller testified that he told Sugar he would not undertake the printing for the corporation in the following words:

"Now, Paul, I want to make one thing clear. I have had bad experience with corporations. I have got to have someone who will personally guarantee this bill.' He (Sugar) said, 'Harry, I will personally see that it is paid. You don't have to worry about the money.' I said, 'Paul, you and I have done business for years. We have been friends for years. Your word is good enough for me.'"

The court held the agent liable on the debt as an original debtor not on promise to pay either the debt of another or to pay an old debt.

In the instant case, Winkel we are concerned with -

- a. Old debt, before Elizabeth Dewsnap was ever on the scene,
- b. Old debt between 9-29-84 (date of lease assignment) and date when Winkel learned of Elizabeth Dewsnap and telephoned her; and
- c. Debts after that when, under Sugar, Winkel can be said to have looked to Elizabeth Dewsnap for payment. (Taken the evidence in a light most favorable to upholding judgment for Winkel.)

As to a and b Elizabeth Dewsnap had an interest in deliveries from Plaintiff as with continued service of the manager, i.e. keeping the place open, hence her proffer to pay that part of Modern's bill.

Any reliance on the telephone conversation could only apply to deliveries after the conversation.

In that conversation no differentiation was made as to which bills, what deliveries or which theater - Elizabeth Dewsnap thought "Beaver" theater.

At this time Elizabeth Dewsnup owed Winkel for deliveries to the Beaver theater which Elizabeth Dewsnup did own, and which she conceded were delinquent from time to time, and we know, from Exhibits 4 and 5, delinquent at least to following extent before final payment:

#1535 - 6 months

#2100 - 5 months

#6247 - 7 months

#5294 - 6 months

#4727 - 6 months;

not withstanding the court's idea to the contrary, R43 L1 to 16.

Stretching Sugar, and under 25-5-6 (2), Utah Code Annotated 1953, Elizabeth Dewsnup could possibly be classed as an original debtor and agreed at pre-trial, and before trial, and after, and now, to be held for Modern Cinema, Inc. debts to the extent of those incurred after 9-29-84, date of lease assignment, even though all were debts of Modern Cinema, and this by way of settlement efforts.

As to the telephone conversation between Winkel and Elizabeth Dewsnup purportedly binding Elizabeth Dewsnup to pay old debts, pre 9-29-84 debts, it is not credible from the evidence that Winkel actually believed Elizabeth Dewsnup intended to, or represented, that she would, pay Modern Cinema's old debts to the tune of \$4,469.27 (\$5,174.89 less post 9-29-84 deliveries.)

A recent case on liability of agent, St. Charles Cable T.V. v. Eagle 664 F.Supp. (S.D.N.Y. 1987) 830 notes page 830:

Under New York law, an agent for a disclosed principal is not liable for contracts entered into between its principal and a third party, absent "clear and explicit" evidence of the agent's intention to substitute or superadd its personal liability for, or to, that of its principal. Citing Savoy Record Company v. Cardinal Export, 15 NY 2d 1, 203 NE 2d 206, 254 NY Supp. 2d 521, (1964).

There the court makes clear that to bind the agent for debt of a disclosed principal there must be the "intention of all the parties" not just one, along with the writing, on which, in that case there was not the necessary "clear and explicit evidence" required.

The federal case cites Savoy v. Cardinal (1964 N.Y.) 203 NE2d 206.

There one Cardinal, the agent, was presented by the supplier with an agreement, which contained, the phraseology -

Where the purchaser is a corporation, in consideration of extending credit to it, the officer or officers signing on behalf of such corporation, hereby personally guaranty the payments hereinabove for.

In Savoy, (as in Winkel), the lower court misinterpreted whose intent was necessary, whether one or both the seller and buyer, the court explaining page 207 as follows:

The courts below rejected Cardinal's contention and denied its motion to dismiss the complaint. It was apparently their conclusion - to cull from Special Term's opinion - that it was "clear . . . that the agreement, prepared by Savoy, was intended by it" to provide that Cardinal's signature as agent serve two purposes, namely, to indicate an acceptance and approval of the contract by Armonia and also to bind Cardinal, in its own corporate capacity, as guarantor of its principal's obligation.

[1] Any proper consideration of the question of Cardinal's responsibility under the agreement must proceed from the predicate, settled for this court in *Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177, 179, that an agent for a disclosed principal "will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal". (See also, *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 66-67, 217 N.Y.S.2d 55, 56-57, 176 N.E.2d 74, 75-76.) If such an intention can ascribed to Cardinal at all, it must, by virtue of the requirements of the Statute of Frauds, be gathered from the language, set forth

above, of Savoy's letters. The difficulty we encounter at the outset, in seeking "clear and explicit evidence" of the agent's intention to be personally bound, lies in the anomalous character of the writing upon which Cardinal's responsibility as a guarantor must depend. If liability is to be imposed, it must have been the intention of all the parties - Armonia and Cardinal in addition to Savoy - that the signature of Cardinal perform, at once, a threefold function: (a) to bind the principal (Armonia) to the agreement; (b) to support the very agency (of Cardinal) itself, since by a peculiar "bootstrap" device the principal is to "represent and warrant" the authority of the very agent whose signature is to bind it to the agreement; and (c) to bind the agent (Cardinal) as a guarantor of its principal's obligation.

[2,3] The writing states that Cardinal is to signify its agreement to be personally bound "by its signature". It may well have been Savoy's intention, as Special Term noted, that Cardinal's act of signing once, solely as agent for Armonia, would likewise bind it as guarantor. However, in determining whether there has been compliance with the Statute of Frauds in such a case, Savoy's intent and belief is beside the point. What is of crucial importance, as our recent decision in *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 217 N.Y.S.2d 55, 176 N.E.2d 74, *supra* demonstrates, is the intention of the agent, the party to be

charged - in this case, Cardinal - to be personally bound. In this context, the writing must be viewed, as it relates to cardinal, only as an offer to the agent to enter into a binding personal commitment as guarantor and the courts cannot, without more, convert a signature by Cardinal "As Agent on Behalf of Armonia" into a binding acceptance of such an offer. [Emphasis added]

In Winkel we are dealing not with a writing, as in Savoy but an alleged statement by the manager (manager in the employ of Modern Cinema, Inc. only) to Winkel, to telephone Elizabeth Dewsnap and a telephone conversation resulting, and possibly Winkel's then intention to look to Elizabeth Dewsnap for payment of, not a future delivery, but old deliveries, in fact deliveries made over a period of many months, to Modern Cinema, Inc. Ex. 1 (from 1-2-83 to 9-22-84 [before Elizabeth])

RKO - Stanley Warner Theatres v. Plaza Pictures, 387 N.Y.S.2d 257

(1976). Action was brought to impose personal liability on an agent where the agent signed for the corporation.

The court explained, page 258 as follows:

. . . when there is a disclosed principal, and the agent acts within his agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or add his personal liability for or to that of his principal, Mencher v. Weiss, 306 N.Y. 1, 4, 114 N.E.2d 177, 179; Keskal v. Modrakowski, 249 N.Y. 406, 408, 164 N.E. 333. The presumption is that the agent intends to bind the principal and not himself, Hall v. Lauderdale, 46, N.Y. 70, 74. Plaintiff failed to present a prima facie case to overcome the presumption against Shore's liability despite ample opportunity to present all its evidence. [Emphasis added.]

The alter ego idea is used (but as an aspect of agency) to bind a principal but it is not so clear how it applies to an alleged agent. 3 Am. Jur. 2d Agency § 274. Basis and Rationale of general rule (for imputation to principal of acts of agent) notes -

. . . Some courts ascribe as the reason for the rule the theory of the legal identity of the principal with the agent - in other words, the agent, acting within the scope of his authority, is, as to the matters embraced therein, for the time being the principal himself or the alter ego of the principal.

Case authorities are quoted backing the proposition that -

. . . no one questions the legal identity of principal and agent, since equity and good conscience require that one who acts through an agent and avails himself of the benefits of his agent's participation should be charged with his agent's knowledge as well as his acts.

However that deals with the liability of the principal.

And 3 Am. Jur. 2d §284 refers to the "sole actor" as the "alter ego" of the principal where the agent is the only person about, and the principal stands on the transaction or retains the benefits, the principal may become liable on the theory that "the agent is said to be the alter ego of his principal, since he is merely the agency through whom the principal himself acted and there again the principal becomes liable.

Liability of the agent as alter ego, where the principal is not concealed or undisclosed is quite another matter.

In Dunbar v. Hansen, 68 Ut., 398 250 P. 982 (1926), the agent without authority from the homeowner made repairs and was held liable, the court made clear however that one professing, without authority, to act as agent, binds himself however with such authority, and with agency disclosed the agent binds only the principal. But the repairs were made "subsequent to the date he first had negotiations with a representative of Ashton - Jenkins Company, looking to the lease of these premises." In other words the consideration came after the representations, the would be principal disclaimed liability, and the agent actually was without authority.

We might reason that Elizabeth Dewsnap, not binding her principal in stating, in effect that "funds would be forthcoming", not binding the principal, bound herself. But that could only be as to deliveries after the date of such commitment and on the theory of original contract.

Fieschko v. Herlich, Ill. 19 , 177 N.E.2d 376 noted that the only remedy against the agent is an action for damages for breach of an implied warranty of his authority or an action for deceit.

In the instant case Winkel,

1. The \$4,469.27 debt was past not future;
2. The principal was known to Plaintiff;
3. The principal was billed by Plaintiff;
4. Principal never disclaimed liability.

Dunbar is cited in 3 Am. Jur. 2d § 299 Nature and Theories of Liability (of agent.)

The discussion is with respect to liability of agent other than where principal is fictitious, nonexistent or it has not authorized the contract yet ought to be held liable on common sense and equity basis, the text noting page 658:

The view generally followed at the present time is that the liability of an agent to a third person on a contract rests upon the theory or ground that he warrants his authority, and not that the contract is deemed to be his own.

The cases cited however are as to future deliveries made after commitment as in Dunbar, not as to old debts, as in Winkel's.

C. FAILURE TO ALLEGE OR PROVE ALTER EGO SITUATION

Plaintiff never alleged, never mentioned at pre-trial, nor breathed at trial, argument or otherwise the alter ego theory or thrust, nor presented evidence of such.

The case is therefore unlike Colman v. Colman, 743 P.2d 782, Utah App. 1987 where theory was not pleaded but the evidence, without objection, established necessary unity of interest such as to justify application of alter ego theory in a divorce case with respect to properties in corporate status held by the husband.

In Winkel, Defendant had no chance to counter the contention and is prejudice by the finding of alter ego absent pleadings and absent proof by Plaintiff of required elements, unlike in Colman where the Defendant, as noted page 785 -

. . .received adequate notice of the alter ego issue and an opportunity to meet it . . .

D. DELIVERIES AFTER 9-29-84, DATE OF ASSIGNMENT OF LEASE

Colman cites Dockstader v. Walker, 29 Utah 2d 370, 510 P.2d 526, Utah 1973 which sets forth the guidelines and requirements for application of the alter ego theory, and which case is referred to in, we believe, all of the later Utah cases applying, or declining to apply the theory.

The court noted page 372:

The evidence upon which plaintiff must rely to prove alter ego is:

- (A) Walker was president of a corporation which sold to the corporate defendant pursuant to a uniform real estate contract the land which was used as a golf course and country club.
- (B) Walker was also president of the corporate defendant.
- (C) The corporate defendant failed as a going concern, and the selling corporation repossessed the land when ~~the~~ payments under the contract were not made.
- (D) The following excerpt from the testimony of plaintiff. (Walker denied making the statement.)

Q: Now, during this period - I mean, what was the conversation between you and Mr. Walker on that date?

A: He stated that, "We have decided to terminate you." When he said, "we," I asked who "we" was. And I said, "Has the Board of Directors become aware of this? Who do you mean by 'we?'" And he says, "I am the Board of Directors."

As opposed to this evidence are the following facts clearly established by the evidence:

- (A) The contract of employment was in writing and was with the corporate defendant.
- (B) The corporate defendant had a board of directors which met regularly.
- (C) The plaintiff worked under the direction of the board of directors.
- (D) The corporate defendant paid plaintiff for services rendered.
- (E) There were several stockholders in defendant corporation, of which Walker and Bagley were the principal ones.

The court rejected the alter ego theory.

The court noted that a corporate veil would be pierced and the stockholders looked to where the entity is used to perpetrate a fraud or defy justice and at page 373 the court noted:

[3] The term "alter ego" is used to describe a situation where the courts go behind the corporate entity and hold a stockholder liable for the debts of the corporation or to hold that it is the stockholder and not the corporation which owns the assets.

[4] The doctrine is generally applied to situations known as "one-man corporations," i.e., where one man owns practically all of the stock, either directly or through others who hold it for his use and benefit, and where the stockholder uses the corporation as a shield to protect him from debts or wrongdoings. It cannot be applied to make a stockholder liable for the legitimate debts of a corporation unless he is so closely allied with the corporation through ownership and management as to enable the courts to see clearly that the corporate entity is but a sham and it is the stockholder who is doing business behind the corporate shield.

[5] In the instant matter it is not shown that Walker owns a majority of the stock of either corporation of which he was president. It clearly appears that he acted under and pursuant to the action of a board of directors. There is no claim of any fraud of any nature and no evidence to show fraud. The trial court never found fraud or any wrongdoing on the part of Walker.

We are unable to find in the record of this case those elements which would justify the trial court in holding the appellant liable for the debts of the corporate defendant. The judgment is, therefore, reversed. Costs are awarded to the appellant.

In Winkel, from the evidence presented it is impossible to find any such commonality of interest as would justify the alter ego application. Elizabeth Dewsnap had no stock, was not an officer, had never worked for nor previously been associated in any way with Modern Cinema, Inc.

Her only connection, inconvenience or otherwise was that 26 years prior she had been married to, and divorced from, Stanley Dewsnap, who was manager of Modern Cinema, Inc. In fact the documents introduced the lease especially, proves the separate interests of Elizabeth Dewsnap and Modern Cinema, Inc. and is inconsistent with a oneness or a unity, or alter ego application.

It is noteworthy that neither in the pleadings nor proof nor argument was there ever any intimation of fraud on the part of Elizabeth Dewsnap.

In Municipal Building Authority v. Lowder, 711 P.2d 273 (Utah 1985), in rejecting the alter ego theory the court stated page 278 -

For one corporate entity to be the alter ego of another, two requirements must be met. First, "there must be such unity of interest and ownership that the separate personalities of the corporation[s] . . . no longer exist." Norman v. Murray First Thrift & Loan Co., Utah, 596 P.2d 1028, 1030 (1979). Second, "the observance of the corporate form [must] sanction a fraud, promote injustice, or [cause] an inequitable result [to] follow." Id.; accord Dockstader v. Walker, Supra.

Valley Lane Corporation v. Bowen, 592 P.2d 589 (Utah 1979) the court cites Dockstader and notes that it is basic that a corporate entity is separate from stockholders as entities, "and that business conducted through it will protect them from personal liability therefore", but applies the alter ego

theory and holds liable the stockholder but noting that the persons, Charles E. and Shirley Bowen agreed to "personally guaranty performance of all of the terms and conditions of the foregoing agreement", and did so in writing, and before delivery.

In Winkel, Elizabeth Dewsnap, the lessee of the Twin Cinema was not even a stockholder, signed no guarantees; and in fact, to protect herself from the same dangers that Winkel faced, non-payment by Modern Cinema, Inc., she took steps to see that the manager was not lost to the cause and that the proceeds from the theater at least paid the help before balances were remitted to Modern Cinema, Inc.

In Centurian Corporation v. Fiberchem, Inc., 562 P.2d 1252 (Utah 1977) the court rejected the defense of alter ego noting page 1253 -

. . . an essential to its asserted defense of alter ego is that the corporations were so used as to confuse or deceive, that there is basic unfairness, something akin to fraud or deception which thus placed defendant at a disadvantage and worked an injustice.

In Winkel, the injustice would be to charge Defendant for deliveries made before Elizabeth Dewsnap was even known to Winkel.

As to deliveries by Plaintiff to Modern November 1984 telephone conversation, there is some rhyme or reason to hold Elizabeth Dewsnap since she did intercept Modern funds, and as to those deliveries she proffered payment which proffer Plaintiff will not deny.

E. FRAUD REQUISITE AND OTHER ELEMENTS

1. Fraud is necessary for Alter Ego Liability

Before the acts and obligations of a corporation may be recognized as those of a particular person under the "alter ego doctrine", it must be shown that an adherence to the corporate entity under the particular circumstances would sanction a fraud or promote injustice. Wiseman v. Sierra Highland Mining Co., 111 P.2d 646, 651, 17 Cal.2d 690.

The mere fact that a corporation is the alter ego of an individual is not sufficient to entitle minority stockholders to relief under the "alter ego doctrine", but fraud must be proved before relief may be accorded. id.

The doctrine of "alter ego" does not create assets for or in corporation, but it simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business, and that liability springs from fraud perpetrated not on the corporation, but on third persons dealing with corporation. Garvin v. Matthews, 74 P.2d 990,992, 193 Wash. 152.

"Alter ego" theory requires that some showing be made that corporation was used by stockholder as sham or device in transaction in question and that equity should look through such sham to impose upon stockholder corporate obligation that was, in reality, his obligation. State v. Nevitt, Tex.Civ. App., 595 S.W.2d 140, 143.

Doctrine of "alter ego" fastens liability on an individual who uses corporation merely as an instrumentality to conduct his own personal business, such liability arising from fraud or injustice perpetrated not only on corporation but on third persons

Fraud Requisite and Other Elements (continued)

who deal with corporation, and under such doctrine court disregards the corporate entity and holds individual responsible for his acts knowingly and intentionally done in name of corporation. *Kirk v. H.G.P. Corp.*, 494 P.2d 1087, 1090, 208 Kan. 777.

The "alter ego" doctrine passes liability onto the individual who uses corporation as instrument in conducting his own personal business, and personal liability springs from fraud perpetrated not on corporation but on third persons dealing with corporation. *Shreveport Sash & Door Co. v. Ray*, La.App., 159 So.2d 434, 437.

2. The Injustice Must be a Result of the Fraud.

Under "instrumentality" or "alter ego" rule there must be complete domination as to transaction in question, fraud or injustice must result from the use of such control, and plaintiff's injury must be a proximate result of control and breach of duty of dominating corporation. *National Bond Finance Co. v. General Motors Corp.*, Mo. 238 F.Supp. 248.

3. Liability Under Alter Ego Theory Rests Upon - A unity of corporation and the "bad actor"; and Control such that the corporation entity becomes a mere instrument or tool, i.e. complete domination by the party sought to be charged.

To establish the "alter ego" doctrine, it must be shown that the stockholders disregarded the entity of the corporation, made corporation a mere conduit for the transaction of their own private business, and that the separate individualities of the corporation and its stockholders in fact ceased to exist. *Sefton v. San Diego Trust & Savings Bank*, Cal.App., 106 P.2d 974, 984.

Fraud Requisite and Other Elements (continued)

Under "alter ego" or "instrumentality" rule, when corporation comes under domination of another person as to have become a mere instrument of the person and is really indistinct from the person controlling it, then corporate form will be disregarded if to retain it would result in injustice, but rule has no application where corporation itself has committed a direct tort. *Mills v. Murray*, Mo.App., 472 S.W.2d 6, 13.

The "alter ego doctrine" does not require that every share must be owned by individual who seeks to mask his activities behind fiction of corporate identity, and important factors that corporation is, in fact, controlled by individual sought to be held and that recognition of separate existence of controlled corporation would work a fraud or an injustice. *O'Donnell v. Weintraub*, 67 Cal.Rptr. 274, 278, 260 C.A.2d 352.

The principle of "alter ego" may be invoked when the actual doer of the act is not an agent but is an automaton or tool actuated by the will and principal. *Plunkett v. Nationwide Mut. Ins. Co.*, 187 A.2d 754, 756, 150 Conn. 203.

Corporation, which was owned by sole owners of judgment debtor corporation and to which all assets of judgment debtor corporation had been transferred, was properly treated as "alter ego" of judgment debtor corporation. *Frank McCleary Cattle Co. v. Sewell*, 317 P.2d 957, 959, 73 Nev. 279.

Consequence of applying "alter ego doctrine" is that corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in area of contracts, acts of one are the acts of all. *Fisser v. International Bank*, C.A.N.Y., 282 F.2d 231, 234.

Fraud Requisite and Other Elements (continued)

The so-called "instrumentality" or "alter ego" rule states that when a corporation is so dominated by another corporation that the subservient corporation becomes a mere instrument and is really indistinct from controlling corporation, then the corporate veil of dominated corporation will be disregarded, if to retain it results in injustice. National Bond Finance Co. v. General Motors Corp., D.C.Mo., 238 F.Supp. 248, 255.

4. Corporation Individuality is Protected Otherwise.

The "corporate entity doctrine" is one of substance and validity and should be ignored with caution, and only when circumstances clearly justify it, and the "alter ego" theory, with respect to corporations, has been adopted by courts to prevent injustice in those cases where the fiction of a corporate entity has been used as a subterfuge to defeat public convenience or to perpetrate a wrong, and the theory should never be invoked to work an injustice or to give an unfair advantage. Superior Coal Co. v. Department of Finance, 36 N.E.2d 354, 360, 377 Ill. 282.

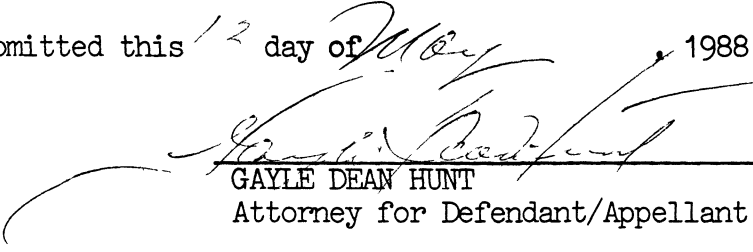
Where board of directors did have a hand in management of defendant and several people had money invested in defendant, defendant's president was not "alter ego" of defendant and could not be held personally liable for infringement of patents though president had designed accused structure and had been in contact with plaintiff when certain information was obtained from plaintiff. Besly - Welles Corp. v. Balax, Inc., D.C.Wis., 291 F.Supp. 328, 347.

Conclusion

The court should render judgment as follows:

1. Taking evidence in a light most favorable to the Plaintiff -
 - a. Hold Defendant Elizabeth Dewsnap liable for deliveries after telephone commitment on an "original contract" theory;
 - b. Hold Elizabeth Dewsnap liable for deliveries from 9-29-84 to date of telephone conversation because she consents to same (not even because she intercepted theater receipts since she paid those over to Modern Cinema, Inc.) and it, not she, owes for those deliveries.
 - c. As to pre 9-29-84 deliveries, find no evidence or theory on which Elizabeth Dewsnap could be bound and protect her with the Statute of Frauds.
2. Since Elizabeth Dewsnap proffered (and proffers) payment for post 9-29-84 deliveries, to assess costs of these proceedings against the Defendant.

Respectfully submitted this ¹² day of *May*, 1988.



 GAYLE DEAN HUNT

Attorney for Defendant/Appellant

On _____, 1988 I mailed four (4) copies of the foregoing to
 the following:

Michael R. Labrum
 Attorney for Plaintiff/Respondent
 108 North Main Street
 Richfield, Utah 84701
 Telephone: 896-6486



GAYLE DEAN HUNT
Attorney for Appellant
2121 South State Street
Salt Lake City, Utah 84115
Telephone: 486-8701

IN THE COURT OF APPEALS OF THE STATE OF UTAH

WINKEL DISTRIBUTING,	:	
	:	Court of Appeals
	:	#870563-CA
Plaintiff/Respondent.	:	
	:	Tenth Circuit Court
vs.	:	#86-CV-1838
	:	
ELIZABETH DEWSNUP, dba VALLEY	:	Argument Priority #14b
TWIN CINEMA and CITI CINEMA,	:	
	:	
Defendant/Appellant,	:	

ADDENDUM TO BRIEF OF DEFENDANT - APPELLANT

Gayle Dean Hunt
2121 South State Street
Salt Lake City, Utah 84115
Telephone: 486-8701

Attorney for Defendant - Appellant

Michael R. Labrum
108 North Main Street
Richfield, Utah 84701
Telephone: 896-6486

Attorney for Plaintiff - Respondent

Index of Exhibits

<u>Exhibit No.</u>	<u>Item</u>	<u>Location</u>
Ex. 1 (Ex. M of E. Dewsnap Affidavit)	3-1-86 Statement, Winkel to Modern with 31 Attached Invoices (on 16 pages)	1 - 17
Ex. 2	9-24-84 Bill of Sale, Modern Cinema, Inc. to Elizabeth Dewsnap (see Assignment of Lease Ex. E below)	18
Ex. 3	Contract of Sale to Brad Whitaker (in court file, unavailable at "press time")	19
Ex. 4	4 Check Vouchers, Defendant to Plaintiff, Beaver Theater	20
Ex. 5	Statement on Beaver Theater	21
Ex. 6	Notice from Defendant to Suppliers	22
Affidavit of Elizabeth Dewsnap		23 - 52
- Ex. A	Receipts, 6 pages	27 - 32
- Ex. B	Vouchers, 2 pages Transfer of Funds	33 - 34
- Ex. C	Vouchers, 6 pages	35 - 40
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- Ex. E	9-24-84 <u>Assignment of Lease</u> , 2 pages (same as Ex. 2)	42 - 43
- Ex. F	Voucher - Power Bill	44
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- Ex. J	Money Order to Winkel - on Beaver account shows payment of disputed \$4,960 (on Ex. K)	48
- Ex. K	Statement on Beaver Account	49
- Ex. L	Voucher - shows payment of disputed Beaver \$70.50	50
- Ex. M	Same as Ex. 1 above (3-1-86 Statement and Vouchers, not repeated here)	51
Affidavit of Stanley Dewsnap		52 - 54

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Findings of Fact and Conclusions of Law	55 - 57
Memo regarding Bulk Sales Act	58

ILL WINKEL DISTRIBUTING CO.

25 EAST 400 SOUTH
ICHFIELD UT

84701

Statement

STATEMENT DATE: 03/01/86

ACCOUNT NUMBER: 63300

PAGE NO.: 1

MODERN TWIN CINEMAS
MODERN TWIN CINEMAS
21 SOUTH STATE
DELTA CO

84701

\$
AMOUNT REMITTED

PLAINTIFF'S
EXHIBIT

1

86-CV-1838

RETURN THIS PORTION WITH PAYMENT

QICE	DATE	TERMS OF REF	CODE	DEBITS	CREDITS	BALANCE
1	01/01/85			4,904.79		4,904.79
10524	01/04/85			119.00 ✓		119.00
16374	01/09/85			59.70 /		59.70
8370	05/07/85			91.40 /		91.40
02518	11/02/83			292.45		292.45
19961	05/25/84			181.20		181.20
18993	06/04/84			146.25		146.25
19015	06/08/84			115.60		115.60
E 3454	06/15/84			37.90		37.90
17301	06/22/84			125.20		125.20
09952	06/29/84			86.20		86.20
36813	07/03/84			141.50		141.50
48622	07/03/84			95.30		95.30
36727	07/06/84			117.35		117.35
44823	07/12/84			129.00		129.00
10370	07/19/84			117.22		117.22
47445	07/25/84			224.80		224.80
08184	07/31/84			254.85		254.85
09712	08/06/84			248.05		248.05
09678	08/10/84			168.00		168.00
08333	08/14/84			29.80		29.80
11186	08/17/84			244.15		244.15
08187	08/22/84			47.90		47.90
18389	08/27/84			193.40		193.40
36733	08/30/84			263.20		263.20
45689	08/31/84			170.55		170.55
35004	09/22/84			327.20		327.20
19196	10/19/84			38.20		38.20
19691	12/12/84			183.90 /		183.90
10748	12/18/84			151.15 /		151.15
04340	02/10/84			140.25 ✓		140.25
02539	01/27/84			505.40 ✓		505.40
D 75244	01/02/83			66.55 ✓		66.55
INTEREST				62.27 ✓		62.27
CURRENT	OVER 15	OVER 30	OVER 45	OVER 60		TOTAL
					5,174.89	5,174.89

BILL WINKEL DISTRIBUTING CO

02539

WAREHOUSE
Richfield, Utah

225 East 4th South

Order No. 633 Date Jan 27, 1984
Sold to Valley Twin Cinemas

Address _____ Salesman _____

QUAN.	DESCRIPTION	PRICE	AMOUNT
12	Cherry Niabs	540	6480
13	Twizzlers	360	4680
2	Lg Carmello		4500
1	Lg Knuckle		1575
1	Lg Kia Kat		1325
6	Lg Pan Pan + Tr Mar		10560
12	Large M&M's		10800
2	85oz Cps	2585	5170
1	Popcorn Boxes		2250
			<u>\$47340</u>
4	Candy 36x30		3200
			<u>\$50540</u>
Rec'd By	<u>Bud Whittaker</u>	TOTAL	<u>100</u>

MOORE BUSINESS FORMS, INC. 48

04340

225 East 4th South

Address _____ Salesman _____

[illegible]

COORS

260 East 2nd South
225 East 4th South

Address _____ Salesman _____

[illegible]

RECEIVED ON ACCOUNT

MOORE BUSINESS FORMS, INC. - A

BILL WINKEL DISTRIBUTING CO.

16374

896-6368

WAREHOUSE
Richfield, Utah

325 East 4th South

Order No. 63300 Date 11/11 1985

Sold to Modern Cinema

Address _____ Salesman _____

[illegible]

MOORE BUSINESS FORMS, INC. - 14

BILL WINKEL DISTRIBUTING CO.

40524

896-6368

WAREHOUSE
Richfield, Utah

225 East 4th South

Order No. 633 Date Jun 4, 1985

Sold to Modern Twin Cinemas

Address _____ Salesman _____

[illegible]

MOORE BUSINESS FORMS, INC. 40

BILL WINKEL DISTRIBUTING CO.

10748

WAREHOUSE
Richfield, Utah 225 East 4th South
896-6368

Order No 633 Date 12/18/84
Sold to Modern Cinema

QUAN.	DESCRIPTION	PRICE	AMOUNT
1	170's piped Cup		36 85
1	83's " "		22 20
1	Candy 36x35		9 30
1	Junior mint Lg		17 60
1	pom-pom Lg		17 60
1	Crackal Lg		15 75
1	Kit Kat Lg		13 25
3	Candy 24x35		18 60
TOTAL			151 15

MOORE BUSINESS FORMS, INC. - M

BILL WINKEL DISTRIBUTING CO.

19691

WAREHOUSE
Richfield, Utah 225 East 4th South
896-6368

Order No 633 Date 12/12/84
Sold to Modern Cinema

QUAN.	DESCRIPTION	PRICE	AMOUNT
8	Mc M King	11.30	90 40
2	Candy 24x35	6.20	12 40
3	Candy 36x35	9.30	27 90
1	pom pom Lg		17 60
1	Junior mint		17 60
5	Twizzler 3.60		18 00
TOTAL			183 90

Rec'd By

MOORE BUSINESS FORMS, INC. - M

19196

896-6368

225 East 4th South

Order No. 633 Date 10-19 1954

Sold to WIN CHAIRES

Address _____ Salesman _____

[illegible]

MOORE BUSINESS FORMS, INC.-40

BILL WINKEL DISTRIBUTING CO.

35044

896-6368

225 East 4th South

Order No. 633 Date 9/22/ 1984

Sold to Modern Cinema

Address _____ Salesman _____

[illegible]

MOORE BUSINESS FORMS, INC. • 800-225-5500

36733

225 East 4th South

Address _____ Salesman _____

Rec'd By

BILL WINKEL DISTRIBUTING CO.

45689

226 East 4th South

Address _____ Salesman _____

Rec'd By

MOORE BUSINESS FORMS, INC. - MO

18389

Order No. 433 Date 8/27 1984
Sold to Modern Cinemas

QUAN.	DESCRIPTION	PRICE	AMOUNT
2	Lg Kot Kot	13.25	26.50
4	Lg MAM's	11.50	45.20
8	Gr Tuzalera		18.00
5	Almond Salatairs		51.00
4	Candy 24x35	620	24.80
3	Candy 36x35	730	27.90
			193.46

TOTAL	193	40
-------	-----	----

BILL WINKEL DISTRIBUTING CO.

08187

Order No. 633 Date 8/22 1954
Sold to Modern Cinema

[illegible]

Rec'd By

total	47	90
-------	----	----

MOORE BUSINESS FORMS, INC. - 34

11186

. 225 East 4th South

Address _____ **Salesman** _____

Brad Whitaker
 TOTAL 244.15

TOTAL	244-15
-------	--------

MOORE BUSINESS FORMS, INC. M

08333

225/East 4th South

Address Kichtfeld Salesman _____

Brad White

29.80

TOTAL

MOORE BUSINESS FORMS, INC. 41

TOTAL

MOORE BUSINESS FORMS, INC. - M

19678

WAREHOUSE
Richfield, Utah

225 East 4th South

for No. 633 Date 8/10/ 1984
to Modern Cinema

from _____ Salesman _____

[illegible]

MOORE BUSINESS FORMS, INC. MA

09712

896-6368

WAREHOUSE
Richfield, Utah

225 East 4th South

Order No. 633 Date 8/6/ 19 84
Sold to Modern Outfitters

Address _____ **Salesman** _____

[illegible]

MOORE BUSINESS FORMS, INC. MA

BILL WINKEL DISTRIBUTING CO.

08184

WAREHOUSE
Richfield, Utah 225 East 4th South
896-6368

Order No. 633 Date 7/31/84
Sold to Modern Cinema

Address _____ Salesman _____

QUAN	DESCRIPTION	PRICE	AMOUNT
1	5 lb popcorn Tub		29 80
1	10 lb " " "		37 90
1	Kit Kat Lg		13 25
1	Kracker Lg		15 75
1	Kit Kat Red Vine		10 25
3	Candy 3.60		10 80
4	Candy 24x35	6.20	24 80
5	M&M King	11.30	56 50
6	Candy 36x35	9.30	55 80

\$254.85

Chg

Brad Whitaker

Rec'd By

TOTAL

BILL WINKEL DISTRIBUTING CO.

47445

WAREHOUSE
Richfield, Utah 225 East 4th South
896-6368

Order No. 633 Date 7/25/84
Sold to Modern Cinema

Address _____ Salesman _____

QUAN	DESCRIPTION	PRICE	AMOUNT
4	Candy 24x35	6.20	24 80
6	Candy 36x35	9.30	55 80
4	M&M King	11.30	45 20
1	Candy Lg	?	6 00
1	Kracker		15 75
1	Kit Kat		13 25

Brad Whitaker

Rec'd By

TOTAL

224 80

MACOM BUSINESS FORMS, INC.-MA

MOORE BUSINESS FORMS, INC. - N

ADDITIONAL BUSINESS FORMS, INC. - 44

MOORE BUSINESS FORMS, INC.-4

09952

896-6368

WAREHOUSE
Richfield, Utah

225 East 4th South

No 633 Date 6/29/1984
Modern Cinema

Salesman

DESCRIPTION	PRICE	AMOUNT
36 - 35¢	9.30	18.60
36 - 35¢	9.30	18.60
king size 11.30		22.60
240 - 24¢	3.60	10.80
240 - 24¢	5.20	15.60

86.20

ch

Brad White

TOTAL

MD

MOORE BUSINESS FORMS, INC. - 48

36813

896-6368

WAREHOUSE
Richfield, Utah

225 East 4th South

Order No. 633 Date July 3, 1984
Sold to Valley Cinemas

Address Salesman

QUAN.	DESCRIPTION	PRICE	AMOUNT
2	# 44 cups		40.00
1	# 48		31.00
1	46oz cups		39.50
1	# 48		31.00

141.50

ch

Brad White

TOTAL

MD

Rec'd By

MOORE BUSINESS FORMS, INC. - 48

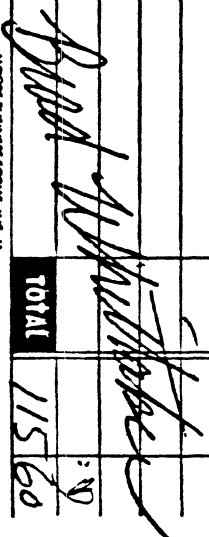
MOORE BUSINESS FORMS, INC. - 40

19015

225 East 4th South

225 East 4th South

Order No. 1033 Date 6/8/1957
Sold to Madden Airplane

Address		Salesman	
QUAN	DESCRIPTION	PRICE	AMOUNT
3	Med Mt King	1130	3390
3	Cherry 36x35	930	2790
3	Cherry 24x35	620	1860
2	poplars	1760	3520
			11560
Rec'd by			
	TOTAL		11560

MOORE BUSINESS FORMS, INC. 1A

KNOW ALL MEN BY THESE PRESENTS: That MODERN CINEMA INC.
a Colorado Corporation of the City, Delta County of Delta
in the State of Colorado, of the first part, for and in consideration of Ten dollars and other
considerations, Dollars,
to it in hand paid, at or before the ensembling or delivery of these presents by
Elizabeth P. Dewsnap of the City, Price County of Carbon
in the State of ~~Colorado~~ ^{Utah}, of the second part, the receipt whereof is hereby acknowledged, has
bargained and sold, and by these presents do ~~se~~ ^{grant} and convey unto the said party of the
second part, her executors, administrators, successors or assigns, the following property,
goods and chattels, to wit: All the lease improvements, personal property of every
Description, theatre equipment and furnishings located in the Valley Twin Cinemas
1150 South Hi-way U. S. 89, Richfield Plaza Shopping Center, Richfield, Utah.
More specifically described as follows:
A. Two Ballantyne 35 MM projectors, complete with sound heads, bases, shutters
lens turrets complete, was new in 1981.
B. Four projection lens, two wide-angle, and two Cinemascope.
C. Two Strong Zenon Lamphouses with power supplies and Zenon Bulbs.
D. Two DITCO Film handling systems with three platters, complete.
E. Two complete Sound systems, complete with rear stage speakers and all
related components.
F. Four Zetrol automatic dimmers with junction boxes, complete.
G. Two Automated control panels for all theatre functions.
H. 667 American Bodiform self-rise theatre opera chairs.
I. Two projection screens with masking and meter controls.
J. Double reader Panel marguee, with neon and changeable letters.
K. Also the following items: Scotsman ice maker, two Sharp concession
cash registers, one Hugin ticket machine, two Gold Metal popcorn poppers
six sand urns, four Torpedos waste containers, one Model-M vacume cleaner
and all office equipment of every description, located in the theatre
located at Valley Twin Cinemas, 1150 South Hi-Way 89, Richfield, Utah.

TO HAVE AND TO HOLD the same, unto the said party of the second part, her
executors, administrators, successors or assigns, forever. And the said party of the first part,
for it's self, it's heirs, executors, administrators, successors or assigns, cove-
nants and agrees to and with the said party of the second part, her executors,
administrators, successors or assigns, to WARRANT AND DEFEND the sale of said property,
goods and chattels, hereby made unto the said party of the second part, her executors,
administrators, successors or assigns, against all and every person or persons whomsoever.

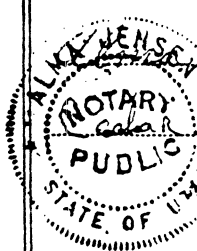
IN WITNESS WHEREOF, The party of the first part has hereunto set
hand and seal, this 29th day of September, 1984.

Signed, sealed and delivered in the presence of

MODERN CINEMA INC.

By: Stanley Dewsnap President [SEAL]

Michael Hunter Secretary [SEAL]



Entry No. 225098 Book 199

Recorded May 23, 1985 At 4:30 Page 317

Bessie N. Curtis, Recorder Sevier County

Request Of Elizabeth Dewsnap Fee \$5.00

317

18

Ex. 3

In court evidence file, not available at "press time".

Contract of Sale Elizabeth Dewsnup to Whitaker
dated

CITI CINEMAS
P. O. BOX 1021 637-1233
PRICE, UTAH 84501

986
97-177/1243

1280

402

Pay to the order of Bill Winkel

Three Hundred and Eighty-Four

Dollars

STATE BANK OF SOUTHERN UTAH
CEDAR CITY, UTAH 84720

For 4406 = 40.30

DEFENDANT'S EXHIBIT #4
86-CV-1838

00009861 1243017791 0 125120 0000038470

CITI CINEMAS - BEAVER
P. O. BOX 1021
PRICE, UTAH 84501

1398
97-280/1243

483

402

Pay to the order of Bill Winkel

One Hundred and Sixty-Eight and 25/100

Dollars

UTAH INDEPENDENT BANK
BEAVER OFFICE
BEAVER, UTAH 84713

For 114 571 = 43.00

001398 124302804130 01149 6 00000016825

CITI CINEMAS - BEAVER
P. O. BOX 1021
PRICE, UTAH 84501

1617
97-280/1243

483

402

Pay to the order of Bill Winkel

Eighty-Two and 65/100

Dollars

UTAH INDEPENDENT BANK
BEAVER OFFICE
BEAVER, UTAH 84713

For 594 = 36.55

001617 124302804130 01149 6 00000008265

CITI CINEMAS
P. O. BOX 1021 637-1233
PRICE, UTAH 84501

1458
97-177/1243

1280

402

Pay to the order of Bill Winkel

Fifty-Five and 40/100

Dollars

STATE BANK OF SOUTHERN UTAH
CEDAR CITY, UTAH 84720

For 418/15 = 27.87

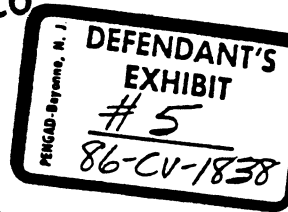
001458 1243017791 0 125120 0000005540

20



**Cares About
Utah**

BILL WINKEL DISTRIBUTING CO
225 EAST 400 SOUTH
RICHFIELD, UTAH 84701
PHONE: OFFICE (801) 896 4916
WAREHOUSE: (801) 896 6368



Account Name:

City Cinema
Beaver

STATEMENT

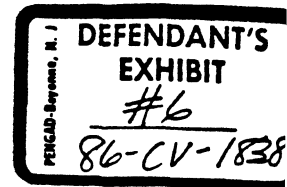
DATE	MEMO	CHARGES	CREDITS	BALANCE
7/2/84	09156 ps. ck. 986	76.20		
7/9/84	09906 ps. ck. 986	40.30		
7/16/84	09758 ps. ck. 986	55.90		
7/23/84	09814 ps. ck. 986	42.50		
7/30/84	08505 ps. ck. 986	49.30		
1/4/85	1535 ps. ck. 1398	64.05		
2/11/85	2100 ps. ck. 1398	61.20		
6/17/85	11467 ps. Coaster ck.	12.40		
6/24/85	11881 ps. Coaster ck.	37.20		
7/7/85	12832 ps. ck. 207	46.50		
7/15/85	13495 ps. ck. 207	49.60		
7/22/85	14048 ps. ck. 207	45.45		
7/29/85	14665 ps. ck. 207	61.20		
4/8/85	6247 ps. ck. 1458	55.40		
3/25/85	5294 ps. ck. 1617	36.55		
3/18/85	4727 ps. ck. 1617	46.10		
Interest		7.33		
Sub Total				\$787.18
Finance Charge				
Total Amount Due				\$787.18

THANK YOU

Accounts are due and payable 10th of month following date of invoice
A finance charge of 1 1/2% per month, 18% per annum, will be charged
on the unpaid balance 30 days or more past due. Customer agrees to pay a
reasonable attorney's fee and other costs of collection after default and
referral to an attorney

ck 256 164.00

21



June 17, 1985

TO WHOM IT MAY CONCERN:

Citi Cinemas has bought out the remainder of Modern Cinema's interests in Utah; therefore, effective June 21, 1985, Elizabeth Dewsnap, dba Citi Cinemas will be responsible for buying, booking and payment of film rental in Moab and Richfield in addition to Price and Beaver - as per previous letter from Philibin Cinema Service.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth Dewsnap".

Elizabeth P. Dewsnap, owner
Citi Cinemas
Box 1021
Price, Utah 84501
(801) 637-2740

Distribution:

Philibin Cinema Service
Modern Cinema Corp.
Film Companies

22

GAYLE DEAN HUNT
Attorney for Defendant
2121 South State Street
Salt Lake City, Utah 84115
Telephone: 486-8701

IN THE TENTH CIRCUIT COURT OF SEVIER COUNTY

STATE OF UTAH

WINKEL DISTRIBUTING,)	AFFIDAVIT OF ELIZABETH DEWSNUP
)	
Plaintiff,)	
vs.)	
)	
ELIZABETH DEWSNUP)	
dba VALLEY TWIN CINEMA)	
and CITY CINEMA,)	
)	CIVIL NO. 86-CV-1838
Defendant.)	

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

ELIZABETH DEWSNUP being duly sworn deposes and states as follows:

With respect to the Twin Cinema in Richfield, the first payroll I dispursed was that October 15, 1984 according to my books.

I was interested in the continuity of managership as well as keeping the Twin Cinema open; and the simplest way was for gross receipts to continue directly to the bank to the Modern Cinema account for October 1984, Exhibit A1-6 \$4,665.45, payroll and manager's salary and incidentals paid out and balance transferred to me to Modern Cinema, Inc.

For the period of time October 1984 through 6-21-85, I accounted to Modern Cinema, Inc., and made transfers to them as follows:

\$ 4,000.00
3,306.67
3,306.67
5,000.00
3,306.67

Exhibit B attached; also made payroll for them of \$1,317.51, Exhibit C1-3

23

attached; a total of \$24,902.97 (which includes one month of manager's salary which represents the gross less items dispursed by me, i.e. payroll and manager's salary of approximately \$21,080.16; total \$45,983.13+.

The first deposit of funds to my account was November 1984. My records show 11-6-84, Exhibit D attached.

I never recorded the assignment, Exhibit E, that I received from Modern Cinema, Inc. until 5-23-85; recorded in Sevier County; and this after the Huish had closed; and by previous agreement, Modern Cinema, Inc. was to run the theaters together until after disposition of the Huish.

I never made a power payment until 1-21-85, Exhibit F for \$1,037.5 because of delinquency; and I made a total of 6 power payments, total \$6,225
Cumulative Total: \$52,208.55.

The first telephone payment I made was 2-10-85, Exhibit G for \$104.01 (part of \$285.97 check) because of delinquency of Modern Cinema, Inc and with next 4 months, total 5 months, for \$520.00.
Cumulative Total: \$52,728.55.

The first least payment I made (rental on the theaters) was 7-1-85 Exhibit H.

The first film rental I paid was 7-1-85, Exhibit I. All previous film rentals were paid by Modern Cinema, Inc. The 7-1-85 film rental was a reservation - a "booking in advance" for the film Witness to Paramount produc

The documents covering the cashier's check (approximately \$50.00) by me to Winkel are attached hereto, Exhibit J and Exhibit K, Invoice 11467 and 11881. Document covering Invoice 12832 for \$46.50 (on statement Exhibit denied by plaintiff is covered by 2-20-87 check 207 for \$70.50, Exhibit L .

Another reason for my not operating the Twin until summer 1985 was that I was running theaters in Price and Beaver, teaching school and working.

24

my doctorate. I needed time to get acquainted with the operation; and so things would proceed smoothly with no interruption in the operation until I could take things over the summer after school was out; and this for convenience since I was going back and forth to Richfield anyway en route to Beaver and to my home property in Cedar City.

The only invoices on Twin after the purchase 9-29-84 are as follows:


1-2-83	Invoice No. 163 ⁷ 2 4	\$ 59.20
11-11-85	Invoice No. 40524	\$ 119.00
1-4-85	Invoice No. 10748	\$ 151.15
12-18-84	Invoice No. 19691	\$ 183.90
10-19-84	Invoice No. 19196	\$ 38.20
SUBTOTAL:		\$ 551.95 <u>Exhibit M</u>
and 5-7-85	Invoice No. 8370	\$ 91.40 (never produced)
TOTAL:		\$ 643.35;

and all the Beaver have been apid in full, which Winkel did not have evidence of and denied until a few minutes before trial.

Dated this 7th day of August, 1987.


ELIZABETH DEWSNUP

Subscribed and sworn to before me this 7th day of August, 1987.


NOTARY PUBLIC,
Residing in Salt Lake County, Utah

My commission expires: 

25

I mailed a copy of the foregoing on August 7, 1987 to the following

Michael R. Labrum
Labrum & Taylor
Attorneys for Plaintiff
108 North Main Street
Richfield, Utah 84701
Telephone: 896-6484



Thin Receipt Deposited to Modern

2A
11/11/84

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

ALL ITEMS ARE RECEIVED BY THIS BANK FOR PURPOSES OF COLLECTION
 AND ARE SUBJECT TO THE UNIFORM COMMERCIAL CODE
 ALL CREDITS FOR ITEMS ARE PROVISIONAL UNTIL COLLECTED

DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
01/10/84	142	50	44		11972

RECEIVED BY

035ZFN10/12/84#078

1243004371: 55 01672 9P

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
11/10/84	141	50			14150

RECEIVED BY

035ZFN10/12/84#078

1243004371: 55 016

167.98+
 140.25+
 132.70+
 80.40+
 100.25+
 206.25+
 310.25+
 351.00+
 34.30+
 259.20+
 129.00+
 100.65+
 47.30+
 746.43+
 33.75+
 451.20+
 81.35+
 123.95+
 82.55+
 221.00+
 4052.45 T

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
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 Richfield, Utah 84701

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
01/10/84	185	50			18550

RECEIVED BY

045ZFN10/04/84#068

1243004371: 55 01

020

plus Sept

2.7

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
12-19-84	80.40				80.40

0455ZFN10/04/84#094 \$80.40 D

⑆⑆24300437⑆ 55 01672 9⑈

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 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

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 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
12-16-84	100.25				100.25

1255ZFN10/19/84#058 \$100.25 D

⑆⑆24300437⑆ 55 01672 9⑈

RECEIVED BY

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 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
12-16-84	26.95				26.95

0355ZFN10/12/84#073 \$26.95 D

⑆⑆24300437⑆ 55 01672 9⑈

RECEIVED BY

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

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 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
12-19-84	916.95				916.95

0355ZFN10/12/84#075 \$916.95 D

⑆⑆24300437⑆ 55 01672 9⑈

RECEIVED BY

28

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ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF
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 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
08/12/84	30.70	10	14.50		351.60
<p>0355ZFN10-12/84#082 \$351.60 D</p> <p>1243004371: 55 01672 9#</p>					RECEIVED BY

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 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF
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 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
08/12/84	34.70	50			34.30
<p>0355ZFN10/12/84#086 \$34.30 D</p> <p>1243004371: 55 01672 9#</p>					RECEIVED BY

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ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF
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 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
08/15/84	259.00	90			259.90
<p>1235ZFN10/19/84#049 \$259.90 D</p> <p>1243004371: 55 01672 9#</p>					RECEIVED BY

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ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF
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 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
08/12/84	129.00				129.00
<p>0355ZFN10/12/84#088 \$129.00 D</p> <p>1243004371: 55 01672 9#</p>					RECEIVED BY

29

DEPOSITED WITH
ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701
 TO THE CREDIT OF
 MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
Oct 11 1989	160.00	65			160.65
					RECEIVED BY

0355ZFN10/12/84#080 \$160.65 D

124300437: 55 01672 9

DEPOSITED WITH
ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701
 TO THE CREDIT OF
 MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
Oct 15 1989	47.00	30			47.30
					RECEIVED BY

1255ZFN10/19/84#045 \$47.30 D

124300437: 55 01672 9

DEPOSITED WITH
ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701
 TO THE CREDIT OF
 MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
Oct 17 1989	748.48				748.48
					RECEIVED BY

1255ZFN10/19/84#054 \$748.48 D

124300437: 55 01672 9

DEPOSITED WITH
ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701
 TO THE CREDIT OF
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 2195 SOUTHGATE
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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
Oct 18 1989	93.75				93.75
					RECEIVED BY

1255ZFN10/19/84#043 \$93.75 D

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

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 2195 SOUTHGATE
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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
06/15/84	451.20	00			451.20

1255ZFN10/19/84#047 8451.20 D
 12243004370 55 01672 9

RECEIVED BY

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
06/19/84	81.35	00			81.35

1255ZFN10/19/84#040 881.35 D
 12243004370 55 01672 9

RECEIVED BY

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
06/17/84	125.95	00			125.95

1255ZFN10/19/84#050 8125.95 D
 12243004370 55 01672 9

RECEIVED BY

DEPOSITED WITH

ZIONS FIRST NATIONAL BANK
 RICHFIELD OFFICE
 55 West 100 North
 Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
 2195 SOUTHGATE
 DELTA, COLORADO 81006

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DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
06/16/84	82.55	00			82.55

1255ZFN10/19/84#056 882.55 D
 12243004370 55 01672 9

RECEIVED BY

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE

RICHFIELD OFFICE
55 West 100 North
Richfield, Utah 84701

TO THE CREDIT OF

MODERN CINEMA
2195 SOUTHGATE
DELTA, COLORADO 81006

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DATE	01/16/1984	<div style="border: 1px solid black; padding: 5px; text-align: center;"> COPIES </div>	<div style="border: 1px solid black; padding: 5px;"> TOTAL FROM OTHER SIDE </div>	<div style="border: 1px solid black; padding: 5px;"> TOTAL <small>PLEASE PRINT NAME</small> </div>
CURRENCY	221.00			
COIN				
CHECKS (LIST SEPARATELY)	<div style="border: 1px solid black; border-radius: 50%; padding: 10px; display: inline-block;"> 100.00 121.00 </div>			

RECEIVED BY

1257710/19/84062 \$221.00 0
1:124300437: 55 01672 9P

32

Transferred to
Modern Cinema

SR, ✓

CITI CINEMAS
P.O. BOX 1021 637-1233
PRICE, UTAH 84501

1280 519 1247 1-1 1985 97-1771243

Pay to the order of Modern Cinema \$3306.⁶⁷
Three thousand and Three Hundred and Six and ⁶⁷/₁₀₀ Dollars

STATE BANK OF SOUTHERN UTAH
CEDAR CITY, UTAH 84720

January, 1985 Comm. 640.00 E. Elizabeth P. Duworsup
For Richfield lease Pym 266667
⑈001247⑈ ⑈124301779⑈ 0 125120⑈ 75 ⑈0000330667⑈

CITI CINEMAS
P.O. BOX 1021 637-2740
PRICE, UTAH 84501

1084 519 1015 4-10 1985 97-421243

PAY TO THE ORDER OF Modern Cinema Corp \$3306.⁶⁷
Three thousand and Three Hundred and Six and ⁶⁷/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR Richfield - Lease pt E. Elizabeth P. Duworsup
⑈001015⑈ ⑈124300637⑈ 55 01815 4⑈ ⑈0000330667⑈

CARBON CREDIT UNION
P.O. BOX 719
745 EAST 2ND SOUTH
PRICE UTAH 84501
TELEPHONE (801) 637 2443

CHK # 016083
REF # 153117

PRICE OFF CE
FIRST SECURITY BANK OF UTAH
NATIONAL ASSOCIATION
100 EAST MAIN
PRICE UTAH 84501
97 204/1243

PAY ***FOUR THOUSAND AND 00/100 DOLLARS***

TO THE ORDER OF
MODERN CINEMA CORPORATION
2195 SOUTH GATE
DELTA, COLORADO 81416

DATE 05/06/85 AMOUNT \$4400.00**
CARBON CREDIT UNION
Edith M. Kinney
33481-63

⑈010376⑈ ⑈124302040⑈ 143 00731 12⑈ ⑈0000400000⑈

33

Transferred
to Modern

Civ. r. r.

Direct between
Banker by
Wire transfer

1104		BAL. FOR'D
DATE	3-28	1985
TO	Modern Cinema	
FOR	Replacoz c.k. st BK.	
RIGHTFUL LEASE	2466.67	
CENNY	640	
TOTAL	3306.67	
THIS PAYMENT	3306.67	
BALANCE	24,942.8	
TAX DEDUCTIBLE	<input type="checkbox"/>	

Have ordered Copy
of Wire Record
from Federal
Reserve Bank

1199		BAL. FOR'D
DATE	4-25	1985
TO	Modern Cinema	
FOR	Bal. on R. of lease Film on Act.	
TOTAL	2500.-	
THIS PAYMENT	2500.-	
BALANCE	16,934.86	
TAX DEDUCTIBLE	<input type="checkbox"/>	

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

97-43/1243

1041

PAY TO THE
ORDER OF

Teresa Anderson

5-20 1985

\$62²⁸

Sixty-two and 28/100

DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

81178794 052-85 22 07378... 8567

FOR

4⁷² fin

Elizabeth P. Duvonius

⑆00104⑆ ⑆124300437⑆ 55 01815 4⑆

⑆0000006228⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

97-43/1243

1040

PAY TO THE
ORDER OF

Beard Whi. Haker

5-20 1985

\$352⁰⁰

Three Hundred and Fifty-two and 00/100

DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR *15 Feb / 2000 fin* ⑆00104⑆ ⑆124300437⑆ 55 01815 4⑆

Elizabeth P. Duvonius

⑆0000035200⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

97-43/1243

1031

PAY TO THE
ORDER OF

Beard Whi. Haker

5-5 1985

\$352-

Three Hundred and Fifty-two and 00/100

DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR *100- (15 Feb 28 50 fin)* ⑆00103⑆ ⑆124300437⑆ 55 01815 4⑆

Elizabeth P. Duvonius

⑆0000035200⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

97-43/1243

1030

PAY TO THE
ORDER OF

Teresa Anderson

5-5 1985

\$68⁵⁰

Sixty-Eight and 50/100

DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

81178794 05-032 8- 07378... 17507

FOR *22-73.70 (520 fin)* ⑆001030⑆ ⑆124300437⑆ 55 01815 4⑆

Elizabeth P. Duvonius

⑆0000006850⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
10/84 PRICE, UTAH 84501

97-43/1243

1062

554

5-20 1985

PAY TO THE ORDER OF Philip in Service

\$284²⁶

Two Hundred and Eighty-Four and ²⁶/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR Bal 2/4/85

Elizabeth P. Demmon

⑆001062⑆ ⑆124300437⑆ 55 0185 4⑆

⑆0000028426⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
10/84 PRICE, UTAH 84501

97-43/1243

1044

205



5-20 1985

PAY TO THE ORDER OF Mervan Willden

\$48⁰⁰

Forty-Eight and ⁰⁰/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR 3.60 Jan

01557FN 5-23-85

Elizabeth P. Demmon

⑆001044⑆ ⑆124300437⑆ 55 0185 4⑆

⑆0000004800⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
10/84 PRICE, UTAH 84501

97-43/1243

1043

205

5-20 1985

PAY TO THE ORDER OF Janene Ward

\$27²⁴

Twenty-Seven and ²⁴/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR 2⁰⁷ Jan

Elizabeth P. Demmon

⑆001043⑆ ⑆124300437⑆ 55 0185 4⑆

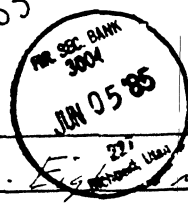
⑆0000002724⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
10/84 PRICE, UTAH 84501

97-43/1243

1042

205



5-20 1985

PAY TO THE ORDER OF Helen Robinson

\$138⁹⁰

One Hundred and Thirty-Eight and ⁹⁰/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR 5 Feb/11 first/16⁰⁰ st.

Elizabeth P. Demmon

⑆001042⑆ ⑆124300437⑆ 55 0185 4⑆

⑆0000013840⑆

MY 85 24
PAY ANY BANK P.R.O.
FIRST SECURITY BANK
OF UTAH N A
SALT LAKE CITY, UTAH

MY 23
PAY ANY BLACK P.P.S.
ZIONS FIRST NAT'L BK
SALT LAKE CITY, UTAH

55637672W

MY 28 28
PAY AMT BANK P.B.
ZIONS FIRST NAT'L BK
SALT LAKE CITY, UTAH

JE 03
PAY ANY BANK PER.
FNS SECURITY BANK.
OF UTAH NA
SALT LAKE CITY, UTAH
1-18

Flight

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

205

97-43/1843

1029

PAY TO THE
ORDER OF

Helen Robinson

5-5 1985
\$155⁴³

One Hundred and Fifty-Five and ⁴³/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR *15 x 12 = 180 -*
(9- for 12.69 for 25¢ st.)

Elizabeth P. Duvonup

⑆001029⑆ ⑆124300437⑆ 55 01815 4⑆

⑆0000015543⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

205

97-43/1843

1028

PAY TO THE
ORDER OF

Jane Wead

5-5 1985
\$31⁹²

thirty-One and ⁹²/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

81800003 051085 81 0442781514228

FOR *10 1/4 = 34.34 (2.42 for)*

Elizabeth P. Duvonup

⑆001028⑆ ⑆124300437⑆ 55 01815 4⑆

⑆0000003192⑆

CITI CINEMAS
P.O. BOX 1021 637-2740
1084 PRICE, UTAH 84501

205

97-43/1843

1027

PAY TO THE
ORDER OF

Maryanne Willdon

5-5 1985
\$81⁷⁴

Eighty-One and ⁷⁴/₁₀₀ DOLLARS

ZIONS FIRST NATIONAL BANK
RICHFIELD OFFICE 55 WEST 100 NORTH
RICHFIELD, UTAH 84701

FOR *26 1/4 = 87 1/4 (6.25 for)*

Elizabeth P. Duvonup

⑆001027⑆ ⑆124300437⑆ 55 01815 4⑆

⑆0000008174⑆

39

DEPOSITED WITH		DATE	CURRENCY	COIN	CHECKS (LIST SEPARATELY)	TOTAL FROM OTHER SIDE	TOTAL
ZIONS FIRST NATIONAL BANK		May 5 1984	74	95			74 95
RICHFIELD OFFICE							
55 West 100 North							
Richfield, Utah 84701							
TO THE CREDIT OF							
CITI CINEMAS							
P.O. BOX 1021 637-2740							
10/84 PRICE, UTAH 84501							

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RECEIVED BY

Entry No. 225100 Book 199
Recorded May 23, 1985 At 4:30 Page 320
Bessie N. Curtis, Recorder Sevier County
Elizabeth P. Dewsnup
Request Of _____ Fee \$6.00

ASSIGNMENT OF LEASE

THIS ASSIGNMENT made and entered into on the
29th day of September, 1984, by and between MODERN CINEMA, INC.,
a Colorado corporation, hereinafter referred to as Assignor,
and ELIZABETH P. DEWSNUP, hereinafter referred to as Assignee.

RECITALS:

1. Assignor is the Lessee of a lease on space
known as Valley Twin Cinemas, at Richfield Plaza Shopping
Center, 1150 South Highway 89, Richfield, Utah.
2. Assignee wishes to have said lease assigned
to Assignee;
3. Assignee acknowledges that Assignee has been
given a copy of the lease and has read the same and has
sought any legal advice or other advice concerning the
same;
4. The Lessor will consent to the assignment
upon condition that the original Lessee, the Assignee
herein, and the original Guarantors, Stanley Dewsnup,
remain liable for the prompt payment of the rent and for
performance of the provisions therein and that the Assignee
also be bound with respect to the payment of the rental
and the performance of all of the terms, conditions and
provisions of the lease.

NOW THEREFORE, in consideration of the sum of
Ten Dollars (\$10.00) and other good and valuable consideration,
the parties agree as follows:

1. Assignor hereby assigns to Assignee the lease dated February 1981 with respect to the space above described.

2. The parties hereto understand and agree that the execution of this Assignment does not release the Assignee or the Guarantor, Stanley Dewnup, from his obligations to make payments pursuant to the lease and to perform the other terms, conditions and provisions of the lease.

3. The Assignee does hereby agree to faithfully perform each and every obligation pursuant to said lease including but not limited to the payment of rent.

4. Based upon the quarantees and the continued liability of the Assignee and its quarantees and the agreement of the Assignee and its Guarantors to be responsible and liable for the payment of rent and the performance of each and every term, condition and provision of the lease, the Lessor does hereby consent to this Assignment of the Lease, dated February 1981 with respect to lease on space known as Valley Twin Cinemas at Richfield Plaza Shopping Center, 1150 South Highway 89, Richfield, Utah.

DATED this 29th day of September, 1984.

ASSIGNOR

MODERN CINEMA, INC. a Colorado Corporation

By

Stanley Dewnup
Stanley Dewnup, President

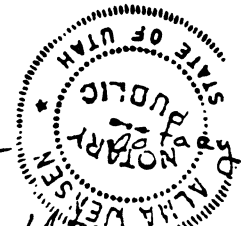
ASSIGNEE

By

Elizabeth P. Dewnup
Elizabeth P. Dewnup
Price, Utah

Michael Hunter
Michael Hunter Secretary

10-2-84
witnessed by
Alma Jensen
Cedar City, Utah



32143

1st -
power bill
paid for
Richfield

CITI CINEMAS		1294
P. O. BOX 1021 637-1233		
PRICE, UTAH 84501		97-1771243
1294	511	1-22 1985
Pay to the	UP + L	\$1037 ⁵⁹
Order of		
One thousand and Thirty-Seven and ⁵⁹ / ₁₀₀		Dollars
STATE BANK OF SOUTHERN UTAH		
CEDAR CITY, UTAH 84720		
For	Calvin P. Duane	
⑈001294⑈ ⑆124301779⑆ 0 125120⑈		75 ⑈0000103757⑈

M185A 51. 012885 0135 001 8 436000808001

JA 85 28

FOR ANY BANK P.E.S.
UNIVERSITY BL. OF UT
MAY LAKE CITY UTAH

JAN 30 85

E

first Rockfield
phone payment

CITI CINEMAS P. O. BOX 1021 637-1233 PRICE, UTAH 84501		554	1338
1200		2-10	19
Pay to the order of <u>Mountain Bell</u>		\$ 285.97	
<u>Two Hundred and Eighty-Five and 97/100</u>		Dollars	
SOUTH BANK OF SOUTHERN UTAH CEDAR CITY, UTAH 84720			
R 154.01	K 69.38	C 51.90	
For P. 34.41	A 47.37		
#001338#		#124301779#	0 125120#
		75	#0000028597#

PAY ANY BANK
FOR UTILITY ONLY
FEB 12 1985
Mountain States Tel & Tel Co
PRICE, UTAH

STATE
FEB 15 85
The Mountain States
Tel & Tel Co
FEB 12 1985
2 PM
Thank you

438.2331	47.27
637.2740	38.41
637.1233	64.38
637.1765	31.90
894.4400	104.01
	<u>285.97</u>

45

First Score Payment
Made by Cili Linams

24

CITI CINEMAS - BEAVER
P. O. BOX 1021
PRICE, UTAH 84501

483

519

1354

97-2801243

7-1 1985

Pay to the order of Utah Retirement Fund. \$3306⁶⁷

Three thousand and three hundred and six and ⁶⁷/₁₀₀ Dollars

UTAH INDEPENDENT BANK
BEAVER OFFICE
BEAVER, UTAH 84713

July 1985
For Valley Town Theatres - Richfield Plaza.

Elizabeth P. Duwensee

#001354# 12263028041330 01149 6# #0000330667#

2 JY 85 02 P
FRB SALT LAKE CITY
PAY ANY BANK
1240-0031-3

JY 85 01
PAY ANY BANK
FIRST SECURITY BANK
OF UTAH N.A.
SALT LAKE CITY, UTAH

85
1240135472

410

§ 1

first Richfield
film payment
(an advance for
7/5)

CITI CINEMAS - BEAVER P. O. BOX 1021 PRICE, UTAH 84501		401	BEAVER, UTAH 84501	PROCESSING	1355
483					97-28071243
Pay to the Order of <u>Paramount Pictures</u>				6-27-1985	\$350.00
<u>Three Hundred and Fifty and 10/100</u>					Dollars
UTAH INDEPENDENT BANK BEAVER OFFICE BEAVER, UTAH 84713		UTAH INDEPENDENT BANK		E. J. DAWSON	
Advance - W. 7/5		For March 2/5 100.00 / Richfield 7/5 250.00		1149 6"	
00003555		1124302804		0000035000	

47

2.1

402

CITI CINEMA'S
P. O. BOX 1021
PRICE, UTAH 84501

286

1322

97-258/1243

9-10-1986

Pay to the order of Carbon Cr. Union \$ 132.50

One Hundred and Thirty-Two and 50/100 Dollars

PRICE OFFICE
Commercial Security Bank
600 EAST MAIN
PRICE, UTAH 84501

For Bill Winkle

Elizabeth P. Dunsen

⑈001322⑈ ⑈124302587⑈ 780014411⑈ ⑈0000013250⑈

CARBON CREDIT UNION
P.O. BOX 718
745 EAST 2ND SOUTH
PRICE, UTAH 84501
TELEPHONE (801) 637-2443

CHK # 005811
REF # 030719

CORPORATE CENTRAL CREDIT UNION
OF UTAH
SALT LAKE CITY, UTAH
31-8400/3240

PAY ***ONE HUNDRED THIRTY TWO AND 50/100 DOLLARS***

DATE 09/10/86 AMOUNT ***132.50**

TO THE ORDER OF BILL WINKLE 00030

CARBON CREDIT UNION

Shirley Tattum

⑈005811⑈ ⑈324084003⑈ 377817⑈ ⑈0000013250⑈

310004827 12148602011

DE 86 15

PAY TO THE ORDER OF
BILL WINKLE
54 - 000081311
NATIONAL BANK
(531) 974-0783

FOH DEPOSIT ONLY
ZIONS FIRST NATIONAL BANK
SALT LAKE CITY, UTAH

	1322	BAL. FORD.	5729.00
DATE	9-10	1986	
TO	CU - cash c.k.	DATES	
FOR	Bill Winkle		
5/20/85	9039.45	DEPOSITS	
6/17/85	11467.00		
8/13/85	10970.00	TOTAL	
06/1/86	11881.00	THIS PAYMENT	132.50
		BALANCE	7,061.76
		TAX DEDUCTIBLE	<input type="checkbox"/>

Show payment
of disputed 12.40
and 37.20
49.60
on Winkle ledger
attached



Cares About
Utah

BILL WINKEL DISTRIBUTING CO.
225 EAST 400 SOUTH
RICHFIELD, UTAH 84701
PHONE: OFFICE (801) 896 4916
WAREHOUSE: (801) 896 6368

Account Name:

City Cinema
Beaver

STATEMENT

DATE	MEMO	CHARGES	CREDITS	BALANCE
7/2/84	09156 ps ck 920	76.20		
7/9/84	09906 ps ck 986	40.30		
7/16/84	09758 ps ck 986	55.90		
7/23/84	09814 ps ck 986	42.50		
7/30/84	08505 ps ck 986	49.30		
1/4/85	1535 ps ck 1398	64.05		
2/11/85	2100 ps ck 1398	61.20		
6/17/85	11467 ps cash ck	12.40	✓	
6/24/85	11881 ps cash ck	37.20	✓	
7/7/85	12832 ps ck 200	46.50		
7/15/85	13495 ps ck 200	49.60		
7/22/85	14048 ps ck 200	45.45		
7/29/85	14665 ps ck 200	61.20		
4/8/85	6247 ps ck 1458	55.40		
3/25/85	5294 ps ck 1617	36.55		
3/18/85	4727 ps ck 1617	46.10		
Interest		7.33		
Sub Total				\$787.18
Finance Charge				
Total Amount Due				\$787.18

THANK YOU

Accounts are due and payable 10th of month following date of invoice.
A finance charge of 1 1/2% per month 18% per annum, will be charged
on the unpaid balance 30 days or more past due. Customer agrees to pay a
reasonable attorney's fee and other cost of collection after default and
referral to an attorney.

Ch 256 164.00
763.48

47

CITI CINEMAS - BEAVER

check that I didn't have a copy of -

CITI CINEMAS 1186
P. O. BOX 1021
PRICE, UT 84501

402

20

91-2/124

2.20 1987

Pay to the order of Bill Winkler

\$70.50

Seventy and 50/100

Do



First Interstate Bank of Utah
Price Office
62 West Main Street
Price, Utah 84501

7/4 #12344 = 24.00
For 7/11 #12342 = 46.50

E Page Driveway

⑈000207⑈ ⑆124000025⑆ 51 01956 0⑈

⑈000000705⑈

Small text at bottom left of check

PAY TO THE ORDER OF
ZION NATIONAL BANK

BILL WINKLER
54-00000-1

PAYEE BANK NO.
123456789
NATIONAL BANK
(C) 1987-1988

30 87 03
PAID BY
123456789

123456789 123456789

225 EAST 400 SOUTH
RICHFIELD UT

84701

STATEMENT DATE 03/01/86

ACCOUNT NUMBER 63300

MODERN TWIN CINEMAS
MODERN TWIN CINEMAS
21 SOUTH STATE
DELTA

PAGE NO. 1

CD

84701

\$ AMOUNT REMITTED

RETURN THIS PORTION WITH PAYMENT

INVOICE	DATE	TERMS OF REF	CODE	DEBITS	CREDITS	BALANCE
1	01/01/85			4,904.79		4,904.79
40524	01/04/85			119.00		119.00
16374	01/09/85			59.70		59.70
8370	05/07/85			91.40		91.40
02518	11/02/83			292.45		292.45
19961	05/25/84			181.20		181.20
18993	06/04/84			146.25		146.25
19015	06/08/84			115.60		115.60
E 3454	06/15/84			37.90		37.90
17301	06/22/84			125.20		125.20
09952	06/29/84			86.20		86.20
36813	07/03/84			141.50		141.50
48622	07/03/84			95.30		95.30
36727	07/06/84			117.35		117.35
44823	07/12/84			129.00		129.00
10370	07/19/84			117.22		117.22
47445	07/25/84			224.80		224.80
08184	07/31/84			254.85		254.85
09712	08/06/84			248.05		248.05
09678 -	08/10/86			168.00		168.00
08333	08/14/84			229.80		229.80
11186	08/17/84			244.15		244.15
08187	08/22/84			47.90		47.90
18389	08/27/84			193.40		193.40
36733	08/30/84			263.20		263.20
45689	08/31/86			170.55		170.55
35004	09/22/84			327.20		327.20
19196	10/19/84			38.20		38.20
19691	12/12/84			183.90		183.90
10748	12/18/84			151.15		151.15
04340	02/10/84			140.25		140.25
02539	01/27/84			505.40		505.40
D 75244	01/02/83			66.55		66.55
INTEREST				62.27		62.27
CURRENT	OVER 15	OVER 30	OVER 45	OVER 60		TOTAL
					5,174.89	5,174.89

AFFIDAVIT OF STANLEY DEWSNUP

STATE OF Colorado)
COUNTY OF Rocky) : ss.

Stanley Dewsnap being duly sworn deposes and states as follows:

He was an employee and manager of Modern Cinema, Inc., a Colorado corporation, and as such manager was and is familiar with the Richfield theaters operated by Modern Cinema, Inc., i.e, The Huish and the Twin Cinemas at the shopping center.

Modern Cinema, Inc. owned both the Huish and the Twin Cinemas from acquisition, the Huish in 1981 and the Twin/when built in 1981 until disposition as follows: Huish deeded back to former owners in approximately August of 1985; Twin lease was sold to Elizabeth Dewsnap 9-29-84.

Modern Cinema, Inc. operated the theaters as follows: Huish until closure preceeding deed back; Twin until 6-21-85.

The reason for Modern Cinema, Inc. operating Twin Cinema after purchase by Elizabeth Dewsnap on 9-29-84 was by agreement and for economy of operation by Modern with the Huish as well as the Twin Cinema ran by the same crew and manager; also as a condition of the sale because E. Dewsnap was tied up with college teaching job, also other theaters, too busy til school out in summer 1985.

Manager's salary and payroll were reported to Modern Cinema's District Office but paid by City Cinema to ensure payment and keep the theater open; a condition Dewsnap dictated to guarantee the theaters staying open in line with the shopping center lease.

Deposits of gross receipts from the Twin Theaters were made to the account of City Cinema after Nov. 1984.

Certain items including payroll and manager's salary were paid by Dewsnup and charged against Modern Cinema, Inc.; and as above-noted, Modern Cinema, Inc. paid films, lease, repairs, overhead, and made profit or suffered loss for the period in question.

Sums transferred by way of accounting by Elizabeth Dewsnup to Modern Cinema, Inc. from date of sale 9-29-84 until date of commencement of operation 6-21-85 was together with payouts made by Modern Cinema, Inc., approximately ^{approximately} \$46,000⁰⁰ and are consistent with the gross receipts of the theaters.

After disposition of the Huish Theater, operation by Dewsnup was effected.

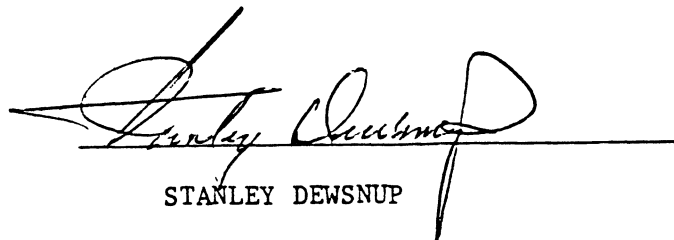
Concession for Huish and the Twin were lumped together while both were owned and operated by Modern Cinema, Inc., i.e. between date of sale 9-29-84 and commencement of Dewsnup operation 6-21-85.

Dewsnup did not assume in any way, shape, or form the previous debt of Modern Cinema, Inc., either before or after purchase of the Twin or before or after she commenced operation of the Twin.

In the theater business, certain person, managers or other, have to be entrusted with cash funds day by day; and both the manager and Dewsnup were so-entrusted. Accounting was effected between Dewsnup and Modern Cinema, Inc. and is available.

As to the concession expenses, the Winkel bill, anything on the Twin and Huish to 6-21-85 is owed by Modern Cinema, Inc.; and anything owed thereafter on the Twin is owed by Elizabeth Dewsnup until, of course, her disposal of the Twin.

Dated this 18 day of Aug, 1987.


STANLEY DEWSNUP

Subscribed and sworn to before me this ¹⁵15 day of Aug,



NOTARY PUBLIC,

Residing in Saline County, Ut

My commission expires: Jan 24, 1988

IN THE TENTH CIRCUIT COURT OF SEVIER COUNTY,
STATE OF UTAH

- - - - -

WINKEL DISTRIBUTING,)	
	:	
Plaintiff,	:	
)	FINDINGS OF FACT AND
-vs-	:	CONCLUSIONS OF LAW
	:	
ELIZABETH DEWSNUP d/b/a	:	CIVIL #86-CV-1838
VALLEY TWIN CINEMA AND)	
CITY CINEMA,	:	
	:	
Defendant.)	

- - - - -

This matter was tried to the Court, sitting without a jury, on July 21, 1987. The matter was taken under advisement with Counsel being given time to submit additional information or documents. Plaintiff's Counsel has submitted no additional pleadings or documents while Defendant's Counsel has submitted two Affidavits with exhibits attached. There is a preponderance of evidence sufficient to support the following:

FINDINGS OF FACT

1. Plaintiff is a wholesale food and beverage distributor doing business in Sevier County, Utah.
2. Defendant is an individual residing in Price, Utah.
3. Defendant does business under the name and style of Citi Cinemas or City Cinemas.

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4. Defendant is employed as a school teacher at the College of Eastern Utah located in Price, Utah.

5. Defendant maintains a home in Cedar City, Utah.

6. City Cinemas operates theatres in Price and Beaver, Utah.

7. Modern Cinemas, Inc. is a Colorado corporation doing business in Utah.

8. Modern Cinemas, Inc. does business under the name and style of Valley Twin Cinemas.

9. Valley Twin Cinemas operates a twin-screen theatre in Richfield, Utah

10. Plaintiff supplied goods to Valley Twin Cinemas in Richfield, Utah during the time period of November 2, 1983 to May 7, 1985.

11. The value of the goods supplied to Valley Twin Cinemas was \$5,174.89.

12. From 1980 to 1985 Defendant visited the theatre operated by Valley Twin Cinemas on a weekly basis, visiting with the manager.

13. The salary of the manager of Valley Twin Cinemas was paid by Defendant.

14. Plaintiff's manager contacted the manager of the Valley Twin Cinemas in Richfield, Utah, demanding payment for the goods supplied. He was told to contact the Defendant.

15. Plaintiff's manager contacted Defendant demand-

ing payment for the goods supplied. Defendant did not dispute the claim but asked for time to pay it since the business was short of money.

16. Defendant is the alter ego of Modern Cinemas, Inc.

CONCLUSIONS OF LAW

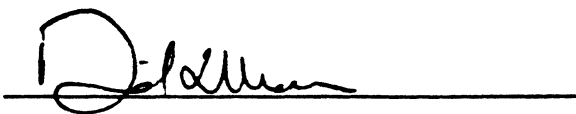
1. Plaintiff should be awarded judgment against the Defendant in the principal sum of \$5,174.89.

2. Plaintiff should be awarded judgment for interest at the rate of 10% per annum.

3. Plaintiff should be awarded judgment for its costs.

Plaintiff's counsel is directed to prepare a judgment consistent herewith.

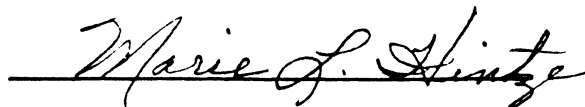
DATED THIS ^{20TH}~~15TH~~ DAY OF OCTOBER, 1987.


CIRCUIT COURT JUDGE

Mailed a full, true, and accurate copy of the within and foregoing Findings of Fact and Conclusions of Law to the following, U.S. Postage Prepaid, this 20th day of October, 1987:

Mr. Michael R. Labrum, Attorney for Plaintiff,
108 North Main, Richfield, Utah (84701)

Mr. Gayle Dean Hunt, Attorney for Defendant,
2121 South State Street, Salt Lake City, Utah
(84115)


Clerk of the Court

57

Bulk Sales Act, 78-6-103.

The assignment of the lease, Modern Cinema, Inc. to Defendant Elizabeth Dewsnap, effecting sale of the Citi Cinema Theatre, does not fall within the Bulk Sales Act principle.

The reason is that sale of the theater, although not in the ordinary course of business, is not an enterprise subject to the Bulk Sales Act under -

78-6-103(3):

The enterprises subject to this chapter are all those whose principle business is the sale of merchandise from stock, including those who manufacture what they sell.

Some illustrations of sales of property held not to come within the Bulk Sales Act because of incidental sale of items in the course of principle business are as follows:

Shoe repair establishment that sold "shoe laces, polish, shoe brushes, innersoles, and sometimes pieces of leather, all of which, with the exception of leather, were displayed in a show case in the window of his place of business . . .". Swanson v. Devine, 196 Ut. 49 Utah 1, 160 P. 872.

Farms, Hotels, Restaurants, Boarding Houses, Bakeries, Manufacturers. Tenn. 19 , 130 S.W.2d 149, Schultz v. Bell, sale of bakery business.

Restaurant keepers. Cases from Arkansas, Kansas, Mississippi, Missouri, North Dakota, Tennessee, Washington, etc. 168 A.L.R. 748.

Sale of soft drink and lunch parlor not within statute. Missos v. Marx Wisc. 197 N.W. 196.

Sale of tobacco and candy in pool room does not make establishments within Bulk Sales Act. McPartin v. Clarkston, Mich. 19 , 250 N.W. 338.

Restaurant and assets not included. De La Rosa v. Tropical Sandwiches, Inc. (Fl.App. D3, 19) 298 S.2d 471 cert den 312 S.2d 760.