

1986

Vernon S. Cheever v. Joseph A. Seethaler : Brief of Appellant

Utah Supreme Court

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Appellants made an effective joinder of necessary and indispensable parties.

2. Whether the THIRD AMENDED COMPLAINT stated a cause of action for fraud and whether or not such disputed issues were before the District Court to prevent Summary Judgment in favor of Respondents and against Appellants.

3. Whether or not Appellant may maintain an independent cause of action as surety.

4. Whether or not the Appellants compromised their claim with the Respondents prior to filing this action.

5. Whether or not the pleadings, depositions, affidavits, and admissions show that there is no genuine issue of material fact and that the Respondents were entitled to a judgment as a matter of law.

6. Whether the Appellant, VERNON S. CHEEVER, may act in two separate capacities; one as President of Utah County Packing at one time and as a separate individual at another time.

STATEMENT OF THE CASE

BRIEFLY THE NATURE OF THE CASE, involves the sale of a meat packing plant by the Respondents, JOSEPH A. SEETHALER and MYRA K. SEETHALER, to UTAH COUNTY PACKING COMPANY INC., and the fraud that was committed in the closing of the transaction on June 10, 1981 wherein the Appellants, VERNON S. CHEEVER and MARTHA T. CHEEVER, without reading the document, TRUST DEED NOTE, EXHIBIT 1 herein, and the DEED OF TRUST with assignment of Rents, EXHIBIT 2 herein. Appellant Martha T. Cheever did not sign the note, Exhibit 1, but did sign the DEED OF TRUST, Exhibit 2. They had both thought that they were limited in their obligation to \$25,000.00 as "guarantors". Of greater importance is the FRAUD committed by the Appellant, JOSEPH A. SEETHALER, in his representations of the nature of the equipment as he showed the Meat Packing Plant to the Appellants. If the Appellants would have known the true facts of the condition of the equipment, and the fraudulent representations of the Respondent, they never would have consented to be "guarantors" on Exhibit 1 and never would have pledged their home as security for their performance on Exhibit 2.

THE COURSE OF THE PROCEEDINGS was initiated by the Plaintiffs/Appellants, by filing a complaint which,

amongst other things, seeks relief from their responsibilities under Exhibit 1 and Exhibit 2. The THIRD AMENDED COMPLAINT, Second Cause of Action, requests an Order releasing Plaintiffs from their collateral described on Exhibit B and decree that Exhibit A and B are void and of no effect because of the conduct of the Appellant, JOSEPH A. SEETHALER by reason of his fraudulent misrepresentation of the equipment during the sale. The case is the most protracted and ludicrous law suit in which there have been at least three trial settings and the filing of 825 paginated pages which resulted in a Summary Judgment against the Appellants.

THE DISPOSITION IN THE COURT BELOW resulted in the Court entering Summary Judgment against Appellants, a copy of which is attached hereto as EXHIBIT 3.

THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW are as follows:

(all references to the paginated Record will be referred to as PR.)

1. Exhibit 1, was only signed by one of the Plaintiffs, Vernon S. Cheever; it was not signed by the Appellant, Martha T. Cheever.

2. Exhibit 2, was signed by both of the Appellants pledging their residence as security for the debt of UTAH COUNTY PACKING INC.

3. The Appellants alleged that they were tricked into signing Exhibit 1 and Exhibit 2 in the amount of \$371,000.00 instead of \$25,000.00. (See Exhibits 18, 19, and Exhibit 16.

4. UTAH COUNTY PACKING INC., a Utah Corporation, has been adjudicated in Bankruptcy. (PR 638, 618)

5. Vernon S. Cheever, in executing Exhibit 1 executed the document in two separate capacities; one as President of Utah County Packing Inc. and also in his separate capacity as an individual.

6. EXHIBIT 4, PR 580-581, is the MOTION FOR SUMMARY JUDGMENT upon which Defendants have based their dismissal. The MOTION lists four separate grounds for dismissal of the Complaint; they are as follows:

1. The Actions by the Corporate Plaintiffs are barred by the applicable statute of limitation.

2. The Plaintiffs have failed to make an effective joinder of necessary and indispensable parties.

3. The Complaint fails to state a cause of action for fraud.

4. The Complaint fails to state any cause of action on which relief can be granted.

7. Appellants concede item no. 1 above. Neither have the Corporate Plaintiffs filed an appeal.

8. Hereafter are VERBATIM REFERENCES in the Second Cause of Action of the THIRD AMENDED COMPLAINT, See Exhibit 17; in brackets are the allegations of VERNON S. CHEEVER, by Affidavit which supports the allegations in the Third Amended Complaint. (See Exhibit 16 and Exhibit D attached thereto).

9. Attached hereto, as Exhibit 20, is another Affidavit of Vernon S. Cheever, dated the 28th day of December, 1983; pages 3, 4, and 5 give a general picture of some of the more definite allegations of fraud in a narrative form as he tracks the deposition of Joseph A. Seethaler filed in the cause.

11. Attached hereto as Exhibit 21 is the Affidavit of Arlin Davis, dated the 25th day of January, 1984. This affidavit tracks the deposition of Joseph A. Seethaler, filed in the cause, and contradicts and declares false the testimony of Respondent, Joseph A. Seethaler. This affidavit supports Appellants Second Cause of Action. (See Exhibit 17, PR 520.)

SUMMARY OF ARGUMENTS

1. There never was any necessity of a joinder of "necessary and indispensable parties"; it was only a ploy of the Respondents to cloud the issues of Fraud.
2. Exhibit 16 and 17 present an abundance of factual situations upon which credible allegations of FRAUD exist preventing entry of SUMMARY JUDGMENT.
3. The Appellants have sufficiently plead and provided supportive evidence sufficient to sustain the elements of fraud as set forth in DUGAN vs. JONES, 625 P2d 1239, Utah 1980). The ETTLINGER case, is not applicable in this cause for the reason in ETTINGER, the "guarantor", did not have a separate and independent cause of action of his own as is the case herein.
4. Where a number of entities have been induced by fraudulent representations, each one has his own choice of remedy and the cause of actions are separate and individual.
5. There never was any "compromise" or "waiver" of any claim belonging to UTAH COUNTY PACKING INC.

6. Even if there was a "waiver" or "compromise" it did not involve Appellants; VERNON S. CHEEVER, in his negotiations never acted in his individual capacity that would affect his cause of action herein.

7. Appellant, MARTHA T. CHEEVER never was involved in any negotiation to "compromise" or "waive" her claim.

ARGUMENT

Attached hereto as Exhibit 3, is the SUMMARY JUDGMENT entered by the Court on the 30th day of November, 1984.

Attached hereto as Exhibit 4, is the MOTION FOR SUMMARY JUDGMENT, dated the 26th day of July, 1984 which is the underlying document upon which the SUMMARY JUDGMENT was entered.

Attached hereto as Exhibit 5, is the RULING (PR 746-747) of the Court that is the basis of the SUMMARY JUDGMENT.

The SUMMARY JUDGMENT does not specify the basis for entry of the SUMMARY JUDGMENT. Therefore, Appellant will discuss the five issues stated in its STATEMENT OF THE ISSUE PRESENTED FOR REVIEW, Page 1 herein.

1. WHETHER APPELLANTS MADE AN EFFECTIVE JOINDER OF NECESSARY AND INDISPENSABLE PARTIES.

A brief statement as to the nature of "indispensable parties" may be of some value in this argument.

...Thus, an "indispensable party" is merely a person without whom the Court will not or cannot proceed. An indispensable party is one without whom the Court will not proceed to any decree even as to the parties before it, or one who, if he is absent from the particular law suit, necessitate dismissal of the suit by the Court if he cannot be joined.

However, indispensable parties may be defined as those persons whose interests in the subject matter of the suit and the relief are so bound up with those of the parties that their legal presence as parties to the proceeding is an absolute necessity. Thus, it is declared as a general rule that an indispensable party is one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible; or that an indispensable party is one having an interest in the controversy of such a nature that a final decree cannot be made without effecting that interest. (59 Am Jur 2d 359)

The main thrust, for having "indispensable parties", is to assure that the liabilities and equities of all of the parties are satisfied in one law suit. In this instance, it would be to guarantee to the Respondents that no liability would reach to them by reason of non joinder or by reason of some latter liability that was to come up between the Corporate entities and the Respondents. It is conceivable that the Corporate Entities might have been joined for the reason that the Corporate Entities might be liable to the Respondents if it is determined that the Respondents are eventually found liable to the Appellants.

How can the Respondents complain. They are the ones that asked to have UTAH COUNTY PACKING joined. See Exhibit 6, bottom paragraph of 514. They are also the ones that asked to have UTAH COUNTY PACKING dismissed. See Exhibit 4, Paragraph 1, PR 580.

Respondents cannot complain that one who seeks to sue them is no longer a party when the record shows no Counterclaim or Crossclaim by the Respondents against the "Corporate Plaintiff" who were forced to join as "Necessary and Indispensable Parties" by Respondents, and then forced out by them. See Exhibit 4. Respondents never have filed any Counterclaim or Crossclaim against the "Corporate Plaintiffs" and therefore cannot be heard to claim a "defective joinder". Nowhere in this file is there any allegation by the Respondents that they have a Counterclaim or Crossclaim against any other party or that any other party may be liable to the Respondents if the Appellants were to succeed against Respondents herein.

As additional evidence of the "effective joinder" of UTAH COUNTY PACKING, see Exhibit 13 14, and 15.

The conduct of the Respondents, has only clouded the issue of FRAUD that is the paramount basis of the THIRD AMENDED COMPLAINT. See Exhibit 7, First and Second Causes of Action, PR 516 and 520.

2. WHETHER THE THIRD AMENDED COMPLAINT STATED A CAUSE OF ACTION FOR FRAUD AND WHETHER OR NOT SUCH DISPUTED ISSUES WERE BEFORE THE DISTRICT COURT TO PREVENT SUMMARY JUDGMENT IN FAVOR RESPONDENTS AND AGAINST APPELLANTS.

In DUGAN vs. JONES, 615 P2d 1239, (Utah 1980) the Supreme Court of the State of Utah, stated very specifically the required elements necessary in order to establish an action based upon fraudulent misrepresentation. In dealing with the question of whether a misrepresentation had been related by a real estate salesman, the Court noted that:

That elements of an action in deceit based on fraudulent misrepresentation are: (1) a misrepresentation; (2) concerning a present existing material fact; (3) which was false; or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acted reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced at; (9) to his injury and damage. (p. 1246)

For argument purposes, the Appellant will follow the nine elements in the order in which they are presented in DUGAN vs. JONES.

(1) A MISREPRESENTATION

Plaintiff in its THIRD AMENDED COMPLAINT, Exhibit 7, have set forth in its Second Cause Action, (PR 520) numerous MISREPRESENTATIONS, beginning at PR 521-524. Those paragraphs are set forth verbatim in Exhibit 17.

(2) CONCERNING A PRESENT EXISTING MATERIAL FACT

In Item 1. above there are many material facts which exist in the allegations made by CHEEVER in his affidavit filed herein. The disposition of JOSEPH A. SEETHALER, filed herein is a continuous dialogue of his denials of the claims of CHEEVER.

(3) WHICH WAS FALSE

Appellant evidence for this item, is found in Exhibit 17, and the comparisons that are made therein to the Affidavit of VERNON CHEEVER, Exhibit D of Exhibit 16. Of particular independent significance is the Affidavit of ARLIN DAVIS, Exhibit 21, which "tracks" the testimony of JOSEPH A. SEETHALER in his disposition.

(4) WHICH THE REPRESENTOR EITHER (a) KNEW TO BE FALSE OR (b) MADE RECKLESSLY KNOWING HE HAD SUFFICIENT KNOWLEDGE UPON WHICH TO BASE SUCH REPRESENTATIONS.

See 3 above. These are also questions of fact to be determined at the time of trial for the trier of the facts; not for SUMMARY JUDGMENT.

(5) THAT THE PARTY ACTED REASONABLY AND IN
IGNORANCE OF ITS FALSITY.

See 3 above. These are questions of fact to be determined at the time of trial for the trier of the facts: not for SUMMARY JUDGMENT.

(6) DID IN FACT RELY UPON IT

See 3 above. These are questions of fact to be determined at the time of trial. For the trier of the facts; not for SUMMARY JUDGMENT.

(8) AND THEREBY WAS INDUCED TO ACT

See 3 above. These are questions of fact to be determined at the time of trial, for the trier of the facts; not for SUMMARY JUDGMENT.

(8) TO HIS INJURY AND DAMAGE

Plaintiffs are loosing their house; they have stated they would not have entered into the loan "but for" the fraud of defendants. (Affidavit of VERNON CHEEVER, Exhibit 16, thereto PR 82 last paragraph and page 83).

For the purpose of having stated a cause of action of fraud the necessary allegation is found in paragraph 13, PR 521, of the THIRD AMENDED COMPLAINT, Exhibit 7, which is duplicated hereafter verbatim as follows:

13. That in the course of the negotiations, the Defendant, JOSEPH A. SEETHALER, made representations; concerning presently existing material facts; which were false; which he either knew to be false, or made recklessly, knowing that he had insufficient knowledge upon which to base such representations; for the purpose of inducing the CHEEVERS to act upon his representations; that the CHEEVERS, acted reasonably and in ignorance of the falsity of the said representations; that the CHEEVERS did in fact rely upon said false representations; that by reason, thereby, they were induced to be personally liable on the sale; that by reason of agreeing to be personally liable on the sale they have been greatly injured and damaged.

3. WHETHER OR NOT APPELLANT MAY MAINTAIN AN INDEPENDENT CAUSE OF ACTION AS SURETY.

The Courts RULING, Exhibit 5, (PR 746) states in part as follows:

The Court finds under these facts of circumstances that the reasoning of the ETTLINGER case cited in defendants brief is applicable to the case at hand.....

The Court in its RULING, Exhibit 5, refers to the "reasoning of the ETTLINGER case cited in the defendants brief is applicable". This is where the Court is absolutely wrong.

What the Defendant/Respondents say is the "reasoning" of the case, and what the Court says is the "law", is that Appellants herein cannot raise the issue of fraud. It is guessing that they state that with the citation found in the ETTLINGER case as follows:

What shall be done with the contract induced by fraud is purely a question for the determination of the party on whom the fraud is committed. He may repudiate it, and if he does so the surety may avail himself of the repudiation..... He may affirm it, in which case the surety cannot be heard to raise the question. He may suspend his action at least for a time, and the surety may not compel him to elect. (Emphasis added.)
ETTlinger VS. NATIONAL SURETY CO., 221 NY 467, 117 NE 945. (New York, 1917)

The question in that case had to do with whether or not the defense of fraud was available to the surety.

On page 946, the Court said, "This cause of action belongs to him, not to the surety. The latter is not defrauded and cannot maintain an action for damages occasioned by fraud." (emphasis added). Later on in the same paragraph the Court stated "in other words, what shall be done with the contract induced by fraud is purely a question for the determination of the party in whom the fraud is committed." (emphasis added).

In the case before the above entitled Court, THAT IS EXACTLY THE QUESTION. In ETTLINGER, the question involved the matter as to whether or not the surety could claim the control of the case when the fraud was committed upon the principal only (emphasis added) and not on the surety. That is not the case here. Here, the fraud has been committed upon the principal and the surety. The surety in this cause of action has his own independent CAUSE OF ACTION. That is, CHEEVER, was defrauded. UTAH COUNTY PACKING was defrauded too; it can do what it wants. In this case, UTAH COUNTY PACKING, has chosen to ALLOW the plaintiff, CHEEVER, to maintain its own independent cause of action against the defendants. (See CONSENT OF UTAH COUNTY PACKING, filed herein, Exhibit 8, PR 740.)

ETTLINGER doesn't say that a surety cannot maintain its own cause of action if it has its own cause of action in its own right. In the case before this Court, CHEEVERS, have their own cause of action in their own right. Appellants were not hindering UTAH COUNTY PACKING, from doing what it wanted to do. UTAH COUNTY PACKING even consented that the SURETY, the plaintiff, CHEEVER, can go ahead as they desire. See Exhibit 8. Notwithstanding the consent that's filed herein, ETTLINGER would not preclude CHEEVER from going forth as it desired. The ETTLINGER decision does not preclude

such conduct as stated herein. It only says that the principal cannot be "forced" to raise a defense which the surety seeks to raise in litigation to void its obligation which belongs singularly to the "principal" which is not shared by the "surety". That is not the case here. This case involves an "independent" cause of action by CHEEVER, for the fraud committed upon them as it relates to their own "independant" recession of their TRUST DEED. UTAH COUNTY PACKING has nothing to do with the TRUST DEED executed by the CHEEVERS. That is what the CHEEVERS are trying to do; that is, have their TRUST DEED invalidated.

The Court's RULING, Exhibit 5, PR 746-747 in the first paragraph focuses upon the ETTLINGER case and how it relates to at least two other subissues which will be discussed at this time.

The FIRST OF THESE SUBISSUES, is the issue of WHETHER OR NOT THE APPELLANTS COMPROMISED THEIR CLAIM WITH RESPONDENTS prior to the filing of the complaint herein.

The basis for RESPONDENTS argument is the AFFIDAVIT of JOSEPH A. SEETHALER, (Exhibit 15 herein, PR 582-583.) It should be noted that the file does not contain any record of the letter of June 18, 1981. For that reason, there is no affidavit in evidence to support the claim of Mr. Seethaler for his alleged

compromise. Nevertheless, the Appellant, without waiving the grounds for that defect, will continue to argue the matter.

First, the discussion shall only relate to whether or not there was a "ratification" by VERNON CHEEVER in his "capacity" as President of UTAH COUNTY PACKING INC.; the issue of "compromise" will then be discussed.

The Affidavits of VERNON CHEEVER, Exhibit 9, and BRUCE COLES, Exhibit 11, PR 755-756, show that UTAH COUNTY PACKING INC. never did "ratify" the contract, nor did UTAH COUNTY PACKING INC. ever "waive" any defense or claim of FRAUD. The negotiations were always ongoing trying to settle with MR. SEETHALER so that he would pay them the \$100,000.00 or so as a credit towards the approximately \$371,000.00 owing. Both the Affidavits of CHEEVER and COLES show that the discussions were ranging around a settlement of \$200,000.00 to \$250,000.00 which would be an approximate \$100,000.00 reduction on the \$371,000.00 owing. Since the claim never was settled, all the defrauded parties were free to file a suit because they were unable to reach a settlement. The fact that negotiations were going on is clear proof that there had been no "waiver" of any defense or any "ratification" of any contract.

The question of whether or not there was a "ratification" or a "waiver" under this set of facts is

a fact question and one for the trier of the fact, and not for Summary Judgment or any other type of Summary Disposition.

Neither was there a "compromise" of any claim. See Exhibit 9, Paragraph 3 therein. Such a fact question is for the trier of the facts, not for Summary Judgment.

6. Whether the Appellant, Vernon S. Cheever, may act in two separate capacities; one as President of Utah County Packing and at other times as a separate individual.

The second subissue has to do with the "separate entity" capacity of VERNON S. CHEEVER when he acted as President of UTAH COUNTY PACKING, INC. and also separately as an individual. Respondents would have us believe that he could not wear two separate hats at different times. If that were true then the personal guarantee on Exhibit 1 is void for the reason he cannot act as two separate entities.

It is clear that the determination of "ratification" of the contract or a "waiver" of the defense of FRAUD, by UTAH COUNTY PACKING INC., presents a factual question for the trier of fact to determine; there must be a trial before the Court or the Jury can determine that factual question.

Nevertheless, even if there was such a finding of "ratification" or "waiver" on the part of UTAH COUNTY PACKING, INC., the Appellants again assert that the law suit is not concerned about the contract between SEETHALER and UTAH COUNTY PACKING INC.; we are only talking about the DEED OF TRUST CHEEVERS executed that is attempted to be foreclosed. This DEED OF TRUST has nothing to do with anyone else except the individual parties, VERNON S. CHEEVER and MARTHA T. CHEEVER. They are separate entities and they have separate rights that are separate and distinct from any other issue or contract or negotiations, etc.

They have their own INDIVIDUAL REMEDY.

The law offers a choice of remedies to a person who has been induced to act in reliance upon false representations. Each buyer of a certificate of an undivided share in a mortgage acquires by his purchase an individual right; and where such purchase is induced by fraud, the wrong done is a wrong to the buyer individually; the choice of remedy for such wrong rests with each buyer, and the cause of action is separate and individual. No buyer has an interest in the cause of action of another buyer, and, therefore, no buyer is a necessary or, indeed, even a proper party to an action at law brought by another buyer to recover the damages which he has suffered or the consideration he was induced by fraudulent misrepresentations to pay. Brenner V. Title Guarantee and Trust Co., 11 N.E. 2d, 890, 891 (New York, 1937)

VERNON CHEEVER'S affidavit, Exhibit 9, PR 761, Paragraph 6 states he was acting in his capacity as President of UTAH COUNTY PACKING INC. and not as in his

individual capacity. That presents a question of fact for the trier of the fact, not for Summary Judgment.

Separate entities are always recognized.

Any discussion of liability for corporate debts starts with the basic premise that a corporation and its stockholders are presumed separate and distinct. Debts of a corporation are not the individual indebtedness of its stockholders, directors, or officers.... However, a corporate officer or director acting on behalf of a corporation is personally liable for damages for what is willful participation in acts of fraud or deceit to one directly issue.... As previously pointed out, an officer of a corporation is not personally liable for conversion committed by the corporation or one of its offices merely by virtue of the office he holds; he must participate or have knowledge amounting to acquiescence or commit a breach of duty he owes to the owner of the property before he will be held liable. (SPEER v. DIGHTON GRAIN INC., 624 P2d 952, 958-959 Kansas, 1981)

See also, FERRARELL v. ROBINSON, 465 P2d 610, 612

Arizona, 1970, wherein the Court stated:

Plaintiffs, in attempting to hold defendant Kramer personally liable, again seek to impose responsibility upon an individual for an alleged corporate wrong. It is clear, however, that defendant Kramer, either as an officer or director cannot be held liable on the contracts of R.I.C., Inc., where, as here, there is no evidence that he undertook to bind himself individually on those contract.

These cases show that the acts of an individual acting as an officer of a Corporation, do not make that person individually liable UNLESS he takes off his hat that he is wearing as an officer of that corporation. If he then puts on another hat, and acts as an individual, he does something that can be charged to him

individually; then he is acting as an individual. That same doctrine and rule of law is the fact of this case. The Defendants must show by a preponderance of the evidence that VERNON CHEEVER as an Individual, waived his individual rights under the DEED OF TRUST. That cannot be shown; if it could be shown, it would be a question of fact that must be decided by a jury or the Court in a trial.

Finally, MARTHA T. CHEEVER. It is clear that she has her own individual right.

Where a number of persons have been induced by fraudulent representations to purchase property, the wrong done is to each individual, each has his choice of remedy, and the cause of action are separate and individual. (37 Am Jur 2d, 434, citing BRENNER v. TITLE GUARANTEE and TRUST CO., 11 NE 2d 890)

The law authors a choice of remedies to a person who has been induced to act upon reliance of false representations. Each buyer of a certificate of an undivided share in a mortgage acquires by his purchase an individual right; and where such purchases induced by fraud, the wrong done is wrong to the buyer individually; the choice of remedy for such wrong rests with each buyer, and the cause of action is separate and individual. No buyer has an interest in the cause of action of another buyer, and, therefore, no buyer is necessary indeed, even a proper party to an action at law brought by another buyer to determine the damages which he has suffered or the consideration that he was induced by fraudulent misrepresentations to pay. (BRENNER v. TITLE GUARANTEE AND TRUST CO., 11 NE 2d 890, 891 (New York, 1937))

MARTHA T. CHEEVER, has an undivided one-half interest in the property that is sought to be foreclosed. There is no testimony, no showing, or any evidence, to show that she "ratified" any contract or "waived" any defenses. See Affidavit of MARTHA T. CHEEVER, Exhibit 12, PR 757-758 and the WARRANTY DEED Exhibit 12, PR 759 showing she has a one-half interest in the Property that is sought to be foreclosed.

WHETHER OR NOT THE PLEADINGS, DISPOSITIONS, AFFIDAVITS, AND ADMISSIONS SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THAT THE RESPONDENTS WERE ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

It is Hornbook Law, that in matters of Summary Judgment, all affidavits of the non-moving party will be attributed as true. In YOUNG v. FELORNIA 244 P2d 862, 863, (UTAH, 1952), this court stated as follows:

In respect to a summary judgment Rule 56 (c), U.R.C.P. provides:

"The judgment sought shall be rendered forthwith if the pleadings, dispositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion should be denied.

Later, this Court, further elaborated on the rule and IN RE WILLIAMS' ESTATES, 348 P2d 683, 685, stated as follows:

A summary judgment is proper only if the pleadings, dispositions, affidavits, and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. If the proof which plaintiff claims she can produce when consider in the light most favorable to her would reasonably justify a finding by clear and convincing evidence that there was an agreement to adopt, then there is a genuine issue of material fact and the case must be reversed. We conclude that without giving plaintiff the opportunity to present her evidence in a trial we cannot hold as a matter of law the plaintiff is not entitled to recovery.

This clearly is the case here. The allegations are numerous in the THIRD AMENDED COMPLAINT, Exhibit 7, First and Second Cause of Actions. See particularly the allegations in Exhibit 17 and the denials made by Mr. Cheever in Exhibit D of his Exhibit 16 filed herein. See also the affidavit of Arlin Davis, Exhibit 21 which tracks the depositions of JOSEPH A. SEETHALER and reputiates the testimony of JOSEPH A. SEETHALER. These provide all the basis needed under the doctrines heretofore referred to in preventing SUMMARY JUDGMENT against Appellants on its Second Cause of Action, THIRD AMENDED COMPLAINT, Exhibit 7, PR 520.

The FIRST CAUSE OF ACTION, of the THIRD AMENDED COMPLAINT, Exhibit 7, PR 516, meets the rule enunciated herein by reasons of the allegations of the Affidavit of

VERNON CHEEVER, Exhibit 9, PR 760, Paragraph 2;
Affidavit of MARTHA T. CHEEVER, Exhibit 18; Affidavit
of BRUCE COLES Exhibit 19.

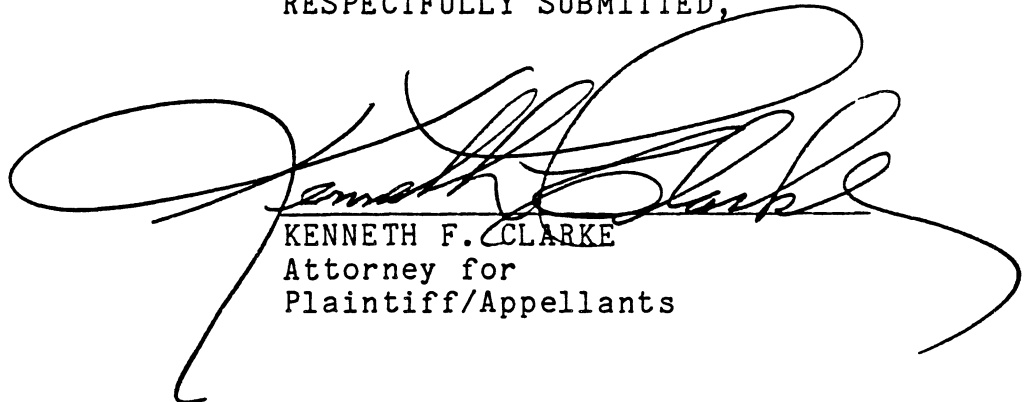
Appellants Third Cause of Action, is also viable;
the trier of the facts may determine that there is no
contract.

Appellants Fourth Cause of Action, is equitable in
nature and should be sustained. So also as to Appellants
FIFTH CAUSE OF ACTION.

CONCLUSION AND PRECISE RELIEF SOUGHT

The Court should rule that SUMMARY JUDGMENT, was
improperly granted, and the judgment of Lower Court
reversed with all causes of action in place and that
the Lower Court should seriously look to determining if
the prevailing party should be awarded Attorney Fees
pursuant to section 78-27-56 of the Utah Code.

RESPECTFULLY SUBMITTED,



KENNETH F. CLARKE
Attorney for
Plaintiff/Appellants

KENNETH F. CLARKE
ATTORNEY AT LAW
Attorney for Plaintiff
One East Center, Suite 300
Provo, Utah 84601
Telephone 801-375-2911

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiff/Appellant

vs.

CERTIFICATE OF SERVICE

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and
wife, and SECURITY TITLE AND
ABSTRACT COMPANY,

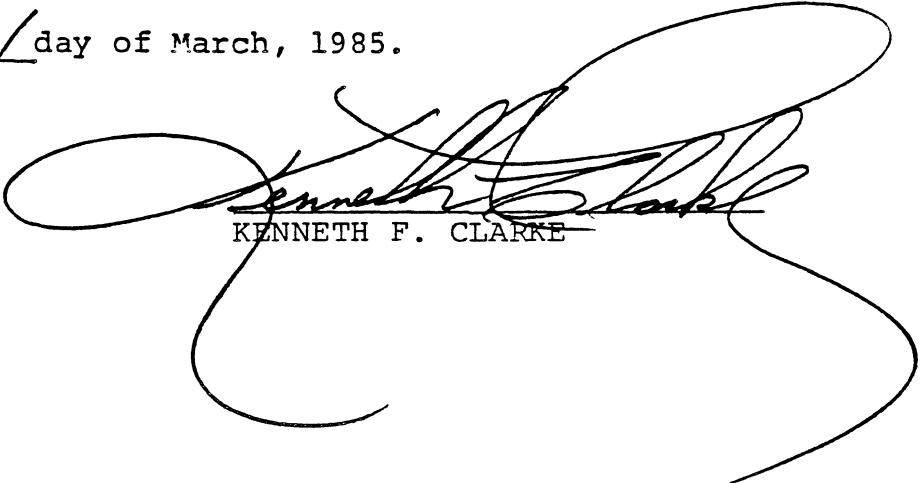
Supreme Court No. 20362

Defendant/Respondent,

_____ /

I HEREBY CERTIFY that I hand delivered to the Law Office
of JACKSON HOWARD, 120 East 300 North, Provo, Utah, 84601,
Four (4) copies of APPELLANTS BRIEF on the 21 day of March,
1985.

DATED this 21 day of March, 1985.


KENNETH F. CLARKE

Trust Deed Note

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing the same, must be surrendered to Trustee for cancellation before reconveyance will be made.

\$ 371,750.00

Provo, Utah,

June 10, 1981

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of JOSEPH A. SEETHALER and MYRA K. SEETHALER, his wife at their office in Provo

Utah, or at such other place as the holder hereof may designate, FIFTY AND NO/100 THREE HUNDRED SEVENTY-ONE THOUSAND SEVEN HUNDRED/ DOLLARS (\$ 371,750.00),

together with interest from date at the rate of ten per cent (10 %) per annum on

the unpaid principal, said principal and interest payable as follows: Accumulated interest from date hereof to June 10, 1982, payable on or before June 10, 1982 and;

THREE THOUSAND FIVE HUNDRED EIGHTY-SEVEN AND 47/100 - - DOLLARS (\$3,587.47)

on the tenth day of July 1982 and the same amount on the same day of each succeeding month until the entire unpaid principal with accrued interest has been fully paid. Each payment shall be applied first to accrued interest and the balance to the reduction of principal. In any event, the undersigned hereby agree that on June 10, 1988 the then remaining principal balance, together with accumulated interest, shall be due and payable in full.


If default occurs in the payment of said installments of principal and interest or any part thereof, the holder hereof, at holder's option and without notice or demand, may declare the entire principal balance and accrued interest immediately due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution. There shall be no prepayment penalty of any kind.

This note is secured by a Trust Deed of even date herewith, on the following properties:


Vernon S. Cheever, Individually


Bruce H. Coles, Individually

UTAH COUNTY PACKING CO., INC., a Utah Corporation

BY: 
Vernon S. Cheever, President

COLPS BROTHERS, INC., a Utah Corporation

BY: 
Bruce H. Coles, Secretary/Treasurer

16973

FILED AT THE REQUEST OF
SECURITY TITLE & ABSTRACT CO.

JUN 11 AM 10:39

UTAH COUNTY, UTAH
DEPUTY CLERK
PA. 135
JUN 11 1981

JURIT TITLE & ABSTRACT CO.

WHEN RECORDED MAIL TO

Name
Street
Address
City &
State

SECURITY TITLE & ABSTRACT CO.
P. O. BOX 45
PROVO, UTAH 84601

16973

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DEED OF TRUST
WITH ASSIGNMENT OF RENTS

This Deed of Trust, made this 10th day of June, 1981, between
VERNON S. CHEEVER and MARTHA T. CHEEVER, his wife, as TRUSTOR,
whose address is _____ Utah

(Street and number)

(City)

(State)

SECURITY TITLE AND ABSTRACT COMPANY, a Utah corporation, as TRUSTEE, and
JOSEPH A. SEETHALER and MYRA K. SEETHALER, his wife, as BENEFICIARY.

Witnesses: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described
property, situated in _____ Utah _____ County, State of Utah:

All of Lot 3, Plat "A", MARJORIE MANOR SUBDIVISION, Provo, Utah, according to the
official plat thereof on file in the office of the Recorder, Utah County, Utah.

42-015-0003 ✓

16774-76 ✓

At the request of Trustor, the Beneficiary agrees to subordinate this Deed of Trust
to a first Trust Deed for a loan not exceeding \$44,000.00.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements,
hereditaments, privileges and appurtenances thereto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT,
HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits.

*Note made by Utah County Packing Co., Inc.; Coles Brother, Inc.; Vernon
For the Purpose of Securing: Cheever, individually and Bruce H. Coles, individually.

(1) payment of the indebtedness evidenced by a promissory note of even date hereto in the principal sum of \$ 371,750.00 *
made by Trustor, payable to the order of Beneficiary on the times, in the manner and with interest as therein set forth, and any extensions and/or re-
newals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or ad-

BOOK 1918 PAGE 6396

ances as hereafter may be made to Trustee, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust, and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

To Protect The Security of This Deed of Trust, Trustee Agrees:

1. To keep said property in good condition and repair; to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general, and if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property Trustee further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustee under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In the event of loss, Trustee shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary, instead of to Trustee and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event that the Trustee shall fail to provide satisfactory hazard insurance, the Beneficiary may procure, on the Trustee's behalf, insurance in favor of the Beneficiary alone. If insurance cannot be secured by the Trustee to provide the required coverage, this will constitute an act of default under the terms of this Deed of Trust.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to effect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. To pay to Beneficiary monthly, in advance, an amount, as estimated by Beneficiary in its discretion, sufficient to pay all taxes and assessments affecting said property, and all premiums on insurance therefor, as and when the same shall become due.

7. Should Trustee fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustee and without releasing Trustee from any obligation hereof, may, Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes, commence, appear in and defend any action or proceeding purporting to effect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, cancel, or compromise any encumbrances, charge or lien which in the judgment of either appears to be prior or superior hereto and in exercising any such power, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

8. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ~~10%~~ 12% per annum until paid, and the repayment thereof shall be secured hereby.

9. To pay to Beneficiary a "late charge" of not to exceed five cents (5¢) for each One Dollar (\$1.00) of each payment due hereunder or due pursuant to the aforesaid promissory note of even date hereof which is more than fifteen (15) days in arrears. This payment shall be made to cover the extra expense involved in handling delinquent payments.

IT IS MUTUALLY AGREED THAT:

10. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustee agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

11. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed of Trust and the note for endorsement (in case of full reconveyance, for cancellation and retention) without effecting the liability of any person for the payment of the indebtedness secured hereby, and without releasing the interest of any party joining in this Deed of Trust, Trustee may (a) consent to the making of any map or plat of said property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting the Deed of Trust or the lien or charge thereof, (d) grant any extension or modification of the terms of this loan, (e) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustee agrees to pay reasonable trustee's fees for any of the services mentioned in this paragraph.

12. As additional security, Trustee hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed of Trust and of any personal property located thereon. Until Trustee shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustee shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustee shall default as aforesaid, Trustee's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, issues, royalties, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed of Trust to any such tenancy, lease or option.

13. Upon any default by Trustee hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustee hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name as far as otherwise called said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

14. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

15 The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of said right and the failure by Beneficiary of any default shall not constitute a waiver of any other or subsequent default

16 Time is of the essence hereof Upon default by Trustee in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby

17 After the lapse of such time as may then be required by law following the recording of said notice of default and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), or public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale The person conducting the sale may, for any cause he deems expedient postpone the sale from time to time until it shall be completed and in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale, provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale Trustee shall execute and deliver to the purchaser its Deed conveying said property as sold, but without any covenant of warranty, express or implied The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof Any person, including Beneficiary, may bid at the sale Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustor's and attorney's fees, (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed, (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 18% per annum from date of expenditure, (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustor In its discretion may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

18 Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor

19 Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

20 Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law

21 This Deed of Trust shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several The term "Beneficiary" shall mean the owner and holder, including any pledges, of the note secured hereby In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

22 Trustor accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law Trustor is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustor.

23 This Deed of Trust shall be construed according to the laws of the State of Utah

24 The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinafter set forth.

Signature of Trustor
Vernon S. Cheever
Vernon S. Cheever
Martha T. Cheever
Martha T. Cheever

STATE OF UTAH
County of Utah }

On the 10th day of June, A.D. 1981, personally appeared before me Vernon S. Cheever and
Martha T. Cheever, his wife

the Signers of the within instrument, who duly acknowledged to me that they executed the same.

My Commission expires February 27, 1982

STATE OF UTAH
County of Utah }

John P. Farn
Notary Public, Residing at
Provo, Utah

On the _____ day of _____, A.D. 19____, personally appeared before me _____
and _____ who being by me duly sworn did say, each for himself, that he the said _____
is the _____ President, and he the said _____ is the _____ Secretary
of _____ and that the within and foregoing instrument was signed in behalf of said corporation by
authority of a resolution of its Board of Directors, and said _____ and _____
each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

My Commission expires _____

16973 _____
Notary Public, Residing at _____

JUN 19 1981 MAY 6 1981

JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84603
TELEPHONE: 373-6345

Attorneys for Defendants Seethaler

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER, MARTHA	:	
T. CHEEVER, UTAH COUNTY	:	
PACKING COMPANY, and COLES	:	
BROTHERS, INC.,	:	SUMMARY JUDGMENT
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
JOSEPH A. SEETHALER, MYRA K.	:	
SEETHALER, and SECURITY TITLE	:	Civil No. 64179
AND ABSTRACT COMPANY,	:	
	:	
Defendants.	:	

The Motion for Summary Judgment filed by defendants Seethaler on July 26, 1984, came on before the above-entitled Court for hearing on September 21, 1984. Further memoranda were submitted and additional arguments heard by the Court on October 1 and November 2, 1984. At each hearing Vernon S. Cheever was present and the plaintiffs were represented by their attorney, Kenneth F. Clarke, and Joseph A. Seethaler was present, and defendants Seethaler were represented by their attorneys, Jackson Howard and Leslie W. Slaugh. The Court having considered the memoranda and arguments of counsel, and being fully advised in the premises, now

1 hereby makes and enters the following summary judgment:

2 Plaintiffs' complaint is dismissed with prejudice.

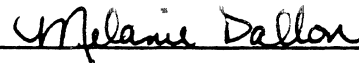
3 DATED this 30* day of November, 1984.

4
5 BY THE COURT:

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7 
8 DAVID SAM, DISTRICT JUDGE

9
10 CERTIFICATE OF MAILING

11 I hereby certify that I mailed a true and correct copy of the
12 foregoing Summary Judgment pursuant to Rule 2.9 of the Rules of
13 Practice of this Court, to Kenneth F. Clarke, Esq., One East Center
14 Street, Suite 300, P. O. Box H, Provo, Utah 84603, this 28th day
15 of November, 1984.

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JACKSON HOWARD, for:
HOWARD. LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84603
TELEPHONE: 373-6345

Attorneys for Defendants, Seethaler

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

VERNON S. CHEEVER and
MARTHA T. CHEEVER,
husband and wife,

Plaintiffs,

vs.

JOSEPH A. SEETHALER and
MYRA K. SEETHALER,
husband and wife, and
SECURITY TITLE AND
ABSTRACT COMPANY,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Civil No. 64,179

Defendants Seethaler, by and through their attorney, hereby
move this Court for an order dismissing this action, with prejudice
The grounds for this motion are as follows:

1. The actions by the corporate plaintiffs are barred by the applicable statutes of limitation.
2. The plaintiffs have failed to make an effective joinder of necessary and indispensable parties.
3. The complaint fails to state a cause of action for fraud.
4. The complaint fails to state any cause of action upon

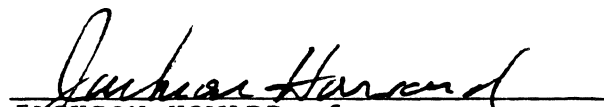
1 which relief can be granted.

2 A memorandum of points and authorities in support of this
3 motion is filed herewith.

4 In the event the Court determines to not dismiss the entire
5 case, with prejudice, these defendants respectfully request that
6 the Court enter an order specifying, with particularity, which
7 causes of action and which issues of fact remained to be tried.

8 These defendants further request that the Court, in the event
9 the Court does not dismiss the entire action, with prejudice, enter
10 an order requiring that the issues which may be dispositive of the
11 entire case (statute of limitations, accord and satisfaction,
12 waiver, etc.), be tried first.

13 DATED this 26th day of July, 1984.

14
15 
16 JACKSON HOWARD, for:
17 HOWARD, LEWIS & PETERSEN
18 Attorneys for Defendants Seethaler
120 East 300 North
Provo, Utah 84601

19 MAILING CERTIFICATE

20 MAILED a copy of the foregoing MOTION FOR SUMMARY JUDGMENT to
21 Kenneth F. Clarke, Attorney for Plaintiffs, 1 East Center Street,
22 Suite 300, P. O. Box H, Provo, Utah 84603; Robert Moody, Attorney
23 for Security Title and Abstract Co., 55 East Center, Provo, Utah
24 84601, this 26th day of July, 1984.


SECRETARY

1984 NOV -7 AM 8:50

In the Fourth Judicial District Court

WILLIAM F. HUGHES, CLERK
DEPUTY

of the State of Utah
In and For Utah County

VERNON S. CHEEVER & MARTHA T.
CHEEVER

Plaintiff

MINUTE ENTRY

CASE NUMBER 64,179

JOSEPH A. SEETHALER & MYRA K.
SEETHALER & SECURITY TITLE &
ABSTRACT CO.

Defendant

DATED November 5, 1984

David Sam

JUDGE

This case is before the court on Defendant's Motion for Summary Judgment and is considered pursuant to Rule 2.8, Rules of Practice of the District Courts.

R U L I N G

In this matter the court finds that undisputed facts establish that there were no facts known to the Principal, Buyer (Utah County Packing) that were not known by the Plaintiff, Surety (Cheever). All facts which establish any alleged fraud were committed upon both the Principal, Buyer, (Utah County Packing) and the Plaintiff, Surety (Cheever). The Principal, Buyer (Utah County Packing) after discovering all facts upon which the plaintiff now complains ratified the contract between the Buyer and the Seller (Seethaler, Inc.). The court finds under these facts and circumstance that the reasoning of the Ettlinger case cited in defendant's brief is applicable to the

PAGE TWO

64,179

case at hand and that the Holbrook case cited by the plaintiff is distinguishable. In the Holbrook case, a partner of the buyer was also a partner of the seller and this material fact was concealed from the surety. In the case at hand, all facts which establish any alleged fraud were known or should have been known by all parties because the surety was also President of Utah County Packing, the party that ratified the contract between the Buyer and the Seller. The court finds that the principal, having ratified the contract, has thereby waived any claim for fraud which election is binding on the surety. The surety who is and was the President of Utah County Packing is thereby estopped from asserting any claim for an alleged fraud having made an election of remedies. See also Dugan v. Jones 615 P.2d 1239.

The court further finds that the plaintiff's complaint does not state a cause of action for fraud. The defendant has admitted that any claim by Utah County Packing is barred by the Statute of Limitations and the court so finds. Accordingly, Defendant's Motion for Summary Judgment is granted.

Dated this 6th day of November, 1984.



DISTRICT JUDGE

cc: Jackson Howard
Leslie Slaugh
Ken Clarke

JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84603
TELEPHONE: 373-6345

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER, et al., :

Plaintiffs, : ORDER

VS. :

JOSEPH A. SEETHALER, et al., :

Defendants. : CIVIL NO. 64,179

Defendants Seethalers' motion to dismiss, which was made in open court on May 29, 1984, came on before this Court for further argument on July 5, 1984. Plaintiff Vernon Cheever was present and the plaintiffs were represented by their attorney, Kenneth Clarke. Defendants Seethaler were represented by their attorney, Jackson Howard. The Court having considered the memoranda and arguments of the parties, and having determined that Utah County Packing Company is a necessary and indispensable party to this action, now hereby makes and enters the following order:

Plaintiffs' complaint is dismissed without prejudice, the dismissal to become effective at the expiration of ten (10) days unless plaintiffs have filed an amended complaint joining Utah

/////

1 County Packing Company as a party to this action.

2 DATED this 12th day of July, 1984.

3 BY THE COURT:

4

5


DAVID SAM, District Judge

6

MAILING CERTIFICATE

7

8 I hereby certify that a true and correct copy of the foregoing
9 was mailed to the following, postage prepaid, this 12th day of July,
10 1984:

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Mr. Kenneth F. Clarke
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorneys for Plaintiffs
P.O. Box H
Provo, Utah 84603

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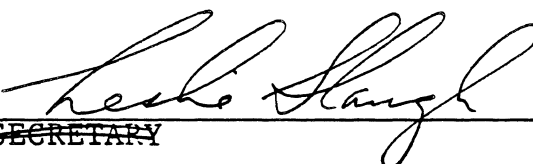
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SECRETARY

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney for Plaintiff's
One East Center, Suite 300
P. O. Box H
Provo, Utah 84603
Telephone 801-375-2911

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

VERNON S. CHEEVER, et al.,

Plaintiffs,

CONSENT

vs.


Case No. 64179

JOSEPH A. SEETHALER, et al.,

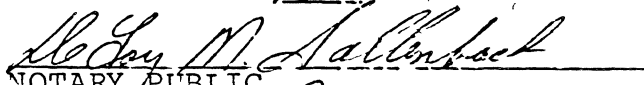
Defendants.

COMES NOW VERNON CHEEVER, the President of UTAH COUNTY PACKING INC., and does by these presents, consent that the Plaintiff's, VERNON CHEEVER and MARTHA CHEEVER, may continue their present cause of action filed against the defendant's, and UTAH COUNTY PACKING INC., by these presents, is willing that such cause of action be maintained by the said Plaintiff against the said Defendant.

DATED this 25th day of October, 1984.


VERNON S. CHEEVER
President UTAH COUNTY PACKING, INC.

SUBSCRIBED AND SWORN TO BEFORE ME this 26th day of October, 1984.


NOTARY PUBLIC
Residing at: Provo, Utah

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK, & CLARKE
Attorney at Law
One East Center, Suite 300
P.O. Box H
Provo, Utah 84604
Telephone 801-375-2911

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 64179

JOSEPH A. SEETHALER et al.

STATE OF UTAH

:ss

County of Utah

VERNON CHEEVER, upon his oath having been duly sworn deposes and says:

1. That he is one of the Plaintiffs in the above entitled matter.

2. That I did not know that I had signed a DEED OF TRUST in the amount of \$371,000.00 until sometime after March 30, 1983 when I was served with a NOTICE OF DEFAULT. I had thought that the DEED OF TRUST was in the amount of \$25,000.00 only.

3. In clarifying my testimony of October 1, 1984, I want it to be clear that the money that was given a credit for \$1,200.00 was not a compromise of all claims that we had by reason of our August 19th letter, a copy of which is attached hereto, but rather was only a partial payment to cover the cost of the drip pans only.

4. Thereafter, there had been negotiations to have a final

settlement with Mr. Seethaler. For months thereafter, we had numerous meetings with Mr. Seethaler and also with Howard Rowely. We continually had negotiations; at one time Mr. Seethaler was even willing to take a complete settlement of all monies owed to him for something on the order of \$200,000.00 . We all thought that maybe Bruce Coles was going to get his money and pay the whole thing off. My best recollection is that these negotiations continued up until probably 60 days before we closed the plant; about May, 1983.


5. We continued to run the plant because we thought that there was going to be a settlement. That is the reason we did not sue earlier; we had no intention of waiving our right for fraud. We had been negotiating this settlement for months; the last meeting being something on the order of around 60 days before we closed the plant and filed bankruptcy.

6. In all of the forgoing, I was always only acting in my capacity as President of UTAH COUNTY PACKING INC. Never at any time, in the negotiations did we ever discuss my personal liability or the personal liability of my wife and DEED OF TRUST we had signed. That matter was never discussed and I never discussed it in my personal capacity as a separate individual either on my own behalf or on behalf of my wife. Never at any time has she ever given me any authority to ever compromise or settle, nor has she ever discussed with me her settling any claims or rights that she might have personally with regards to her one half equity in the residence.

DATED THIS 16 day of November, 1984.


VERNON CHEEVER

SUBSCRIBED AND SWORN to before me this 16 day of November, 1984.

My Commission expires: 



& Sons
Gary & Ron



Coles Bro. In

MASTER

Exhibit

A

Utah County Packing Company

40 South 200 West
Provo, Utah 84601

Mr. Joseph Seethaler
3655 Foothill Drive
Provo, Utah 84601

August 19, 1981

Dear Mr. Seethaler:

It has now been over two months since we closed the transaction of purchasing Seethaler Meats. As per our contractual agreement set forth in the Earnest Money and Exhibit "A", "Seller to guaranty all machinery and equipment to be in good working condition for 60 days after take over by Buyer", and because of other assurances by the Seller the following conditions prevail.

Since we purchased the stock of an existing and operating Corporation and since the Seller repeatedly stated that the equipment was in excellent condition.. "as good as new since it had received regular maintenance", the assumptions are:

- 1) The business would pass City Code for operation and safety. An inspection is necessary when starting up or purchasing an existing company.
- 2) The business would meet the regulations of the State Health and FDA Meat Department.
- 3) The equipment was in excellent condition as stated and as guaranteed for two months after take over.

THE FINDING AND RESULTS:

Since the above conditions and assumptions were not true (see facts below) we are, therefore, submitting to you to recover \$100,255.97 cash, which includes the following repairs and replacement of equipment that has become necessary to maintain business.

Thursday June 11, 1981: We took over and first thing Thursday morning the Weiner Peeling Machine broke down and we had to get a new pulley and put the machine back in order again...total time down for three men 1 hour. One of the employees said they had been having trouble with the machine for months and that Joe would not buy a new part for it so it was not in working condition when we took over.

C.: 521-2122



& Sons
Gary & Ron


Coles Bro. Inc.

Utah County Packing Company

40 South 200 West
Provo, Utah 84601

CONCLUSION:

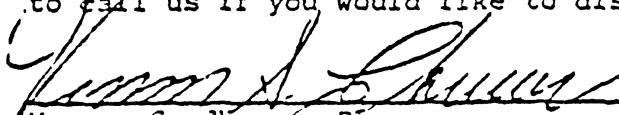
After spending three months in operation of this venture it has been determined that there has been a GROSS misrepresentation of the condition and value of this building and the equipment. There has not been a day go by that some major breakdown has not occurred. The expenses to date to repair the equipment and buildings has now surpassed the \$100,000.00 mark.

It is our intention to recover the funds that we have expended for repair and maintenance of equipment and building for the first two months of operation. (The first two months were guaranteed by Mr. Seethaler) It is our intention to deduct a minimum of \$58,000.00 from the balance that we owe Mr. Seethaler in connection with a new packaging machine. (See comments) It is our intention to recover in cash the sum of \$42,255.97 for expenses and value that we have paid for repairs to equipment and buildings that was guaranteed by Mr. Seethaler for the first two months after the take over.

FACTS:

- 1) The equipment is in fair to poor condition and not in excellent condition as guaranteed.
- 2) The building would not past City or State Code
- 3) The Appraiser was not qualified to appraise this equipment since it is out of the realm of his expertise..thus a gross over statement of value was placed on the building and equipment.
- 4) The loss of business for us during the first two months of operation, because of the major breakdowns, would total over \$50,000.00. You will note that we charged you only \$10,108.40 for labor where in fact the labor charged by professionals would have been closer to \$35,000.00.

We stand ready to receive the funds as outlined. Please submit funds no later than September 20, 1981. At that time we will amend the contract of the amount of funds that we owe you by \$58,000.00. Please feel free to call us if you would like to discuss this matter further.


Vernon S. Cheever/Pres


O. Kent Coles/Sec and Tres

521-2122



vernon J. Chee
& Sons
Gary & Ron


Coles Bro. Inc

Utah County Packing Company

40 South 200 West
Provo, Utah 84601

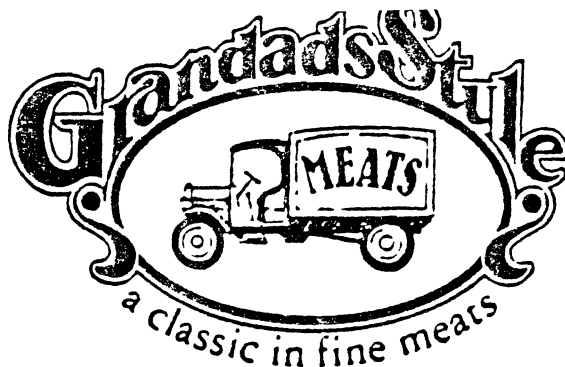
them. We will have to buy a new packaging machine. This one is a pile of junk. Mr. Seethaler guaranteed it was a working condition. Half of it had been taken off and junked because it had broken down and never repaired. So...now it takes four people to hand run it and then it only seals the packages 50%...so we are experiencing spoilage. Today we couldn't get heat to all the Smoke Houses at the same time. They came over and said all the pipes are so limed up it would be impossible to use them that way. This will have to be fixed before we can go into full production. It is now two and one half months after purchasing and we still are not in full operating condition.

Friday July 31: The Louis A. Roser Refrigeration men are down from Salt Lake again trying to get this antiquated machinery to work. The Coolers are all hot and the meat is spoiling. Everything is worn out. It's midnight and both of Roser's men are still working...trying to get the refrigeration system working. They said everything is so out-dated that they just don't know if they can fix it.

Saturday Aug 1st: 1:00 A.M.....they finally got the Coolers working. They said oil had not been drained out of the filter trap for over two years and it had clogged all the lines...two men plus us three..overtime for fourteen hours. The equipment is under compressed. We need a new Compressor. There are too many machines working off of one compressor. The refrigeration man told us there was no way we could get it down to 10 or 15 degrees above zero because the plant was over it's capacity on the ammonia condensor system. He said he didn't think it would last much longer. Mr. Seethaler was told this last year but he didn't do anything about it yet we were told everything was in top condition. The building needs a new roof as it has large cracks between building sections and leaks in a dozen places.

All the Cooler doors are worn out and need to be replaced. I could go on and on but there is no use. It just boils down to the fact that the condition of the building and the equipment were grossly misrepresented.

The Inspector came in and red-tagged the weiner holding cooler. Water was running down from the roof. The employees said it had been leaking for years and they told Joe that he needed a new roof. We went up and inspected it and found three great big cracks in the roof all the way across the building. It was reported there were no leaks...that he had



& Sons
Gary & Ron



Utah County Packing Company

40 South 200 West
Provo, Utah 84601

it was going out but he wouldn't do anything about it. We had to buy five new belts and repair the cutter...another full days work.

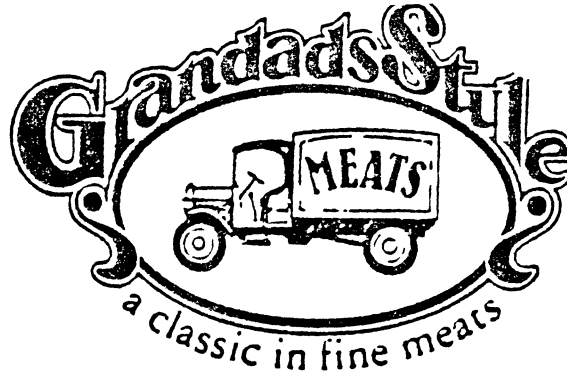
Next: The Meat Inspector said the walls had to be foamed or he would condemn the plant. Arlin said he told Mr. Seethaler about the defective hose on the foamer pump...told him it was shot but still Mr. Seethaler didn't do anything about it. We had to buy a new one and repair the pump....\$37.49 for hose and more man hours Also, the Inspector had red-tagged a lot of the equipment in the packaging room. The reason for this was that Mr. Seethaler refused to have a drain put up under the coils so they would not drip on the meat. He also needed a fan above the weiner peeler so it would draw the steam out and not have the condensation build up above the machine.

Next: We had the Fire Marshal in and inspect the plant before they would issue us our City License. They found so many things wrong it is impossible to name but they will not give us our license until all of the repairs are made. We had Boshard Electric come in and give us a bid which was \$1500.00. Vern told Mr. Seethaler this and he said it was way high and that he would guarantee his man Erdman Electric would do it for \$500.00. We called Erdman Electric and asked him to come over and give us an estimate. They came and looked at the plant but didn't even want our business. So we hired Boshard Electric to do the work. The more they did the more they found that needed to be repaired to meet the Code. It cost us \$4,000.00 to complete the work so far.


Next: Both the hoists that Mr. Seethaler said were operating were not. I repaired one hoist and we had to take the other one to Electric Motor Company. The main box on the compressor was so old that it blew out and had to be replaced...over \$200.00.

July 14, 1981: The Elevator broke down as it has about every day since we took over. We called Otis Elevator Company and they are sending a man down to see if they can fix it. Saturday Gary, Ron and myself worked all day on the Band Saw. The bearings have been bad for months.

July 15, 1981: The Beef Cooler that Joe said just needed a valve opened needed a new Coil...Coil plus installation \$1500.00. There is not a Scale in the plant that works. The last inspection the State condemned every one. We had to have a Scale Company from Salt Lake come and fix



VERNON B. GALE
& Sons
Gary & Ron


Coles Bro. Inc

Utah County Packing Company

40 South 200 West

Provo, Utah 84601

Friday June 12, 1981: We were told by the employees that the Smoke Houses were not working...that they could only use one house. Ron, Gary and myself had to spend all day June 13th working on the smoke houses. We had to unplug the drain. Water had been standing for six months in the drain...(Roto Rooter...\$35.00) We had to replace pipes both steam and chimney stacks and had to take each out and have repaired. The employees said it had been patched so many times that it gave up the "ghost". After it was repaired we had to take another day to install...this had to be done after working hours as we couldn't work while the plant was open...more down time and lost production due to faulty equipment.

Next: The Bacon Press broke down... a defective plug had been used so we had to have a new one machined. The switch is still bad. We had to order new points for it. The employees said they have had to hold it in with their fingers to keep it in.... \$15.00 and down for three hours. Next the Linker Machine wouldn't work automatically because a part had been broken for some time. We took it to Field Welding and had it repaired...\$23.88 and one full day broke down. Many man hours were lost. The next day the Inspector asked us where the Stainless Steel Buckets were. He said we could not use the old ones because they had been red-tagged. The employees said Mr. Seethaler took the stainless steel buckets home. All of this equipment was part of the equipment that we bought and Mr. Seethaler and Mr. Rowley guaranteed all that was in the plant when we went through before we made the offer would stay and be part of the equipment we were to have. Also, Mr. Seethaler removed the Vise from the work bench. The employee said Mr. Seethaler took it home. The Vise and Buckets must be returned or they will have to pay for new ones.

Next: We could not get the Beef Cooler cold enough to keep the meat. We had some spoilage so we called L.A. Roser Refrigeration Repair from Salt Lake City. They sent a man down and he said Mr. Seethaler had told him to turn the one coil off because it was shot. When I asked him about this he, Joe, said he didn't know anything about it. The repair man said he fixed it once and it blew out in two weeks time so Joe told him to turn it off. (We have ordered a new one and we expect Mr. Seethaler to pay for it. (Included on the list to Mr. Seethaler)

Next: We were making weiners for the 4th of July...

IN WORKING CONDITION PARTS AND MACHINERY THAT IS GUARANTEED TO BE

Smoke House Stacks.....	\$ 14.00	
Smoke House Coils.....	\$ 43.00	
Smoke House Drain.....	\$ 35.00	
Bacon Press.....	\$ 15.00	
Linker Machine (Field Welding)	\$ 23.88	
Stainless Steel Buckets (4 @ \$47.00).....	\$ 188.00	
Heavy Duty Vice.....	\$ 32.45	
V. Belts for Cutter.....	\$ 149.18	
Hose for Clean up Pump.....	\$ 37.49	
Work from Creer Sheet Metal.....	\$ 695.00	
Pulley for Weiner Peeler.....	\$ 5.00	
Roto Rooter.....	\$ 35.00	
Motor for Acupat.....	\$ 145.00	
Louis A. Roser used Coil and Installation.....	\$ 2,500.00	
Craighead Plumbing (P.O. Valve Water Tank).....	\$ 94.43	
Hoist repairs.....	\$ 34.10	
Boshard Electric (Joe's part).....	\$ 4,000.00	
Karman Bearing-Saw.....	\$ 13.64	
Air Conditioner repairs (Parts missing).....	\$ 72.77	
Meldrum Scale Company.....	\$ 248.10	
Keene Saw repairs.....	\$ 70.23	
Louis A. Roser repair on Refer Coil.....	\$ 500.00	approx
Ray Debel Plumbing repair on boiler and pipes.....	\$ 946.00	
Truck alternator.....	\$ 51.09	
New Packaging machine.....	\$58,000.00	
Slicer repairs.....	\$ 520.45	
New floors needed to pass inspection.....	\$ 8,740.00	
New Roof (approx).....	\$ 8,000.00	
Down time..man hours to repair equipment.....	\$10,108.40	
New IBM Typewriter (missing).....	\$ 1,500.00	
Address Machinge (missing).....	\$ 500.00	
Work Bench Vice (large).....	\$ 55.00	
Stainless Steel Pots.....	\$ 500.00	
2 Large Filing Cabinets.....	\$ 360.00	
		\$100,255.97

JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 EAST 300 NORTH STREET
P. O. Box 778
PROVO, UTAH 84603
TELEPHONE: 373-6345

Attorneys for Defendants, Seethaler

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and
MARTHA T. CHEEVER,
husband and wife,

Plaintiffs,

vs.

JOSEPH A. SEETHALER and
MYRA K. SEETHALER,
husband and wife, and
SECURITY TITLE AND
ABSTRACT COMPANY,

Defendants.

AFFIDAVIT OF JOSEPH A.
SEETHALER

Civil No. 64,179

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

JOSEPH A. SEETHALER, after being first duly sworn, deposes and
states as follows:

1. I am one of the defendants in the above-entitled matter,
and have personal knowledge of the facts stated herein.

2. On or prior to June 18, 1981, Mr. Cheever contacted me with
respect to certain alleged defects in the equipment of the meat
packing company which Utah County Packing Co. and Coles Brothers,

1 Inc. had just purchased from Seethaler's, a Utah corporation. Utah
2 County Packing Co. had previously indicated its desire to purchase
3 the accounts receivables from Seethaler's. Although I disagreed
4 with the existence of any defects, I agreed to reduce the price for
5 the accounts receivables by approximately \$1,200.00, in satisfac-
6 tion of the claims made by Mr. Cheever.

7 3. I received the letter attached hereto from Mr. Cheever
8 shortly after August 19, 1981. I recognize the signature on the
9 letter as being that of Mr. Cheever.

10 4. Vernon Cheever, Bruce Coles, and other principals of Utah
11 County Packing Co. and Coles Brothers, Inc. made numerous tours
12 through the meat packing plant prior to the final closing of the
13 sale. No attempt was ever made to restrict the scope of their
14 tours through the plant nor to conceal the true condition of the
15 equipment in the plant.

16 DATED this 26th day of July, 1984.

17

18

19


JOSEPH A. SEETHALER

20

21

SUBSCRIBED and sworn to before me this 26th day of July,
1984.

22

23

24


NOTARY PUBLIC

My Commission Expires:

Residing at:

12-12-85

Mapleton Utah

2 Pages

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney at Law
One East Center, Suite 300
P.O. Box H
Provo, Utah 84601
Telephone 801-375-2911

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1984 NOV 16 PM 4: 23

WILLIAM F. HUISH, CLERK

BQ DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

JOSEPH A. SEETHALER et al.

Civil No. 64179

STATE OF UTAH

:ss

County of Utah

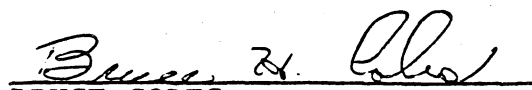
BRUCE COLES, upon his oath having been duly sworn deposes and
says:

That sometime in August of 1981, we had filed a a letter complaint
against Mr. Seethaler for defective items. Thereafter, we met numer-
ous times with Mr. Seethaler and sometimes with Mr. Rowely for the
purpose of trying to reach a settlement agreement to offset what was
owed by UTAH COUNTY PACKING INC. to Mr Seethaler by reason of the def-
ective items and what we considered was a fraud that was committed
upon us. Those negotiations went on for months and continued into the
early part of 1983. It is my best recollection that it was about this
time that we approached FMA FINANCE and MR. RON BISH. At one time Mr.
Seethaler entertained but did not agree to take \$200,000.000 in com-
plete settlement. Sometime thereafter, we were told by Mr. Bish that
we could not get the necessary financing to cash Mr. Seethaler out.

It was at this time that we told him that he was going to have to take a substantial reduction in order to have the meat packing plant refinanced with FMA. We told him that if he didn't do that that the only alternative we had was to close the door and give it back to him.

The basis for our negotiating all this time, a reduction in the amount owed to him, was by reason of the August 19, 1981 letter and what we had thought we had lost by reason of his fraudulent representations as to the condition of the equipment and machinery.

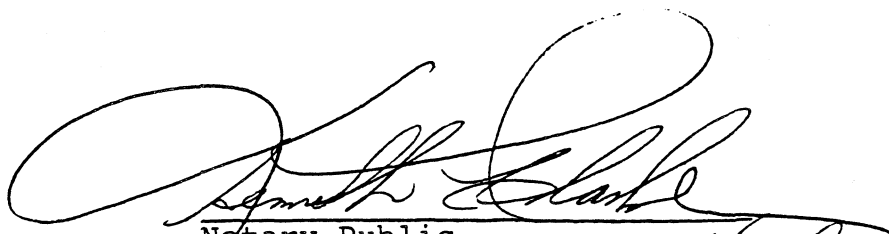
DATED THIS 16 day of November, 1984.


BRUCE COLES

SUBSCRIBED AND SWORN to before me this 16 day of November, 1984.

My Commission Expires:

9/22/85


Notary Public
residing at: Prvo, Utah

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney at Law
One East Center, Suite 300
P. O. Box H
Provo, Utah 84601
Telephone 801-375-2911

Exhibit 14
3 Pages
FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1984 NOV 16 PM 4:23

WILLIAM E. HUSH, CLERK
30 DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 64179

JOSEPH A. SEETHALER et al.

STATE OF UTAH

:ss

County of Utah

MARTHA T. CHEEVER, upon her oath having been duly sworn deposes
and says:

1. That she is one of the Plaintiffs in the above entitled action.
2. That I never did authorize my husband, VERNON S. CHEEVER, to act as agent, or in any other capacity for me with regards to my interest in our residence. I am a half owner in our residence as more fully set forth by the WARRANTY DEED a copy of which is attached hereto.
3. Never at any time did I authorize my husband to compromise a claim, waive any defense, assert any position on behalf, or in any other way affect my right to my one half share in the said real property or to affect any defense that I may have by reason of the attempted foreclosure by JOSEPH A. SEETHALER and MYRA K. SEETHALER.

DATED this 16 day of November, 1984.

Martha T. Cheever
MARTHA T. CHEEVER

SUBSCRIBED AND SWORN TO before me this 16 day of November,

1984.

My commission expires:

James H. Clark
NOTARY PUBLIC for State of Utah
Residing in Provo, Utah

16774

SECURITY 188
NO 22773

Ser. No.

WARRANTY DEED

FILED - 7-10-76

EDWIN REED TUCKER and MATHRYN JO TUCKER, his wife

Grantor E, of Provo, Utah

hereby CONVEY AND WARRANT to VERNON S. CHEEVER and MARTHA T. CHEEVER, his wife, as joint tenants with full rights of survivorship and not as tenants in common.

Grantor E, of PROVO, UTAH

for the sum of Ten dollars and other valuable consideration----- DOLLARS

the following described tract of land in Utah County,

State of Utah, to-wit:

All of Lot 3, Plat "A", Marjorie Manor Subdivision, Provo, Utah, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

WITNESS THE HANDS of said Grantor E this 2nd day of July A. D. 19 76

Signed in the presence of

Edwin Reed Tucker
Mathryn J. Tucker

STATE OF UTAH,

County of Utah

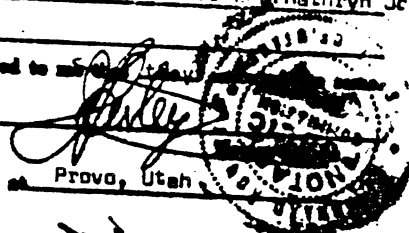
On the 2nd day of July, A. D. 19 76, personally appeared

before me, a Notary Public in and for the State of Utah, Edwin Reed Tucker and Mathryn Jo Tucker, his wife

the signers of the above instrument, who duly acknowledged to me that they were the

My commission expires Nov. 1, 1978

Residing at Provo, Utah



Edwin Reed Tucker
Mathryn Jo Tucker
P.O. Box 237
Provo, Utah

UTAH COUNTY RECORDER
JUL 12 1976
P. S. E. S.

1976 JUL -9 PM 4:35

BOOK

RECORDED AT THE OFFICE OF
SECURITY TITLE & A.M. CO.

16774

204 1486 MAY 503

EXHIBIT 1 2 Pages
FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
1984 AUG 24 PM 3:17
WILLIAM F. HUISH, CLERK
aw DEPUTY

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney at Law
One East Center, Suite 300
P. O. Box H
Provo, Utah 84603
Telephone 801-375-2911

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA T.
CHEEVER, husband and wife, UTAH
COUNTY PACKING, INC., a Utah
Corporation; COLES BROTHERS, INC.,
a Utah Corporation,

A F F I D A V I T

Plaintiffs,

Civil No. 64179

vs.

JOSEPH A. SEETHALER and MYRA K.
SEETHALER, husband and wife, and
SECURITY TITLE AND ABSTRACT
COMPANY,

Defendants.

STATE OF UTAH

:ss

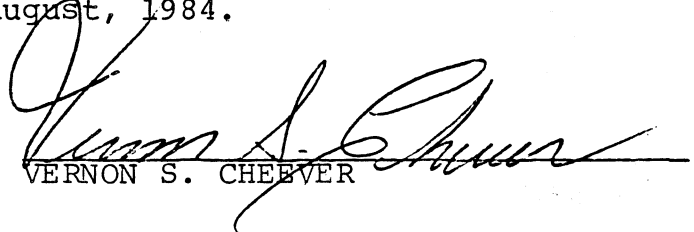
COUNTY OF UTAH

VERNON S. CHEEVER, upon his oath having been duly sworn deposes
and says:

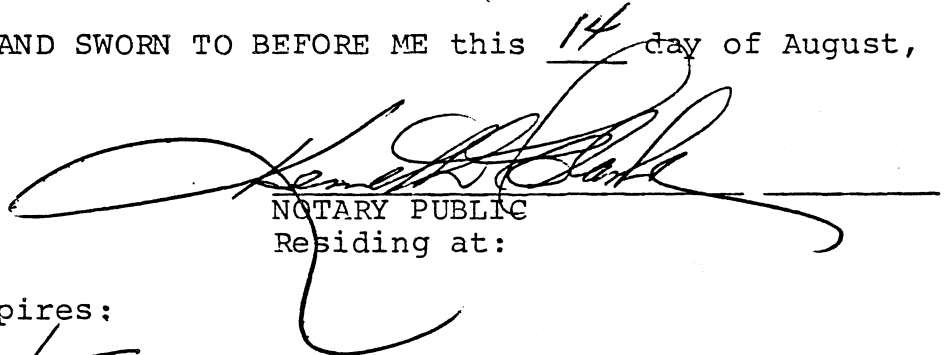
That he is one of the Plaintiff's in the above entitled action.
That he is also the President of UTAH COUNTY PACKING COMPANY, INC..
That UTAH COUNTY PACKING COMPANY, INC., is a corporation organized
under the laws of the State of Utah and is presently in good standing.

That sometime around the 16th of July, 1984, myself and my son-in-law, BRUCE COLES, met with KENNETH F. CLAPKE, As President of UTAH COUNTY PACKING COMPANY, INC., I authorize MR. CLARKE to bring an action in the above entitled case against the SEETHALERS.

DATED this 14 day of August, 1984.


VERNON S. CHEEVER

SUBSCRIBED AND SWORN TO BEFORE ME this 14 day of August, 1984.


NOTARY PUBLIC
Residing at:

My commission expires:

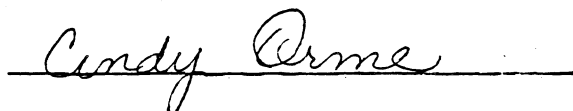
9/22/85

HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to the law office, this 24 day of August, 1984, to the following:

Leslie Slaugh
120 E. 300 N.
Provo, Utah


Robert Moody
55 East Center
Provo, Utah


Cindy Orme

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney at Law
One East Center, Suite 300
P. O. Box H
Provo, Utah 84603
Telephone 801-375-2911

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1984 AUG 24 PM 3:17

WILLIAM F. HUISS, CLERK
 DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA T.
CHEEVER, husband and wife, UTAH
COUNTY PACKING, INC., a Utah
Corporation; COLES BROTHERS, INC.,
a Utah Corporation,

Plaintiffs,

A F F I D A V I T

vs.

Civil No. 64179

JOSEPH A. SEETHALER and MYRA K.
SEETHALER, husband and wife and
SECURITY TITLE AND ABSTRACT
COMPANY,

Defendants.

STATE OF UTAH

:ss

COUNTY OF UTAH


THEODORE KENELL, upon his oath having been duly sworn deposes
and says:

That some time around the 17th day of July, 1984, I received
a telephone call from KENNETH F. CLARKE, the attorney for the Debtor
in UTAH COUNTY PACKING COMPANY, INC.. That during the term of the
estate of said bankruptcy, I was duly appointed as the TRUSTEE in
the said case. MR. CLARKE informed me that he desired to bring an

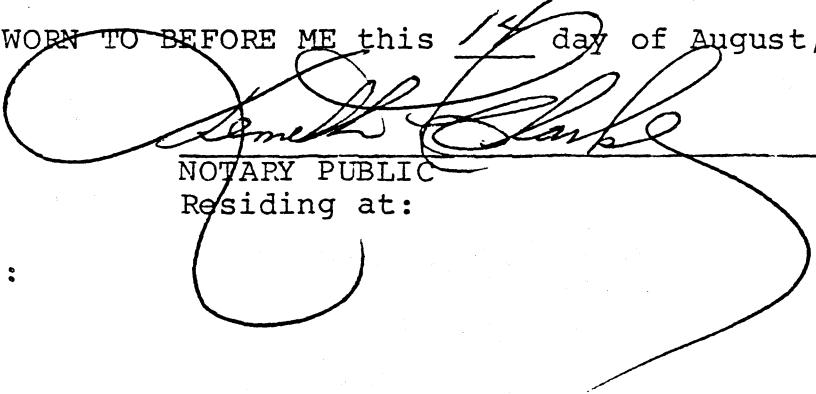
action in the State Court on behalf of the said UTAH COUNTY PACKING COMPANY, INC.. I informed him that I had no objection to him doing so. That I had been dismissed as Trustee and under the law he had the right to bring the cause of action. Subsequently, on the 10th day of August, 1984, MR. CLARKE called me on the phone again and asked me to sign this affidavit and represented to me that if any recovery were made, that he would notify me and I would then make the decision as to whether to reopen the estate.

The Bankruptcy Estate of UTAH COUNTY PACKING COMPANY, INC., was closed on the 20th day of January, 1984, as more fully set forth in the Certified Copy of the Order closing the estate, the original of which is attached to this affidavit. As the former Trustee of the said estate, since the estate is closed, I believe that all causes of action and all rights are returned to the Debtor; in this case, UTAH COUNTY PACKING COMPANY, INC..

DATED this 14 day of August, 1984.


THEODORE KENELL

SUBSCRIBED AND SWORN TO BEFORE ME this 14 day of August, 1984.


NOTARY PUBLIC
Residing at:

My commission expires:

EXHIBIT 11

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re:

UTAH COUNTY PACKING COMPANY, INC.

Debtor(s).

} Bankruptcy Case 83C-01603

ORDER CLOSING ESTATE

There being no provision under law for discharge of the above debtor, it is hereby ordered that the above case be closed upon entry of this Order.

It is further ordered that the Trustee in the above case be relieved of his trust; and that the bond of said Trustee is canceled and the surety or sureties thereon are released from further liability thereunder, except any liability which may have accrued during the time such bond was in effect.

DATED: January 20, 1984

by certify that the annexed and foregoing
ue and complete copy of a document on
the United States Bankruptcy Court
District of Utah.

Dated: **MAY 24 1984**

Attest:

Glenn E Clark

United States Bankruptcy Judge

Julia Vernon
Deputy Clerk

KENNETH F. CLARKE
1 East Center, Suite 303
Box H
Provo, Utah 84603
375-8891

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1583 SEP 20 PM 2:47

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MB DEPUTY

13 Pages

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 64179

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and
wife and SECURITY TITLE AND
ABSTRACT COMPANY,

Defendants.

STATE OF UTAH

ss

COUNTY OF UTAH

VERNON S. CHEEVER Upon his oath having been duly sworn
deposes and says:

That he is one of the Plaintiffs in the above entitled
action.

That attached hereto is Exhibit D. That I have read
the contents thereof, and state that the contents contained
therein, are true; by reference I adopt the statements
contained therein as part of this affidavit.

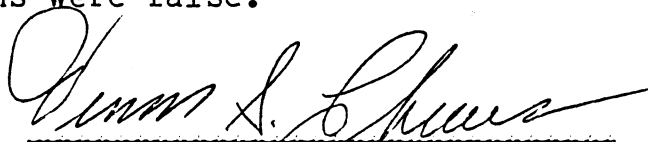
That your affiant never personally discussed this
matter with JOSEPH A. SEETHALER, nor did my wife. I was
approached by BRUCE COLES, my son-in-law, who indicated to me
that MR. SEETHALER was demanding that we had some kind of

"personal involvement" in the matter. That he wanted more security than just the return of the property that he was selling. My wife and I discussed it and we indicated that we just were not willing to put up our house as security. We finally agreed that we would be willing to put up our house and be liable to the extent of \$25,000.00 and no more. During this time I discussed with Mr. Coles that I thought that our house was worth about \$85,000.00 and he thought that it was worth probably only about \$75,000.00 to \$79,000.00. The collateral, which was to be for not more than \$25,000.00, was to be a second position because the COLES were only going to be putting up their building for security to the extent of their equity.

We discussed that the balance of the \$371,000.00 was the Corporations liability. That if it failed, we would only loose the collateral of \$22,000.00 to \$27,000.00 on our home. I believed that the papers that I signed, Exhibit A and B, filed with the complaint, incorporated a limitation of my liability only to the extent of not more than \$25,000.00 and no more. I believed that any mortgage or DEED OF TRUST that I signed was limited to a \$22,000.00 to \$27,000.00 second position on my house and no more depending on the value of the home. Exhibit A & B do not reflect what I had agreed with MR. COLES.

I have since learned that the representations that MR. SEETHALER made, that I have recited in Exhibit D, were false. I would not have signed Exhibit A or B or purchased on behalf

of Utah County Packing Co. Inc. if I had known the truth.
MR. SEETHALERS representations were false.


VERNON S. CHEEVER

SUBSCRIBED AND SWORN TO before me this 16 day of
September, 1983.


NOTARY PUBLIC

Residing at:

Provo, Utah

My Commission Expires:

9/22/85

EXHIBIT "D"

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

VERNON S. CHEEVER, upon his oath having been duly sworn, deposes and says:

That he is one of the Plaintiffs in the above entitled action. That your affiant entered into negotiations with the Defendant, Joseph A. Seethaler, for the purchase of a meat packing business. That the sale was finally consummated on or about the 10th day of June, 1981.

That prior to the purchase, your affiant's best recollection is that the Defendant made some of the following representations.

Mr. Seethaler had told us that the plant was "in top working condition". That "everything was new or better than new because of his maintenance program". He mentioned that he was "making good money"; "that everything was paid; for that he didn't owe a dime on anything". He said that "he had bought a condominium in St. George that was paid for, a new Cadillac for his wife, a jeepster wagoneer and that his home in Provo was paid for." He claimed that he was paying himself a wage of \$65,000.00 a year and also receiving \$400.00 per month rent.

He further represented that he was doing from \$700,000.00 to \$800,000.00 of sales per year. That in truth and fact, it is believed that his sales for the year 1980 were at or about \$400,000.00. Mr. Seethaler told us how much the utilities were running per month when in truth and fact the actual experience was more than double his representations.

He also represented that the third quarter state insurance funds had been paid when in truth and fact they had not been paid. In fact, subsequent to the sale, he went to the state of Utah and obtained the refund from the deposits.

With regard to the refrigeration equipment, he stated that all you needed to do was to turn on a valve on the cooler in order for the coolers to cool. In truth and fact the coils were blown out several months before June, 1981. He had stated that they were not cold at the time because he had "turned them down; that he did not need them cold."

Subsequent to the purchase of the plant the fire marshall condemned many parts of the electrical system because they would not meet the fire code.

The phone system was in such a state of disrepair that Mountain Bell had to completely overhaul the system.

With regard to the three smoke houses in the plant, Mr. Seethaler volunteered, without being asked, that they were all

working except that one had a clogged drain. That in truth and fact only one of them was working and that in order to keep the one working that it required immediate maintenance and repair. That eventually two of the smoke houses were brought into operation but both of them could not be run at the same time because the boiler in the plant was not of sufficient capacity to run both smoke houses at the same time.

He further represented that of the three electric hoists two of them were in working order and that the third had all new parts and that all that needed to be done was to be assembled. That in truth and fact there were not sufficient parts to assemble the third hoist and that the other hoists required continued maintenance.

Prior to the purchase of the plant, the package room had been "red tagged"; that means that the inspection people had actually placed red tags on them and the equipment could not be used. Mr. Seethaler stated that this was done just because they needed a little cleaning. When in truth and fact, they needed substantial outlays of capital to construct and install "drip pans" and also "suction fans" to take the steam out of the room; all at great expense and inconvenience. Mr. Seethaler had been told by the meat inspectors, prior to his representations to your affiant and prior to the purchase,

that suction fans and drip pans would be required.

Your affiant, in retrospect, now realizes why Mr. Seethaler would excuse himself from riding on the elevator and suggested to your affiant and his sons "let's take the stairs, it's easier". Subsequent to the purchase, the use of the elevator revealed that the controls were defective and that the elevator never did work properly and proper repair would be at great expense. His representations at the sale were that the elevator had a value of \$25,000.00. That in truth and fact the elevator had little or no value because of the fact that it was not repairable. Your affiant was advised by the salesman of the Otis Elevator Company that it was not repairable and that a new one should be purchased.

Mr. Seethaler, when asked about the roof, said that it was "fine, no problem". That in truth and fact that it leaked and that it would take from five to eight thousand dollars to repair it.

Mr. Seethaler had mentioned that you had to have a "water softner" in order to keep the lime out of the pipes and that it was working but you had to keep salt in it in order for it to work properly. That in truth and fact that it was in a state of disrepair and had to be repaired.

In the sale there was included four Dodge trucks.

Prior to the sale, Mr. Seethaler represented that these trucks were refrigerated. That in truth and fact only two of them were refrigerated. Of the two that had refrigeration, one of them was not working and had to be repaired.

In the purchase Mr. Seethaler explained how the "alley hoist" worked. He neglected to state that it had leaky seals and that it was really not fit for the purpose for which it was used.

All of the scales were rejected by the Department of Weights and Measures and some of them had to be reconditioned in order to pass inspection; others were condemned and were never repaired.

With regards to the patty machine, Acupat #1 and #2, he stated that "one of the machines needed a little repair". That in truth and fact an estimate from a repair company indicated that it would take \$8,000.00 to bring it up to working conditions. A new one had to be purchased at a cost of about \$36,000.00.

With regards to the "meat chopper" he explained how it was working and that it was in working order and in good condition and it would chop four hundred pounds at a batch. That in truth and fact you couldn't put two hundred pounds in it and it had bad bearings, bad belts and electrical problems.

He explained that the "mince master" emulsified the meat and said that it was working. That in truth and fact that it had bad bushings, knives and gaskets.

Mr. Seethaler showed how the "ham blender" worked. The demonstration was made without any ham being in the blender. That subsequent to the purchase, when ham was placed in the blender, it was determined that the bearings were worn out and that the machine dripped grease. That it had to be repaired at great expense.

With regard to the lunch meat slicer, he specifically showed us how it worked and specifically stated that it was working and that you could set it for any adjustment that you needed for the amount of slices required. That in truth and fact it needed all new electrical relays, current boards and the motor had to be rewound at great expense.

Mr. Seethaler showed your affiant what is known as a "weiner peeler" and how it worked. Subsequent to the sale, it was determined that prior to the sale it was in a state of disrepair; that it had to have a new motor, vacuum, bearings and wheels.

Mr. Seethaler, in demonstrating the "packaging machine" was asked what it would take to produce packages that would hang up on the walls for display. He stated that "all it would

take would be to buy a new die". ^{it could not be so converted;} That in truth and fact the machine was obsolete; we could not get parts for it; the machine was for packaging cheese and not meats and would not really seal the packages; a new machine had to be purchased at the expense of at or about \$51,000.00.

In showing the boiler to your affiant, Mr. Seethaler stated "that's a good old boiler; better than the new ones." That in truth and fact the boiler had to be completely renovated, delimed and new lines replaced. The hot water tanks and pumps had to be redone and many of the steam lines had to be replaced. The boiler was not of sufficient capacity to run all three smoke houses.

With regards to the "tipper ties" it was subsequently determined that they were "leased"; that they were not owned by Mr. Seethaler as represented. Your affiant subsequently determined that the co2 tank with the packaging machine was also "leased" and was not owned by Mr. Seethaler.

Mr. Seethaler also showed your affiant the "refrigeration system, and how it worked and answered questions about its use. Subsequent to the purchase, it was determined that the refrigerations system had various problems from compressor overhauls to leaking valves and lines and oil getting into the system which prevented the coolant from working effectively and

thus prevented the whole system from operating.

In showing your affiant the "ice maker" he explained how it worked and bragged about how much ice it put out. That in truth and fact it had to be covered with metal in order to pass inspection and it also had to have repairs in order to maintain in operating condition. Finally, it had to be junked.

Subsequent to taking over the operation, your affiant determined that the "wall foamer" had a broken pump and hose and had to be repaired. That the "butcher bandsaw" had to have new bearings, wheels, pulleys belts and it finally had to be overhauled. That the "staple machines" were burned out and had to be replaced. That the "hand slicer" had electrical wiring problems. That the "rear dock" had to be rewelded and would not lift up properly. That there had to be miscellaneous repairs to tubs, carts, pallot jack and other miscellaneous repairs. That the "smoke maker" motor fan was burned up and the flues were all plugged and holes in them and would not work properly. That the "ham press" had a broken airvalve. The floors in the building had to be refinished and covered to pass inspection. The cooler walls needed covering to pass inspection.

That subsequent to the sale, Mr. Seethaler was caught taking the back metal step from the building and placing it

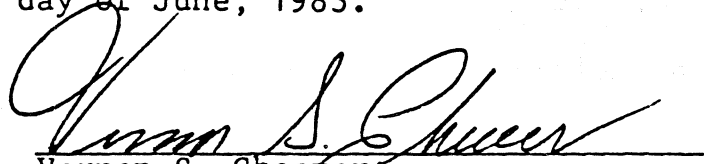
into his car. He said it belonged to a piece of equipment he had at home.

That subsequent to the negotiations, and prior to the sale, Mr. Seethaler removed several items of property that were represented to have been sold with the plant, including but not limited to a typewriter valued at or about a thousand dollars; a label addresser valued at or about five hundred dollars; a filing cabinet valued at or about eighty dollars; and a vise valued at or about thirty dollars; and several stainless steel buckets valued at or about thirty dollars a piece. Your affiant was told by Seethaler's employees that they had taken six truck loads of miscellaneous items up to Mr. Seethaler's garage. Prior to the sale it was represented that items in the building were part of the purchase except for Mr. Seethaler's personal tools and personal effects.

Your affiant states that Joseph A. Seethaler made many representations that were false and fraudulent. That your affiant relied upon the representations, warranties, of the Defendant Joseph Seethaler. That your affiant would not have entered into guarantee \$25,000.00 of the purchase price but for the representations of the Defendant, Joseph A. Seethaler and if your affiant would have been informed of the true facts as they existed your affiant never would have guaranteed any pay-

ment individually for the purchase of the plant. That the plant would not have been purchased. By reason of the conduct of the Defendants Utah County Packing, without regard to down time, I estimate spent out or about \$125,000.00 for parts and labor to try and put the building and machinery in operating condition. Utah County Packing has filed bankruptcy.

DATED this 25 day of June, 1983.


Vernon S. Cheever

SUBSCRIBED AND SWORN to before me this 25 day of June, 1983.


NOTARY PUBLIC

Residing at: Provo, Utah

My Commission Expires:

9/22/85

Exhibit 17
5 Pages

(AVC in brackets after each separate paragraph, refers to Affidavit of VERNON S. CHEEVER, page of this Brief and referred to herein as EXHIBIT 16. All page references are to Exhibit D of the Affidavit; Exhibit D starts with page 1 on page of this Brief.)

VERBATIM REFERENCES IN THIRD AMENDED COMPLAINT

- (a) The Defendant, JOSEPH A. SEETHALER, represented that the plant and all equipment therein was "in top working condition"; that in truth and fact, it was not for the reasons hereafter cited. (AVC last paragraph page 1.)
- (b) Said Defendant represented that "everything was new or better than new because of the maintenance program"; that in truth in fact, he had no maintenance program other than to keep it running; there was no regular lubrication program; lubrication was not performed daily. (AVC, last paragraph)
- (c) The said Defendant represented that in order to operate the beef cooler that all was needed was to turn on a valve and that the the coolers were all in good operating condition, and that the reason that the said coolers were not cold at the time of that conversation was because the Defendant had turned them down, that he did not need them cold; that in truth in fact, the system was so worn out that the coil was ruptured and would not work and had to be replaced. (AVC, page 2, third to last complete paragraph.)
- (d) Said Defendant represented that the electrical system in the plant was in good operating condition; that in truth in fact; before a business license was issued to the Plaintiffs at or about \$8,000.00 was spent as condition to get a business license for electrical repairs.

(AVC, page 2, second to last complete paragraph.)

- (e) Said Defendant represented that telephone system was in good operating condition; that in truth in fact, a whole new phone system had to be installed; that prior to the replacement, it was always being repaired. (AVC, page 2, last complete paragraph.)
- (f) Said Defendant represented that all of the three smoke houses in the plant were in good operating condition except for one clogged drain; in truth in fact, only one worked and coils had to be replaced together the second to work but the boiler was not sufficient capacity to run three at once. (AVC, last sentence, page 2, and continuing page 3.)
- (g) The said Defendant represented that two of the three electric hoists in the plant were in good working and operating condition and that the third hoist had all new parts and that simply was in need of assembly; that in truth in fact, they did not work and had to be immediately repaired. (AVC, first complete paragraph, page 3.)
- (h) The said Defendant represented that the reason for the red tags on the equipment in the package room was merely that the set of equipment was in need of "a little cleaning"; that in truth in fact, moisture was dripping off the ceiling and drip pans and suction fans had to be installed at great expense in order to remove the red tag placed by the meat inspectors. (AVC, last ten lines of page 3.)
- (i) The said Defendant represented that the elevator in the building was in good operable condition and had a value of \$25,000.00; that in truth in fact, was in very poor condition and continually breaking down on numerous occasions and of little value. (AVC, first complete paragraph page 4.)
- (j) The said Defendant represented that the roof on the building was in good condition and was "fine, no problem", that in truth in fact, it leaked in several places and SEETHALER had been warned by the inspectors that water was dripping down the walls of the coolers and other places and did in fact so drip. (AVC, second to

- (k) The said Defendant represented that four Dodge trucks which were included in the sale were refrigerated and in good working and operable condition; that in truth in fact, only two were refrigerated and one of the two did not work. (Avc, last sentence page 4 and complete paragraph on page 5.)
- (l) The said Defendant represented that all six of the scales in the operation were in good condition; that in truth in fact, none of them would pass inspection by the DEPARTMENT OF WEIGHTS AND MEASURES without repair at great expense; that repair was made at great expense. (AVC, second complete paragraph page 5.)
- (m) The said Defendant represented that the Patty machines were in good operating condition except that "one of the machines needed a little repair"; that in truth in fact, neither worked, and a new one had to be purchased at the expense of \$36,000.00. (AVC, second to last complete paragraph page 5.)
- (n) The said Defendant represented that the "meat chopper" was working and in good working order and in good operable condition; that in truth in fact, it needed new bearings, belts, and controls at great expense. (AVC, last complete paragraph page 5.)
- (o) The said Defendant represented that the "Mince Master" was in good operable and working condition; that in truth in fact, it required numerous repairs and great time waiting for hard to find parts. (AVC, first complete paragraph page 6.)
- (p) The said Defendant represented that the "Ham Blender" was in good working and operating condition; that in truth in fact, paddle bearings were worn out and the machine was leaking rusty water and grease. (Avc, second complete paragraph page 6.)

- (q) The said Defendant represented that the lunch meat slicer was in good operable and working condition and specifically represented that the said machine was working and that it could be set for any adjustment needed for the amount of slices required; that in truth in fact, immediate repairs of at or about \$500.00 was required to have a new electrical control system and other repairs. (AVC, third complete paragraph page 6.)
- (r) The said Defendant represented that the "weiner peeler" was in good operable and working condition; that in truth in fact, a new motor and vacuum and pulleys and controls had to be replaced at great expense. (AVC, fourth complete paragraph page 6.)
- (s) The said Defendant represented that the "packaging machine" was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased. (AVC last three lines, page 6 and completing paragraph on page 7.)
- (t) The said Defendant represented that the "boiler" was in good operating and working condition and further represented, "that's a good old boiler' better than the new one"; that in truth in fact, a year prior to sale, the controls did not work and six months before it almost blew up. In order to keep it working, it had to be delined and new lines replaced. It was not of sufficient capacity to run the three "smoke houses" at once. (AVC, first complete paragraph page 7.)
- (u) Said Defendant represented that he owned the "tipper ties" and that the "tipper ties" were included in the sale and further that the CO2 tank was owned by the said Defendant and included in the sale; that in truth in fact, Defendant did not own them. (AVC, last complete paragraph page 7.)
- (v) Said Defendant represented that the "refrigeration system" was in good operable and working condition; that in truth in fact, the condensers were worn out;

and continually leaked ammonia. Many other replacements were made. (AVC, last six lines page 7, and first line page 8.)

- (aa) Said Defendant represented that the "ice maker" was in good operable and working condition; that in truth in fact, it was junked after six months and after great expense and repair. (AVC, first complete paragraph, page 8.)
- (bb) The said Defendant represented that the "band saw" was in good operating and working condition; that in truth in fact, the bottom shaft and bearings were worn out and finally completely had to be overhauled. (AVC, last complete paragraph page 8.)
- (cc) The said Defendant represented that the "staple machines" were in good working and operating condition; that in truth in fact, they were worn out and had to be replaced within a few weeks. (AVC, last complete paragraph page 8.)
- (dd) The said Defendant represented that the "hand slicer" was in good working and operating condition; that in truth and fact, it was worn out and bearing, blade, and motor had to be replaced. (AVC, last complete paragraph page 8.)
- (ee) The said Defendant represented that the back metal steps, big oak desk, garage jack, and office typewriter, label addresser, a filing cabinet, a vise, several length of pipe, and several stainless steel buckets were all included in the sale agreement; that in truth in fact, defendant took them from the plant just prior to the sale. (AVC, first complete paragraph page 9.)
- (ff) The said Defendant represented that the "packaging machine was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased; that in truth in fact, it needed more than a new die; the machine was obsolete; the factory representative stated, "new parts could not be obtained"; CO2 leaked from the packages; the machine had to be replaced about 90 days from the purchase at the expense of at or

KENNETH F. CLARKE
1 East Center, Suite 303
Box H
Provo, Utah 84603
375-8891

1983 SEP 20 PM 2:47

WILLIAM F. HUISH, CLERK
MS DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 64179

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and
wife and SECURITY TITLE AND
ABSTRACT COMPANY,

Defendants.

STATE OF UTAH

ss

COUNTY OF UTAH

MARTHA CHEEVER, Upon her oath having been duly sworn
deposes and says:

That she is one of the Plaintiffs in the above entitled
action.

That BRUCE COLES, my son-in-law, approached us and told
us that MR. SEETHALER wanted us to have some personal
involvement in the purchase. We told him that we didn't have
any collateral we could give except our house. I didn't want
to put up the house as collateral. Finally I agreed with
BRUCE that we would be willing to give up to \$25,000.00
interest in our house. I understood that our liability was
going to be limited to \$25,000.00 and no more.

At the closing of the loan, I never did read Exhibit A or Exhibit B that is attached to the complaint. I have since read them and they do not reflect what we agreed.

Martha J. Cheever
MARTHA CHEEVER

SUBSCRIBED AND SWORN TO before me this 16 day of September, 1983.

Keneth M. Clarke
NOTARY PUBLIC

Residing at: Provo, Utah

My Commission Expires: 9/22/85

KENNETH F. CLARKE
1 East Center, Suite 303
Box H
Provo, Utah 84603
375-8891

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1983 SEP 20 PM 2:47

WILLIAM F. HUISH, CLERK
MS DEPUTY

Exhibit
3 Pages

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

AFFIDAVIT

vs.

Civil No. 64179

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and
wife and SECURITY TITLE AND
ABSTRACT COMPANY,

Defendants.

STATE OF UTAH

ss

COUNTY OF UTAH

BRUCE COLES, Upon his oath having been duly sworn
deposes and says:

That he is the son-in-law of VERNON CHEEVER the
Plaintiff in the above entitled action.

That during the negotiations for the purchase of the
meat packing business from MR. SEETHALER, MR. SEETHALER
insisted that both the COLES and the CHEEVERS have some kind
of "personal involvement" in this matter.

I approached MR. and MRS. CHEEVER, the Plaintiffs
herein, and told them that MR. SEETHALER wanted them to give
some kind of collateral to get them to be "personally
involved" in the purchase of the meat packing business.

The CHEEVERS told me that all that they had that was free and clear was their house. MRS. CHEEVER was not willing to put the house up for collateral. Finally, they both agreed that they would be willing to give a security in the house, but not for more than \$25,000.00. Since the COLES were going to give a security interest in a building to the extent of their equity we agreed that the SEETHALER interest would be a second position and that it would be for not more than \$22,000.00 to \$27,000.00 depending on the home value.

Thereafter, I met with MR. SEETHALER and MR. ROWLEY and presented them a plan that I had preconceived prior to my meeting with them. I had determined in my mind that the CHEEVERS residence was worth something between \$75,000.00 and \$79,000.00. Based upon this I used a .9 multiplier and determined that the value of their interest was something on the order of \$66,000.00 to \$69,000.00. So that they would be given \$22,000.00 to \$25,000.00 worth of security interest, I devised the plan whereby if they could always obtain a loan for up to \$44,000.00, as a first position, that would always give MR. SEETHALER a second position of between \$22,000.00 to \$27,000.00 security. Never at any time did I ever discuss with MR. SEETHALER or MR. ROWLEY, that either the COLES or the CHEEVERS were going to be personally liable for the full amount owing to MR. SEETHALER. The discussions were always about just giving the equity that existed in our office building and \$22,000.00 to \$27,000.00 Second Position on the CHEEVER home, depending upon the value of the home if there

was a default. The CHEEVERS were only to be limited in their liability in the amount of \$22,000.00 to \$27,000.00 depending on the home value and no more; he was always to have the right to get a loan in First Position for \$44,000.00 at anytime from anyone.

Exhibit A, attached hereto was not correct. VERNON S. CHEEVER was to be individually liable only for the amount of equity in his home. Above the \$44,000.00 and no more.

Exhibit B, attached hereto was not correct. It did not reflect the intentions and agreements of the parties. VERNON S. CHEEVER was only to be individually liable for equity in his home. Above the \$44,000.00 and no more.

At the time of the closing I did not read Exhibit A or Exhibit B. I have since read them and neither one of them reflect the agreement of the parties. MR. SEETHALER was present when these matters were discussed with him by me.


BRUCE COLES

SUBSCRIBED AND SWORN TO before me this 16 day of September, 1983.


NOTARY PUBLIC

Residing at: Provo, Utah

My Commission Expires: 9/22/85

KENNETH F. CLARKE
One East Center, Suite 300
P.O. Box H
Provo, Utah 84603

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1983 DEC 28 AM 11:58

WILLIAM F. HAYSH, CLERK
DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and
MARTHA T. CHEEVER, husband
and wife,

Plaintiff,

vs.

JOSEPH A. SEETHALER and
MYRA K. SEETHALER, husband
and wife, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendant.

SUPPLEMENTAL
AFFIDAVIT OF VERNON S.
CHEEVER IN OPPOSITION
OF MOTION TO STRIKE
Civil No. 64,179

STATE OF UTAH

:ss

COUNTY OF UTAH

VERNON S. CHEEVER, on his oath having been duly sworn deposes
and says:

That he is one of the Plaintiffs in the above-entitled action.
That he is the same VERNON S. CHEEVER that executed the affidavit
filed herein dated the 22nd day of June, 1983.

That I have read the affidavit of June 22, 1983 on the 26th day
of December, 1983.

That I have "personal knowledge" of the facts contained in this
affidavit. That I am over 21 years of age and of sound mind, have no
mental defect and am "competent to testify to the matter stated" herein.

That in reading the affidavit of June 22, 1983, where I stated

my "best recollection", I mean that to be that notwithstanding that statement, the items that followed would be my testimony at the time of trial, I do not mean by stating "best recollection" that I do not have "personal knowledge" of the matter stated therein. I do "affirmatively state" that all of the matters recited in the Affidavit of June 22nd, 1983, are by "affirmative statement" and are by reason of my own "personal knowledge" except the following:

On Page 5 of the Affidavit, there is the paragraph "all the scales were rejected by the Department of Weights and Measures and some of them had to be reconditioned in order to pass inspection; others were condemned and never repaired." I do not know when the scales were "rejected" but I do know that they had stamps on them that showed that they were rejected.

That on Page 9 of the affidavit of June 22nd, 1983, the only "complete paragraph" sets forth information that I did not have "personal knowledge concerning" but determined the truth of it from other persons.

Besides the exceptions that I have heretofore stated, the matters of this affidavit and the affidavit of June 22nd, 1983, are made upon "personal knowledge" and I do "affirmatively" state that the statements that I have made in this affidavit and the affidavit of June 22nd, 1983 are true.

That I have read the DEPOSITION OF JOSEPH A. SEETHALER filed herein and makes the following statements under oath concerning some of the portions of his testimony set forth therein.

On p. 10, l. 15-18, Mr. Seethaler was asked to the question

whether or not he had made the statement, "everything was new or better than new because of your maintenance program". His answer was, l. 19, "I did not make that statement". He is not telling the truth, I heard him make that statement.

On p. 11, l. 3-4, he was asked the question, "and generally during the last year that you operated the plant was the equipment generally in good working order?". His answer, l. 5, was "yes". The statement is not true, immediately when we took over possession of the equipment, we found that there were many, many items that were not in good working condition as previously set forth in my affidavit and in the Complaint filed herein.

On p. 16, l. 21-23, he was asked the question, "did you specifically state that all you needed to do was turn on a valve on a cooler in order to make the coolers to cool?" His answer, l. 24, was, "No." That is not a true statement, I was present when I heard him state, "that all you needed to do was turn on a valve on the cooler in order for the coolers to cool." In truth in fact, the coils were blown out several months before June, 1981. He had stated that they were not cold at the time because he had "turned them down; that he did not need them cold."

On p. 13, l. 1-3, he was asked the question, "did you make a characterization to the Cheevers or the Coles' that you were paying yourself a wage of \$65,000.00 a year?" His answer, l. 4 was, "I did not." On p. 13, l. 7-8, he was asked the question, "did you make a characterization that you were also receiving \$400.00 a month rent from the corporation?" His answer, l. 9, was "I did not make that statement." Both of his answers are not true. He personally stated to me that he claimed that he was paying himself a wage

of \$65,000.00 a year and also receiving \$400.00 per month for rent.

On p. 21, l. 2-3, he was asked the question, "60 days prior to the sale, had you had all three (smoke houses) of them in operation? " His answer, l. 4-5, was "I had all three of them in operation two days prior to the sale." The answer is not true, the day after the sale, when we took possession, I personally observed that one of the smoke houses was not working and that the condition was such that it was dismantled to the point that it would have been impossible for it to have been operated the week before the sale. Subsequent to the sale, we determined that it was impossible to operate all three at the same time, because there was not sufficient steam generated from the boiler to operate all of them at the same time. My testimony about operating them all three at once is in direct contradiction to a question and answer wherein he was asked, p. 21, l. 20-23, "is it your statement then that there were times within two days or at least within a month before that you would have all three of them in operation at once with meat in all three at once processing?" His answer, l. 24, was "yes." The statement is not true, there was not enough steam pressure in the plant to operation them all at once. See also his question p. 22 l. 20-22 in which he was asked, "did you ever experience any difficulty in supplying enough heat to all three smoke houses at once?" His answer was, l. 23, "No."

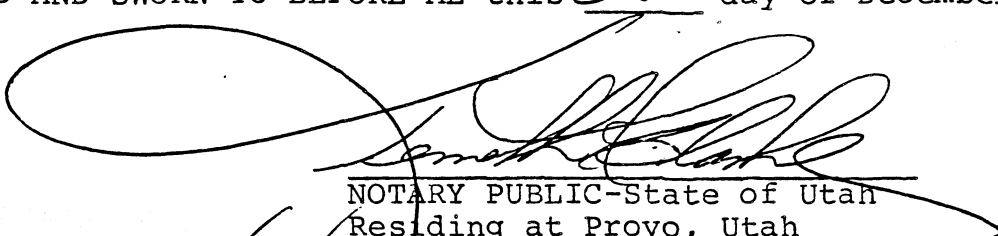
On p. 50, l. 20-22, he was asked the question, "during the demonstrations of the plant, the tours, did you make a representation

that this is a good old boiler?" His answer, l. 23, was "I don't think I would make that statement." Then he was asked the question, l. 24-25, "that it's better than the new ones, do you remember that kind of a statement?" His answer, p. 51, l. 1, was "I didn't make that statement." He is not telling the truth, I personally was present when he made the statement to me. I relied upon this statement together with all of the other statements that have heretofore been cited that he made, which I have alleged are false.

There are numerous other statements which he has made in the deposition which I believe are not true; I have only highlighted some of the ones that I believe are more pertinent.


VERNON S. CHEEVER


SUBSCRIBED AND SWORN TO BEFORE ME this 28 day of December, 1983.


NOTARY PUBLIC-State of Utah
Residing at Provo, Utah

My commission expires: 9/22/85.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 28 day of December, 1983, to JACKSON HOWARD, 120 E. 300 N., P.O. Box 778, Provo, Utah 84603.


KENNETH F. CLARKE

KENNETH F. CLARKE
Attorney for Plaintiffs
One East Center, Suite 300
P.O. Box H
Provo, Utah 84603
Telephone 375-2911

EXHIBIT 1 & 1
8 Pages

FILED
IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1984 JAN 30 AM 8:34

WILLIAM F. HUGHES, CLERK
DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,

Plaintiffs,

vs.

JOSEPH A. SEETHALER and MYRA K.
SEETHALER, husband and wife
and SECURITY TITLE AND ABSTRACT
COMPANY,

Defendants.

AFFIDAVIT IN SUPPORT OF
MOTION FOR ORDER TO SHOW
CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT
ISSUE; TEMPORARY RESTRAIN-
ING ORDER

Civil No. 64179

STATE OF UTAH

:ss

COUNTY OF UTAH

ARLIN DAVIS, upon his oath, having been duly sworn, deposes and says:

That for several months prior to June 10, 1981, I was employed by JOSEPH
A. SEETHALER. That subsequent to the purchase of the Meat Packing Plant on
June 10, 1981, I was employed by UTAH COUNTY PACKING.

That prior to the purchase, I recall VERNON CHEEVER and his sons being
shown through the plant by MR. SEETHALER. I was not within range of hearing
their conversations.

I have personally read the DEPOSITION OF JOSEPH A. SEETHALER, taken on
August 10, 1983, at the hour of 9:50 a.m., at the Law Office of KENNETH F.
CLARKE, KNIGHT BUILDING, Provo, Utah. Under oath, I now refer to some of those
portions of the depositions and make responses thereto.

In response to the statement that the machinery in the Plant was "everything was new or better than new because of the maintenance program" I would respond that 95% of the machinery was junk. It was out-dated. One of my main responsibilities at the Plant several months prior to the June 10, 1981 sale was to be the lead maintenance man in keeping the equipment in as good of working condition as possible, in fact, I was the only person in charge of that responsibility.

With regards to the maintenance program of the plant, there really wasn't any general program of daily lubrication or systematic procedure in keeping the machinery in good working order, the general program was that if it broke, you fixed it. That was the only maintenance we had. We just kept everything greased and oiled and hoped it would continue to work. There was no scheduled program kept on the different machineries, nor was there any systematic procedure for checking the machinery; if it broke, we fixed it. On p. 10, l. 23, MR. SEETHALER was asked the question, "Now what do you characterize by an 'excellent maintenance program' then? What do you mean by that?" His answer, p. 10, l. 25, "That means the equipment was serviced daily, lubricated, cleaned properly, oiled for use and kept in good working order." It was true the machinery was cleaned, but it was not lubricated all of the time, no it wasn't. It was squirted down with oil to keep it from rusting, other than that, that was about it. The equipment was not serviced daily.

On p. 11 of the deposition l. 3-4, he was asked the question, "And generally during the last year that you operated the plant was the equipment generally in good working order?" His answer was, l. 5, "Yes." My response to that question would be that it definitely was not in good working order. Much of the equipment was always breaking down, it was so old. Some of the items of the equipment that kept breaking down were the Bacon press, Patti machine, packaging machine, on p. 20 of the deposition, l. 24, with regards to the Smoke Houses he was asked the

question, "During the year prior to the sale did you use all three of them?" His response was, p. 21, l. 1, "Yes." Then on p. 21, l. 2-3, he was asked the question, "Sixty days prior to the sale had you had all three of them in operation?" His answer, l. 4-5, was "I had all three of them in operation two days prior to the sale." Question, l. 6-7, "Were there times that all three of them would operate at the same time?" His answers, l.-8-9, "Two days prior to the sale all three of them were operating." Question, l. 10, "At the same time?" His answer, l. 11, "At the same." The coils in the Smoke Houses were long since worn out. We were always having to take them down and have repairs on the coils. The smoke generator that was in there never did work to good. It was always clogging up. The control valves were always giving trouble. He never would buy a new gasket, I had to make my own. The Smoke Houses were operated by steam, the lines were so clogged with lime that it was impossible to run all three of the Smoke Houses at the same time. The lines just couldn't handle enough steam in order to run all of the three smoke houses at the same time. You could not put the pressure to the smoke houses in order to make them operate. You could never operate more than two smoke houses at the same time because of the lack of steam pressure problem resulting from the clogged lines.

On p. 21, l. 20-23, he was asked the question, "Processing? Okay. Is it your statement then that there were times within two days or at least within a month before that you would have all three of them in operation at once with meat in all three at once processing?" His answer, l. 24, "Yes." is not true for the reasons that I have heretofore stated.

Also, on p. 22, l. 10, he was asked the question, "Did you ever experience any difficulty in producing enough smoke to run all three of them at once?" His answer, l. 12, "No. actually there were some of them that weren't equipped for the smoke operation. You don't use smoke in all of the operation." His statement is not true, we were always having trouble with the smoke generator and there

were many many times that we couldn't get enough smoke generated in order to run the smoke houses.

On p. 23, MR. SEETHALER was asked, l. 4, "What was your experience with the boiler in the last year? Your heat generating facility?" ANSWER l. 6, "It was adequate." QUESTION l. 7, "Do you recall of any severe breakdowns?" ANSWER l. 8, "not within the last year, no." The boilers didn't work good at all, they were very inadequate. About six months before June, 1981, the shut down on the boiler had stuck. It ran out of water. I had told MR. SEETHALER about this matter and always reported to him the many difficulties that we were always having with all of the equipment. He even had a guy come out and re-turn the tubes in the boiler after the incident in early 1981. This was also caused by the fact that the boiler had shut down and you could even look in the boiler and see how the belly had bowed because it got so hot. If the makeup valve would have come on, that is if the water would have been introduced into the boiler, the boiler would have blown up. On p. 23, l. 12, MR. SEETHALER said, "Yes, the heating system was in good order. It was adequate." My testimony is that it was not in good working order and it was not adequate.

On p. 32, in regards to the packaging room, he was asked the question, l. 25, "Had you had difficulty with condensation dripping off the ceiling?" His answer, p. 33, l. 2, was "No." That is not a true answer; we had trouble with condensation dripping off the ceiling all of the time. The condensation did not come from the insulated pipe, it came off of the metal ceiling. The condensation was coming from the weiner peeler and was going up to the cold steel ceiling and condensing on the ceiling and dripping off of the ceiling; it was not coming from the insulated pipes.

On p. 34, l. 13-14, he was asked the question, "Do you ever recall any inspectors telling you that you needed to install suction fans?" His answer, l. 25, was "No." That is not a true statement, I personally heard the inspectors

tell him to install suction fans. The inspectors had shown us how the moisture was going to the ceiling and how a fungus was developing there and how the moisture would drip back down. I know MR. SEETHALER had been told about it because they took him out and showed it to him and explained that the water was coming off of the ceiling, and he would say, "We'll get to it" then afterwards, he would say, "Don't worry about it" and then he just walked away. We would then dry it off and try to get it dry by wiping it by rags just so that we could get the red tags off and then go back to work.

With regards to the bacon press, he was asked the question on p. 41, l. 24-25, "The year prior to the sale did you have any difficulty in its normal, everyday operation?" His answer, p. 42, l. 5, "Nothing unusual, no." QUESTION, l. 6, "It was in good working order?" "It was in working order the day I left, yes." My testimony is that the press never was in good working order for the last year prior to the purchase of the plant.

On p. 45, l. 23-25, He was asked the question, ".....My question now is do you recall of employees making complaints to you about any particular pieces of equipment during the last year?" His answer, p. 46, l. 3, "Nothing specific. I am sure that if employees found something that was malfunctioning I was aware of it and it was maintained. But nothing specific." My testimony is that every time he would come in, we were talking about something breaking down and what are we going to do about this piece of machinery or that piece of machinery. Some of the specific complaints that I made to him were as follows:

1. The bacon press, it was always giving us trouble, we tried to find out if he was going to throw it out and buy a new one or just keep repairing it. I probably complained to him four or five times about the bacon press a year prior to the sale.
2. The packaging machine. I probably told him 15 or 20 times of difficulties we were having a year prior to the sale.
3. The patti machine. Again, I probably told him 15 or 20 times during the year prior to the sale about problems on the patti machine.
4. The band saw. I told him that the shaft on the bottom was bad. I told

him that we were having to put bearings in it about every one or two months.

5. Smoke houses. With regards to the smoke houses, I can't even give a number how many times we had problems with the smoke houses during the past year; we were always having troubles with them. I told him at least 100 times during the past year of problems we had with the smoke houses.

I notice that on p. 47, MR. SEETHALER was asked the question, l. 2, "Had any employees in your memory during the last year made any complaints about this particular machine?" His answer was, l. 4, "No." The statement is not true, I had made complaints to him about the ham blender machine. I had made complaints to him during the last year about four or five times. I had pointed out that the paddles had the bearings gone in them, and it was leaking rusty water down into the machine itself.

I notice also that on l. 5 he was asked the question, "At the time of the sale did you know of any defective parts in it?" His answer was, l. 7, "None that I knew of." The statement is not true, he told us to tie towels around the shafts at the top, to catch the rusty water coming out of the massager.

On p. 47, l. 16, he was asked the question about the meat slicers, "Any that had had any complaints by employees to you about?" His answer, l. 18, was "No." The statement is not true. I told him that the lunch meat slicer had a bearing bracket bearing in the back end of it which was broke. He told me just to put a washer on it and tighten up the bolt so that it wouldn't move.

On p. 47, l. 21, concerning the meat slicer he was asked the question, "Were they in good working order at the time of the sale?" His answer, l. 23, was "Yes." The statement is not true, it was not in good working order at the time of the sale. The counter didn't work right, the slicer wouldn't slice the lunch meat properly.

On p. 49, with regards to the packaging machine, he was asked the question, l. 16, "During the year prior to the sale had any employees made any complaints

about this packaging machine?" His answer, l. 18, "None that I know of." This statement is not true, the feed on it wouldn't work right, the cellophane would not stay on the guides properly. The heating elements that sealed the seal weren't working properly. They were always breaking. Contact points on them were wore out. The CO-2 function wasn't working properly and most of the controls on it didn't work. The feed chains were not working properly. I had told him all about these things.

On p. 51, l. 7, he was asked the questions, "Had you had any difficulty with the boilers?" His answer, l. 8, "At what period of time?" QUESTION, l. 9, "A year prior to the sale had you had any major shutdowns on the boiler?" His answer, l. 11, "No." This statement is not true. A year prior to the sale the controls on the boiler were not in working order. The starter that starts the fire was not in good working order; it always caused problems. I told him of the problems.

On p. 54, l. 6, MR. SEETHALER was asked the question, "A month prior to the sale did you remove any items from the plant other than your personal tools?" His answer, l. 8, "No." QUESTION, l. 9, "Am I correct in assuming that--would that be two months or three months before the sale that you did not remove any significant items from the plant and that anything that they viewed in their walk-throughs that you showed them through those items stayed in the plant and were part of the sale?" His answer, l. 15, "That is right. To the best of my knowledge. The equipment list as so stated in the lease back agreement was all at the plant the day they took over." The statement is not true, I personally saw the following items removed:

1. Full box of tools.
2. A big garage jack.
3. Several lengths of pipe, both black and galvanized, that were in 20 foot lengths; probably he took 15 or 20 lengths.
4. Big oak desk; I personally helped haul out this desk.
5. A big fire proof file cabinet.
6. A lot of laundry soap.
7. A lot of toilet paper.

8. An IBM typewriter.
9. An address machine.
10. A work bench vise.
11. Four or five stainless steel buckets, probably two and a half gallon size.

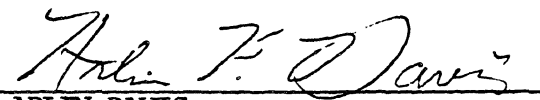
I personally helped MR. JOSEPH A. SEETHALER for approximately three days, haul stuff out of the plant. We used the large dodge vans to do the hauling. The work on two of the days was intermittent. He gave me two air operated grease pumps and a couple of boxes of soap and a couple of rolls of string. One of the days was a Saturday and I worked most all of the day just hauling out stuff that he told me to haul out. All of the items that I saw him take and that I helped him remove were done within a month prior to the time that UTAH COUNTY PACKING took over.

The items that I have mentioned in my testimony heretofore, have referred to items that are contained in the first 54 pages of the deposition. I have not read past the 54th page of the deposition and do not make any statements with reference to any testimony after page 54.

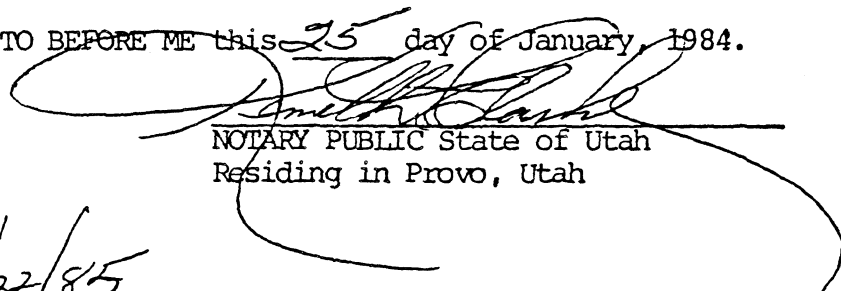
The statements that I have made here have only been referenced to the deposition and are not comprehensive of all of the problems and defects that occurred a year prior to the sale; I have only responded to some of the items in the deposition and to some of the questions that have been asked of me by MR. CLARKE.

This affidavit is made upon personal knowledge.

DATED this 25 day of January, 1983.


ARLIN DAVIS

SUBSCRIBED AND SWORN TO BEFORE ME this 25 day of January, 1984.


NOTARY PUBLIC State of Utah
Residing in Provo, Utah

My commission Expires:

9/22/85
97