

2001

# Zions First National Bank v. M-S Commodities, INC. : Reply Brief

Utah Supreme Court

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Jay A. Meservy; Verhaaren and Meservy; Jeffrey N. Clayton; Moyle and Draper; Frank N. Karras; Ronald J. Ockey; Jones, Waldo, Holbrook and McDonough; Attorneys for Appellant.

J. Thomas Greene, Gifford W. Price; Callister, Greene and Nebeker; Attorneys for Plaintiff.

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IN THE  
SUPREME COURT

DEC 17 1975

OF THE BINGHAM YOUNG UNIVERSITY  
STATE OF UTAH Reuben Clark Law School

ZIONS FIRST NATIONAL BANK,  
a National Association,

*Plaintiff and Respondent,*

vs.

M-S COMMODITIES, INC.; M-S COMMODITIES  
OF UTAH, INC.; PRISCILLA SECREST;  
MAURIE SCHNEIDER; J. MORONI STOOFF;  
EDWARD DALLIN BAGLEY; DAL-RON  
ENTERPRISES, a corporation,

*Defendants and Respondents,*

Case No.  
13669

ZIONS FIRST NATIONAL BANK,  
a National Association,

*Third Party Plaintiff and Respondent,*

vs.

CLARK TANK LINES COMPANY,  
a corporation,

*Third Party Defendant and Appellant.*

APPELLANT'S REPLY BRIEF

Appeal from Portions of a Judgment in favor of Plaintiff and  
Third Party Plaintiff-Respondent and Defendant-Respondent,  
M-S Commodities, Inc. by the District Court of  
Salt Lake County, Utah  
Honorable Bryant H. Croft, Judge

J. THOMAS GREENE and  
GIFFORD W. PRICE, of  
Callister, Greene & Nebeker  
800 Kennecott Building  
Salt Lake City, Utah 84111

*Attorneys for Plaintiff and*

*Third Party Plaintiff-Respondent*

JAY A. MESERVY, of Herbaaron & Meservy  
466 East 5th South, Salt Lake City, Utah 84111

*Attorneys for M-S Commodities, Inc.; M-S Commodities of Utah,  
Inc.; Maurie Schneider and Priscilla Secrest*

JEFFREY N. CLAYTON, of Moyle & Draper  
600 Deseret Plaza, Salt Lake City, Utah 84111

*Attorneys for J. Moroni Stoeff and Dal-Ron Enterprises*

FRANK N. KARRAS

321 South 600 East, Salt Lake City, Utah 84102 Reuben Clark Law School, BYU.

*Attorney for Edward Dallin Bagley* Supreme Court, Utah

RONALD J. OCKEY, of  
Jones, Waldo, Holbrook &  
McDonough  
800 Walker Bank Building  
Salt Lake City, Utah 84111  
*Attorneys for Appellant*

FILED

DEC 10 1975

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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ZIONS FIRST NATIONAL  
BANK, a National  
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Plaintiff and  
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Case No.  
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M-S COMMODITIES, INC.,  
M-S COMMODITIES OF UTAH  
INC., PRISCILLA SECREST,  
MAURIE SCHNEIDER, J.  
MORONI STOOF, EDWARD  
DALLIN BAGLEY, DAL-RON  
ENTERPRISES, a corporation,

Defendants and  
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ZIONS FIRST NATIONAL  
BANK, a National Asso-  
ciation,

Third Party Plaintiff  
and Respondent,

vs.

CLARK TANK LINES COMPANY,  
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## I. RESPONDENT'S STATEMENT OF FACTS

The Statement of Facts set forth in Respondent's Brief does not add anything to the Statement of Facts in Appellant's Brief which is material to this appeal. However, Respondent has included certain facts which are wholly immaterial. None of the facts referred to in Paragraph B, pages 6-9 of its Brief are pertinent. As admitted at page 9 of Respondent's Brief, these relate only to events transpiring on or after March 16, 1971, and to the liability of M-S Commodities and Maurie Schneider to Zions on the \$38,505.08 overdraft.

## II. THE COUNTERCLAIM JUDGMENT IN FAVOR OF M-S COMMODITIES AGAINST ZIONS BANK SHOULD BE REVERSED BECAUSE THE \$25,000 WERE FUNDS BELONGING TO DAL-RON ENTERPRISES AND M-S COMMODITIES HAD NO INTEREST THEREIN, SUFFERED NO DAMAGE WITH RESPECT THERETO AND HAD NO STANDING TO MAINTAIN THE COUNTERCLAIM

In its Brief (Point II, pages 26-31), Zions argues that the Counterclaim judgment against it in favor of M-S Commodities should be sustained, asserting before this court that there is "substantial evidence"

to support such judgment. This assertion is directly contrary to the characterization of the evidence made by Zions before the court below. At the close of M-S Commodities' case-in-chief, Zions moved for judgment to dismiss the counterclaim for insufficient evidence, particularly on the grounds that M-S had failed to prove that the \$25,000 was its money and that it therefore had no standing to sue (these being precisely the same arguments made by appellant in Point I of its Opening Brief).

Mr. Greene: . . . On behalf of Zions First National Bank [we move] to dismiss the counterclaim of M-S Commodities, I believe that is the only defendant which seeks the counterclaim. We think the evidence affirmatively shows that the money in question was not M-S Commodity money. They have no right to be asserting this counterclaim, among other reasons. (R. 1264; A.141.)

Zions' motive for adopting this inconsistent

position is clearly stated in its Brief. <sup>1/</sup> It simply believes it will be easier to collect a judgment against Clark Tank Lines than from the parties (M-S Commodities, Inc., Maurie Schneider, J. Moroni Stoof and Dal-Ron Enterprises) against whom it was awarded judgments totaling over \$38,500 on its complaint in this action. This consideration apparently outweighs any embarrassment it may feel about speaking from both sides of its corporate mouth in this matter. Respondent contends that it would be "unconscionable"

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<sup>1/</sup> "Reversal of the offset judgment in favor of M-S and against Zions would only increase the net uncollectible judgment in favor of Zions against the defunct corporation M-S from the net of \$13,505.08, but such would not restore the \$25,000 which in fact was wrongfully diverted. Clark Tank Lines would thus retain the \$25,000 which became a part of the \$38,505.08 loss suffered by Zions First National Bank--which clearly would be an unequitable and unconscionable result." (Respondent's Brief, p. 37. The Court should note that Respondent refers only to the judgment awarded to it against M-S Commodities and completely ignores the judgment also awarded to it against Schneider and Stoof, neither of whom (particularly Schneider) is "defunct".)

for Appellant to keep the \$25,000 received by it in payment of a lawful debt,<sup>2/</sup> but that it is perfectly proper to have the money turned over to M-S Commodities even though, as the Trial Court found and as Respondent itself argued in the Court below, these funds never belonged to M-S but were at all times the property of Dal-Ron Enterprises, who has never and does not here seek to recover them.

In its Brief, Respondent totally ignores the Trial Court's express finding that the \$25,000 which is the subject of M-S's counterclaim belonged to Dal-Ron Enterprises. This finding was repeated at least four times by Judge Croft in the record. The Court's statements are quoted at pages 16 and 17 of Appellant's Opening Brief.

Instead, Respondent's entire discussion of this point (Respondents' Brief, pp. 26-31) attempts to show that the evidence establishes that the funds belonged to M-S Commodities, thus challenging a factual finding

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<sup>2/</sup>

Respondent admits that Appellant received the money in partial payment of a debt owed to it by Stoof. See Respondents' Brief, p. 12.



the Trial Court urged upon it by Respondent  
ring trial. Respondent's dilemma is obvious.

the evidence supports the Trial Court's finding  
at the funds belonged to Dal-Ron Enterprises, the  
dal Court committed clear error in awarding M-S  
modities judgment for "damages" it patently did not  
fer. On the other hand, if the evidence shows that  
funds belonged to M-S Commodities, as Respondent  
claims, its remedy was to assign error to the  
rt's factual finding by appealing the Counterclaim  
gment against it to this Court, which it has not  
3/  
e. To extricate itself, Respondent cleverly attacks  
Trial Court's factual finding under the guise of

---

3/  
Respondent perhaps recognized that to assign  
or to a factual finding of the Trial Court which  
pondent itself argued for during trial would be con-  
cy to the rule barring a party from claiming error  
ch it "invited" the trial judge to make or from  
ing positions on appeal inconsistent with positions  
en before the lower court. See, e.g., Ludlow v.  
Colorado Animal By-Products, Inc., 104 Utah 221, 137  
ntinued on following page.)

3/

(Continued) P. 2d 347, 354, (1943); Helman v. Patterson, 121 Utah 221, 137, P. 2d 911 (1952). The rule is summarized in 5 C.J.S. Appeal and Error §1503, pp. 867-71, as follows:

When a party relies, in the trial court, on a certain ground, or theory, of action or defense, he is bound thereby and will not be allowed, in the appellant court, to assume or adopt any position or attitude which is inconsistent therewith, or to shift, change, or abandon his theory or contentions, nor will he be heard to question the propriety or validity of his course in that behalf, nor may he enlarge his theory of recovery. The rule applies to a party who has tried his case wholly or in part on a certain theory.

This general rule is for the purpose of the orderly administration and attainment of justice; its enforcement promotes consistency of action before the courts, and prejudice need not first be shown before the courts will enforce such rule.

Appellant submits that Respondent's attack on the Trial Court's finding here, although not a direct assignment of error, is contrary to this rule.

claiming that the evidence supports its "judgment", apparently in the hope that by emphasizing the latter it can gloss over the irreconcilable inconsistency between it and the Trial Court's factual finding.

Respondent's effort to "harmonize" the Trial Court's decision by contradicting its factual finding does not square with the record. The evidence clearly supports the Trial Court's finding that the funds belonged to Dal-Ron. Respondent admits (Respondent's brief p. 27) there was at least \$9,357.50 in the Dal-Ron cash account in Chicago on the day the \$25,000 wire transfer was made (after deducting the \$9,000 margin call issued on its account that day). Assuming, arguendo, that the remainder of the \$25,000 came from M-S Commodities' funds, its loss would be only \$15,642.50, not the \$25,000 awarded to it by the Trial Court. However, there is ample evidence supporting Judge Croft's conclusion that all of the funds were Dal-Ron's. In addition to the \$18,557.50 shown by Exhibit 58-DC (R. 1238-40; 132-33, 215) to be in Dal-Ron's cash account on the morning of the transfer (March 15, 1971), it also

ld have had whatever surplus existed in its equity  
 ount. Respondent's assertion that "there is no  
 dence that Dal-Ron had anything in an equity account"  
 ief p. 26) misses the point. The record is simply  
 ent as to the amount of such balance. If there was  
 egative balance it was M-S's burden to prove it,  
 ch it failed to do. As stated in Appellant's  
 ing Brief (p. 21):

In the absence of such proof, and in  
 view of the Trial Court's express finding  
 that the \$25,000 were Dal-Ron's funds, this  
 Court is entitled. . .to presume that  
 Dal-Ron's equity and cash accounts at  
 least equalled \$25,000 on that date.

hermore, the fact that there was a \$9,000 margin  
 on the Dal-Ron account on March 15, 1971, does not  
 , as Respondent suggests, that its equity position  
 ts commodity contracts was zero or negative on  
 day. A margin call is issued when the customers  
 unt falls below the Exchange's margin requirements,  
 though the customer may have substantial equity  
 is commodity contracts. In addition, Stoof testi-  
 that on March 15, 1971, M-S owed \$20,000 for

commissions previously earned by him on commodities contract sales. (R. 1037; A.77.) Under the arrangement between M-S and Dal-Ron, commissions earned by Stoof and Mr. Bagley were payable by M-S to Dal-Ron. (R.1037; 47) Thus, there is ample evidence supporting Judge Stoof's finding that the \$25,000 belonged to Dal-Ron.

Respondent's argument that neither Stoof nor Schneider "intended for there to be a net loss of \$25,000 from the Dal-Ron account" as a result of the \$25,000 wire transfer (Respondent's Brief p. 27-31) is completely immaterial. Presumably, if the transaction had gone as the parties intended, the \$34,725.50 Dal-Ron check deposited into its Segregated Fund Account at Zions would have cleared its payor bank and the overdraft on the Segregated Fund Account would have been only \$13,505.08 instead of the \$38,585.08 recovered by Zions in this action. In its Brief (p. 28), Respondent states:

Therefore, had the \$34,725.50 deposit been good, the Dal-Ron account would not have had a reduction of \$25,000.

his is true. And Zions would have sued for an over-raft of only \$13,505.08, M-S would have claimed no offset and Clark Tank Lines would not have been made a third Party Defendant. But the deposit was not good. Dal-Ron's (not M-S Commodities') account did have a \$25,000 reduction and this action followed. The question is not whether the parties "intended" for there to be a "net loss" of \$25,000 from the Dal-Ron account but whether M-S Commodities, the party claiming the offset, suffered any loss by reason of the transfer. The Trial Court's finding that the funds belonged to Dal-Ron <sup>4/</sup> clearly means that it did not.

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4/

Judge Croft's comments quoted at pp. 28-29 Respondent's Brief show clearly that he considered the "intent" of the parties with respect to the transaction. Notwithstanding, he expressly found that the funds "belonged to Dal-Ron Enterprises, Inc." The only significance of his remarks concerning the parties' intention was to support his companion finding that the funds "did not belong to J. Moroni Stoof, personally. . . ."

Respondent next asserts that the "net reduction" in the Dal-Ron account caused by the wire transfer damaged M-S Commodities. There is not a breath of competent evidence to support this claim. Respondent refers only to an Answer to Interrogatories filed by M-S Commodities and read into the record during the first day of trial (R. 862) over Appellant's objection R. 863-64, 1029-30)<sup>5/</sup> wherein it is stated that Dal-Ron "did not have sufficient funds to cover margin calls and the \$25,000 which Mr. Stoof was requesting." From this one must assume, at the very least, that there were some funds in Dal-Ron's accounts and M-S, who had the burden of proving its damage, failed to introduce any evidence as to the amount of the inefficiency claimed in the Interrogatory. Nor did any other party offer any such evidence. On the other hand, there is ample evidence as noted above, (all

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<sup>5/</sup>

Appellant objected to this evidence on the ground that it was hearsay. Maurie Schneider, who signed the Answer to Interrogatories on behalf of M-S Commodities, did not attend the trial and could not be cross-examined on the statements made therein.

which, it should be noted, came from the testimony of M-S's own agents, Priscilla Secrest, Stoof and (they) from which the Trial Court could reasonably conclude that M-S was holding sufficient funds of Dal-Ron to cover the \$25,000.

III. THE COUNTERCLAIM JUDGMENT  
IN FAVOR OF M-S COMMODITIES AGAINST  
ZIONS SHOULD BE REVERSED BECAUSE ZIONS  
DID NOTHING FOR WHICH IT IS LEGALLY LIABLE  
IN CONNECTION WITH THE \$25,000 WIRE TRANSFER

Respondent continues its defense of the Trial Court's judgment against it on M-S's counterclaim at pages 31-37 of its Brief where it argues variously that: (1) it was negligent in disbursing the \$25,000 to Tank Lines, (2) Appellant's agents induced it to be negligent and (3) Appellant's reliance on the Uniform Fiduciary Act is misplaced.

Appellant agrees with Respondent's statements (Respondent's Brief pp. 32-33) that its "negligence" was not found by the Trial Court to lie in the fact that it failed to "deliver" the funds to Dal-Ron in the form of a check made payable to Dal-Ron. This omission does not, however, establish Respondent's negligence under



he facts of this case. The simple, uncontroverted fact is that Respondent disbursed the Dal-Ron funds precisely in the manner and to the person directed by Dal-Ron's representative (and concerning whom it had, conversely, no knowledge that he was in any way associated with Clark Tank Lines). Appellant refers the court to its arguments under Point II of its Opening Brief on this matter and to its additional arguments under Points III and IV thereof on the general question of Respondent's negligence. One statement in Respondent's Brief deserves comment. In its Opening Brief, Appellant noted that the instruction given to Respondent on the Advice of Credit which transferred the \$25,000 directed it only to "credit" Dal-Ron with the funds and did not preclude it from hereafter disbursing them as directed by Dal-Ron's resident (Stoof). Respondent claims Dal-Ron had no account to which the funds could be "credited" and notes Respondent's Brief p. 32) the testimony of its employee, Karen Christensen, that the \$25,000 was sent to Respondent "for delivery to Dal-Ron". This

nstruction of the evidence only strenghtens Appellant's argument that Respondent did not disobey the instruction disbursing the funds instead of "crediting" them Dal-Ron's "account". As Respondent states (Ibid.), ions Bank was used to assist in the delivery of unds to Dal-Ron" which it clearly did by disbursing am in accordance with instructions given to it Dal-Ron's President.

Respondent's argument (Respondent's Brief pp. -35) that Appellant's agents induced it to act "neg- gently" presumably is made in response to Point III Appellant's Opening Brief wherein Appellant urges at Respondent was entitled to follow the instructions acerning the distribution of the funds given to it by Commodities own agents, Stoof and Betty Curtis. pondent's argument here demonstrates the fuzziness its entire thinking on the question of its liability M-S on the latter's counterclaim. The activities Appellant's agents admittedly are pertinent on the ue of its liability to Respondent on the latter's

Third Party Complaint. But they have absolutely nothing to do with Respondent's liability to M-S on the counterclaim, which liability must be established first, as a basis for Respondent's claim against Appellant on the Third Party Complaint. If Respondent acted in a way for which it is legally liable to M-S, it does not matter who may have induced or caused it to so act unless it was so induced by M-S's own agents, in which case M-S must be barred from any recovery. This, in fact, is the case here, as Appellant has explained under Point III of its Opening Brief. Stoof was M-S's local Branch Manager and was not even known by the Zions' employees involved in disbursing the funds to be employed by Clark Tank Lines. Betty Curtis was employed only by M-S on the day in question. They arranged for the funds to be sent from M-S's Chicago Bank to Respondent and instructed Respondent to disburse the funds to Craig Maddux in a check made payable to Clearfield State Bank. Respondent's failure to distinguish between the evidence pertinent only to

the counterclaim and that which is material only to the third party action demonstrates its desire to preserve, at any cost, the lower court's judgment against it in order to hang on to its third party judgment against Appellant.

Respondent's contention that Appellant's reliance upon the Uniform Fiduciary Act is "misplaced", because Respondent was given "specific instructions as to the disbursal of the money and did not follow them" (Respondent's Brief p. 36), ignores the fact that the instructions concerning such disbursal were given to Respondent by Stoof, the fiduciary of both the transferor of the funds (M-S Commodities) and the designated recipient (Dal-Ron). The evidence is clear that Karen Christensen released the funds upon Stoof's instruction because she knew he was associated with both M-S and Dal-Ron. (R. 653, 1196, 1203-04; . 115, 122-23, 237) The Trial Court so found:

He [Maddux] indicated to Karen Christensen, the wire transfer clerk at the Bank, that the check should be made payable to Clear-

field State Bank, which instruction previously had been given to Karen Christensen by J. Moroni Stoof, whom she knew to be associated with both M-S and Dal-Ron. (R. 653; A.237)

There is no evidence that Christensen knew Stoof to be associated with Clark Tank Lines in any manner. Under the statute, the Bank is protected from liability to M-S for ordinary negligence in disbursing funds to M-S's fiduciary regardless of the use thereafter made of the funds by him. The Court erred in finding liability solely on the basis of ordinary negligence.

IV THE THIRD PARTY JUDGMENT  
AGAINST CLARK TANK LINES IS UNSUPPORTED  
BY ANY FINDING OF ACTIONABLE  
WRONG BY CLARK VIS-A-VIS ZIONS BANK

The balance of Respondent's Brief is devoted to argument urging this Court to sustain its Third Party judgment against Appellant. Respondent contends that this judgment is proper "upon principles of fairness and equity" because Appellant is "unjustly benefited" by the receipt of the funds as a result of the actions of its own agents, Stoof and Maddux.

and equity" is indeed astounding in this instance.

Three parties (Respondent, M-S and Appellant) are here contending a right to recover or retain the \$25,000.

Is Respondent claiming that it is more fair for M-S to recover these funds, which belonged to Dal-Ron, than for them to be retained by Appellant, who received them in payment of a lawful debt? Is Respondent claiming that it has a more equitable right to these funds than Appellant? If so, upon what basis? It must be remembered that Respondent's claim against Appellant is made only by third party pleading. It has no claim for the funds against Appellant unless it is required to pay them to M-S on the latter's counterclaim. M-S failed to prove that it suffered any loss of its own funds by reason of the transaction. There is no evidence that it was required to or that it did reimburse Dal-Ron or anyone else for the money. Appellant, on the other hand, proved that Maddux received the funds from Stoof because Stoof was indebted to Appellant in the known amount of \$50,000 on March 15, 1971. Indeed, to respond

to Respondent's contention that not a "scintilla of evidence" shows that the \$25,000 ever belonged to Appellant (Respondent's Brief, p. 25), the record shows that, unknown to Appellant, Stoof was on that day indebted to it in the approximate amount of \$593,000 as a result of a series of embezzlements from Appellant (R. 1177-78; A. 104-05) much of which funds were invested by him in the Commodities Market through M-S Commodities. Appellant can hardly be said to be "unjustly benefited" or "unjustly enriched" by receiving \$25,000 from Stoof under such facts.

Appellant recognizes that the Trial Court stated its awareness of the various roles occupied by Stoof in this case and that on March 15, 1971, Stoof held agency positions with M-S, Dal-Ron and Appellant. In its Opening Brief (particularly under Points II, III, V and VIII thereof) Appellant has stated its reasons for urging that the Trial Court nevertheless committed error in awarding judgment to M-S on its Counterclaim. M-S simply cannot escape the legal consequences of the

facts, as found by the Trial Court, that Stoof and Betty Curtis instructed Respondent how to disburse the funds (i.e., by a check payable to Clearfield State Bank) and to whom it should deliver the check (i.e., to Craig Maddux). M-S is not aided by the fact that Stoof's purpose was to obtain the funds to repay his debt to Appellant and that he arranged to have the money picked up at Zions Bank by another Clark Tank Lines employee (Maddux). In this sense, the Trial Court's statement that Appellant's employees "caused all of this mess" (R. 1350; A.202) is not supported by the evidence. Karen Christensen released the funds to Maddux solely because she had been instructed to do so by Stoof and Betty Curtis. (R. 653, 1125, 1137-38, 1156, 1196; A. 83-84, 93-94, 96, 237.) She had no knowledge that Stoof was in any way associated with Clark Tank Lines, but knew he was the Salt Lake representative for M-S and that he was connected with the Dal-Ron account. (R. 653, 1196, 1203-04; A. 115, 122-23, 237) Betty Curtis was employed only by M-S



As far as Christensen was concerned, Appellant's employees didn't cause her to do anything. Stoof was clearly wearing his M-S and Dal-Ron's "hats" in all of his contacts with Christensen in this matter. Curtis wore only the M-S hat.

In entering its Findings of Fact and Conclusions of Law, the Trial Court expressly refused to find that Appellant obtained the \$25,000 from Zions by "deceit, trickery, and/or misrepresentation" or by reason of "fraud." (See Appellant's Opening Brief pp. 40-41.) Appellant recognizes that the Trial Court stated that Stoof and Maddux "acted together" on behalf of Appellant in obtaining the funds (R. 658; A.242) and that Appellant "least of all" was entitled to them. (R. 1350; A.202) However, the Court's judgment against Appellant must be based on some conclusion that it committed a legally actionable wrong. No such finding or conclusion was made by the Trial Court. Concerted action is not inherently wrongful and unless Stoof and Maddux were engaged in some form of mis-

Zions Bank, there is no basis for the Third Party Judgment.

Appellant respectfully urges the Court to reverse the judgments herein appealed from and to award Appellant its costs herein.

Respectfully submitted,

RONALD J. OCKEY, of  
Jones, Waldo, Holbrook  
& McDonough  
800 Walker Bank Building  
Salt Lake City, Utah 84111  
Attorneys for Appellant

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