

1988

# Western Capital and Securities, Inc. v. Helen Knudsvig : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 88-0198

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN CAPITAL AND SECURITIES,  
INC. )

Plaintiff-Appellant, )

-v- )

HELEN KNUDSVIG, )

Defendant-Respondent, )

88-0198-CA

No. 870056

14b

BRIEF OF APPELLANT

Appeal from the Judgment of the  
Second Judicial District Court In  
And For Weber County, State of Utah,  
Honorable John F. Wahlquist, Judge

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DEPOSITED BY THE  
STATE OF UTAH  
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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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## STATEMENT OF THE ISSUES

### ISSUE NO. I

THE DECISION OF THE TRIAL COURT IN DISMISSING PLAINTIFF'S COMPLAINT NO CAUSE OF ACTION WAS CONTRARY TO THE FACTS BEFORE THE COURT AND THE STATE OF THE LAW AND SHOULD BE REVERSED AND JUDGMENT ENTERED IN FAVOR OF THE PLAINTIFF FOR THE AMOUNT PRAYED IN PLAINTIFF'S COMPLAINT.

### ISSUE NO. II

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED SECURITIES AND EXCHANGE RULE 10B-5 IN THAT THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE.

### ISSUE NO. III

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED SECURITIES AND EXCHANGE RULE 10B-10 IN THAT THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE.

### ISSUE NO. IV

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED VARIOUS NASD RULES IN THAT THERE WAS NO SHOWING THAT THE DEFENDANT HAD A PRIVATE RIGHT OF ACTION FOR VIOLATION OF NASD RULES, THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE AND THAT SEVERAL OF THE STATED RULES DO NOT AND DID NOT EXIST AT THE TIME OF THE CAUSE OF ACTION.

### ISSUE NO. V

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST THE PLAINTIFF FOR PUNITIVE DAMAGES. PUNITIVE DAMAGES ARE NOT AVAILABLE PURSUANT TO THE ALLEGATIONS SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM, ARE NOT AVAILABLE WITHOUT A FINDING OF ACTUAL DAMAGES, AND ARE NOT AVAILABLE UNLESS SPECIFICALLY REQUESTED BY THE DEFENDANT IN HER COUNTERCLAIM.



ISSUE NO. VI

THE TRIAL COURT ERRED IN RENDERING FINDINGS AND CONCLUSIONS AND JUDGMENT RELATING TO THE FOLLOWING MATTERS WHICH WERE NOT AT ISSUE BEFORE THE COURT, ARE NOT SUSTAINABLE UNDER THE FACTS OR ARE CONTRARY TO LAW. THE IMPROPER MATTERS INCLUDE THAT A STOCK SALE CANNOT TAKE PLACE WITHOUT A CERTIFICATE IN POSSESSION; THAT PLAINTIFF ATTEMPTED TO PURCHASE DEFENDANT'S STOCK TO PREVENT PROFIT TAKING BY THE DEFENDANT; THAT THE MOTIVE TO PURCHASE THE DEFENDANT'S STOCK WAS IMPROPER AND ILLEGAL; THAT THE REASON THE DEFENDANT NEVER RECEIVED HER STOCK CERTIFICATE FROM THE TRANSFER AGENT WAS TO FURTHER SOME ALLEGED SCHEME; THAT THE PLAINTIFF IS REQUIRED TO CLOSE ALL SALE TRANSACTIONS WITHIN FIVE DAYS OF THE TRANSACTION; THAT A CONVERSION OF DEFENDANT'S SHARES OCCURED; THAT ILLEGAL INSIDER ACTIVITY OCCURED AND THAT THE PLAINTIFF HAD ANY HOLD OR CONTROL OVER VENTURE CONSOLIDATED INC.; THAT A CHEAT OF THE STOCK BUYING PUBLIC IN GENERAL OCCURED.

STATUTES AND RULES VERBATIM

Section 10b of the Securities Exchange Act of 1934

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

Sec. 10(b) To use or employ, in connection with the purchase or sale of any security registered on a national exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 28 (a) of the Securities Exchange Act of 1934

Sec. 28 (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the

securities commission (or any agency or officer performing like functions) of any State over any securities or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations of a self-regulatory organization that are filed with the Commission pursuant to section 19(b) of the Act.

UCA 70A-8-319

A Contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

Securities and Exchange Commission Rule 10b-5

It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they are made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Securities and Exchange Commission Rule 10b-10

See Addendum attached hereto.

National Association of Securities Dealers Section 12

Sec. 12. A member at or before the completion of each transaction with a customer shall give or send to such customer written notification disclosing (1) whether such member is acting as a broker for such customer, as a dealer for his own account, as a broker for some other person, or as a broker for such customer and some other person; and (2) in any case in which such member is acting as a broker for such customer or for both such customer, and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the fact that such information will be furnished upon the

request of such customer, and the source and amount of any commission or other remuneration received or to be received by such member in connection with the transaction.

National Association of Securities Dealers Section 18

Sec. 18. No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

National Association of Securities Dealers Section 21(a&b)

Sec. 21.

Requirements

(a) Each member shall keep and preserve books, accounts, records, memorandum, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the rules of this Association.

Information on accounts

(b) Each member shall maintain accounts of customers in such form and manner as to show the following information: name, address, and whether the customer is legally of age; the signature of the registered representative introducing

the account and the signature of the member or the partner, officer or manager accepting the account for the member. If the customer is associated with or employed by another member, this fact must be noted. In discretionary accounts, the member shall also record the age or approximate age and occupation of the customer as well as the signature of each person authorized to exercise discretion in such account.

IN THE SUPREME COURT OF THE STATE OF UTAH

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WESTERN CAPITAL AND SECURITIES,  
INC. )

Plaintiff-Appellant, )

-v- )

No. 870056

HELEN KNUDSVIG, )

Defendant-Respondent, )

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arose out of the sale of securities by the Defendant and her failure to deliver the certificate to finalize the transaction resulting in a purchase of securities to close the sale transaction. A Complaint was filed on December 19, 1984 for recovery of the loss occasioned by the failure to deliver the certificate for the securities sold. A Counterclaim was filed and amended alleging violations of Rule 10b-5, Rule 10b-10 and various NASD rules. Trial was held October 16 and 20, 1986 before the Honorable John F. Wahlquist. Judgment was entered



November 10, 1986 in favor of the Defendant for punitive damages only in the amount of \$10,000. A Motion to Alter or Amend the Findings of Fact, Conclusions of Law and Judgment was filed on November 10, 1986 and denied February 3, 1987. Appeal was taken to this Court by the Plaintiff on February 3, 1987.

## STATEMENT OF THE FACTS

Plaintiff is a securities Broker-Dealer licensed with the Securities and Exchange Commission and the Utah Securities Division. (Page 7). Defendant was a customer who purchased securities through Plaintiff and numerous other brokerage firms in Salt lake and Ogden, Utah. (Page 10, 72, 416, 422, 463).

Prior to 1984, Defendant purchased in an Underwriting through Plaintiff 20,000 shares of stock of Venture Consolidated, Inc. (Venture) for a total price of \$200.00. (Page 416). The offering of the Venture stock was an unspecified purpose offering wherein Venture proposed to raise funds and then attempt to enter into a profitable business opportunity. Pursuant to the Underwriting, the Transfer Agent, Interwest Transfer, was to deliver directly to the Defendant, her purchased shares of stock. (Page 417).

On July 26, 1984, Venture proposed the adoption by the shareholders of a proposition to acquire for stock, Big O Tires, Inc., Snow Bros., Inc., S&H Corporation and D&J Corporation, all of which were Utah franchisees of Big O Tires. (Exhibit 2P). Defendant acknowledged receipt of Notice of this proposed merger. (Page 401). The Venture

Shareholders approved the acquisitions on September 27, 1984 at a special meeting of shareholders and changed the name of the Corporation to Tires, Inc. (Tires) and also approved a 20 for 1 reverse split. (Page 72).

On or about September 13, 1984, Plaintiff's representative, Louis Babcock (Babcock) went to Defendant's place of business and notified Defendant that her shares of Venture had increased from \$.01 to approximately \$.15 to \$.17 per share and asked if Defendant desired to sell her shares. (Page 410-2,25). Defendant declined. (Page 425-6). Defendant later attempted to contact Babcock, and being unable to do so, contacted Plaintiff's office in Salt Lake City where she spoke to Richard Davis (Davis), a registered representative for Plaintiff. (Page 440-3). After a lengthy discussion Defendant requested the sale of her shares of stock of Venture and also requested that the commission on the sale be given to Babcock. (Page 444). Davis, not knowing how to accomplish the sale with commission being payable to Babcock, and while the Defendant waited on the phone, contacted Richard L. Parker, the Executive Vice President of Plaintiff regarding instructions. (Page 445). Parker wrote a trade ticket showing the method to ensure the commission was payable to

Babcock and delivered the ticket to Davis who took the ticket to Plaintiff's Trading Department which Department accepted the sale order at \$.17 per share. (Page 445-6). Davis then returned to the phone and informed Defendant of the sale and the price of the sale. (Page 448). Several days later, Defendant again contacted Davis and indicated she had changed her mind and did not want to sell her stock. (Page 447-8). Davis informed her that she could not cancel the trade. She asked what to do and Davis requested she contact her representative, Babcock, for specific instructions. (Page 448). Defendant failed to deliver the stock certificate and Plaintiff's Financial Principal, Kim H. Johnson, (Johnson) contacted Babcock and instructed him to contact Defendant concerning the certificate. (Page 469). Babcock contacted Defendant and she indicated she would deliver the certificate to Plaintiff's office in Salt Lake. (Page 469). Approximately one week passed and having not received the certificate, Johnson again contacted Babcock and instructed him to contact Defendant. Babcock contacted Defendant and was informed that Defendant could not find her certificate. Babcock told her how to obtain replacement of the certificate from Interwest Transfer. (Page 471). Defendant indicated she would get her husband's help in

finding the certificate. (Page 471, 502). Again a length of time passed and the certificate was not delivered. Johnson again contacted Babcock and he again contacted Defendant. (Page 501-2). She indicated she could not find the certificate and had never received it from Interwest Transfer after the initial underwriting. (Page 471). Babcock again informed Defendant of the method to replace the stock certificate. (Page 471).

Defendant then contacted Plaintiff and spoke with Johnson. Defendant told Johnson that she had done the trade with Davis. (Page 502-4). Defendant indicated she did not have the stock. (Page 504). Johnson explained the replacement procedures, (Page 505) though also informed her that if she did not deliver the certificate prior to November 30, 1984, that Plaintiff would buy in stock to cover her sale and she would be responsible for any losses. (Page 505). Defendant became angry and requested the cancellation of the sale. (Page 505). Johnson again reiterated the need to deliver the stock certificate and ended the conversation. (Page 505).

Defendant failed to deliver the certificate and on November 30, 1984, Plaintiff purchased for Defendant's account, stock to cover Defendant's failure to deliver her

certificate. (Page 505). On December 12, 1984, Plaintiff's Counsel notified Defendant of the condition of her account and requested payment of the difficiency created due to Defendant's failure to deliver the stock certificate. (Exhibit 5D). Payment was not received and on December 19, 1984, suit was filed by Plaintiff requesting payment. (Page 7). Defendant counterclaimed violation of 10b-5 and 10b-10 of the Securities Act of 1934 and various NASD regulations. (Page 70). Trial was held before Judge John F. Wahlquist and Judgment was entered November 10, 1986 awarding Defendant punitive damages in the amount of \$10,000. (Page 295). Plaintiff made a motion to Alter or Amend the Findings, Conclusions and Decree (Page 299) which Motion Judge Wahlquist denied on February 3, 1987 (Page 318) and Plaintiff appealed both the Judgment and the denial of the Motion to Alter or Amend. Appeal was filed February 3, 1987. (Page 333).

## SUMMARY OF THE ARGUMENTS

### ARGUMENT NO. I

THE DECISION OF THE TRIAL COURT IN DISMISSING PLAINTIFF'S COMPLAINT NO CAUSE OF ACTION WAS CONTRARY TO THE FACTS BEFORE THE COURT AND THE STATE OF THE LAW AND SHOULD BE REVERSED AND JUDGMENT ENTERED IN FAVOR OF THE PLAINTIFF FOR THE AMOUNT PRAYED IN PLAINTIFF'S COMPLAINT.

### ARGUMENT NO. II

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED SECURITIES AND EXCHANGE RULE 10B-5 IN THAT THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE.

### ARGUMENT NO. III

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED SECURITIES AND EXCHANGE RULE 10B-10 IN THAT THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE.

### ARGUMENT NO. IV

THE TRIAL COURT ERRED IN ITS FINDING THAT PLAINTIFF VIOLATED VARIOUS NASD RULES IN THAT THERE WAS NO SHOWING THAT THE DEFENDANT HAD A PRIVATE RIGHT OF ACTION FOR VIOLATION OF NASD RULES, THE TRIAL COURT DID NOT PROPERLY APPLY THE FACTS TO THE REQUIRED ELEMENTS FOR SUCH A VIOLATION AND DID NOT FIND ACTIONS ON THE PART OF THE PLAINTIFF TO SUPPORT THE NECESSARY ELEMENTS OF A VIOLATION OF THIS RULE AND THAT SEVERAL OF THE STATED RULES DO NOT AND DID NOT EXIST AT THE TIME OF THE CAUSE OF ACTION.

### ARGUMENT NO. V

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AGAINST THE PLAINTIFF FOR PUNITIVE DAMAGES. PUNITIVE DAMAGES ARE NOT AVAILABLE PURSUANT TO THE ALLEGATIONS SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM, ARE NOT AVAILABLE WITHOUT A FINDING OF ACTUAL DAMAGES, AND ARE NOT AVAILABLE UNLESS SPECIFICALLY REQUESTED BY THE DEFENDANT IN HER COUNTERCLAIM.

ARGUMENT NO. VI

THE TRIAL COURT ERRED IN RENDERING FINDINGS AND CONCLUSIONS AND JUDGMENT RELATING TO THE FOLLOWING MATTERS WHICH WERE NOT AT ISSUE BEFORE THE COURT, ARE NOT SUSTAINABLE UNDER THE FACTS OR ARE CONTRARY TO LAW. THE IMPROPER MATTERS INCLUDE THAT A STOCK SALE CANNOT TAKE PLACE WITHOUT A CERTIFICATE IN POSSESSION; THAT PLAINTIFF ATTEMPTED TO PURCHASE DEFENDANT'S STOCK TO PREVENT PROFIT TAKING BY THE DEFENDANT; THAT THE MOTIVE TO PURCHASE THE DEFENDANT'S STOCK WAS IMPROPER AND ILLEGAL; THAT THE REASON THE DEFENDANT NEVER RECEIVED HER STOCK CERTIFICATE FROM THE TRANSFER AGENT WAS TO FURTHER SOME ALLEGED SCHEME; THAT THE PLAINTIFF IS REQUIRED TO CLOSE ALL SALE TRANSACTIONS WITHIN FIVE DAYS OF THE TRANSACTION; THAT A CONVERSION OF DEFENDANT'S SHARES OCCURED; THAT ILLEGAL INSIDER ACTIVITY OCCURED AND THAT THE PLAINTIFF HAD ANY HOLD OR CONTROL OVER VENTURE CONSOLIDATED INC.; THAT A CHEAT OF THE STOCK BUYING PUBLIC IN GENERAL OCCURED.



## ARGUMENT

### ARGUMENT NO. I PLAINTIFF'S CASE

THE PLAINTIFF IS ENTITLED TO JUDGMENT AGAINST THE DEFENDANT PURSUANT TO THE CONTRACT OF SALE ENTERED INTO BY THE PARTIES.

According to the Restatement of Contracts 2d Section 17, the formation of a contract requires a bargain in which there is a manifestation of mental assent to the exchange and a consideration. The testimony of Davis clearly shows that the Defendant contacted the Plaintiff and entered into a contract for the sale of 20,000 shares of Venture Consolidated stock (now Tires, Inc.). There was an agreement to sell shares with the Plaintiff paying for the shares and the Defendant agreeing to transfer ownership. Thus there was a bargain, mutually agreed upon with consideration given on both sides. The Defendant agreed to sell her shares and Plaintiff agreed to purchase the shares. (Page 440-8). The testimony of Parker supports Davis' testimony in that he corroborates the testimony as to the conversation on the date of the sale of the stock. (Page 561). Davis' testimony of the conversation in which the sale contract was entered into is further corroborated by Davis testimony of the subsequent conversation where the Defendant admitted the existence of the contract. (Page

447-8). Exhibit 3P, the trade ticket, which was prepared on the date of the sale conversation clearly evidences the sale, confirms the price, date, number of shares, and participants to the transaction. Defendant's self-serving denial after suit was filed cannot overcome the evidence of the contract. The District Court recognized the existence of the conversation on the date of the sale in its Findings thus acknowledging that the Defendant had lied while testifying that she never made the call on that date. (Page 288-9). Defendant's claim that it was all a scheme to get her shares of stock and that the conversation didn't occur is belied since Davis would not have known if or how many shares the Defendant had in Venture Consolidated since the shares were not in the Plaintiff's possession. That fact that Davis knew how many shares Defendant possessed confirms not only the conversation but Defendant's desire to sell a specified number of shares. The price rise and potential profit on the sale is consistent with the District Court's findings that the Defendant invested "in new issues which will hopefully achieve a quick rise in value." (Page 287). Defendant's knowledge of the sale, which she denies, is further evidenced by the testimony of Davis that the Defendant called him again shortly after the sale and said

she had changed her mind about the sale. (Page 447). The District Court in its Memorandum Decision recognized the existence of this conversation. (Page 279). Further the Defendant admitted to Johnson that she had done the trade with Davis. (Page 504).

The Babcock testimony shows that not only did the Defendant know of the sale, but that she intended to complete her portion of the sale by delivering the stock to the Plaintiff. (Page 470).

The District Court in its Findings acknowledged that the Defendant requested the sale but the District Court stated that the Defendant's state of mind to be that she believed she could get out of the sale because she had a sale previously cancelled. (Page 289). There is no obligation on the part of the Plaintiff, especially once it has performed its part of the contract, to agree to void a contract of sale. The Defendant did not notify the Plaintiff at the time of the sale contract of her belief that she could get out of the transactions. The District Court infers in its Memorandum Decision that the Plaintiff knew of or participated in some scheme so that Defendant would not have her certificate. (Page 277). The evidence shows that the Transfer Agent, Interwest Transfer, had the

responsibility to deliver the Certificate to the Defendant and the the Defendant knew that she could get a replacement of the certificate through the Transfer Agent. (Page 417). An unmarked Exhibit is a letter from the Defendant to the Transfer Agent which she testified she sent to the Transfer Agent. (Page 574). The letter clearly shows that prior to or contemporaneously with the sale contract the Defendant knew she didn't have her certificate and that the Transfer Agent could replace it for her. That a participant to a contract believes she can cancell a sale later, even if that participant honestly believes that to be true, when the other party has given no indication that it will allow such a cancellation, is not grounds to determine a contract was never entered into. According to the Restatement of Contracts 2nd Section 153, a contract is voidable only if the mistake was known to the other party or the effect is such that enforcement of the contract would be unconscionable. That the Defendant would have to complete a sale that she agreed to is clearly not unconscionable especially when the terms were as agreed by the Defendant. The Defendant has never shown otherwise.

Pursuant to the request of the Defendant, a sale of 20,000 shares of stock was entered into. The fact that the

Plaintiff purchased the shares for itself does not does not make the sale invalid. The Defendant knew that the Plaintiff was a Securities Broker-Dealer who purchased stock for itself. That the Plaintiff purchased the stock because it believed it could make money by so purchasing does not void the sale. If this were the case, then any contract for the purchase of an investment would be invalid.

Proof that the sale accrued is further evidenced by the Plaintiff's records which are consistent in evidencing the date, price, number of shares sold, and participants to the contract. (See Exhibits 7P, 3P, 6P, the trade ticket, confirmation, quarterly account statement.) The testimony of Johnson, the keeper of the records (Page 493) shows the records to have been found in the place and order in the business records of the Plaintiff as was appropriate for the date and time of those records. (Page 495-6). The testimony and documents clearly show that a contract for sale between the Plaintiff and Defendant was entered into. As reflected on the Account Statement (Exhibit 6P), the Plaintiff completed its part of the contract by crediting to the Defendant's account payment for the shares sold. The parties mutually agreed to the sale of a fixed number of shares, at a specified price, with consideration agreed to

be given by both parties. The Plaintiff completed its portion of the contract and the Defendant cannot now avoid her responsibilities under the contract.

Subsequent to the entry of the contract, the Defendant failed and refused to deliver the required share certificate to the Plaintiff. In order to close out Defendant's account and supply the required certificates, the Plaintiff purchased at or below the fair market price, sufficient shares of stock to cover the Defendant's sale. (Page 505-7). There is no evidence contradicting this.

According to the testimony and as shown on the confirmations of purchase and the account statements (Exhibits 4P, 6P) the purchase price of the shares was \$8,625.00 which left a balance due and owing to the Plaintiff by the Defendant of \$5,402.20 for which Plaintiff filed suit and for which it should receive judgment together with attorney's fees and costs.

The Defendant in her Amended Counter-Claim claims that the contract is unenforceable pursuant to the Statute of Frauds. The District Court in its Findings, without any specificity as to the Statute of Frauds, stated that the Plaintiff failed to give notice of the sale transaction. (Page 289). The Court in its Memorandum Decision stated

"The question of whether or not a notice of this transaction was mailed out or not is in conflict. The Court concludes that the Plaintiff has failed to establish by a preponderance of the evidence that such a notice was given." (Page 277). These are the only references to the notice of the sale. The Plaintiff contends that the Court did not rule that the contract was unenforceable pursuant to the Statute of Frauds and therefore the District Court erred in not enforcing the contract of sale. However, the sale should be enforced since it complied with the Statute of Frauds. Utah Code 70A-8-319 states that a securities contract is not enforceable unless within a reasonable time a confirmation of the sale has been received by the defendant and the defendant has not within ten days sent written objection to the contents of the confirmation. The Defendant in her testimony admits that she did not send written objection to the confirmation of the sale. (Page 438). The only question is whether the confirmation was received. The law is clear that where there is proof that an item has been duly mailed a presumption of receipt by the sendee arises. 29 Am Jur 2d, 193; Campbell vs. Gowans 35 Utah 268, 100 P 397 affirmed in Thiessens v. Department of Employment Security, Board of Review of the Industrial

Commission of Utah 663 P2d 72; Lieb v. Webster 190 P2d 701; Olsen v. Davidson 350 P2d 338.

The testimony of Johnson was that the confirmation was generated by computer which typed the address on the confirmation and that the address on Exhibit 3P, the Plaintiff's copy of the confirmation, was computer generated and would show the same address as on the original confirmation sent to the defendant. (Page 513). The Defendant confirmed that the address on Exhibit 3P is her address and had been at the time of the sale. (Page 438).

The Defendant has denied receipt of this confirmation. However, the unsupported denial of receipt by an addressee ought to be received with the greatest amount of caution. In Re Imperial Land Co. (1872) L.R. 15 Eq (Eng) 18. Further the court in Renland v. First National Bank 90 Mont. 424, 4 P2d 488 (1931) stated that positive testimony of nonreceipt does not overcome the presumption of delivery. See also Olsen v. Davidson, Supra. where the Court stated that mere denial of receipt does not rise to the dignity of a bona fide rebuttal of such presumption. Similarly First National Bank of Denver v. Henning 150 P2d 790. Additionally, in Wenger v. Success Manufacturing Co. 227 F2d 548 (1915) the Court stated that denial of receipt does not overcome the



presumption of receipt especially when the sendee admitted receiving previous notices sent to the same address. The Defendant in her testimony admits to having received subsequent mailings from the Plaintiff (Page 438) which were generated in the same manner. (Page 512).

The question that remains is whether the confirmation was mailed. The Court in Lieb v. Webster, Supra, stated the where an office handles such a large volume of business that no one could be expected to remember any particular notice or letter, proof of mailing may be made by showing an office custom with respect to the mailing and compliance with such custom in the specific instance. The testimony of Johnson, Plaintiff's office manager, sets forth the office custom as it relates to mailing business correspondence including confirmations. (Page 507-14). That testimony clearly indicates a system was in place during the time of this sale by the Defendant. It clearly provides accurate addressing and affixing of postage to each confirmation. It clearly shows he is responsible for the system and was personally involved with the system. Further, Johnson testified that while he didn't remember that specific confirmation he specifically remembered handing the stack of confirmations

to the clerk who posted the confirmations and he watched her leave for the post box. (Page 521).

The Court in Tabor & Co. v. Gorinz 356 NE2nd 1150 (1976) reiterated that mailing could be established by evidence of corroborative circumstances tending to establish the fact that the custom had been followed in the particular instance and stated that those corroborative circumstances would include evidence that the confirmation forms were created so that the correct sendees address would show on the envelope, and that the senders return address was imprinted on the envelope, that the sendee admitted receiving mailings made pursuant to the same business practice close in time to the transactions in question and that the disputed item had not been returned. The Court stated that this would be sufficient even in the absense of the testimony of the clerk who would have mailed the letters.

As the testimony sets forth in this case, the confirmation of the sale was generated by computer with the address on the envelope imprinted as on the confirmation and as on the copy kept by the Plaintiff. (Page 513). The Defendant acknowledged the address on the Plaintiff's copy of the confirmation to be her address. (Page 438). Further,

the Defendant admitted (Page 438) to having received other documents which were mailed pursuant to the same procedure at or near the same time. (Page 512). And also, the confirmation of sale which Defendant denies receiving was never returned to the Plaintiff and if it had been returned it would have been segregated in a separate file. Johnson testified that he personally checked that file for return of the sale confirmation and it was not in the file. (Page 513).

In the case Pence Mortgage Co. v. Stokes 559 SW2d 500, a mailing was sufficiently established if the above steps were shown and if the copy of the notification which was sent to the insurance agent was received by the agent. The Defendant's Agent, Babcock, testified he received his copy of the notification of the sale (called a can buy). (Page 472 & 478).

The evidence clearly shows a mailing custom which was adhered to in the instant case thus raising the presumption of receipt and therefore the contract is enforceable.

The District Court in its Findings indicated that the Plaintiff should be estopped from collecting the amount due to it since the Plaintiff waited to buy-in securities to cover the sale and non-delivery in the Defendant's account.

In the case *Billings Associates v. Bashaw*, NY Supreme Court Appellate Division, January 19, 1967, 276 NYS 2d 446 (1967) the Court stated that the failure of a broker to liquidate a securities transaction until one month after the customer failed to pay for the transaction was no bar to his action against his customer for damages but the time period may determine the amount of damages which the broker sustained. In this action the Plaintiff did not buy-in the Defendant's account until November 30, 1984. The testimony indicates tha the Defendant after the sale indicated she would bring in the certificate (Page 470); then that she had lost the certificate (Page 471); and again later she called the Plaintiff and said she had lost the certificate (Page 504) and was given a date on which the buy-in would occur which date was November 30, 1984. (Page 505). The Defendant's conduct in stating that she would bring in the certificate on several occasions should in fact work an estoppel of her right to claim the sale should have been bought-in earlier. Further, the Defendant at any time could have made a purchase to close out the previous sale. She never did so, instead she continued to to say she would bring in the the certificate. The Defendant now claims that the Plaintiff should have bought in her account after the first

conversation with Davis a week or so after the sale because she claims she told Davis she had changed her mind about the sale. (Page 447). She was told she couldn't cancel the sale and when she asked what to do she was told to contact her broker, Babcock. (Page 448). She didn't contact her broker, but when he contacted her, she didn't say to cancel the sale, she said she would bring in the certificate. (Page 470). The Plaintiff withheld buying-in the Defendant's account based upon the Defendant's statements that she would bring in the stock. It is the Defendant and not the Plaintiff who should be estopped from relief.

#### ARGUMENT NO. II - RULE 10B-5

THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF RULE 10B-5.

The elements which must be shown in order to make a finding of violation of Securities and Exchange Act Rule 10b-5 are as follows:

- a) The person alleging the violation must be a purchaser or seller.
- b) There must be the use of a manipulative or deceptive device as set forth in the statute itself.
- c) Scienter must be plead and proved by the one claiming a violation.

d) There must be actual damages.

A) Purchaser or Seller

The U.S. Supreme Court in *Blue Chip Stamps et al. v. Manor Drug Stores*, 421 US 723 (1975) confirmed the rule enunciated in *Birnbaum v. Newport Steel Corp.* 193 F2d 461 (1952) that a person who is neither a purchaser or a seller may not bring an action under Section 10b of the Securities Exchange Act of 1934 or the SEC's Rule 10b-5 thereunder. The Court also ruled that since Congress had refused to extend Section 10b to cover attempts to purchase or sell, the Court would not extend the scope of the present statute or rule thereunder.

The Defendant in this action has consistently claimed and maintained that she was not a seller. Therefore, by her own admissions she has herself foreclosed the use of Section 10b and Rule 10b-5 thereunder.

Additionally, since the Defendant retained her shares of stock, she would not be a seller under the theory as set forth in *O'Brien v. Continental Illinois National Bank & Trust Co. of Chicago* 1979 CCH Federal Securities Law Reporter Dec. 96,780 wherein the Court stated that pension trustees who entered discretionary trust or agency agreements with a bank for investment of funds did not meet

the purchaser-seller requirement with respect to securities which were retained and ultimately sold.

Since the Defendant did not meet this element the 10b-5 claim must fall.

**B) Use of a Manipulative or Deceptive Device.**

Rule 10b-5 itself requires some manipulative or deceptive device. The Defendant in her Amended Counter-claim has claimed that the Plaintiff attempted without authorization to convert and sell the Defendant's shares. As set forth above, the evidence clearly shows that the Defendant not only authorized the sale but requested it. Further, the acts of the Defendant after the sale in agreeing to bring in the certificate evidences her willingness to enter into the transaction. Since the Defendant's only claim is that the Plaintiff executed an unauthorized sale, and since that sale was in fact authorized, a further essential criteria for a violation of Rule 10b-5 has not been met and the District Court's decision must be reversed.

**C) Scienter.**

In *Ernst & Ernst v. Hochfelder* 425 US 185 (1976) the Supreme Court stated that Scienter was an essential element for a violation of Section 10 and Rule 10b-5 thereunder.

Scienter was defined by the Court to be a mental state embracing intent to deceive manipulate or defraud - an intentional or wilful act. The Defendant has only claimed the alleged unauthorized sale as a violation of Rule 10b-5. The District Court in its Memorandum Decision stated:

"The Court has learned to its frustration during this trial that the Defendant's testimony is extremely difficult to follow, particularly when she is excited. The Salt Lake Broker interpreted the conversation to be a request for a stock sale." (Page 276)

The District Court clearly found at most that there was a good faith misunderstanding regarding the stock sale. Thus there was no finding of intentional or wilful misconduct relating to the sale and no finding of scienter can stand relating to the sale and thus no violation of Rule 10b-5.

In addition, in facts similar to this case, the Ninth Circuit in Brophy v. Redivo, et al. 1984 CCH Federal Securities Law Reporter 99,676 stated:

"Ms. Brophy argues that Blyth, Eastman, through Mr. Redivo, traded on her account without authority and by doing so violated section 10b of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j, and Rule 10b-5 of the Securities and Exchange Commission. Because we are reviewing the granting of a directed verdict for the defendants, we view the evidence in the light most favorable to plaintiff and therefore assume that defendants' August trades on Ms.



Brophy's account were unauthorized. We must then answer a question previously unaddressed by this court: Does unauthorized trading, without more, constitute a violation of Rule 10b-5? We hold it does not." (at 97,723).

In the case before the court, the Defendant's only allegations relating to the 10b-5 claim are unauthorized trading. Under the holding in the Brophy case no cause of action lies pursuant to 10b-5. Under the Brophy case and the Ernst & Ernst case it is clear that the Defendant has failed to meet her burden in proving scienter and thus the District Court's ruling must be reversed.

#### D. DAMAGES

A civil right of action pursuant to Section 10 of the Securities Exchange Act and Rules 10b-5 and 10b-10 thereunder, requires as an element of the violation, some injury or damages. James et al. v. Meinke 85-86 CCH Federal Securities Law Reporter Dec. 92,417; Herman MacLean v. Huddleston (Ca-5 1981) 1981 CCH Federal Securities Law Reporter 97,919 640 F2d 534 (1981); E.F. Hutton & Co., Inc. v. Penham (SDNY) 547 F Supp 1286; Birnbaum v. Newport Steel Corp., 193 F2d 461; Blue Chip Stamps vs. Manor Drug Stores, 421 U.S. 723 (1975). The District Court's Findings, Conclusions and Judgment show no injury to the Respondent.

The District Court did not make an award of any actual, general, nominal nor compensatory damages, nor was Respondent granted any equitable relief. Obviously an essential element for a violation of 10b-5 was not found by the District Court and therefore its decision must be reversed.

#### ARGUMENT NO. III - RULE 10B-10

THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF RULE 10B-10.

The elements requisite for a showing of violation of Rule 10b-10, since it was adopted pursuant to Section 10 of the Securities Exchange Act of 1934 as was Rule 10b-5, are similar to those required for a showing of violation of Rule 10b-5. Those elements include:

- a) The person claiming the violation must be a purchaser or seller.
- b) Scienter must be alleged and shown.
- c) There must be proof of violation of one of the listed requirements in Rule 10b-10.
- d) The person claiming the violation must show actual damages.

A) Purchaser or Seller and Damages

The elements that there be a Purchaser or Seller and Damages are identical as set forth under Argument II. Since the Defendant has failed to prove these elements the District Courts Decision must be reversed.

B) Scienter

As to the requirement of Scienter, the only evidence was the testimony of Johnson that every effort was made to send out a confirmation of the sale. There are no allegations of Scienter in Defendant's Amended Counter-Claim and no findings of scienter in the District Court's ruling. On this element alone the decision must be reversed.

C) Rule 10b-10 Listed Requirements

In order to sustain a finding of violation of Rule 10b-10, one of the requirements enumerated in the rule must be shown to have been violated. The District Court's only Findings in regards to Rule 10b-10 was that the Plaintiff failed to give notice of the sales transaction. (Page 289). In its Conclusions the Court stated the Plaintiff had violated Rule 10b-10 by failing to provide a notice in writting of the sale transaction to the Defendant. As set forth in Argument No. I, the Plaintiff believes it has shown that a notice was in fact given to the Defendant. However,

as to this element, the District Court clearly required the burden of proof incorrectly. The burden of proof in Section 10 actions is clearly on the one claiming a violation. *Herman MacLean v. Huddleston* 640 F2d 534 (1981). The District Court in this action in its Memorandum Decision stated "The Court concludes that the Plaintiff has failed to establish by a preponderance of the evidence that such a notice was given." (Page 277). Placing the burden on the Plaintiff was erroneous and the Courts finding on this element alone requires a reversal of the District Court's decision.

The Defendant has failed to prove even one of the elements necessary to sustain a violation of Rule 10b-10, much less all of the required elements and therefore the Court's decision must be reversed.

#### ARGUMENT NO. IV - NASD RULES

In order for the Defendant to prevail in an action for violation of NASD Rules, she must show that she has a private right of action to bring a suit pursuant to NASD Rules. In addition, the Defendant must prove and findings must be entered regarding each of the elements of a violation of those Rules.

A) Private Right of Action.

The NASD, National Association of Securities Dealers, Inc. is a private corporation which was organized pursuant to authority given under the Securities Exchange Act of 1934. The Corporation is not a government agency. In order for the Defendant to prevail on her allegations of violation of any NASD rules she must show a private right to enforce those rules and recover for losses occasioned thereunder. The District Court never acknowledged that private right of action nor were any Findings of such a right made; without such Defendant's cause of action must fail.

B) Elements for Violation

The Tenth Circuit while not granting a private right of action for NASD violations, in dicta indicated that if a Private Right of Action were to exist for violation of NASD Rules then one of the requirements would be a showing of scienter. *Utah State University v. Bear Stearns et al.* 549 F2d 164 (1976) 10th Cir. The Defendant made no allegations in her Amended Counter-Claim and the District Court made no findings of Scienter as to any of the alleged violations of NASD rules and therefore the allegations in this regard must fail and the District's Court's decision in this regard must be reversed. The Tenth Circuit Court's reasoning as to

whether a private right of action exists under NASD rules parallels the U.S. Supreme Court's reasoning in Ernst & Ernst v. Hockfelder 425 US 185 (1976), wherein it granted a private right of action in Section 10b cases. It is therefore appropriate that since the basis for a cause of action under 10b requires that damages be proved and found to exist, that similarly, damages are an essential element for a private right of action for violation of NASD rules, if such private right exists.

The District Court's Findings, Conclusions and Judgment show no injury to the Defendant. The District Court did not make an award of any actual, general, nominal nor compensatory damages, nor was Defendant granted any equitable relief. Without a finding of actual damages, no violation can exist and the District Court's ruling must be reversed.

#### C) Specific Requirements of the Alleged NASD Rules.

A review of each of the substantive portions of the NASD rules must be made and violation must be shown for there to be a violation.

#### Section 12.

Section 12 requires the delivery of a confirmation and specifies the information the confirmation must contain. No

findings were made that the confirmation, Exhibit 3P, did not contain the required information. The issue of whether the confirmation was delivered has been discussed previously in detail in the Arguments above and specifically in Argument III relating to Rule 10b-10. Since the elements were not shown, the District Court's decision in this matter must be reversed.

#### Section 18.

This section closely parallels the prohibitions of Rule 10b-5 and were discussed in detail in Argument No. II above. Since the allegations were not sustained nor proven as set forth above in Argument II, the decision of violation under this Rule must also be reversed.

#### Section 21(a&b)

This section requires that the books and records of the Plaintiff must be kept as set forth therein and that certain information must be kept by the Plaintiff regarding its customers. There is no evidence nor findings that the Plaintiff's books and records were kept other than as set forth in the rule and thus the ruling of violation of this section must be reversed.

Paragraphs 2761 and Paragraph 2162 Sections 1 and 9.

There is no paragraph 2761 in the NASD Rules of Fair Practice, nor are there Section 1 and 9 in paragraph 2162 of the Rules of Fair Practice and therefore the decision as to these must be reversed.

#### ARGUMENT NO. V - PUNITIVE DAMAGES

An award of punitive damages can only be upheld if there is some proper basis upon which that award can rely. It is well settled law that recovery pursuant to the Securities Exchange Act of 1934 is limited to actual loss as mandated by Section 28(a) of the Act and that an award of punitive damages is not allowed pursuant to a private right of action for violation of Section 10 and Rules promulgated thereunder. *Green v. Wolf Corp.* 406 F2d 291 (1968); *Richardson v. MacArthur* 451 F2d 35 (1971); *Vogel v. Trahan* (ED Pa Jan 11, 1980) 79-80 CCH Federal Securities Law Reporter Dec 92,321; *Jones v. Miles* 81-82 CCH Federal Securities Law Reporter Dec 98,276 (Ca-5 1981); *de Haas v. Empire Petroleum Company* 435 F2d 1223 (1970). The Court in *Green v. Wolf Corp.* Supra, at page 302 stated that Section 28(a) limited recovery in private suits pursuant to the Securities Exchange Act of 1934 to actual damages. This was adopted by the Tenth Circuit in *Richardson v. MacArthur*,



Supra, at page 45 wherein the Court stated that Section 28(a) limited "recovery in private suits for damages to 'actual damages'." Since the NASD itself and all rules promulgated thereunder have effect pursuant to the Securities Exchange Act of 1934 Section 15A, only actual damages would be allowed and punitive damages specifically not permitted. Thus the award of punitive damages was error and should therefore be reversed.

On a separate theory, punitive damages would not be available to Defendant in this matter in that this Court in Cohn vs. J.C. Penney 537 P2d 306, at page 311, held that special damages must be plead in order to be awarded unless the "pleadings contain such information as will apprise the defendant of such damages as must of necessity flow from that which is alleged." The necessity for pleading punitive damages should require no less, since this Court has found that an award of punitive "constitutes an extraordinary remedy outside the field of usual redressful remedies..." First Security Bank of Utah v. JBJ Feedyards, Inc. 653 P2d 591 (1982). Since as shown above, punitive damages are not allowable pursuant to 10b-5, 10b-10 and NASD rules, and since these are the only claims for relief plead by the Defendant, these violations plead by the Defendant fail to

contain such information as would appraise the Plaintiff of the necessity to defend relative to punitive damages. Without having requested punitive damages nor having plead sufficient information so as to appraise Plaintiff regarding the need to defend against such damages, an award of punitive damages was error and should be reversed.

The award of punitive damages must also be reversed alternatively on another basis in that this Court has consistently held that there must be some relationship between actual damages and an award of punitive damages, *First Security Bank v. JBJ Feedyards, Inc. Supra*; *Bundy v. Century* 692 P2d 754 (1984); *Cruz v. Montoya* 660 P2d 723 (Utah 1983); or there must be at least some grant of equitable relief. *Nash v. Craigco* 585 P2d 775 (1978). In this case, the District court did not find nor award any actual, compensatory, nominal damages nor grant any equitable relief. Defendant may content that equitable relief was granted wherein the Court ruled that she was the sole owner of her shares of stock and that the Plaintiff had no ownership interest therein. In fact, however, no such relief was granted since Plaintiff had never claimed any ownership of Defendant's stock and was only claiming that Defendant owed to Plaintiff a sum of money. While the Court

had properly granted a Pre-Judgment Writ of Attachment to ensure funds were available in the event Plaintiff was successful on its claim, the elimination of the Writ of Attachment was not a grant of equitable relief but merely the logical result of a finding that Plaintiff had not proved its case and was not entitled to relief. Therefore, since no damages were granted to the Defendant, no grant of punitive damages is sustainable and the entry of such an award was error and must be reversed.

#### ARGUMENT NO. VI - MISCELLANEOUS FINDINGS

The Court entered various Findings which were not alleged by the Plaintiff or the Defendant and which are not sustainable by the facts and law. Each Findings is treated separately.

#### A SECURITY CANNOT BE SOLD WITHOUT THE POSSESSION OF A CERTIFICATE

The District Court ruled that a sale of securities cannot take place without the presence of the stock certificate. Common usage and knowledge reflects that sales of securities are made common place without the certificate in possession. Short sales, or sales made in anticipation of a drop in price wherein the seller can purchase the shares at a lower price to cover the previous sale are

commonplace and executed daily. The District Courts findings should be reversed.

THE PLAINTIFF PURCHASED THE DEFENDANT STOCK TO PREVENT PROFIT TAKING BY THE DEFENDANT.

The evidence as set forth above is that the defendant contacted the Plaintiff in order to sell her shares. There is no evidence that the Plaintiff ever had any means of obtaining Defendant's certificate and thereby preventing her later sale and profit. The District Court's Finding must be reversed.

THAT THE MOTIVE TO PURCHASE THE DEFENDANT'S STOCK WAS IMPROPER OR ILLEGAL.

The District Court's finding that the commission on the sale of the defendant's shares was small and that therefore there must have been some other reason for the sale is not supported by the facts. The Defendant's sale was of over \$3,000 and the commission would therefore be several hundred dollars. The amount of money for the work necessary was not disproportionate to trades in the Salt Lake Market. There is no evidence that the purchase of the shares would result in any improper or illegal use of the shares.

THAT THE REASON THE DEFENDANT DID NOT RECEIVED HER SHARE CERTIFICATE FROM THE TRANSFER AGENT WAS TO FURTHER SOME ALLEGED SCHEME.

There is no evidence that the Plaintiff had any control over the Transfer Agent or could in any manner restrict the delivery of the Defendant's certificate. The District Court's Finding in this matter is without basis and must be reversed.

THAT THE PLAINTIFF IS REQUIRED TO CLOSE ALL SALE TRANSACTIONS WITHIN FIVE DAYS OF THE TRANSACTION.

The Plaintiff's account card (Exhibit 1P) requires the customer to complete their transactions by the fifth business day. However, the Account Card specifically allows the Plaintiff the option of allowing a transaction to remain open or to close the transaction at their discretion. The wording on the Account Card is plain and the Court's interpretation otherwise is error and must be reversed. THAT A CONVERSION OF THE DEFENDANT'S SHARES OCCURED.

The Court's Findings in paragraph 7, and Conclusions in paragraphs 1 and 5 indicate that the Defendant's shares where converted. In fact, as set forth above, the Issuer of the shares owned by the Defendant changed its name and effected a reverse stock split. The changing of a corporate

name and stock split is not a conversion of securities and the Court's Findings and Conclusion must be reversed.

THAT ILLEGAL INSIDER ACTIVITY OCCURED AND THAT THE PLAINTIFF HAD ANY HOLD OR CONTROL OVER VENTURE CONSOLIDATED.

The Court's Judgment indicates that the Plaintiff had an involvment and hold and control over Venture Consolidated. There is no evidence that the Plaintiff ever had sufficient stock to control or maintain a hold over Venture Consolidated. In fact the only testimony is by Johnson and is that the Plaintiff never had such hold or control by way of stock ownership. (Page 518). There is no evidence of any other type of hold or control which Plaintiff was alleged to have had. Further, there is no evidence that the Plaintiff was in possession of any information which could be considered "inside information". The only information about Venture Consolidated was that information which was found in Exhibit 2P which the Defendant admitted to having received prior to the sale and at the approximately time it was distributed to shareholders generally. (Page 400-1).

THAT A CHEAT OF THE STOCK BUYING PUBLIC IN GENERAL OCCURED.

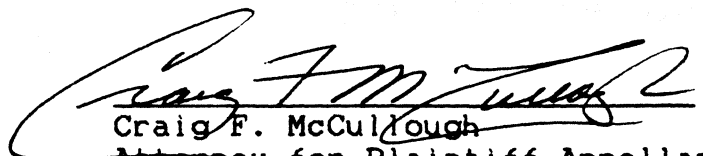
The District Court's Conclusions and Judgment indicate that the Plaintiff acted in such a manner so as to deceive

and cheat the public in general. There is no evidence that the general public was ever cheated in any manner and in any way by the Plaintiff. This should be reversed.

#### CONCLUSION

The facts and evidence before this Court require a reversal of the District Court's decision and the entry of a Judgment against the Defendant in favor of the Plaintiff in the amount of \$5404.20 plus interest from the date of the sale transaction, attorneys fees and costs. Further that the decision as to violations by the Plaintiff of Rules 10b-5, 10b-10 and NASD Rules must be reversed. The entry of a Judgment in favor of the Defendant for punitive damages was improper and must be reversed. The various miscellaneous Findings and Conclusions and Judgments as set forth above must be reversed.

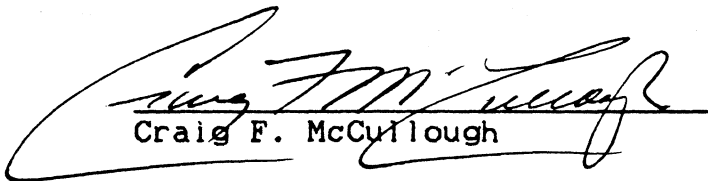
Dated this 18th day of May, 1987.



Craig F. McCullough  
Attorney for Plaintiff-Appellant  
185 South State Suite 520  
Salt Lake City, Utah 84147-0378

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of May, 1987, I deposited postage prepaid in the United States Mail, a copy of the foregoing Brief of Appellant addressed to Gerald S. Wight, Attorney for Defendant-Respondent, Legal Forum Building, 2447 Kiesel Avenue, Ogden Utah 84401.

  
Craig F. McCullough



## **ADDENDUM**

### **Contents**

**Securities and Exchange Commission Rule 10b-10**

**Findings of Fact, Conclusions of Law and Judgment**

**Memorandum Decision**

## [§ 22,729A]

## Confirmation of Transactions

➡ Rule 10b-10 is amended. See below.

Reg. § 240.10b-10. (a) It shall be unlawful for any broker or dealer to effect for or with the account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security (other than U.S. Savings Bonds or municipal securities) unless such broker or dealer, at or before completion of such transaction, gives or sends to such customer written notification disclosing

(1) Whether he is acting as agent for such customer, as agent for some other person, as agent for both such customer and some other person, or as principal for his own account; and

(2) The date and time of the transaction (or the fact that the time of the transaction will be furnished upon written request of such customer) and the identity, price and number of shares or units (or principal amount) of such security purchased or sold by such customer; and

(3) In the case of any transaction in a debt security subject to redemption before maturity, a statement to the effect that such debt security may be redeemed in whole or in part before maturity, that such a redemption could affect the yield represented and that additional information is available upon request; and [Adopted in Release No. 34-19687 (¶ 83,341), April 18, 1983, effective January 1, 1984, 48 F. R. 17583.]

(4) In the case of a transaction in a debt security effected exclusively on the basis of a dollar price

(i) The dollar price at which the transaction was effected, and

(ii) The yield to maturity calculated from the dollar price; *Provided, however*, that this paragraph (ii) shall not apply to a transaction in a debt security with a maturity date that may be extended by the issuer thereof, with a variable interest rate payable thereon, or a participation interest in notes secured by liens upon real estate continuously subject to prepayment; and [Adopted in Release No. 34-19687 (¶ 83,341), April 18, 1983, effective January 1, 1984, 48 F. R. 17583.]

(5) In the case of a transaction in a debt security effected on the basis of yield

(i) The yield at which the transaction was effected, including the percentage amount and its characterization (*e.g.*, current yield, yield to maturity, or yield to call) and if effected at yield to call, the type of call, the call date and call price;

(ii) The dollar price calculated from the yield at which the transaction was effected; and

(iii) If effected on a basis other than yield to maturity and the yield to maturity is lower than the represented yield, the yield to maturity as well as the represented yield; *Provided, however*, that this paragraph (iii) shall not apply to a transaction in a debt security with a maturity date that may be extended by the issuer thereof, with a variable interest rate payable thereon, or a participation interest in notes secured by liens upon real estate continuously subject to prepayment; and [Adopted in Release No. 34-19687 (¶ 83,341), April 18, 1983, effective January 1, 1984, 48 F. R. 17583.]

(6) Whether any odd-lot differential or equivalent fee has been paid by such customer in connection with the execution of an order for an odd-lot number of shares or units (or principal amount) of a security and that the amount of any such differential or fee will be furnished upon oral or

written request; *Provided, however,* That such disclosure need not be made if the differential or fee is included in the remuneration disclosed, or exempted from disclosure, pursuant to paragraph (a)(7)(ii); and [Amended in Release No. 34-19687 (¶ 83,341), effective January 1, 1984, 48 F. R. 17583.]

(7) If he is acting as agent for such customer, for some other person, or for both such customer and some other person,

(i) The name of the person from whom the security was purchased, or to whom it was sold, for such customer or the fact that such information will be furnished upon written request of such customer; and

(ii) The amount of any remuneration received or to be received by him from such customer in connection with the transaction unless remuneration paid by such customer is determined, pursuant to a written agreement with such customer, otherwise than on a transaction basis; and

(iii) The source and amount of any other remuneration received or to be received by him in connection with the transaction; *Provided, however,* That if, in the case of a purchase, the broker was not participating in a distribution, or in the case of a sale, was not participating in a tender offer, the written notification may state whether any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer; and

(8) If he is acting as principal for his own account

➡➡➡ *Rule 10b-10(a)(8)(i) is amended. See below.*

(i) The amount of any mark-up, mark-down, or similar remuneration received in a transaction in an equity security if he is not a market maker in that security and if, after having received an order to buy from such customer, he purchased the security from another person to offset a contemporaneous sale to such customer or, after having received an order to sell from such customer, he sold the security to another person to offset a contemporaneous purchase from such customer; and

➡➡➡ *Reproduced below is the text of Rule 10b-10(a)(8)(i) as amended in Release No. 34-22397 (¶ 83,912), effective March 17, 1986.*

(i)(A) If he is not a market maker in that security and, if, after having received an order to buy from such customer, he purchased the security from another person to offset a contemporaneous sale to such customer or, after having received an order to sell from such customer, he sold the security to another person to offset a contemporaneous purchase from such a customer, the amount of any mark-up, mark-down, or similar remuneration received in an equity security; or

(B) In any other case of a transaction in a reported security, the trade price reported in accordance with an effective transaction reporting plan, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer. [Amended in Release No. 34-22397 (¶ 83,912), effective March 17, 1986, 50 F. R. —.]

(ii) In the case of a transaction in an equity security, whether he is market maker in that security (otherwise than by reason of his acting as block positioner in that security).

(b) A broker or dealer may effect transactions for or with the account of a customer without giving or sending to such customer the written notification described in paragraph (a) of this section if

(1) Such transactions are effected pursuant to a periodic plan or an investment company plan; and

## [§ 22,729A] Reg. § 240.10b-10—Continued

(2) Such broker or dealer gives or sends to such customer within five business days after the end of each quarterly period a written statement disclosing each purchase or sale, effected for or with, and each dividend or distribution credited to, or reinvested for, the account of such customer (pursuant to the plan) during the period; the date of each such transaction; the identity, number and price of any securities purchased or sold by such customer in each such transaction; the total number of shares of such securities in such customer's account; any remuneration received or to be received by the broker or dealer in connection therewith; and that any other information required by paragraph (a) will be furnished upon written request; *Provided, however,* That the quarterly written statement may be delivered to some other person designated by the customer for distribution to the customer; and [Amended in Release No. 34-19687 (§ 83,341), effective July 25, 1983, 48 F. R. 17583.]

(3) In the case of transactions effected pursuant to an investment company plan

(i) Payments for the purchase of securities by such customer or by such customer's designated agent are made directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company; and

(ii) The intention to give or send to the customer the written statement referred to in subparagraph (b)(2) of this paragraph, in lieu of the written notification required by paragraph (a), is disclosed in writing to such customer.

(c) A broker or dealer may effect transactions for or with the account of a customer without giving or sending to such customer the written notification described in paragraph (a) of this section if

(1) Such transactions are effected in shares of any no-load open-end investment company registered under the Investment Company Act of 1940 that attempts to maintain a constant net asset value per share and that holds itself out to be a "money market" fund or has an investment policy calling for investment of at least 80% of its assets in debt securities maturing in thirteen months or less; and

(2) Such broker or dealer gives or sends to such customer within five business days after the end of each monthly period a written statement disclosing each purchase or redemption, effected for or with, and each dividend or distribution credited to, or reinvested for, the account of such customer during the month; the date of each such transaction; the identity, number and price of any securities purchased or redeemed by such customer in each such transaction; the total number of shares of such securities in such customer's account; any remuneration received or to be received by the broker or dealer in connection therewith; and that any other information required by paragraph (a) will be furnished upon written request; and

(3) Such customer is provided with prior notification in writing disclosing the intention to send the written information referred to in paragraph (c)(1) on a monthly basis in lieu of an immediate confirmation.

[Paragraph (c) as adopted in Release No. 34-19687 (§ 83,341), effective July 25, 1983, 48 F. R. 17583.]

(d) A broker or dealer shall give or send to a customer information requested pursuant to this rule within five business days of receipt of the request; *Provided, however,* That in the case of information pertaining to a

transaction effected more than 30 days prior to receipt of the request, the information shall be given or sent to the customer within 15 business days.

(e) For the purposes of this rule,

(1) "Customer" shall not include a broker or dealer;

(2) "Completion of the transaction" shall have the meaning provided in Rule 15c1-1 under the Act;

(3) "Time of the transaction" means the time of execution, to the extent feasible, of the customer's order;

(4) "Debt security" as used in paragraph (a)(3), (a)(4), and (a)(5) only, means any security, such as a bond, debenture, note, or any other similar instrument which evidences a liability of the issuer (including any such security that is convertible into stock or a similar security) and fractional or participation interests in one or more of any of the foregoing; *Provided, however*, that securities issued by an investment company registered under the Investment Company Act of 1940 shall not be included in this definition; [Adopted in Release No. 34-19687 (§ 83,341), April 18, 1983, effective January 1, 1984, 48 F. R. 17583.]

(5) "Periodic plan" means any written authorization for a broker acting as agent to purchase or sell for a customer a specific security or securities (other than securities issued by an open end investment company or unit investment trust registered under the Investment Company Act of 1940), in specific amounts (calculated in security units or dollars), at specific time intervals and setting forth the commissions or charges to be paid by the customer in connection therewith (or the manner of calculating them); and

(6) "Investment company plan" means any plan under which securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 are purchased or sold by a customer pursuant to

(i) An individual retirement or individual pension plan qualified under the Internal Revenue Code; or

(ii) A contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, such securities in specified amounts (calculated in security units or dollars) at specified time intervals and setting forth the commissions or charges to be paid by such customer in connection therewith (or the manner of calculating them); or

(iii) Any other arrangement involving a group of two or more customers and contemplating periodic purchases of such securities by each customer through a person designated by the group; *Provided*, That such arrangement requires the registered investment company or its agent

(A) To give or send to the designated person, at or before the completion of the transaction for the purchase of such securities, a written notification of the receipt of the total amount paid by the group;

(B) To send to anyone in the group who was a customer in the prior quarter and on whose behalf payment has not been received in the current quarter a quarterly written statement reflecting that a payment was not received on his behalf; and

(C) To advise each customer in the group if a payment is not received from the designated person on behalf of the group within 10 days of a date certain specified in the arrangement for delivery of that payment by the

## [¶ 22,729A] Reg. § 240.10b-10—Continued

designated person and thereafter to send to each such customer the written notification described in paragraph (a) of this section for the next three succeeding payments.

➡ *Reproduced below is the text of Rule 10b-10(e)(7) and (8) as added in Release No. 34-22397 (¶ 83,912), effective March 17, 1986.*

(7) "Reported security" shall have the meaning provided in Rule 11Aa3-1 under the Act. [Added in Release No. 34-22397 (¶ 83,912), effective March 17, 1986, 50 F. R. —.]

(8) "Effective transaction reporting plan" shall have the meaning provided in Rule 11Aa3-1 under the Act. [Added in Release No. 34-22397 (¶ 83,912), effective March 17, 1986, 50 F. R. —.]

(f) The Commission may exempt any broker or dealer from the requirements of paragraphs (a) and (b) of this section with regard to specific transactions or specific classes of transactions for which the broker or dealer will provide alternative procedures to effect the purposes of this section; any such exemption may be granted subject to compliance with such alternative procedures and upon such other stated terms and conditions as the Commission may impose.

[Adopted in Release No. 34-13508 (¶ 81,143), effective January 1, 1978, with the exception of paragraphs (b), (c), (d) and (e), which are effective June 1, 1977, 42 F. R. 25323; amended in Release No. 34-14184 (¶ 81,367), effective date postponed until April 1, 1978, 42 F. R. 60734; Release No. 34-14573 (¶ 81,536), effective date postponed until August 1, 1978, 43 F. R. 11981; Release No. 34-14942 (¶ 81,638), effective date postponed until December 18, 1978, 43 F. R. 30271; Release No. 34-11219 (¶ 81,746), effective December 18, 1978, 43 F. R. 47503; Release No. 34-19687 (¶ 83,341), April 18, 1983, effective July 25, 1983 and January 1, 1984, 48 F. R. 17583; and Release No. 34-22397 (¶ 83,912), effective March 17, 1986, 50 F. R. —.]

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Nov 16 10 28 AM '86

WELLS FARGO BANK  
NATIONAL ASSOCIATION

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

WESTERN CAPITAL AND  
SECURITIES, INC.,

Plaintiff,

-vs-

HELEN KNUDSVIG,

Defendant.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

CIVIL NO: 92290

This matter having come before the Court for trial on the 16th day of October, 1986, at the hour of 9:30 a.m., Plaintiff being present in Court and represented by Attorney Craig McCullough, and Defendant being present in Court and represented by her attorney, Gerald S. Wight, and the Court having taken the matter under advisement and subsequently issued its Memorandum Decision, does hereby make the following Findings of Fact in accordance with that Decision.

FINDINGS OF FACT

1. That Defendant is a 61-year old lady who has habitually dabbled in penny stocks usually in the amount of

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

a few hundred dollars or less, investing in new issues which will hopefully achieve a quick rise in value. Plaintiff attempted to establish that the Defendant was an experienced and sophisticated investor but this is contrary to the facts that were brought out at trial.

2. In 1984 Defendant bought some \$200.00 worth of penny stocks in a company known as Venture Consolidated which at that time amount to 20,000 shares. The particular stock was a new issue and a typical penny stock offering and the Plaintiff corporation was the market maker of the issue and the market which would follow. The plan was to sell 100 million (100,000,000) shares, or \$1,000,000.00 worth and eventually insiders captured 23% of the 200,000 plus shares sold while the public holding was to be at \$200,000.00. The investment was principally held in cash in a plan developed wherein a shareholders meeting would be called to bring about a merger and consolidation with several other corporations with the resulting entity to be known as Tires, Inc., with a 20 to 1 reverse stock split taking place immediately thereafter. This particular shareholders meeting was to occur on September 19, 1984. In the meantime, the Venture Consolidated stock rose from one cent (1¢) to sixteen (16¢) or seventeen (17¢) cents, the sole reason for the rise apparently being the proposed merger and the



general market making activities of the Plaintiff brokerage. Due to the activities of Plaintiff and other involved parties, the result of their activities was to raise the value of Venture Consolidated and eventually the Tires, Inc. stocks. This has resulted in the Defendant's original \$200.00 investment being worth approximately \$30,000.00 at the time of trial which is primarily based upon the general market making activities of the Plaintiff brokerage and/or other insiders activity.

3. That the Plaintiff has at all time maintained an Ogden office with the account executive for that office, Lou Babcock, being well acquainted with the Defendant. That Mr. Babcock visited with the Defendant on September 14, 1984, and advised her of the stocks climb in value and offered to sell it for her. Such a sale would bring on the recording of an additional indication of a fixed value for the market making activity, and would serve also to pick up the stock in the face of what appeared to be high promotional activity in order to prevent profit taking before the explosion in value was to occur. That while the motive to sell the stocks on commission was no doubt present, the Court does find that any such commission would be very small. That the Defendant became excited about the potential rise in value and decided to obtain a second opinion by placing a call to

the Salt Lake office and requesting further information. That the broker who received the call interpreted the conversation to be a request for a sale of her shares and he then contacted the vice-president of the brokerage for further instructions on what to do in as much as he knew that there was no stock certificate with the Plaintiff brokerage. That in spite of this difficulty, the vice-present of the brokerage immediately approved the sale and the brokerage then made an entry that the purchase was made for their market making account. That the Plaintiff failed to give notice of the transaction as required by its own agreement with the Defendant and by Federal and Association Rules and Regulations.

5. That the Defendant had no intention of making a sale of her shares and was aware of the fact that such a sale could not take place without the presence of a stock certificate and had in the past had such a sale cancelled as opposed to having a purchase made by the broker to cover what is known as a "short sale". That one of the reasons that the Defendant has never received a stock certificate is that it would serve the personal interest of the insiders' market making activity to freeze the outsiders and prevent their profit taking and interference with the stock's rise by making it more difficult for them to "profit take".

6. That regulations and the broker's contract itself with the Defendant, require a wind up and closing of all transactions within five (5) days after a sale or purchase occurs. That the Plaintiff brokerage made no effort to close in the five (5) day period and that they in fact preferred not to do so, preferring instead to await further developments. That the stock rose uniformly during the next period of time and there was never any drop below the sales price so that the brokerage position would be threatened. That after approximately seventy-five (75) days, the Plaintiff decided to make a transfer purporting to cover the short, making an entry that they had bought from their own profit making account. That this resulted in a paper calculation that if the sale was made in accordance with the original sales entry, and a short coverage was effected at the repurchase date, that the Defendant would owe the \$5,400.00 claimed in Plaintiff's Complaint because of the rise in the market during the seventy-five (75) days of Plaintiff's dalliance. That the Plaintiff knew that it would not be closing within five (5) days, even assuming that the original sale had actually taken place and let the matter ride at the Defendant's risk and should now be estopped to make any claim against the Defendant. That the Plaintiff brokerage has suffered no damage in that the

entries made were strictly to and from their own market making accounts and records and there is no evidence to establish that they were ever in any way threatened in their position. That Defendant's shares could not be sold without possession of the certificate.

7. That the Defendant is the rightful owner of the 20,000 shares of Venture Consolidated which has subsequently been converted to 1,000 shares of Tires, Inc., free and clear of any and all claims of the Plaintiff.

#### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court does hereby arrive at the following Conclusions of Law:

1. That the Plaintiff has failed to establish any cause of action against this Defendant and has wrongfully attempted to sell her 20,000 shares of Venture Consolidated, which has since been converted to 1,000 shares of Tires, Inc.

2. That said sale was in violation of Rule 10B(10) and 10B(5) of the Securities Exchange Act of 1934, and that Western Capital and Securities, Inc., attempted to unlawfully convert the shares of Venture Consolidated held by the Defendant and by means and instrumentalities of interstate commerce or the mails or any facility of any national

securities exchange, employed a scheme and made untrue statements of material fact, or failed to admit a material fact and have engaged in a course of practice which operates to defraud the Defendant in that they attempted without any authorization whatsoever to convert and sell the securities of the Defendant.

3. That the Plaintiff further acted in violation of its own agreement with the Defendant which required a settling of all accounts within five (5) business days of the transactions, and also Rule 10B(10) of the Securities Exchange Act of 1934 by failing to finalize said transaction and further to provide a notice in writing of the same to the Defendant as required by Rule 10B(10) and its own agreement.

4. That in addition, the actions of Western Capital and Securities, Inc., are in direct violation and in contravention of the NASB Manual Rules of Fair Practice, Paragraph 2162, Sections 12, 18, 21(a)(b), and 2761 in addition to Sections 1 and 9 of the Paragraph 2162.

5. That the Defendant is the sole and rightful owner of the 20,000 shares of Venture Consolidated which have subsequently been converted to 1,000 shares of Tires, Inc., and said ownership is free and clear of any claims of any kind of the Plaintiff, Western Capital and Securities.

6. That the activity of the Plaintiff in this matter is unconscionable and done with the intent to make a profit on the stocks generally held in the market making account with the risk of loss solely that of the Defendants if there should be any lapse in the rise of the stock's value. That the Plaintiff is a relatively large brokerage business which has branch offices, makes prices and invests for its own purposes, etc. That persons in the position of the Defendant are vulnerable to the behind-the-scenes activities of entities such as the Plaintiff, and particularly in the penny stock market which attracts persons who might otherwise not be able to afford any losses. That these people cannot normally afford the costs and expenses involved in litigation if treated unfairly or illegally.

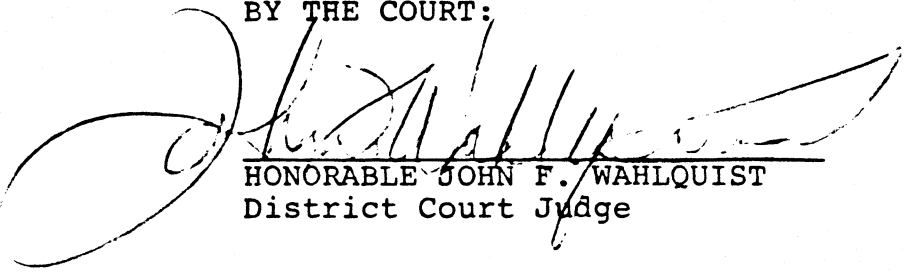
7. That the deliberate failure to move towards the closing of a transaction, together with the motive of the Plaintiff to hold the stock at the Defendant's expense for a period of seventy-five (75) days, far in excess of the mandatory five (5) day maximum, directly resulted in a cheat of the stock buying public and more particularly this Defendant, both of which are near helpless in situations such as this.

8. That based upon the size of the transaction, the freezing of the stock that eventually reached a high value

of \$30,000.00, and the assertions of an unconscionable right to hold the stock at investor's risk justifies the award of punitive damages in the amount of \$10,000.00.

DATED this 10 day of October, 1986.

BY THE COURT:

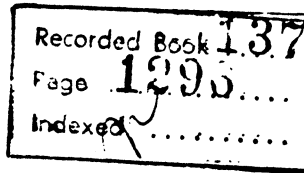
  
HONORABLE JOHN F. WAHLQUIST  
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30 day of October, 1986, I mailed a true and correct copy of the above and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW by placing same in the U.S. Mail postage prepaid and addressed to the following:

Craig F. McCullough  
Attorney for Plaintiff  
185 South State Street, #528  
Salt Lake City, Utah 84111

  
SECRETARY



Nov 10 1986

REC'D  
FIC/CLERK  
CLERK

GERALD S. WIGHT, #3461  
VLACHOS & SHARP  
Attorney for Defendant  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401  
Telephone: 621-2464

IN THE DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

WESTERN CAPITAL AND  
SECURITIES, INC.,

Plaintiff,

-vs-

HELEN KNUDSVIG,

Defendant.

JUDGMENT

CIVIL NO: 92290

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57/429

This matter having come before the Court for trial on the 16th day of October, 1986, at the hour of 9:30 a.m., the Court having taken the matter under advisement at the close of testimony and oral argument, and having previously rendered its Memorandum Decision and entered Findings of Fact and Conclusions of Law, does hereby award judgment as follows:

1. That the Complaint of the Plaintiff is dismissed no cause of action.

2. That the Defendant is the sole owner of the 20,000 shares of Venture Consolidated which has since been

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converted by the company to 1,000 shares of Tires, Inc., and has been at all times and places in that the Plaintiff has not and does not have any claim whatsoever on said shares or against the Defendant.

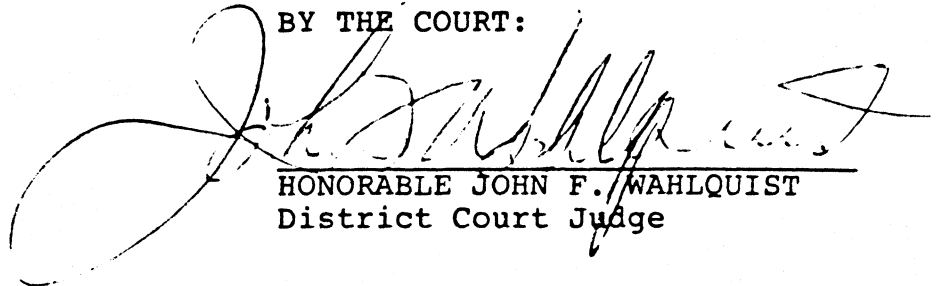
3. That the Plaintiff has acted in violation of Rule 10B(5) and 10B(10) of the Securities Exchange Act of 1934 and the NASD Rules of which the Plaintiff is a member and has further acted in a manner so as to deceive and cheat the public in general and the Defendant in particular by its involvement and hold and control over the subject corporation with the knowledge and inside information of its dealings in up coming business activities, and has used all such to the detriment and damage of the Defendant in attempting to convert her stock, all in violation of all applicable rules and regulations thus entitling the Defendant to judgment against the Plaintiff in the amount of \$10,000.00 punitive damage in addition to costs of Court in the amount of \$35.00.

4. It is further Ordered that Interwest Transfer or any other entity which has previously been served with or notified of any restraining order restraining the obtaining of the certificate by the Defendant shall forthwith release any such certificate and issue the same to the Defendant upon appropriate application.

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DATED this 10 day of October, 1986.

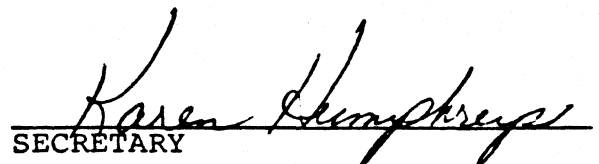
BY THE COURT:

  
HONORABLE JOHN F. WAHLQUIST  
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20 day of October, 1986, I mailed a true and correct copy of the above and foregoing JUDGMENT by placing same in the U.S. Mail postage prepaid and addressed to the following:

Craig F. McCullough  
Attorney for Plaintiff  
185 South State Street, #528  
Salt Lake City, Utah 84111

  
SECRETARY

ATTORNEYS AT LAW  
LEGAL FORUM BUILDING  
2447 KIESEL AVENUE  
OGDEN, UTAH 84401

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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WESTERN CAPITAL AND  
SECURITIES, INC.,

Plaintiff,

vs.

HELEN KNUDSVIG,

Defendant.

MEMORANDUM DECISION

Case No. 92290

The Court has considered the testimony, and the exhibits, and the implications drawn therefrom. The defense attorney is invited to submit findings of fact and conclusions of law consistent with that indicated below.

FACTS

1. The defendant is a 61-year old lady. She has habitually bought penny stocks. This is usually in the amount of a few hundred dollars. She is most interested in new issues that will hopefully make a quick rise, even though they may descend later.

2. The plaintiff's witnesses have claimed that the defendant was granted concessions because she was an established good investor. This is not real. She testified that she bought or traded a few hundred dollars per year. Her testimony is not refuted. Her stock speculation in the face of financial problems brings forth an image of a chronic desperate gambler.

3. In 1985 she bought \$200 worth of one cent Venture Consolidated (20,000 shares). This was a new issue, and a typical penny stock offering. The plaintiff corporation was the "market maker" of the issue and the market to follow. The plan was to sell 100,000,000 shares (\$1,000,000 worth). Insiders captured 23% of the 200,000 plus shares sold, and the public holding was reported to be at \$200,000. The investment was principally held in cash. A plan developed wherein a shareholders meeting was to be called to bring about a stock transfer with Tires, Inc., at a 20 to 1 reverse split. This was to occur on October 19, 1986. In the meantime, the Venture Consolidated stock rose from one cent to sixteen or seventeen cents. There is no evidence as to why the stock value rose, except the proposed merger and the general market making activities of plaintiff brokerage. There is nothing like "discovery of oil on the adjoining property" in evidence. The bottom line seems to be that a cash injection of something like \$200,000 was to raise the value of a Venture Consolidated to many times the invested value and to further raise the Tire, Inc., stocks. The result was that this \$200 investment has a market value of in the neighborhood of \$30,000 at trial time. The evidence offers no explanation for this rise except the general market making activities of the plaintiff brokerage and/or other "insiders' activity".

4. The plaintiff maintains an Ogden office. The Ogden representative was well acquainted with the defendant. He called on her place of business on about September 13 or 14, 1985. His purpose was to tell her of the stock's climb and to offer to sell it for her. Such a sell would bring on the recording of an additional indication of a fixed value for the market making activity, and would serve also to pick up the stock in the face of what appeared to be high promotional activity in order to prevent profit taking before the explosion in value was to occur. While the motive to sell the stocks on commission is no doubt present, the Court notes that such commission would be very small.

5. The defendant was excited. She decided to get a "second opinion". After the Ogden office closed, she phoned the Salt Lake office and pumped for further information. The Court has learned to its frustration during this trial that the defendant's testimony is extremely difficult to follow, particularly so when she is excited. The Salt Lake broker interpreted the conversation to be a request for stock sale. He contacted the vice-president of the brokerage for further instructions on what to do inasmuch as he knew that there was no stock certificate with the plaintiff brokerage. In spite of this difficulty, the vice-president of the brokerage immediately approved the sale.

The brokerage then made an entry that the purchase was made for their market making account. The question of whether or not a notice of this transaction was mailed out or not is in conflict. The Court concludes that the plaintiff has failed to establish by a preponderance of the evidence that such a notice was given.

6. The defendant interpreted the telephone conversation in another direction. She had in the past experienced efforts to make sales when she did not have a stock certificate and had been faced with canceled sales as opposed to purchases by the broker to cover what is called "shorts". She assumed that there would be no final sale until she was able to get a stock certificate. The Court has considered the conflicting evidence as to whether or not a stock certificate was actually sent to her or not, and has concluded that the preponderance of the evidence is that it was not sent. This finding is not only based upon the defendant's testimony, but also the implication that it would serve the personal interests of the insiders' market making activity to freeze the "outsiders" and prevent their profit taking and interference with the stock's rise by making it more difficult for them to "profit take".

7. Regulations and the broker's contract both require a wind up and close of all transactions within five days after a sale or purchase occurs. The plaintiff brokerage made no effort

to close in the five-day period. They preferred not to do so and did await developments. The stock rose uniformly during the next period of time. There was never a drop below the sales price, so that the brokerage would be threatened. After approximately 75 days, the plaintiff decided to make a transfer purporting to cover the "short". They made an entry that they had bought from their profit-making account. The result is that a paper calculation that if the sale was made in accordance with the original sales entry, and a short coverage was effected at the repurchase date, that the defendant would owe the \$5,000 plus dollars, because of the rise in the market during those 75 days. The Court rejects this theory in that the plaintiff knew they were not closing within 5 days, even if you assume that the original sale was made, and let the matter ride at the defendant's risk, and should now be estopped to make such claims. The Court finds that the brokerage suffered no damages in that the entries made were strictly from their market making records. There is no evidence that they were ever in any way threatened, she could not sell without the stock.

8. The Court finds that the defendant continues to be the owner of the 20,000 shares of Venture Consolidated and/or the stock by whatever name it now is known.

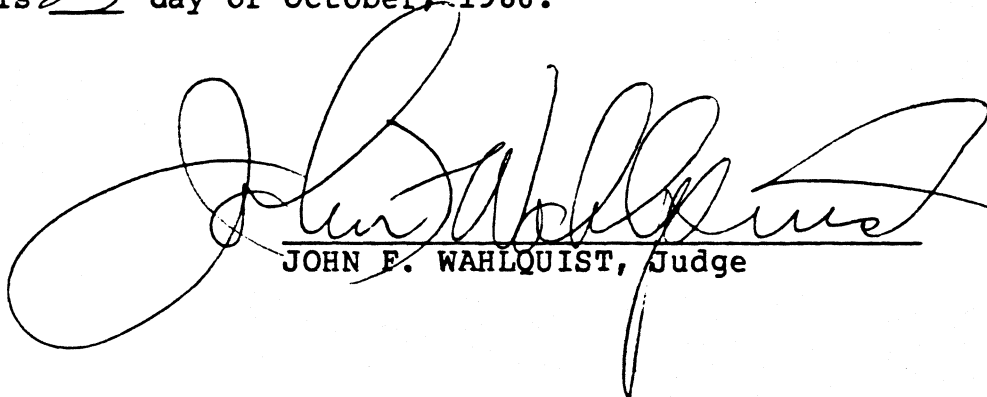
DAMAGES

The Court considers that the alleged sale never occurred pursuant to the contract. The Court does, however, find that the plaintiff's activity in this instance is unconscionable. It knew early that the defendant had denied the original sale had been made, but nevertheless the brokerage took no action to close the transaction within the five days. It left the situation in an ambiguous state. Its intent was that they could make a profit on the stocks generally held in the market making account with the risk only to the defendant because of the stock's rise in value was consistent. The Court is mindful that the evidence in general discloses a relatively large brokerage business which has branch offices, makes prices, invests for its own purposes, etc. The Court is also mindful of the vulnerability of persons in the defendant's position. It is obvious that the penny market stock market is one that attracts persons that might otherwise be in the lottery ticket person class. Their purchases are generally sufficiently small that they cannot afford litigation if treated unfairly. The deliberate failure to move towards the closing of a transaction, even if they were correct that a sale occurred and an agreement had taken place, their motive was to hold at the defendant's expense for the period over the five-day maximum or on into what they have testified is their right to hold



indefinitely, and their tying up of the stock certificate requiring lengthy litigation, all results in general cheat of a public that is near helpless. The Court has considered the size of the transaction, the freezing of stock that eventually reached \$30,000, and the assertions of an unconscionable right to hold the stock investors at risk justifies the award of punitive damages in the amount of \$10,000.

DATED this 23 day of October, 1986.



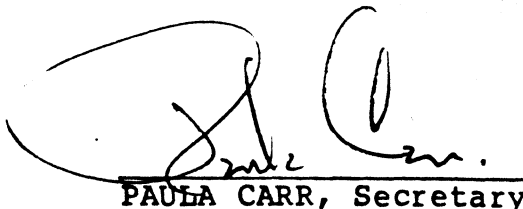
JOHN F. WAHLQUIST, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of October, 1986, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

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