1978

Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Brief of Appellant Valad

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,

Plaintiff and Respondent,

vs.

TED R. BROWN & ASSOCIATES, INC.,

Defendant, Crossclaimant, Respondent, Defendant to Valad's Counterclaim and Appellant,

and

VALAD ELECTRIC HEATING CORP.,

Defendant, Cross-Defendant, Counterclaimant and Appellant.

Supreme Court No. 15530

BRIEF OF APPELLANT VALAD

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable Hal Taylor, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is basically a contract action wherein Plaintiff ordered certain electrical heaters from Defendant Brown who in turn ordered said heaters from Defendant Mallory; the heaters were claimed to be defective.

DISPOSITION IN LOWER COURT

This case was tried by the Court, sitting without a jury, commencing on January 19, 1976, and continuing through until January 29, 1976, for a total of seven days of actual trial. Pursuant to stipulation, the case was tried first as to the issue of liability and second as to the issue of damages.

Upon completion of the evidence on liability, the Court made the definite ruling that Mallory did not get what it thought it was going to get with respect to the heaters, and that the preponderance of the evidence showed that Valad was required to furnish a certain type of heater which it did not furnish. (T. 620) At the beginning of the next day, however, the Court reversed itself and said that it had not intended to rule absolutely that Valad was liable despite the specific statement so made (T. 620, lns. 23-29), but that the Court did want to have post-trial briefs on the matter. The Court also indicated at the beginning of the bifurcated portion of the trial on damages, that the burden of persuasion was on Valad, not Mallory, the Plaintiff:

> As between the Plaintiff and the Defendant Valad, I indicated in chambers that I felt that the burden of persuasion in view of my rulings, would be upon Valad to persuade me that they were not liable. (T. 631-2)

At the conclusion of the trial, the Court took the matter under advisement and all counsel submitted post-trial

briefs, which are found in the record. Subsequently, Findings of Fact and Conclusions of Law as well as a Judgment were filed by the Plaintiff; Defendant Valad filed objections to the Findings of Fact and Conclusions of Law and a Motion for a New Trial. On April 5, 1977, all counsel met with Judge Taylor in chambers and agreed to certain Findings of Fact and Conclusions of Law as to form, and further agreed that the Judgment would be amended to conform to the revised Findings of Fact and Conclusions of Law. (R. 641)

In the second appeal on this matter, Supreme Court No. 15544, issues are presented which bear no relevance to Valad's appeal and concern only Mallory and Brown.

NOTE: The relevant abbreviations used herein are as follows: Record--"R."; Transcript--"T."; line or lines--"lns."; Exhibit--"Ex. or Exs."; Purchase Order--"P.O."; kilowatt--"KW"; paragraph--"¶"; and drawing--"DWG".

RELIEF SOUGHT ON APPEAL

Appellant, Valad Electric Heating Corporation, seeks reversal of the judgment of the lower Court in favor of Mallory and/or Brown. Appellant Valad further seeks judgment on its Counterclaim against Brown in the sum of $4,837.50. In the alternative, Valad seeks that its Motion for a New Trial be granted, and that the Court order a new trial on all of the issues in this case.

STATEMENT OF FACTS

The Parties

Plaintiff, Mallory Engineering, Inc., (hereinafter "Mallory"), whose principal office is located in Salt Lake City, Utah, designs and manufactures environmental equipment "very similar to the three projects that are under consideration in this Court case", according to it's president, Lee Farber. (T. 4) Defendant Ted R. Brown and Associates, Inc., (hereinafter "Brown"), is a firm of engineering consultants located in Salt Lake City, Utah, which ordered certain industrial heaters from Valad for the purpose of selling them to Mallory. Valad Electric Heating Corporation (hereinafter "Valad"), is a manufacturer and designer of electric heaters and industrial heating equipment. It's only office and plant are located in Tarrytown, New York. (T. 357-8)

Principal Characters

The persons primarily involved in the negotiations for the parties were:

A. Lee Farber, president of Mallory: Mr. Farber is a qualified mechanical engineer. (T. 3-4) Mr. Farber did almost all of the negotiating with Brown's Carl Nyman for the purchase of the heaters.

B. Carl Nyman, Brown's engineer: The only person who negotiated on behalf of Brown was Carl Nyman, a qualified electrical engineer. (T. 226) Mr. Nyman negotiated with both Mallory's Farber and Valad's Cecchini.

C. Peter Cecchini, Valad's General Manager: All of the negotiations with respect to the order of the heaters by Brown were carried on by Peter Cecchini, Valad's

General Manager. Mr. Cecchini does not hold any technical engineering degrees such as Farber or Nyman, but has a degree in "industrial engineering", which deals generally with plant layout and business management of industrial plants, etc. (T. 356, 499)

Jurisdictional Contacts

Peter Cecchini's uncontradicted testimony at trial indicated that Valad had no employees, representatives, branch offices, or other sales contacts in the State of Utah. (T. 360) Further facts with respect to the validity of personal jurisdiction over Valad are set forth in Point I below.

Preliminary Negotiations

Beginning in January, 1972, (T. 358, 362) Brown sought out manufacturers of heating equipment which it wanted to buy in order to sell them to Mallory. (T. 75, 358-60, 219-22) The latter had purchased similar heaters from companies other than Valad. (T. 14, 33) After consulting Peter Cecchini of Valad (T. 385) and Valad's advertising leaflets in November, 1972, Brown eventually chose to negotiate with Valad (T. 97-99; Exs. 42 and 45) with whom it had never before dealt commercialiy. Thereafter, the extended preliminary negotiations leading to the eventual written contract to sell (Ex. 20) between Valad and Brown were conducted entirely by them. (T. 74, 240-42, 252-75, 326-32, 351-2, 358-9, 364-400)

Mallory's Governmental Contracts

Mallory's Lee Farber testified that he had certain contract commitments to build mobile environmental chambers designed to test ammunition, weaponry, etc. (T. 4) Mallory needed heaters for the purpose of raising the temperature in

these environmental chambers. (T. 4) During 1972, Farber and Nyman negotiated for the purchase of various heaters. The evidence is conflicting with respect to whether or not Nyman read the basic government documents or had knowledge of Mallory's specific heater needs. (T. 6, 7, 10, 13, 101, 195-6, 430-2) However, it is not contested that Valad never received copies of the government specifications. (T. 6-10, 13, 430-2) Further facts with respect to the government specifications appear in Point V below.

Relationship Between The Parties

The Record clearly establishes that Brown was Mallory's vendor and Mallory was the vendee. (T. 97) Similarly, Brown and Valad had the relationship of Vendor-Vendee. (T. 20, 23, 25-6, 28, 220-21, 235, 254-5, 281) There was no contractual relationship between Mallory and Valad. Mallory seeks to hold Valad only on a third-party beneficiary theory and the theory of guarantees. (Conclusion of Law No. 5) Further facts with respect to the relationship of the parties appear in Point II below.

Valad's Three Classes of Heaters

Cecchini's uncontradicted testimony showed that Valad manufactured three types of heaters. (T. 426-30) The three types are:

Class A: Stock-Items, mass produced, repetitive; heaters of various Valad designs; all advertised in it's catalog. (T. 426-7, 436)

Class B: Modified stock heaters with the same fundamental theory, design and structure as stock items but modi-

fied in size or shape for a customer's particular needs. (T. 427-30. 436-7, 475-6, 492-6)

Class C: Specially designed or custom-made heaters, expressly guaranteed to meet the customers' special requirements for performance. (T. 427-8, 431, 437, 481, 524-5)

The heaters involved in this litigation fall into the Class B only. (T. 429-30) Additional facts regarding the significance of the classes of heaters appear in Point II below.

Offer And Acceptance

The initial negotiations between Cecchini and Nyman, with respect to the purchase of the heaters by Brown, resulted in Brown's P.O. 6730 for the 15 and 21 KW heaters. (Exs. 10 and 11) This purchase order from Brown included a copy of a purchase order from Mallory to Brown, Mallory's P.O. 4016. (Ex. 9) These were not detailed enough to constitute a specific offer capable of acceptance by a manufacturer and were not accepted by Valad. On the basis of negotiations and discussions after those purchase orders, Valad presented Brown with detailed structural shop drawings for the 15 and 21 KW heaters. (Exs. 17 and 18) These constituted Valad's specific offer for the manufacture of the heaters. Nyman and Farber reviewed these drawings (the revised number 17 and the new 18), made certain modifications and approved them. This approval was written on both drawings, constituting Exhibit 20 (of which Exhibit 83 is the original), in Nyman's handwriting, by the words: "Approved for construction". Thus, Exhibits 20 and 83 became the only contract in the case between Valad and Brown.

Shipment Of The Heaters And Problems

Sometime after the speed letter of January 26, 1973, arrived (Ex. 20), Valad began manufacturing the heaters and shipped the same in mid and late March, 1973. (T. 36, 713, Exs. 36 and 37) Valad manufactured the 12 KW heaters represented by Mallory P.O. 4047 (Ex. 12), and these are not at issue in this case. Valad never agreed to manufacture the 50 and 36 KW heaters and the record is devoid of any evidence that such were accepted.

Mallory installed the heaters after receipt in late March or early April and indicated its dissatisfactions to Brown's Nyman on or about April 30, 1973. (T. 241, 75, 415) At that point, Mallory got in touch with Valad for the first time (T. 74-5), and several conversations were held. The result of these conversations was Mallory's repudiation of any further contract with Valad, specifically for the 36 and 50 KW heaters. (Ex. 35) Additional facts with respect to the time sequence of the significant and relevant events in this case appear below.

POINT I

THE COURT DOES NOT HAVE PERSONAL JURISDICTION OVER DEFENDANT VALAD UNDER THE "LONG ARM" STATUTE, U.C.A. 1953 §§78-27-22 THROUGH 25. NOR HAS DEFENDANT VALAD MADE A GENERAL APPEARANCE OR IN ANY OTHER WAY SUBJECTED ITSELF TO THE PERSONAL JURISDICTION OF THE COURT.

There can be no valid judgment against Valad since the Court in the first instance never had personal jurisdiction over Valad. The Complaint herein was filed on September 20, 1973, and purportedly served upon Valad pursuant to the provisions of the Long Arm Statute (U.C.A. 1953 §§78-27-22 through 24) in New York. (R. 9, 11) On November 1, 1973, Valad responded pro se with a single, "blue backed" document (filed as one document in the Salt Lake County Clerk's office), and consisting of two parts:

A. A document entitled "Answer, Counterclaim, and Cross-Complaint" (R. 23) which was actually a response to Defendant Brown's Cross-Complaint; and

B. A document entitled "Answer" (R. 24-33), which raised all of the jurisdictional defenses. (R. 25-27)

The Lower Court And First Appeal

On April 14, 1975, Defendant Valad filed a "special appearance" (R. 125-6) and an Affidavit (R. 137-141), treated by the Court as a Motion to Quash Service of Summons (R. 142 and 170), and denied on April 28, 1975. (R. 170)

Valad's affidavit is very significant to this case. (R. 137-141) It specifically denied the presence of agents, sales, offices, bank accounts, advertising and any other significant contact in Utah. It shows the disputed transaction to be isolated. The allegations contained in the affidavit therein have never been contested, challenged or disproven,

either on the previous appeal or at trial.

The Remittitur

Defendant Valad filed a Notice of Appeal on May 12, 1975 (R. 173), followed by a Petition for Interlocutory Appeal on May 23, 1975 (Supreme Court No. 14102). The Interlocutory Appeal was sought due to Brown's filing of a Motion to Dismiss. (Supreme Court No. 14102)

Via the Remittitur on June 2, 1975, the Court granted Brown's Motion to Dismiss the Appeal but specifically reserved the issue of personal jurisdiction for any ultimate appeal in the matter. (R. 178) That same Remittitur, by its own terms, rendered the interlocutory appeal of Valad moot. (R. 178)

Testimony At Trial

During the trial, the following testimony came in unchallenged and unrefuted:

Q. (Schmidt, Attorney for Valad): Did you ever have a sales representative in the State of Utah?
A. (Valad's Cecchini): No, never.
Q. Did you ever before do business in the State of Utah?
A. No.
Q. How many transactions, if you can remember the number, did you have with Ted R. Brown where you actually received purchase orders from them?
A. Before this?
Q. Before this case.
A. None.
Q. So that the only purchase orders you ever received from Ted R. Brown were those involved in this present litigation?
A. Yes. That is correct.
Q. You have no branch office in the State of Utah?
A. None.
Q. You never did?
A. No. (T. 360)

Lack Of Minimum Contacts In Utah

The line of cases beginning with Hill v. Zale, 25 Utah 2d 357, 482 P. 2d 332 (1971), clearly defines the limits of "long arm" jurisdiction in Utah. Hill says that the Utah statutes, U.C.A. 1953 §78-27-22 et seq., require the "transaction of business" or "doing business" within the state in order to subject a nonresident corporation to the jurisdiction of our Courts. Id. at 333. The "doing business" test was met by the analysis of a number of factors such as the presence of local offices, personnel, continuous, systematic activity, etc., "none of which is alone the sine qua non to establish a business presence in the state." (See the list at 482 P. 2d at 334) None of the parties to this action have alleged in the complaints or elsewhere, that Valad had any of the contacts required by Hill v. Zale. (R. 4, ¶10; 5, ¶11; etc.)

There are no cases in Utah or elsewhere which predicate jurisdiction on finding of such "minimum contacts" as Valad's in Utah. The analysis of Hill v. Zale has been applied over and over again since 1971 to deny jurisdiction against a defendant in Valad's position. See Union Ski Company v. Union Plastics Corp., 548 P. 2d 1257 (Utah 1976), wherein the Court stated that the burden was on the Plaintiff to affirmatively demonstrate that the Defendant comes within the requirements set forth in Hill. (548 P. 2d at 1259) See also Packaging Corporation of America v. Morris, 561 P. 2d 680 (Utah 1977); and Hodge v. Sands Manufacturing Co., 150 S.E. 2d 793 at 800 (W. Va. 1966), which is almost identical to the case at the bar.

A.
VALAD DID NOT ENTER
A GENERAL APPEARANCE

Mallory and Brown claim without merit that Valad has done acts which constitute a general appearance, thus subjecting it to the jurisdiction of the Court herein. Why? Valad allegedly filed an "Answer" and served answers to interrogatories thereafter. The documents allegedly constituting the "general appearance" are the single,"blue-backed" documents found in the record at pages 23 through 33, and the responses to discovery found in the record at pages 63 through 107 and 115 through 122.

Objection To Jurisdiction
Raised At First Opportunity

The documents found in the record pages 23 through 33 are, significantly, Valad's first appearance of any kind in the record. The pleading found at page 23 is, by misnomer, entitled "Answer, Counterclaim and Cross-Complaint". However, a cursory reading will reveal that it is only a one-page response to the Cross-Complaint of Defendant Brown.

The pleading that begins at page 24 in the record is titled an "Answer". It raises as the "First Defense" the lack of jurisdiction over the person of Valad. (R. 25-27, ¶¶6-18) This defense explains at length that Valad never previously transacted any business within the State of Utah with either Mallory or Brown (R. 26, ¶¶8, 9, 10) and that Valad has no domicile, nor any office, files, facilities, equipment, sales representatives, employees, etc., in Utah. (R. 26 ¶12) It cannot be contested that Valad is clearly claiming, at its earliest opportunity, that the Court lacked personal juris-

diction over it for any purpose whatsoever, as to both Brown and Mallory. Technically, the words of objection to jurisdiction are not found in the document mistitled "Answer, Counterclaim and Cross-Complaint" (R. 23) filed simultaneously with the "Answer". (R. 24)

No Waiver Of The Jurisdictional Defense

Rule 12(h) of the Utah Rules of Civil Procedure provides that a party waives all defenses and objections which it does not present in its answer. Valad raised the objection to jurisdiction in its answer. (R. 26) Rule 12(b) further provides that:

> No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading...or by further pleading after the denial of such motion or objection.

Valad's objection to jurisdiction contained in the "Answer" was physically joined (R. 23, 24) to the mis-titled "Answer, Counterclaim and Cross-Complaint" (R. 23), and thus was part of the same responsive pleading. It was obviously intended to be joined with the defenses to Brown's Counterclaim. Since Valad raised the issue of no personal jurisdiction in its responsive pleading designated "Answer", it cannot be waived just because it was joined with other defenses or pleadings

No General Appearance

The distinction between general and special appearances has been narrowing. In holding that a motion to release the attachment did not constitute a general appearance, the Court recently noted the following:

> The distinction between general and special appearances has been abolished by the language

contained in Rule 12(b) as follows:

> No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection.

Brown v. Carnes Corp, 547 P. 2d 206 at 207 (Utah 1976).

[See also Green v. Roth, 192 So. 2d 537 (Fla. App. 1966); Sharp v. Sharp, 409 P. 2d 1019 (Kan. 1966); and Anderson v. Mikel Drilling Co., 102 N.W. 2d 293 (Minn. 1960)].

Substance And Intent Prevail Over Technicalities

The reason for the fading distinction between general and special appearances is the general policy of the Federal Rules favoring substance over technicalities of form. This policy has been expressed as follows:

> We recognize that the Federal Rules of Civil Procedure must be construed liberally to bring about a just, speedy and inexpensive determination of every action. Any requirement of compliance with barren technical formalities is to be avoided. (Emphasis added) Plant Economy, Inc. v. Mirror Insulation Co., Inc., 308 F. 2d 375 at 378 (3rd Cir. 1962)

Thus, where the contention is made, as in the case at the bar, that a party has committed technical acts which should subject him to the personal jurisdiction of the Court despite a contrary intent, the substance of the acts should prevail over the form. See Farmer's Trust v. Alexander, 6 A. 2d 262 at 264 (Pa. 1939). The intent of a party is paramount: "An appearance is not to be inferred except as a result of acts from which an intent to do so may properly be inferred." 6 C.J.S., Appearances, Sec. 12, P. 19.

Utah cases dealing with the issue of "appearance" show that this Court has been reluctant to construe a general

appearance on a technicality. In Fiberboard Paper Products Corp. v. Dietrich, 25 Utah 2d 65, 475 P. 2d. 1005 (1970), the Defendant's pro se letter to Plaintiff's attorney, with a copy to the Court Clerk, denying that he owed the bill, was not a general appearance. Id. at 1006. In Housely v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967), the non-resident defendant's counsel purportedly appeared "specially" at a hearing to amend Plaintiff's complaint and actually objected thereto. The Supreme Court rejected Plaintiff's claim that this constituted a general appearance because the intent to make a special appearance by the defendant was clearly stated. Cf. Barber v. Calder, 522 P. 2d 700 (Utah 1974).

Other jurisdictions facing the issue of whether a party has unintentionally done acts which amount to a general appearance, despite contrary intent, have arrived at similar results to that of Utah. See Cornett v. Smith, 466 S.W. 2d 641 at 642 (Ky. 1969).

The facts of the case at the bar show that Valad never intended to appear, nor in fact appeared generally, or waive it's objection to personal jurisdiction. At the instance of its first appearance in Court on October 29, 1973, Valad raised the objection to personal jurisdiction. (R. 24-25) The objection to jurisdiction was stated in clear, concise, and unmistakable terms. The claim that the filing of the answer to Brown's cross-complaint (R. 23) subjected Valad to jurisdiction is clearly putting form and technicality above substance, and it is not countenanced by either the letter or the spirit of the Utah Rules of Civil Procedure.

B.

FURTHER PLEADING OR RESPONSE TO DISCOVERY AFTER THE OBJECTION TO JURISDICTION BY VALAD DID NOT SUBJECT IT TO THE JURISDICTION OF THE COURT.

Valad responded to a request for admissions and answered interrogatories in February, 1974. (R. 63-74; 75-107; 115-122) This could not subject Valad to the personal jurisdiction of the Court. All of these discovery responses were filed pursuant to the mandatory rules requiring responses to lawful discovery requests. See Rules 33 and 36, U.R.C.P. The next Court document filed by Defendant Valad after said discovery responses was the "Special Appearance and Notice", treated by the Court as a Motion to Quash. (R. 135) Because the filing of discovery responses is mandatory, it cannot constitute a general appearance. Rule 12(b); Semole v. Sansoucie, 104 Cal. Rptr. 897 (1972); see also Stelly v. Quick Mfg., 229 So. 2d 584 (La. 1969).

C.

A CORPORATION MAY NOT APPEAR PRO SE, AND ANY PURPORTED PRO SE APPEARANCE CANNOT AMOUNT TO A GENERAL APPEARANCE.

The law is well established in this state and elsewhere that a corporation cannot appear pro se. Tuttle v. Hi-land Dairymen's Assoc., 10 Utah 2d 195, 350 P. 2d 616 (1960); 19 ALR 3d 1013. This was conceded by counsel for Mallory and Brown when they filed a joint motion in March of 1975, eighteen months after the case had begun, to compel Valad to appear by counsel or suffer default. (R. 123, 128) All of the pleadings and Court documents in the file

prior to this time were filed pro se by the corporation's general manager, Peter Cecchini. (R.23-24, 33, the "blue-back" cover sheet between 33 and 34, 73, 74, 88 and 107) Therefore, Defendant Valad was not properly before the Court in any event and any pleadings or documents that may have been filed with the Court cannot amount to a general appearance or subject Valad to the jurisdiction of the Court.

POINT II

UNDER COMMON-LAW PRINCIPLES OF CONTRACT LAW AND UNDER THE RULES OF CONTRACT FORMATION PROMULGATED BY THE UNIFORM COMMERCIAL CODE, THERE WERE NO MANIFESTATION OF MUTUAL ASSENT AND NO WRITTEN CONTRACT TO SELL BETWEEN VALAD AND BROWN UNTIL, AFTER PROTRACTED PRELIMINARY NEGOTIATIONS, VALAD ACCEPTED BROWN'S COUNTER-OFFER (EXHIBIT 20). THE TRIAL COURT'S FINDINGS REFER TO NO FACTS CONCERNING CONTRACT FORMATION. THEY RELY ONLY ON UNACCEPTED PURCHASE ORDERS WHICH VALAD NEVER SIGNED IN ANY DOCUMENT REQUIRED BY THE STATUTE OF FRAUDS; AND THEY DISREGARD EXHIBIT 20 (ALSO EXHIBIT 83).

A.

1. On December 14, 1972, Mallory sent its Purchase Order No. 4016 (Ex. 9) to Brown to purchase the 15 and 21 KW heaters, which were not yet in existence and were "future goods" under the UCC. Under the applicable Statute of Frauds and the UCC, a written "contract to sell" is required.

2. On December 15th, Brown sent its P.O. 6730 to Valad for the same two non-existent heaters (Exs. 10 and 68): "Subject to specifications and limitations of Mallory Engineering P.O. 4016 attached". But it was not attached. Brown's purchase order concluded with the sentence: "Engineering drawings and certification of NBFU (National Board of Fire Underwriters) compliance to be furnished by 12/22 so duct fabrication can proceed." This offer was not accepted by Valad and never became part of any written contract to sell. The certification was not sent "by 12/22".

3. On December 20, 1972, Brown by letter sent an addendum to its P.O. 6730 to Valad (Ex. 11), on which the concluding

sentence was: "We are also enclosing a copy of Mallory's purchase order to us and a sketch that should have gone forward with our original order, for your file." Mallory's P.O. 4016 (Ex. 9) was enclosed with this letter but not the sketch. (T. 392) This was not an offer; it was merely part of an offer.

4. Exhibit 17, Valad's letter (and enclosure) dated January 19, 1973, was sent to Nyman (Brown) and, on Nyman's specific instructions (T. 407), to Lee Farber (Mallory). It reads:

> Enclosed are two (2) copies of DWG. #73-119 on our vent duct heater for a total of 21 KW, 208 VAC on your P.O. 6730.

Enclosed with this letter (Ex. 17) was Valad's shop drawing (without annotation or postil) No. 73-119, dated "1/73" (January 1973), which is also part of Exhibit 17.

All of the prior telephone communications and correspondence between Nyman (for Brown) and Cecchini (for Valad) had produced a sufficient convergence of minds as to enable Valad to develop a design and structural drawing of the still non-existent heater inadequately attempted in Brown's P.O. 6730* (Ex. 10) dated December 15, 1973. The discussions between Cecchini and Nyman had clarified, refined and modified P.O. 6730 to the point where Valad could draft and was now asking

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*No purchase order presented by Mallory or Brown was ever signed by Valad nor accepted in any document signed by it. Thus, Plaintiff's claim that Brown's or Mallory's purchase orders constituted a contract complying with the Statute of Frauds is untenable. Besides, these purchase orders were not specific and detailed enough to enable anyone to manufacture the theoretically proposed, but non-existent, heaters.

approval of its drawing No. 73-119, which incorporated these clarifications, refinements and modifications. Neither this drawing, nor the letter transmitting them, say anything about performance-standards.* But they did constitute Valad's first firm offer to Brown which the latter could accept or refuse to accept. As appears below, Brown did not accept this firm offer by Valad.

5. Exhibit 11, dated December 20, 1972, shows that Brown changed, and to that extent abandoned, its P.O. 6730 dated December 15, 1972 (Ex. 10), to which Valad's transmittal letter in Exhibit 17 had referred. That was tantamount to an anticipatory rejection of Valad's firm offer (Ex. 17) based on the supplemented P.O. 6730.

During the period between the dispatch, on December 15, 1972, of Brown's P.O. 6730 to Valad and December 23, 1972, when Valad received Exhibit 11 (dated December 20, 1972), there were many further phone calls and other communications between Nyman and Cecchini which further clarified, refined and modified Exhibit 10, Brown's P.O. 6730:

(1) 12/15/72: A telephone call (T. 395)
(2) 12/19/72: A Valad letter to Nyman (Ex. 70; T. 391)
(3) 12/19/72: Telephone call (T. 395)
(4) 12/20/72: Brown's P.O. 6730 was amended by its letter of that date to Valad which added to that purchase order (Ex. 11)
(5) 12/20/72: Telephone call (T. 258, 393-4, 397)
(6) 12/21/72: Valad's letter to Brown (T. 395; Ex. 72)
(7) 12/21/72: Valad's "Price Quotation" with sketch (Ex. 54)

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*As Exhibits 17 (and Exhibits 20 and 83) show.

(8) 12/21/72: Phone call (T. 393-4)
(9) 12/22/72: Valad's letter to Nyman regarding thermostats, etc. (T. 396-7; Ex. 47)
(10) 12/22/72: Valad's letter (T. 119-20)

All of the foregoing negotiations would have been unnecessary had Valad actually accepted Brown's P.O. 6730 (Ex. 10) or had Brown considered its P.O. 6730 final and satisfactory.

6. Exhibit 18, Valad's transmittal letter dated January 22, 1973, changed the picture by revising its shop drawing #73-119 and by submitting another shop drawing numbered 73-120. It read:

> Enclosed are two (2) copies of DWG. #73-120 on our Vent Duct Heater, 5 KW ea. 208V, 1 PH on P.O. #6730. [A]lso enclosed are two (2) revised copies of DWG. #73-119, 7 KW eac. 208V, P.O. #6730. Two hole location was left off.

This was obviously a new firm offer (or counter-offer with respect to P.O. 6730) proposed by Valad for Brown's acceptance. Up to this point in time, the numerous discussions and negotiations had produced absolutely no contract to sell and no meeting of minds. It had produced only conversations searching for specifics on which to agree. The new firm offer (or counter-offer vis-a-vis Brown's P.O. 6730) by Valad replaced and revised Valad's transmittal letter dated January 19, 1973 and its enclosed shop drawing, both of which constituted Exhibit 17.

B.

Exhibits 20 and 83*, dated January 26, 1973, are Nyman's speedletter and enclosures (drawings 73-119 and 73-120)

*Exhibit 83 is the original speedletter and its enclosures (drawings annotated by Nyman); Exhibit 20 is a copy of Exhibit 83. Where, in this brief, one of these two is mentioned, the other is intended, also.

which are Brown's response to Valad's new firm offer, described in Section 6, supra. By Exhibit 18, Valad had sent to Brown two pairs of each of two different shop drawings without hand-written annotations or postils. Now, by Exhibit 83 (also Ex. 20) Brown returned to Valad one of each of the two different pairs of shop drawings; i.e. Valad's revised shop drawing #73-119 and Valad's shop drawing #73-120. But the returned drawings were now annotated by comments on the face of each drawing in Nyman's handwriting and by his instructions in his speedletter. (Exs. 20 and 83) These annotations show that Brown had substantially accepted Valad's new firm offer (its counter-offer vis-a-vis Brown's P.O. 6730). To be more precise, the annotations showed that Brown would accept Valad's said new firm offer provided certain changes, as detailed in Nyman's annotations and speed-letter, were made. In other words, as each of the two returned drawings showed (by postils in Nyman's handwriting above Nyman's signature) the Valad new firm offer (Ex. 18) was "Approved for construction, subject to comments as made" on the drawings and in the speedletter. (Exs. 20 and 83; T. 411-12, 429-30, 451-53)

Valad promptly agreed to these changes by telephone; then Valad proceeded immediately to manufacture the heaters as shown on the drawings, which Nyman had "approved for construction". (Ex. 20) In so manufacturing the heaters, Valad followed exactly the comments and annotations made by Nyman in Exhibit 20, which is the only manifestation of mutual assent in this case; the only written contract in this case which satisfies the Statute of Frauds. (Exs. 20 and 83)

C.

The following legal principles are applicable to this

written contract as set forth above:

1. Communications which constitute mere negotiations preparatory to an agreement do not imply a contract. Head v. Providence Ins. Co., 2 Crunch 127, 2 L.Ed. 129; South Boston Iron Co. v. United States, 118 U.S. 37.

2. There can be no contract in compliance with constitutional due process where the minds of the parties have not met. Utley v. Donaldson, 94 U.S. 29; Holder v. Anltman, M. & Co., 169 U.S. 81; Valcarce v. Bitters, 12 Utah 2d 61, 362 P. 2d 427 (1961); Oberhansley v. Earle, 572 P. 2d 1384 (Utah 1977).

3. What one party to a contract understands or believes (see e.g. T. 101-4, 106-11, 113-16) does not govern construction thereof unless such understanding or belief is induced by conduct of the other party. National Bank of Metropolis v. Kennedy, 17 Wall 19; 21 L.Ed. 554.

4. The Courts may not, constitutionally, make for the parties a better agreement than they themselves have been satisfied to make. Green County v. Qunlan, 211 U.S. 582; New Orleans v. New Orleans Waterworks Co., 142 U.S. 79; Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452.

5. In contract law, the specific (e.g. structural drawings like Exhibit 83) prevail over the general or merely theoretical (like Brown's and Mallory's purchase orders not capable of manufacture). Smoot v. United States, 237 U.S. 38.

6. Where as here, both parties treated a document (Exhibits 20 and 83) as the agreement and acted upon it, an agreement is legally implied. Small Co. v. American Sugar Refining Co., 267 U.S. 233.

D.

The American Law Institute's Restatement of the Law of Contracts makes "manifestation of assent by the parties who form the contract to the terms thereof" a "requirement of the law for the formation of an informal contract". (Ch. 3 § 19) In this connection the Restatement classifies contracts as "formal or informal" (Ch. 1, §6) and defines "informal contracts" as all contracts other than "contracts under seal," "recognizances" and "negotiable instruments." (Ch. 1 §§6, 7 and 11)

On the subject of "Offer and Acceptance", the Restatement states:

> The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties. (Ch. 3, §22)

Its "Comment" on § 22 is, in part:

> This rule is rather one of necessity than of law. In the nature of the case one party must ordinarily first announce what he will before there can be any manifestation of mutual assent...

Exhibit 20 as a counter-offer was so definite in its terms that Valad was able immediately to manufacture it. (Restatement, Ch. 3, § 32) This was not true of Mallory's P.O. 4016 (Ex. 9) nor of Brown's P.O. 6730 (Ex. 10) as augmented by Brown's letter of December 20, 1972. (Ex. 11)

Even if Valad had not notified Brown of its acceptance of the Brown counter-offer (Ex. 20), Valad did what that counter-offer requested; i.e., it produced heaters required by Exhibit 20, designed and constructed in every detail as that Exhibit required. Thus, Valad's performance, without more, operates as a promise to render complete performance. (Restatement, Ch. 3 § 63)

Under the U.C.C., "goods which are not both existing and identified are 'future' goods"; and a "purported present sale of future goods or any interest therein operates as a contract to sell". 70A-2-105(1) and (2) The contract formed by Valad's acceptance of Brown's counter-offer (Ex. 20) was a "contract to sell" within the meaning of UCC 70A-2-105(2).

The only contract in this case was the contract to sell made by Valad's acceptance of Brown's counter-offer (Ex. 20). The goods contracted for were non-existent at the time. They were "future goods" which as such could be specified for accurate contractual identification only by a structural drawing like Exhibit 20. The heaters produced by Valad conformed with that contract because they were "in accordance with the obligations under the contract" (Exhibit 20) within the meaning of 70A-2-106(2). That contract did not violate the Statute of Frauds, since it was in writing. (Ex. 20)

If proffered as a contract, the purchase orders, being unsigned by Valad (and unaccepted by it in any other signed documents) would violate the Statute of Frauds. Neither the Trial Court nor the Plaintiff bothered to consider this.

Under the UCC, a contract to sell may be made "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Brown and Mallory did recognize the existence of the Exhibit 20 (83). And an "agreement sufficient to constitute a contract of sale may be found even though the moment of its making is undetermined". 70A-2-201(2)

No language spelling out a performance warranty or

performance standards was part of the counter-offer (Ex. 20) accepted by Valad. The statutory warranty of title and against infringement was not violated by Valad. 70A-2-312(1) and (3), and 70A-2-313

In the instant case there was no implied warranty of fitness for a particular purpose under 70A-2-315, because neither Brown nor Valad knew or understood, when their contract was formed, the particular purpose for which the heaters were required, nor the environment in which they would be placed. (T. 6-7, 430-432, 424-427, 481, 493) Valad never saw the government contracts. Therefore, the buyer Brown could not rely on Valad's skill or judgment to select suitable heaters within the meaning of 70A-2-315. Brown was buying from Valad for the purpose of reselling to Mallory; and the written contract to sell (Ex. 20) was basically a specific, structural drawing which required Valad to build the heaters pursuant to the design delineated in those drawings.

Brown, before entering into the contract to sell, could not examine the goods (which were not yet made) nor a sample thereof (there was none) nor a model thereof (it existed only virtually in the drawings which the buyer approved). Therefore, a warranty of performance must be excluded, since a drawing can't be tested for performance and no prototype was made by Valad or ordered from or tested by Valad or anyone else. See 70A-2-316. The heaters covered by the written agreement (Ex. 20) were in Class B, not Class C, of the manufacturer's products. (T. 425-430, 437, 452, 475, 481-2, 492-3, 495-6, 524-530)

Nowhere in the Findings of Fact is there any statement which indicates when or whether a legal contract between Valad and Brown eventuated or what the terms of that contract were. Finding Nos. 4 through 9 were written on the assumption that Brown's P.O. 6730 (dated December 15, 1972) as amended by Brown's letter dated December 20, 1972 (Ex. 11) constituted a contract without the least respect for the Statute of Frauds. That assumption is factually and legally erroneous. No evidence suggests that Valad ever accepted Brown's P.O. 6730 or its addendum dated December 20, 1972. Each was incomplete without the other, even from Brown's point of view (as Exhibit 11 shows). Both were superseded eventually by Exhibit 20. The assumption that Valad accepted Exhibits 10 and 11 does not explain the negotiations about the structure of the 15 and 21 KW heaters which continued, unabated, from December 15, 1972 to January 26, 1973, when Brown sent its speedletter enclosing Valad's annotated drawings (Ex. 20). Nor does that assumption explain Exhibit 20, reference to which the Trial Judge carefully but inexplicably eliminated from his Findings of Fact.

These Findings generally omit any indication of contract formation or the precise terms and conditions of the contract on which the Trial Court relied to find a breach by Valad. The most important document in case, Exhibit 20, was completely neglected by the Trial Court. Apart from that document and its acceptance by Valad, there is absolutely no evidence in the record of mutual assent, contract or meeting of minds. The Findings never show what offer Valad accepted

from Brown prior to January 26, 1973, to form a plausible and legal contract to sell. If Exhibit 20 (83) is not the contract to sell, there was none. Thus, the Findings unveil no contract on which the Trial Court could lawfully rely.

The Findings indicate an attempt to convert unaccepted offers (e.g. Exhibits 9 and 10) which were naked purchase orders for non-existent goods (i.e., "future goods" under the UCC) into a contract binding Valad.

Finding No. 2 goes beyond the Trial Court's ruling when it accepted the Government contracts in evidence. They were admitted only "to show . . . there was a contract for the production of environmental units". (T. 6-10) Finding No. 2 erroneously includes Mallory's "commitments to manufacture . . . environmental units which required as part of their essential components some electrical heaters of precise and exacting specifications." (Emphasis added) The contents of the Government contracts were not part of the admitted evidence. Finding No. 2 erroneously makes them a part.

Finding No. 10 fails to give the valid reasons, appearing in the record, why the 36 and 50 KW heaters were not shipped. (T. 429-430)

Finding No. 15 disregards the overwhelming evidence demonstrating that (a) Brown and Mallory accepted delivery of the 15 and 21 KW heaters*; (b) the delivery dates were not hard and fast conditions*; (c) the delivery dates were waived or modified*; and (d) the delivery dates were not of the essence in the contract to sell (Exhibit 20)*.

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*These matters are discussed in Points III and IV of this brief.

Finding Nos. 16 and 17 are irrelevant insofar as they refer to the 12 KW heater, about which there was no dispute. Valad admitted having made the 12 KW heaters incorrectly because of a typographical error which read 1.2 KW instead of 12 KW. (T. 455-459) Indeed, Valad had, by its Interrogatory No. 2, asked Mallory, for the purpose of delimiting the items of damage, to detail all of the violations of contract it was claiming. (R. 294, T. 67) That had the effect of confining those claimed violations to (i) sheath temperature, (ii) continous flow of voltage, (iii) KW capacity of the heaters and (iv) delivery time. All these matters concerned only the 15 and 21 KW heaters.

Finding No. 17 merely alleges generally and unspecifically "defective" heater assemblies. The alleged "defects" are not pointed out. It is impossible to determine what precisely the Court had in mind.

Finding No. 18 omits the substantial, unrefuted and irrefutable evidence of the unreliability of Mallory's tests. They were performed with improperly calibrated instruments based on no certificate of calibration (T. 49, 56, 58-60, 63, 505-506); with make-shift graph paper not intended for the testing instrument used (T. 57-58); with some thermostats bypassed (T. 51, 60); with other thermostats ruined by the heat caused by welding. (T. 175, 506-510, 516-518) Mallory's story of 500°F. heat is incredible (T. 509-510, 513-514), because it means that not one of the 18 thermostats, installed by Valad in the heaters, functioned to cut off the current at 250°F., at which all the thermostats were (without contradictory evidence) set. (T. 509, 513) The KW capacity is a function of sheath surface area. (T. 383-384, 154-155) The

Valad drawings (Ex. 20) annotated by Nyman showed that sheath area, the formula for which Nyman knew (T. 373-374, 378-379, 383-384) when he approved the drawings in Exhibit 20 (83).

Finding No. 22 is both incomplete and erroneous. The sheath temperature could not possibly have been above 250°F., if Mallory had not damaged or bypassed the 18 reliable Ranco thermostats with which Valad had equipped the heaters. It is physically impossible for all 18 thermostats to have failed when 225°F. was reached. Nor were these heaters defective or in violation of the contract to sell or of the "Certificates of Certification."

Finding No. 23 alleges unspecifically that Valad did not meet the "required specifications" -- which ones the Court leaves to speculation. Valad complied with the approved structural drawings in Exhibit 20 (83). (T. 429-430)

Finding No. 24 assumes that Valad had a contractual duty to supply replacement heaters gratis. No such duty can be discovered in the contract to sell. (Ex. 20) The Findings pay no attention to the relevant fact that the Regan heaters (which were ordered by Mallory purchase orders) specified watt density. The Brown and Mallory purchase orders did not do so. (Exs. 9, 10, and 11; T. 91, 170-172, 526; Exs. 39-41)

G.

Conclusions of Law Nos. 3 and 4 state: "Valad breached its contracts...", as if there were more than one contract! Nowhere in the Findings or Conclusions did the Trial Court: Identify these contracts; describe how they were formed; state who made the offers and who the acceptances; affirm whether they were contracts of sale or contracts to

sell; recite their terms; aver that they were written or oral; cite or exhibit a specific writing competent to serve as the basic written contract; or, if oral, explain away the applicable Statute of Frauds. The conclusion that "Valad breached its contracts" thus has no factual or legal premise.

The evidence establishes that Valad built the 15 and 21 KW heaters in meticulous compliance with the structural drawings (Ex. 20 or 83) approved by Brown. There was, therefore, no breach of any contract by Valad.

Assuming breach, arguendo, the conclusion of indirect damages of $30,840.60 is legal error, as shown in Point VII infra.

Conclusion of Law No. 5 states: "Mallory is entitled to judgment against Valad for...damages to Mallory sustained being a Third Party Beneficiary of the contract of sale..." This conclusion is legal error on two scores: There was no contract of sale; there was only a contract to sell, in view of the UCC. In the second place, Mallory was not, as a matter of law, a "third party beneficiary."

H.

Mallory's complaint purports to allege three causes of action against Brown and Valad. The first cause of action does not mention, refer to or intimate any contract between Brown and Valad. Nor does it state any cause of action against Valad. Its sole reference to Valad (R. 2 ¶3) merely states that Valad "is a New York Corporation with its principal place of business in Tarrytown, Westchester County, New York."

The second cause of action also fails to allege or

mention any contract between Brown and Valad. It refers, however, to Valad's "Certificates of Certification" (Exs. 22 and 23) dated March 13, 1973 which were sent to Mallory (and Brown) long after the contract to sell between Brown and Valad (Ex. 20) dated January 26, 1973, had been concluded. These "certificates" are discussed below.

The third cause of action also fails to allege or mention any contract between Brown and Valad. The record and Mallory's responses to interrogatories show there never was any contract relationship between Valad and Mallory respecting the 15 and 21 KW heaters, and no theory of "third party beneficiary" appears anywhere in the complaint.

I.

The documentary supplements to the complaint, such as Mallory's "Response" to Valad's request for production of documents show the bankruptcy of Mallory's claims. In the answer to Valad's demand No. 1 that Mallory produce "copy of any and all papers comprising a contract between Defendant Brown and Plaintiff [Mallory]", the latter answered on October 28, 1975:

> The papers comprising the contract between Defendant Brown and Plaintiff consist of the following, copies of which are attached: (a) Mallory P.O. 4016; (b) Mallory P.O. 4047; and (c) Mallory P.O. 4041. (R. 211)

But they were neither signed nor accepted by Valad. Plaintiff never even alleged that they were.

Valad's Request No. 2 required Mallory to produce "each and every paper, if there be more than one, which sets forth any contract which Mallory alleges existed between Mallory and Valad." (R. 211) Mallory answered:

> There was never a direct contract between Mallory and Valad, except for the quarantee and certification expressly requested from Valad by Mallory and these written guarantees and certifications are dated March 13, 1973 and pertain to the 15 and 21 KW heaters, copies of which are attached hereto. (R. 212)

Mallory contends that its unaccepted purchase orders in some way constitute a contract between Brown and Valad! Clearly, however, the purchase orders were not accepted and did not constitute a contract with Valad.

POINT III

TIME WAS NOT OF THE ESSENCE IN EITHER MALLORY'S CONTRACT WITH BROWN OR BROWN'S WITH VALAD; THERE WAS NO FIRM OR FIXED DATE OF DELIVERY; AND THERE WAS NO BREACH OF CONTRACT BY VALAD BECAUSE OF LATE DELIVERY. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ON DELIVERY HAVE NO FACTUAL OR LEGAL FOUNDATION; AND MALLORY IS EQUITABLY ESTOPPED FROM PRESSING ITS FALSE CONTENTION OF LEGALLY LATE DELIVERY.

The Court found in part that Valad breached its contract with Brown, and was thus liable to Mallory under the third party beneficiary theory (Conclusions of Law No. 5), because the heaters were late (Finding of Fact No. 15), and because Valad did not take corrective action. (Finding of Fact Nos. 23 and 24) Mallory received the 12, 15 and 21 KW heaters (T. 36-37), found satisfactory and used the 12 KW heater (T. 189-190), and eventually alleged the 15 and 21 KW heaters to be unsatisfactory. (T. 39) The 36 and 50 KW heaters were never shipped due to Mallory's repudiation (see Point IV). The Trial Court apparently believed the questionable testimony of Mallory's President, Lee Farber, that "time was of the essence" on all of the orders for all the heaters. The Plaintiff then calculated the alleged indirect damages, based upon the "delay" figured from six weeks after the dates of Mallory's purchase orders. (Exs. 100 and 102, and Ex. A of the Findings)

The Findings of Fact and Conclusions of Law seriously misapply the law to the facts, have no substantial support in the evidence, and constitute reversible error. R. C. Tolman Co., Inc., v. Mighton Water Assoc., 563 P. 2d 780 (Utah 1977);

Brown v. Board of Education in Morgan County School District, 560 P. 2d 1129 (Utah 1977).

Delivery Times of Heaters

Finding of Fact No. 15 reflects the following time schedule alleged by Plaintiff on the basis of offers (purchase orders) which Valad did not accept with respect to various heaters:

ITEM	INITIAL UNACCEPTED OFFER*	SENT FROM/TO	ALLEGED DELIVERY TIME
15 and 21 KW Heaters (Job 281)	P.O. 4016 12/14/72 (Ex. 9)	Mallory to Brown	"delivery guaranteed within 6 weeks ARO"
21 KW Heater (Job 281)	P.O. 6730 12/15/72 (Ex. 10)	Brown to Valad	"when ship-1/24/73, or before"
15 KW Heater (Job 281)	Letter 12/20/72 (Ex. 11)	Brown to Valad	NO DATE ALLEGED
12 and 50 KW Heaters (Job 277)	P.O. 4047 12/26/72 (Ex. 12)	Mallory to Brown	NO DATE ALLEGED
12 and 50 KW Heaters (Job 277)	P.O. 6754 1/03/73 (Ex. 13)	Brown to Valad	"when ship--ASAP"
36 KW Heater (Job 285)	P.O. 4241 2/08/73 (Ex. 14)	Mallory to Brown	NO DATE ALLEGED
36 KW Heater (Job 285)	P.O. 7269 2/07/73 (Ex. 15)	Brown to Valad	"when ship--ASAP-- 6 weeks or before"

* None of these offers were ever accepted. See Point II.

The Applicable Statutes

The Uniform Commercial Code provides that the time for shipment or delivery where not provided or agreed upon is a "reasonable time". 70A-2-309(1) What constitutes a reasonable time "depends on the nature, purpose and circumstances of such action". 70A-1-204(2) A time requirement may be waived. 70A-2-209(4) It may be modified by the parties (70A-2-209) or repudiated by the buyer, giving the aggrieved party the right to suspend performance. 70A-2-610

Unsupported Computation of Delayed Time

Finding No. 25 and Exhibit A to the Findings allegedly reflect the "total delayed time" in days for each heater. On P.O. 4016, the time was computed from January 25, 1973, the claimed "delivery date", through June 8, 1973, when the "cover" heaters ordered from another manufacturer were installed, a total of 133 days. (Plaintiff's "Itemization of Damages", Ex. 100 and 102) Similarly, Mallory calculated "indirect damages" for 112 days on P.O. 4047 and 70 days on P.O. 4241. Id.

No Delivery Date Specified

Mallory's P.O. 4047 and 4241 are undated as to delivery time. The finding of the Court that these heaters were late is unsupported by the record and evidence.

The Court accepted Mallory's ipse dixit testimony about delivery time six weeks from the dates of Mallory's purchase orders. (P.O. 4047 and 4241) This was contrary to the evidence. For example, Interrogatory No. 9, Valad's First Set of Interrogatories to Mallory (R. 185), asked

Mallory to "specify the commitment or commitments which Plaintiff claims Valad violated". Farber's answer, based on the false claim that Valad had accepted the purchase orders, was as follows:

> Mallory P.O. 4016 stipulates a guaranteed delivery date "within 6 weeks ARO". Specific delivery dates were not specified on Mallory P.O. 4047 and 4241, but it was a general understanding with the Ted R. Brown Co. that Valad had intended to provide heaters in sufficient time to permit orderly contract completion without contract modification for consideration. (emphasis added) (R. 297)

When Mallory's Farber was pressed for an explanation as to what constituted the "general understanding" at trial (T. 193-4), he admitted the following:

> A. Brown's P.O. 6754 is not so explicit in that it just says "ASAP". But Brown understood, which is the reason for my saying "generally understood", that time was of the essence on all of these projects.
> Q. Why do you say Brown understood it since you are speaking of the understanding of someone else? Is there something they said to you that indicated that?
> A. When I say Brown understood, I meant specifically Mr. Nyman understood that time was of the essence.
> Q. But my question is why do you say he understood it? How do you know he understood it?
> A. I assume he understood it. (emphasis added) (T. 194)

The Court based its damage award on Farber's unrevealed assumption, of which Valad knew nothing. This is manifest error.

Waiver or Estoppel as to Time of Delivery Requirements

The facts mandate a finding of waiver of delivery time requirements on all of the jobs. The law on waiver in commercial situations has been stated as follows:

> It is sometimes indicated that where a buyer does not treat the contract as breached after delivery had been delayed beyond the time stipulated, but evidences an intent to continue the contract in force, the buyer is deemed to waive the time limit for delivery and to permit delivery within a reasonable time thereafter...the act of a buyer accepting the goods after a delay in delivery, with full knowledge thereof, has also been held to bar the buyer from refusing to pay or taking action to rescind or cancel the contract...
> 67 Am. Jur. 2d Sales, §330, pps. 469-70. (emphasis added)

Since no particular provision of the Utah Uniform Commercial Code displaces the common law of waiver or estoppel, it is applicable in this case. U.C.A. 1953 §70A-1-103 See also Clovis National Bank v. Thomas, 425 P. 2d 726 (N.M. 1967).

The following points, completely ignored by the Court in its findings, show waiver and demonstrate the gross misapplication of the law to the facts:

1. MALLORY APPROVED THE CONSTRUCTION PLANS FOR THE 15 AND 21 KW HEATERS ON OR ABOUT THE PURPORTED "TIME OF THE ESSENCE" DELIVERY DATE OF JANUARY 24, 1973. On the 15 and 21 KW heaters, Mallory figured damages from January 24, 1973 (Ex. 102, pg. 6), because the unaccepted P.O. 4016 dated December 14, 1972 (Ex. 9) purportedly allowed six weeks for delivery. Valad's customer, Ted R. Brown and Associates, received P.O. 4016 from Mallory, sent its own purchase orders to Valad, received Valad's construction drawings, and returned to Valad a Jan. 26, 1973 dated "speed letter" with the approved construction drawings. (Exs. 20, 55, and 83; T. 35, 221-22, 275 and 411) In other words, this speed letter was not even mailed to Valad until at least two days after (!) Mallory's

alleged "time of the essence" delivery date, January 24th. (Ex. 102, p. 6)

Knowledge of Delay at Time of Approval

The strongest evidence of Mallory's waiver of any specific delivery time on the heaters represented by P.O. 4016 is the undisputed fact that only a few days before the Jan. 26, 1973 "speed letter" to Valad (Exs. 20 and 83), Mallory approved the shop drawings. Exhibit 20 itself recites that "The drawings 73-119 and 73-120...have been reviewed by Mallory Engineering and approved..." Since the drawings referred to were only sent to Mallory by Valad on January 19th (Dwg. 73-119 - 21 KW, Ex. 17) and January 22nd (Dwg. 73-120 - 15 KW, Ex. 18), this "review" and "approval" --especially with mailing time--must have occured around January 24th through January 25th. (T. 180-1) Thus, Mallory had to know at the time of said approval that construction could not even begin until after the alleged "time of the essence" delivery date. Yet Mallory still, curiously, claims damages on the 15 and 21 KW heaters from January 24th. Valad was lulled into proceeding with manufacture and Mallory should be estopped to claim late delivery.

2. MALLORY'S ALLEGED DAMAGES DON'T COINCIDE WITH THE ALLEGED DELAYS. With respect to the damages due to alleged "lateness" of delivery, Farber testified:

> The heaters started to cause me troubles when they were not delivered after January 29, 1973,* which was the guaranteed delivery date that I would get the heaters...And for the period of February, March and April this heater problem

*This is probably reporter error since Farber consistently testified that January "24", 1973, was the guaranteed delivery date.

> contributed significantly to the inability of Mallory Engineering to meet its obligations. (T. 740)

It is terribly inconsistent for Mallory to claim damages during February, March and April, when by Farber's own testimony, Mallory's approval of Valad's shop drawings could not have reached Valad until January 28 or 29, 1973. Also, Mallory did not even issue P.O. 4241 (36 KW heaters, no delivery date specified) until February 8, 1973. Thus, Mallory's damage claims simply find no support in the evidence.

3. MALLORY DID NOT PROTEST "DELAYS". Mallory's lack of protest or objection was a tacit, or implicit waiver of any requirement of delivery by January 24, 1973, giving rise to equitable estoppel. In fact, in his testimony about the receipt and delivery of the 15 and 21 KW heaters (P.O. 4016), Farber stated:

> I don't recall specifically whether it's a 15 or 21 KW heater, was delivered in early March of 1973. The second two sets of that heater as I recall were delivered March 19, 1973. (emphasis added) (T. 713)
> It's my recollection that we received Valad heaters in two separate shipments - two or three shipments. I'm not exactly--two I'm positive of, in March of 1973. (emphasis added) (T. 36)

There is absolutely no testimony or showing of protest based on late delivery until late April when Farber finally telephoned Valad. (T. 241, 75, 415)

4. MALLORY'S REQUEST FOR THE CERTIFICATES OF CERTIFICATION SHOWS ACCEPTANCE OF THE PURPORTED LACK OF TIMELINESS. Mallory's waiver of late delivery is implicit in its request for the "certificates of certification" (Exs. 22 and 23), accepted without protest in the middle of March, 1973. (T. 105, ln. 29) The certificates were dated March 13, 1973.

(T. 38, 105, 134, 135) All of the heaters were received by mid-March on Farber's own calculations (T. 36, 38, 713; Exs. 100, 102), yet the record shows no protest, objection, demand or claim of delay until early May. This is a clear waiver of firm delivery dates, and Mallory should be estopped from claiming that time was of the essence!

POINT IV

MALLORY ACCEPTED THE HEATERS WITHOUT ANY VALID REJECTION. MALLORY ALSO UNLAWFULLY REPUDIATED THE CONTRACT BETWEEN BROWN AND VALAD. BROWN PARTICIPATED IN THAT ILLEGAL REPUDIATION. MOREOVER, MALLORY, IN CONCERT WITH BROWN, UNLAWFULLY REJECTED THE 15 KW AND 21 KW HEATERS, WHICH CONFORMED EXACTLY WITH BROWN'S SPECIFICATIONS, AS SHOWN IN POINTS II, V AND VI HEREIN.

The Utah Uniform Commercial Code provides that acceptance occurs if any of three conditions arises, when the buyer:

> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will retain them in spite of their non-conformity; or
> (b) fails to make an effective rejection...; or
> (c) does any act inconsistent with the seller's ownership...; U.C.A. 1953 §70A-2-606.

In the event that the goods are deemed non-conforming, the buyer (Mallory) must "reject" the goods under the Code, as provided in §70A-2-602. Rejection must be within a reasonable time after delivery and it is ineffective unless the buyer (Brown) "seasonably" notified the seller (Valad). 70A-2-602(1) Furthermore, any exercise of ownership by the buyer with respect to the goods after rejection is wrongful. If the buyer takes possession of the goods before rejection, he is under a duty after rejection to use reasonable care in storing or handling them. 70A-2-602(2)(a) and (b) In addition, the buyer must specify in connection with the rejection a particular defect ascertainable by reasonable inspection to later justify the rejection where the seller (Valad) could have cured said defect if the buyer (Mallory) had stated it seasonably. 70A-2-605

The cited law was either ignored or seriously misapplied by the Court, thus constituting reversible error.

Mallory's Acceptance

The Valad packing slips show that the 15 and 21 KW heaters were shipped in March (Exs. 36 and 37), and Farber testified that they were installed in late March and April of 1973. (T. 37-8) Because the heaters were received both in early March (T. 713) and late March (T. 36), Mallory must have been in possession of the heaters for two to three weeks before they were finally installed. (T. 37-8) The waiting period plus the eventual installation certainly constitute acceptance under 70A-2-605 and 606, since Mallory had "reasonable opportunity to inspect the goods."

No Revocation Of Acceptance

There was no revocation of acceptance after discovery of any "alleged" defect under 70A-2-608(1)(b). The test performed by Mallory after the units were installed (T. 39, ls. 14-26, T. 126), could have easily been performed prior to the installation. (T. 217-18; 505-511, 513) In fact, the Stabro lab tests conducted immediately prior to the trial and more than two-and-a-half years after the tests done by Mallory, showed how quickly the test could be made and also exhibit results similar to the Mallory tests. (T. 86-7, 593, Ex. 38) Thus, if Mallory had acted reasonably, assuming arguendo that the heaters were non-conforming, the nonconformity could have been discovered prior to installation. (T. 39-40, 86-88) Thus, there could be no revocation of acceptance under law.

Furthermore, under 70A-2-608(2), Mallory could not

revoke its acceptance after the discovery in late April, 1975, of the alleged non-conformity, because the revocation must "occur within a reasonable time after the buyer...should have discovered the ground for it and before any substantial change in condition of the goods..." (Emphasis added) Mallory should have discovered the alleged defect in late March or early April when the heaters were received. For reasons known only to itself, it did not discover the alleged defects until the latter part of April. (T. 241, 75, 414)

By installing the heaters prior to the tests, Mallory also caused a "substantial change in the condition of the goods" since they could not be removed without destruction. (T. 69-71); 70A-2-608(2) Later, the heaters were in fact destroyed in removal, a fact known in advance of installation by Mallory. (T. 69-71) Thus, their installation in the first instance was an act inconsistent with the seller's ownership, foreclosing revocation under still another code section. 70A-2-606(1)(c) Thus, there was no valid revocation of acceptance by Mallory.

No Effective Rejection By Mallory

70A-2-606(1)(b) provides that the buyer has accepted goods unless he makes effective rejection pursuant to 70A-2-602(1). Mallory made an ineffectual attempt at rejection, after various conversations in early May, culminating in the Mailgram of rejection (as well as repudiation) addressed to Valad on May 8, 1973. (T. 81-2, Ex. 35) Even if Mallory's oral rejection came a day or two before the written rejection, as mentioned in the Mailgram (Ex. 35), it still occured almost two months after the first shipment of

heaters, and forty days after the second shipment. It also occured long after installation. However, 70A-2-602(1) requires the following:

> Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. (Emphasis added)

Forty days to two months after delivery is certainly not reasonable time for rejection. This is especially so for alleged defects that could have been discovered upon testing on arrival (and before installation). (T. 39-40, 86-88)

Mallory Repudiated The Contract, Thus Substantially Impairing The Value Of Said Contract To Valad, Resulting In Valad's Suspension Of Performance.

The Uniform Commercial Code provides in 70A-2-610 as follows:

> Anticipatory repudiation--when either party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may...(c) suspend his own performance.

At the time of repudiation (T. 81-2, Ex. 35), on May 8, 1973, Mallory had no idea whether the unshipped, unmanufactured 36 and 50 KW heaters would be conforming, or for that matter, could be made or altered to conform to Mallory's subjective desires. Thus, Mallory's repudiation was totally unjustified.

Mallory's repudiation substantially impaired the value of the contract to Valad since Mallory made a clear statement with Ex. 35 that it did not intend to continue the contract and would secure what, in its opinion, were conforming heaters elsewhere. This statement by Mallory gave rise to Valad's rightful suspension of its performance on P.O.'s 4047 and 4241.

Even Assuming That Valad's Performance Was Late With Respect to Delivery, Such Is Excused.

The Uniform Commercial Code provides that:

> Delay in delivery or non-delivery...is not a breach of his (seller's) duty...if performance as agreed has been made impracticable by the occurence of a contingency, the non-occurence of which was a basic assumption upon which the contract was made...§70A-2-615

Valad's Cecchini testified about a letter dated March 27, 1973, wherein Valad explained that it was then encountering some unanticipated labor difficulties which resulted in a serious slow-down in the plant. (T. 426, Ex. 58) Farber acknowledged having received said letter, wherein the labor problems were explained. His own testimony suggested that Mallory asked Cecchini to send it. (T. 748, Ex. 104) More importantly, Mallory acknowledged that it actually used this letter to attempt to get extensions from the Government (T. 191-2) for its own delays! Thus, it is hard to understand Mallory's contention that it was damaged by the late shipment of heaters when it used the lateness to its own advantage and obtained contract extensions. Valad is excused because of the labor problems; and Mallory is estopped to claim delay in delivery.

POINT V

DURING THE TRIAL MALLORY'S PRESIDENT, FARBER, REPEATEDLY CONFUSED HIMSELF, THE TRIAL COURT AS WELL AS THE ISSUES IN THE CASE BY TENDENTIOUSLY USING, AS IF THEY WERE PART OF AN AGREEMENT BETWEEN VALAD AND BROWN OR BETWEEN MALLORY AND VALAD, THE FOLLOWING WORDS OR PHRASES: "CAPACITY", "DENSITY", "LIMITSTATS", "SPECIFICATIONS" (IN GOVERNMENT CONTRACTS), "DESIGN", "PURCHASE ORDERS" (MALLORY'S AND BROWN'S), "PERFORMANCE STANDARDS", "CONTINUOUS FULL VOLTAGE", HIS "TESTS", AND "APPROVED FOR SIZE ONLY". ACTUALLY, THESE WORDS AND PHRASES AS USED BY FARBER WERE RELEVANT ONLY TO HIS OWN PARTISAN PURPOSES AS A WITNESS. THEY WERE NOT RELEVANT TO THE ONLY CONTRACT TO SELL (EXHIBIT 83) IN THE CASE.

First, it must be re-emphasized that there was no contract between Mallory and Valad. This has been thoroughly discussed in Point II above.

1. No purchase order, whether Mallory's or Brown's, was ever part of the contract between Brown and Valad, either explicitly or by incorporation by reference. The Mallory and Brown purchase orders were not explicit or detailed enough to tell Valad exactly what Brown wanted to buy from Valad. The purchase orders simply served to begin discussions between Brown and Valad. These discussions quickly abandoned the purchase orders and replaced them eventually with shop drawings. These drawings form the basis for the agreement between Valad and Brown since they were, by Brown, "approved for construction". The purchase orders were never relevant to the actual agreement since they were only part of the preliminary negotiations which led to the contract.

Neither Brown nor Mallory at any time ever explicitly contended that any of their purchase orders had ever been

accepted by Valad. No offer by Brown was ever accepted by Valad (T. 429-430, 436-496) until it accepted Nyman's modifications noted in Exhibit 83 (20). This exhibit comprised Nyman's speedletter and Valad's two shop drawings, numbered 73-119 and 73-120, and annotated in Nyman's handwriting. (T. 35-36, 442, 452-453, 493-494) Exhibit 83 (20) confirms the testimony of Cecchini (T. 425-426, 429, 431-432, 453, 475-476, 481-482, 493) and McCarron (T. 543-544) to the effect that these shop drawings were structural specifications to guide and control Valad's manufacture of the heaters ordered by Brown in the drawings "approved for construction".

2. Thus, the only contract between Brown and Valad (Ex. 83) included approved drawings which themselves dictated the design of the heaters. (T. 424-432, 481, 493, 495) Because the drawings were approved, the controversy in the record about who had the duty to design the heaters is irrelevant. (T. 189, 104-105, 141, 174, 188-189, 426-427, 429-431) After receiving Brown's purchase orders, Valad eventually "developed a drawing". (T. 481) Then, "it was up to Mallory or to Brown...to approve the heaters or not approve the heaters" as sketched in the shop drawings. (T. 482) In Mallory's Answers to Valad's Interrogatories, Farber admitted that he had approved the Valad drawings contained in Exhibit 83 (20):

> ...Lee Farber reviewed these drawings in detail with Mr. Nyman, who made notations on these drawings and returned them to Valad, "approved for construction subject to comments made". (R. 307)

3. Exhibit 83 sets forth no performance standards, as is clear from its contents (T. 543-544); despite Farber's preoccupation with that concept during his testimony. How a device, pictured on a drawing board, will (i.e., after con-

struction and after insertion in undescribed environmental chambers) eventually function is always problematical. Only actual tests or trial-runs in loco can disclose accurately the device's performance data. Nyman confirmed this (T. 279-80) in testimony quoted infra in section 10.

It is an almost universal practice for all manufacturers of successful, time-tested products to manufacture three types or classes thereof, exactly as Valad does. (T. 326-330) The first class constitutes stock items, mass-produced, repetitive as advertised in catalogues. For these Valad submits a price quotation to be either accepted or rejected by the customer. Its guarantee covers heat production, limited by thermostat, workmanship and materials. (T. 426-427, 436) The second class is a modified version of the first class. Valad submits a shop drawing and quotation which the customer either accepts or rejects. (T. 530, 542) If the customer accepts, it must approve the shop drawing before Valad manufactures. (T. 427-430, 436-437, 475-476, 492-496) Here Valad guarantees conformity with the approved drawing. (T. 425-430, 437, 452, 475, 481-482, 492-493, 495-496, 524-530) The third class of product manufactured by Valad is designed and invented to meet the customer's special requirements. (T. 524, 537) It is not a mere modification of the stock items. This third-class device requires from Valad invention, experimentation, and testing in the exact location and environment wherein the customer wishes to utilize it. It requires, especially, production of a costly prototype which takes the place of a drawing and which is approved, if it is successful, by the customer in writing. If it is not approved, the customer pays for all work up to that time. Valad's guarantee

explicitly and in writing covers performance such as was rendered by the tested prototype. (T. 427-428, 431, 437, 481, 524-525)

Nyman selected heaters from Valad's catalogue and simply wanted a modified model of Valad's stock items. There never was any talk of a tested prototype. Valad never did and never could guarantee capability of a heater to perform in unknown governmental equipment. (T. 431) At no time did Nyman ever supply to Valad density requirements which would be essential to a warranty of performance in a particular manner. (T. 431-445, 155, 172, 213-214) Eventually, Nyman asked Valad to construct in accordance with approved and annotated drawings. (Ex. 83; T. 447, 451-452)

Mallory's alleged "performance standards" (Ex. 4) were on their face incomplete. Furthermore, Exhibit 4 was never given to Valad and constituted no part of the sole agreement (Ex. 83) between Valad and Brown.

4. A specific density factor was indeed implicit in the structural drawings. (Ex. 83) It was readily computable from the data set forth in those annotated structural drawings, which the parties had "approved for construction". Those shop drawings in Exhibit 83 are not consistent with any other density requirement.

Q: ...Mallory never provided any parameter for watts per square inch at any time; is that it?
A: ...No. No, we don't have that capability on the cartridge heaters.
Q: I see, but it is an essential parameter for manufacture and design of the heater?
A: Absolutely essential.
Q: -- It does not appear on your purchase order, does it?
A. It does not.

Q: Even though it is essential, as you say.
A: Yes. (T. 157)

Incidentally, Nyman used the wrong figure to compute watt density during his testimony. He used 3.57 square inches per lineal inch, instead of 3.07, the correct constant. (T. 371, 372-375, 377)

5. Exhibit 83 (20) contains no language which explicitly calls for a mathematically precise electric capacity or its equivalent heat capacity; except within the ranges of electric voltages (which vary from time to time) supplied by the public utility (whose electricity cannot always be produced at targeted voltage); and except within the tolerance allowed to electrical devices by the National Fire Underwritters Code (herein sometimes "Code" or "Safety Code"). On this point, McCarron's testimony was uncontradicted. (T. 530-532)

6. The "specifications" in Mallory's government contracts (which Valad never saw, and of which it was never informed) are not found in Exhibit 83. The Trial Court admitted these government specifications not to show their nature or essentials but merely to demonstrate the existence of Mallory's contracts with the government. (T. 6-7, 10, 13, 18-23, 185, 169)

7. Farber made much of his bizarre interpretation (T. 39, 42, 67-68, 153-154) of the following sentence excerpted from Mallory's unaccepted purchase order (which never was part of any contract between Brown and Valad):

> ...the sheath temperature will not exceed +250°F. when operating at continuous full voltage and a maximum air temperature of +160°F. with an air velocity of 5 FPS. (Ex. 9)

He claimed to believe that the quoted language bespeaks a requirement that the heater must operate continuously "at continuous full voltage." (T. 39, 42, 153-154; but see 371-374, 418, 533, 566) Neither the purchase order nor its quoted specification appear in the contract between the parties. (Exs. 83 and 20) Therefore, they are no part of any agreement between Valad and Brown.

Secondly, the quotation does not say the heater must always be heating; it merely says that when it is heating or operating, the sheath temperature must not exceed +250°F. Thirdly, continuous operation of the heater (as distinguished from "continuous full voltage" when the heater is operating) is belied by the government specifications, which speak of "de-energizing the heating system" and of a "hi-low controller...which would de-energize both the heating and cooling systems". Fourthly, the patent presence of many thermostats (required by the relevant Safety Code) on the shop drawings in Exhibit 83 necessarily calls for interruption of electricity whenever the temperature reached +250°F., at which the thermostats were set.

8. Farber tried repeatedly (T. 51-54, 169, 122-123) to distinguish between "limitstats" or thermostats used as fail-safe devices on the one hand and temperature control built into the structure of the heater, on the other. He claimed that only the latter had his approval. The indisputable proof, however, is that the shop drawings in Exhibit 83 did receive his approval. Those drawings unmistakably depicted eighteen thermostats, whose inevitable function it was to interrupt the electrical current when the thermostatic sensors

show +250°F.* In any event, the tenuous distinction which Farber, the witness, tried to make is not to be found in the only contract (Ex. 83) between Valad and Brown. Indeed, it is not even stated in any purchase orders prepared by Mallory or Brown; and of course no such purchase orders were ever accepted by Valad or constituted parts of Exhibit 83.

9. The Trial Court stated irrelevantly**: "Mallory didn't get what they thought they were going to get...the thermostats were put in there in such a manner that there was going to be an interrupted flow of current and not continuous... (T. 620) Nothing could show more cogently the Trial Court's confusion. What Mallory thought they were going to get is not the question here. It is true that the thermostats were put in the heaters in such a manner that there was going to be an interrupted flow of current. But that was required not only by the Safety Code but also by the shop drawings in Exhibit 83, which the Trial Court completely neglected both during the trial and in its Findings of Fact. Indeed, the Trial Court completely neglected all facts relating to contract formation in the case. The Judge's remarks show that he was adrift in Farber's confusions about the real issue.

It is clear, too, that the Trial Court did not consider relevant Farber's confusion on the question whether Brown had followed instructions in giving data to Valad. (T. 97, 108, 137-9)

*Actually, the thermostats were set at +225°F. to insure a sheath no hotter than +250°. (T. 508-9)

**At the end of McCarron's testimony, the Trial Court asked another irrelevant question (T. 561) about Valad's capability to build, from "proper specifications", a heater whose sheath temperature would not exceed +250°F. He still refused to recognize Exhibit 83.

This has a massive bearing on exactly what "Mallory thought they were going to get" (to use the Trial Court's comment). When shown Exhibit 20 (Ex. 83) at Trial, Farber testified:

> A: ...If Nyman's written instructions pertaining to the use of thermostats is interpreted to be the method of limiting sheath temperature, then it is not correct...To the best of my capability, I am saying right now if Nyman is directing Valad to use thermostats as the means of limiting sheath temperature, it is not correct.
> Q: [Mr. Tibbals] Is there any language there that is amenable to such an interpretation.
> A: There could be.
> Q: How?
> A: Let me read, "Since each insert will have three stats, three thermostats are required for a total of 9 for each set. This is detailed in your December 22, 1972 letter." (T. 119; Ex. 83)

Thus, Farber admits that Brown gave Valad wrong instructions in Brown's unaccepted purchase order. In any event, Exhibit 83 calls for thermostats "to limit the sheath temperature". (T. 548)

10. Both Nyman and Mallory alleged that the approval "for construction" was only an approval "for size". Of course, Exhibit 83 makes no such distinction. Nyman's notations over his own signature on the shop drawings in that Exhibit state explicitly that the drawing was "approved for construction subject to comments made" in the speedletter and in the annotations on the drawing. (T. 339, 399, 401-402, 411) Nyman's language in the speedletter, dated January 26, 1973, is even more explicit: "Please proceed with immediate production..." (Ex. 83) Actually, as that Exhibit shows, both its drawings were marked in Nyman's handwriting "approved for construction". No such limitations as "approved for size only"

appears anywhere in Exhibit 83.

Nyman's approval of the structural drawings in Exhibit 83 became embarrassing to him during cross-examination, and he tried to rationalize:

> Q: And that was the structure that was approved by the drawing that you people signed; isn't that right?
> A: The only thing we approved, or that we sent back after discussions with Mallory was the fact that the heaters would be of a certain size. We had no way of examining them [in loco] for their capability of performing the criteria, however. [Neither did Valad!]
>
> ***
>
> Q: And the layout was approved for construction by you?
> A: That particular layout was, but without any possibility of analyzing the capability of that size unit to perform the job.
> Q: Did you add that qualification in any writing to Valad?
> A: No. We felt that there was no qualification to add since the particular criteria had been provided so that the heaters would do a particular job. (Emphasis added) (T. 279-280)

But the "particular criteria" were not added to Brown's transmittal letter (Exs. 83 and 20); nor to the enclosed drawings; nor to any other contract to sell the involved "future goods". .

In other words, Nyman admits he approved a layout for size only without even knowing "the capability of that size unit to perform the job"! But he approved it. He ordered something without being concerned by its possible incapability. But he ordered it in his speed letter. (Exs. 20 and 83) He got what he approved and ordered. Now he wants to put blame on Valad. And the performance "criteria" (Ex. 4) he referred to were no part of any contract document signed by Brown or Valad. (T. 431, 432, 437, 481-2, 493, 495-6) Nyman's notations on the drawings and his speedletter (Exs. 20 and 83)

reveal no limitation of approval to size only.

The shop drawings and speedletter obviously show much more than mere size or dimentional factors. The shop drawings themselves (numbered 73-119 and 73-120) in Exhibit 83 contradict Nyman; on their face and as annotated by Nyman himself, they reveal the following specifications in addition to dimensional requirements:

A. Shop Drawing #73-119:

(1) A total of three thermostats for each of three inserts; i.e., nine thermostats, whose sizes are not even mentioned.
(2) These thermostats were to function "to limit to 250°F sheath temp." The
(3) "customer does not want holes for mtg" [mounting].
(4) Compliance with "Class I, Group D" (of the National Fire Underwriters Code).
(5) Heating by "steps" as numbered by Nyman.
(6) The design and structure of the heater.
(7) The number of its heating elements.
(8) Fins on the elements.
(9) Seals on the holes.
(10) Number of "inserts" (two).
(11) The requirement that the number of holes be kept to a minimum.
(12) The KW factor.
(13) The voltage factor.
(14) The requirement of AC (alternating current).
(15) The three phase ("PH") requirement.
(16) The requirements "detailed in your [Valad's] December 22, 1972 letter" [Ex. 18].
(17) Requirement that the thermostats be set as high as possible but not to exceed 250°F.
(18) The comment that 200°F. is "much too low, since [the] entering air [in the duct] is 200°F. in one case."
(19) Mallory's wish to weld into duct and to seal and mount are noted.
(20) The 13.875" and 14,375" "cutout."
(21) "Approved for construction subject to comments as made".

B. Shop Drawing #73-120:

(1) A total of three thermostats for each of three inserts; i.e., nine thermostats in all.
(2) These thermostats were to limit sheath

temperature to 250°F.
(3) No holes if possible; otherwise a minimal number of holes.
(4) Seals on each hole.
(5) Compliance with "Class 1, Group D" (of the Code).
(6) Heating "steps" as numbered by Nyman, but different from the "steps" in Drawing #73-119.
(7) The design and structure of the heater.
(8) The design, structure and number of "inserts" (three).
(9) The number of heating elements (six).
(10) Fins on the elements.
(11) Instructions about flanges, etc.
(12) Valad must supply to Mallory a letter stating compliance with Class I, Group D, of the Code and to be sent with shipment.
(13) Customer does not want three holes for the mounting ["mtg"].
(14) If Valad must use holes for attaching the terminal box, the holes must be sealed.
(15) Three thermostats for each insert "to limit 250°F. sheath temp. since have 3 steps".
(16) "Approved for construction subject to comments as made."

All these specifications in Exhibit 83 (20) demonstrate Nyman's and Farber's manifest error in testifying that their "approved for construction" in Exhibit 83 was merely approval for size.

Farber also perceived how damaging to his claim were the shop drawings approved by himself and Nyman. (T. 442, 452, 493-4; Ex. 20) Farber was suddenly and conventiently disturbed (T. 32-3) by the very shop drawings (Exs. 83 and 20) which he had reviewed with Nyman (T. 106-7, 109-10, 118) before Nyman sent Exhibit 83 to Valad. The speedletter, itself, which is part of that Exhibit, states: "The drawings [73-119 and 73-120] * * * have been reviewed by Mallory Engineering . . ." Besides, on instructions from Nyman (T. 402, 407), Valad had mailed Exhibits 17 and 18 directly to Farber. (T. 124-5)

Thus, neither Farber nor Nyman spoke the truth when they said the Valad shop drawings were approved for size only. Drawing #73-119 presented 21, and drawing #73-120 presented 16, non-dimentional requirements; and both showed the words: "approved construction". (Exs. 83 and 20)

11. Valad's attorney questioned Mallory's Farber very closely on the testing procedures which, Farber claimed, showed that the heaters were deficient for the purposes of his Government contracts. Farber was extremely uncertain about some of the details of the tests. (T. 42-3) None of the instruments used by Mallory had been tested by the accepted method for fixing accuracy of calibration. (T. 49, 61) None of the instruments had a standard certificate traceable to the National Bureau of Standards' calibration (T. 49, 56) which is required for U. S. Government contracts. (T. 227-8) To accept Mallory's tests as reliable one would have to believe that not one single Ranco thermostat (out of 18), attached by Valad to the heaters "tested" by Mallory, worked! This is not only incredible, it is impossible. (T. 534, 549, 552) The charts used to record the test data did not have the proper grids. (T. 229-32) Nyman did not make any tests of his own, but relied completely on Farber's tests. (T. 342)

Valad tested all of the heaters before they left the factory, in the presence of those testifying; and the results were recorded on instruments calibrated by the National Bureau of Standards. (T. 506, 515, 546-7, 568-9; Ex. 86) These results showed that all eighteen Ranco thermostats* were

*Valad in the previous 15 years had manufactured about 1,000,000 heaters, all equipped with Ranco thermostats (T. 504-5) without complaint. (T. 505-6, 507-10, 511, 513-4)

working properly. (T. 506, 508, 510, 549-50, 556)

Mallory's Farber testified that immediately upon receipt of the heaters, they were inserted in the environmental chambers for testing purposes. (T. 39, 126) The heaters were installed by welding them in; but the thermostats were not removed before the welding began. (T. 506) They would have worked in Mallory's environmental chambers if they had been properly installed (see Exhibit 86) or if they had not been destroyed by the intense heat generated by welding. Installation by welding could permanently distort the thermostats. They are ruined at heat above +550°F. The welding process causes temperatures of up to 8,000°. (T. 518, 554-5) Since these heaters bore visible burn marks in the vicinity of the welding seals (T. 179), it is clear that the welding had a destructive effect on the thermostats. (T. 553-555) This caused them to malfunction for Mallory's tests, assuming the tests were correctly carried out.

POINT VI

THE HEATERS MANUFACTURED BY VALAD FOR BROWN AND DELIVERED TO MALLORY, ON BROWN'S INSTRUCTIONS, COMPLIED FULLY AND EXACTLY WITH THE SPECIFICATIONS ESTABLISHED BY EXHIBIT 20(83), BROWN'S COUNTER-PROPOSAL, WHICH VALAD HAD ACCEPTED (THUS CONSTITUTING THE ONLY CONTRACT IN THIS CASE WHICH IMPOSED ANY OBLIGATION UPON VALAD).

The specifications which Valad followed (T. 543-4) in manufacturing the 21 KW and 15 KW heaters sold to Brown were spelled out by Brown's speedletter and the two Valad shop drawings Nos. 73-119 and 73-120 (Exs. 20 and 83), which Carl Nyman had annotated. These three documents (the speedletter and the two shop drawings aforesaid) constitute Exhibit 83 (Exhibit 20).

(1) The heaters' structure and construction, mandated by Exhibit 20, were built by Valad precisely (T. 543) as that Exhibit required. (T. 118-20; 183-4, 495, 543-4) "I built to those drawings," (T. 543) was McCarron's uncontradicted testimony.

(2) The 21 and 15 KW heaters were meticulously based on the shop drawings. Neither Brown nor Mallory claimed that the structural drawings were violated by the actual construction of the heaters. Cecchini testified that Brown got what it had ordered.

(3) There were three inserts, each having three thermostats, due to the three "steps" in each insert. Thus, there was a total of 9 thermostats on the three inserts. (T. 146-9, 151-3, 250, 282-3, 394, 410, 548-50, 554)

(4) These thermostats were all set at 225°F., so that

the sheath temperature could not exceed 250°F. (T. 378, 382, 383, 479, 508-9, 554-6, 123-4, 138, 144, 146, 154, 394, 504-5, 509-10)

(5) Valad eliminated holes for mounting and reduced other holes to a minimum. (T. 543-4)

(6) The NBFU Code was complied with, as Valad's certificates showed.

(7) The thermostats were tested at Valad's factory and they worked satisfactorily and accurately. (T. 556, 549-50)

(8) There were fins on the heating elements, just as the approved shop drawing required.

(9) There were seals on the holes.

(10) Instructions as to the flanges had been obeyed.

Exhibit 83 (20) and its drawings as accepted and manufactured by Valad sold future goods, not yet manufactured nor tested. The contract constituted by that Exhibit says nothing at all about performance standards or criteria. The drawings are structural drawings approved by the parties for construction of the heaters. The latter were constructed in conformity with the drawings. (T. 543) At no time during the trial or in the complaint did Plaintiff contend or allege that the heaters were not constructed in accordance with the drawings in Exhibit 83 (20). McCarron's testimony on this (T. 543) is uncontradicted in the record.

POINT VII

THE COURT'S AWARD OF $30,840.60 AS OVERHEAD OR "INDIRECT COSTS OR DAMAGES" AGAINST VALAD IS TOTALLY UNSUPPORTED BY THE RECORD AND CONTRARY TO THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE, U.C.A. 1953 §§70A-2-711 - 715.

The Court awarded the sum of $10,647.80 as "direct" costs and damages sustained by the Plaintiff. Of this sum, $8,072 was the increased cost of "cover" of replacement heaters, and the balance was incidental and consequential damages. Assuming arguendo that Mallory is entitled to recover, this would be the correct measure of damages under the Utah Uniform Commercial Code, U.C.A. 1953 §§70A-2-711 and 712 for a buyer (Mallory) who is forced to "cover" when the seller (for this purpose, Valad) "fails to make delivery or repudiates".*

In addition, however, the Court found that Mallory was entitled to $30,840.60 as overhead or "indirect costs or damages" (Finding of Fact No. 25), despite strenuous objections at trial by Brown and Valad. (T. 689-702 and Exs. 100 and 102) Both Brown and Valad objected that such "indirect damages" or "overhead" are speculative in nature, not foreseeable by the parties, irrevelant to the delay and legally incorrect in general. (T. 696, 700, 702, 716)

The Uniform Commercial Code Governs the Transaction

The law in this case on damages is controlled by the Utah Uniform Commerical Code (all citations to Utah Code Ann., 1953, unless otherwise noted). 70A-2-102, 105 and 106(1)

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*For the purpose of this point, both Mallory and Brown will be deemed to be the "buyer" and Valad the "seller", despite the fact that Valad's contract of sale was only with Brown. Thus, the same arguments apply to both Brown and Mallory as "buyers".

Mallory's rights against Valad are controlled by the provisions of U.C.A. §70A-2-711, which reads in pertinent part as follows:

> Where the seller (Valad or Brown) fails to make delivery or repudiates...the buyer (Mallory) may cancel and...
> (a) "cover" and have damages under... (§712); or
> (b) recover damages for non-delivery as provided in this chapter. (Section 70A-2-713)

No Statutory Provision Allows Overhead Damages

In the instant case, Mallory as ultimate buyer elected to "cover" or, basically, seek damages for the difference between the cost of the heaters Mallory purchased from Regan after the alleged breach or "cover" price ($16,488), and the contract price with Brown ($8,416) (exlcuding the 12 KW heaters), together with incidental and consequential damages. (Exs. 39-41, 102) Mallory is absolutely limited, as a buyer, to the difference between the contract price, and the "cover" price. The result would be no different under the alternative remedy of 70A-2-713 (market price at time of breach). There is absolutely no statutory provision nor equitable ground for recovery of "overhead" sought by Mallory!

Mallory cannot claim that overhead expense is included in "incidental and consequential damages" under 70A-2-715. Incidental damages contemplate such things as inspection, transportation, and storage costs. Consequential damages have generally been held to encompass such anticipatable claims as lost future profits, additional interest charges, etc. Consequential damages do not encompass such uncontemplated things as overhead or indirect damages. 17 A.L.R. 3d 1010 at 1117, §46.

Only A "Seller" Can Recover Overhead Damages

Under 70A-2-708 of the Uniform Commercial Code, only

a "seller" can recover indirect or overhead damages. This statute provides that where the standard measure of damages for non-acceptance or repudiation (the difference between the market price and the unpaid contract price, together with incidental and consequential damages), is inadequate to put the seller in as good a position as performance would have done, then

> ...the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer...(emphasis added). 70A-2-708

It is not a legislative oversight that gives "reasonable overhead" damages only to a seller. The buyer is not given this remedy. Overhead damages are expressly reserved only to the seller, and specifically omitted for a buyer. Thus, the Court erred in awarding such damages to Mallory.

The cases generally allow only a seller to recover "reasonable overhead", while excluding said recovery to buyers. (See 3 A.L.R. 3d 679) The general rule is that a seller may recover reasonable overhead expenses when the Defendant is responsible for Plaintiff's incuring or wasting "reasonably foreseeable" overhead expenses. Furthermore, the Plaintiff may only recover said overhead expenses when they are properly allocated with other jobs. (3 A.L.R. 3d at 695) In Conditioned Air Corp. v. Rock Island M.T. Co., 114 N.W. 2d 304, 3 A.L.R. 3d 679 (Iowa 1962), the plaintiff, a seller, had a contract to furnish 206 aluminum panels for use in a school. The panels were shipped on defendant's truck and damaged in transit. The Court upheld the award of a percentage of Plaintiff's overhead expense as damages occasioned by the necessity of replacing the damaged panels. The award included an allocation of payroll taxes,

wages and salaries, workmen's compensation insurance, and other direct labor expenses related only to this particular job and excluded overhead expenses for other jobs upon which Plaintiff was concurrently working. Accord: Perfecting Service Company v. Product Development and Sale Co., 131 S.E. 2d 9 (N.C. 1963); see also Lenobel v. Seniff, 300 N.Y.S. 226, resettled 1 N.Y.S. 2d 1022 (1937), wherein the Court held that awarding overhead damages would result in an awkward, cumbersome inquiry into elements of overhead of which the Defendant had no personal knowledge and no means of meeting or refuting Plaintiff's claims.

Mallory's Formula For Overhead Damages is Incorrect And Grossly Unfair

Mallory is asking for a percentage of the entire overhead for the entire year, for all Mallory's jobs, including the ones allegedly involved in this dispute. (Findings of Fact, Ex. A and Ex. 102) Mallory asked the Court below to multiply that total overhead times the percent that Mallory's total income bears to the income on the jobs in dispute. The formula might be expressed as follows:

$$\text{Total Overhead Expense On All, Non-Related Jobs, FOR YEAR} \times \frac{\text{"Income" From Disputed Job}}{\text{Total Income For the Year}} \times \text{Number of days delayed* in disputed job by alleged breach, as a percentage of the year} = \text{DAMAGES}$$

Expressed in numbers, the formula for Job 277 (12 and 50 KW heaters) would read as follows:

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*See Point III for discussion of why this was an incorrect standard.

$$\$143,893.88 \times \frac{\$206,243.00}{\$456,229.62} \times \frac{112}{365} = \$19,957.28$$

The identical formula was used to calculate the overhead or indirect damages for each of the other two jobs in dispute. (Exhibit A of Findings of Fact)

There is no law or evidence to support award of damages so calculated. Plaintiff's President, Farber, testified that these indirect expenses were simply the cost of business operation (overhead) (T. 683, ls. 7-14), and that it did not represent lost profit or lost business opportunity. Furthermore, he calculated them from Mallory's operating statement based upon delays in getting out the three disputed jobs as a percentage of the total overhead for the years '73 and '74. (T. 686-689) That is all that was ever said during the trial about how the indirect damages were calculated!

The Use of "Income" As A Standard Is Not Appropriate

The indirect damages were also figured as a percentage of total income. (Ex. 102) There is no legal justification for this. No testimony shows why "income" is a valid standard by which to measure overhead damages even if they are allowable.

Most significantly, no testimony explains the substance or effect of the other delays that Mallory was experiencing due to problems not related to this lawsuit. Farber testified (T. 736-7) that after the replacement heaters were installed, "We had additional problems that required some more effort on the part of Mallory Engineering and their suppliers..." (T. 737, ls. 9-11) These additional problems had nothing to do with the problems allegedly created by Valad. Therefore, the record contains no evidence upon which the Court could logically or legally

assign all of the overhead for the year '73 and '74 as the basis upon which the income percentage was applied to arrive at the indirect damages.

Use of "Income" Raises Collateral Issues

There are many collateral issues that would and should be explored if this standard is to be applied in this case, to wit: Was Mallory's income abnormally low in '73 and '74 because of the recession, which is no fault of Valad? For what other reasons was Mallory's income so low? Were there instances where Mallory's debtors had not yet paid Mallory, thus creating abnormally low income? Were there delays on other jobs not related to this dispute which nevertheless increased Mallory's overhead? What were the other independent production and financial problems on the jobs in dispute that were not attributable to Valad, which Mallory admitted? (T. 736-7)

The Trial Court's Standard Of Damages Is Purely Speculative

The effect of these and other factors on the amount of overhead and the allocation that could be attributed to Valad's alleged breach are purely speculative and conjectural, as well as collateral. This Court has repeatedly held that:

> The general rule is that an award of damages cannot properly be made on mere possibility or conjecture, there must be a firmer foundation. That is, any such award must be supported by proof upon which reasonable minds acting fairly thereon could believe that it is more probable than not that damage was actually suffered. Jamison v. Utah Home Fire Insurance, 559 P. 2d 958 at 961 (Utah 1977)

See also Graham v. Street, 2 Utah 2d 144, 270 P. 2d 456 (1954), where the Court held:

> ...only such damages are recoverable as are shown with reasonable certainty to have been sustained.

> Remote, contingent and conjectual losses will not be considered. Sutherland on Damages, 4th Ed., Section 1775, as cited Id. at 459.

Plaintiff's measure of damages for indirect, overhead expenses can only be considered conjectural and speculative.

Furthermore, this Court has often held that a trial Court must evaluate any loss suffered by the most direct, practical and accurate method that can be employed. Even Olds, Inc. v. Nielson, 22 Utah 2d 49, 448 P. 2d 709 (1968). The most direct and accurate approach for a buyer who is damaged is the approach used by the Uniform Commercial Code: The cost of "cover" plus incidental and consequential damages resulting therefrom. In this case, that sum would be under $11,000. (Ex. 102)

Mallory's Overhead Damages Were Not Foreseeable

In addition, damages are not proper unless they may be reasonably assumed to have been within the contemplation of the parties as a probable result of the breach. Jim Mahoney v. Galokee Corp., 522 P. 2d 428 (Kan. 1974) In other words, unless the damages are foreseeable, there can be no recovery. In the case at the bar, it was never contended that either Brown or Valad could have foreseen that the sale of the allegedly defective heaters would result in a recovery of one-fifth of the total overhead of the Plaintiff's operation during a particular year.

Bad Public Policy

This raises a particularly strong policy argument against the position taken by Plaintiff: If manufacturers of small, component items are forced to bear the risk of incurring

charges or overhead expenses that exceed, by many times, the value of the component (in this case, about $7,000), how can a small manufacturer like Valad ever afford to take the risk for such a small amount of money? The result would be a spectacular jump in the costs of items such as Valad's heaters, since no company could afford to assume liability for such unknown, uninsurable, conjectural damages.

The relationship between the costs of the heaters as charged by Valad in relation to the damages assessed (see Ex. A, Findings of Fact) is as follows:

Price of heaters (Exs. 10, 11, 13, 15) charged to Brown by Valad:	$ 7,060.00
Price of heaters (Ex. 16) charged to Mallory by Brown:	$ 9,262.00
Valad's risk (Findings of Fact) as determined by direct damages:	$10,647.80
Valad's risk (Findings of Fact) as determined by indirect damages:	$30,840.60
Valad's total risk:	$41,488.40

On this showing, Valad thus unknowingly undertook a risk 5.88 times as great as its $7,060 order.

CONCLUSION

Appellant Valad seeks initially to impress upon the Court that the lower Court never had jurisdiction in the first place. The line of cases beginning with Hill v. Zale demonstrate that there simply were not sufficient contacts to lawfully bring Valad into this action and Valad never intentionally submitted itself to the jurisdiction of the Court.

In addition, Valad argues most strenuously that the Trial Court completely ignored and misapplied the basic fundamental principles of contract law. The law compels the conclusion that there was no contract between Mallory and Valad, but that there was a contract between Brown and Valad. Furthermore, the contract between Brown and Valad was consummated by the meeting of the minds that occured when Brown approved the construction drawings represented by Exhibit 20 (also Ex. 83). The clear preponderance of the evidence demonstrates that there was no other contract other than Exhibit 20 (83), and that Valad manufactured the heaters strictly pursuant to the requirements of Exhibit 20.

Valad further strenuously contends that regardless of the terms of contract between itself and Brown, or regardless of whether Mallory was a third party beneficiary of said contract, Mallory accepted the heaters pursuant to the terms of the Uniform Commercial Code, made no valid or effective rejection, and later repudiated without cause the contract, thus giving Valad the right to suspend any performance not yet due. The evidence also demonstrates that the "delay time" upon which Mallory computed damages was totally unsupported

by the evidence since Mallory clearly waived any requirement that the heaters be shipped within six weeks of its purchase orders.

Finally, the computation of damages itself wherein the Trial Court awarded indirect or overhead damages is totally unsupported by the evidence, contrary to law, and a serious breach of sound public policy.

Defendant and Appellant Valad requests that this Court simply reverse the judgment of the Trial Court as to Valad, or in the alternative, grant Valad a new trial on the issues.

Respectfully submitted,

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Robert B. Sykes