

1988

# Wasatch Tool & Die v. Helmut E. Reinicke and Allison Garland : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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WASATCH TOOL & DIE, INC., and )	
JUERGEN MUELLER, )	No. 880225-CA
Plaintiffs/Appellants, )	
vs. )	
HELMUT E. REINICKE and )	
ALLISON GARLAND, )	
Defendants/Respondents.)	Priority No. 14(b)

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RESPONDENTS' BRIEF

Appeal from an Order of the  
Third District Court,  
Denying Plaintiffs' Motion to  
Set Aside Summary Judgment

Honorable James S. Sawaya

---

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DEPOSITED BY THE  
STATE OF UTAH

AUG 16 1990

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## APPLICABLE STATUTES AND RULES

### LIMITATIONS

#### 78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

#### 78-12-25. Within four years.

Within four years:

- (2) An action for relief not otherwise provided for by law.

#### 78-12-26. Within three years.

Within three years:

(1) An action for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof; except that in all cases where the subject of the action is a domestic animal usually included in the term "livestock" which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant.

### PARTNERSHIP

#### 48-1-15. Rules determining rights and duties of partners.

(7) No person can become a member of a partnership without the consent of all the partners.

#### 48-1-28. Causes of dissolution. Dissolution is caused:

- (1) Without violation of the agreement between the partners:
  - (a) By the termination of the definite term or particular undertaking specified in the agreement.
  - (b) By the express will of any partner when no definite term or particular undertaking is specified.
  - (c) By the express will of all the partners who have not assigned their interests, or suffered them to be charged for their separate debts, either before or after the termination of any specified term or

particular undertaking.

- (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) By the death of any partner.

(5) By the bankruptcy of any partner or the partnership.

(6) By decree of court under section 48-1-29.

#### 48-1-29. Dissolution by decree of court.

(1) On application by or for a partner the court shall decree a dissolution whenever:

- (a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.
- (b) A partner becomes in any other way incapable of performing his part of the partnership contract.
- (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.
- (d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.
- (e) The business of the partnership can only be carried on at a loss.

(2) On the application of the purchaser of a partner's interest under sections 48-1-24 or 48-1-25.

- (a) After the termination of the specified term or particular undertaking.
- (b) At any time, if the partnership was a partnership at will, when the interest was assigned or when the charging order was issued.

#### UTAH RULES OF CIVIL PROCEDURE

#### Rule 12. Defenses and objections.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. 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. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

#### Rule 56. Summary judgment.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

#### STATEMENT OF FACTS

Defendants, Helmut E. Reinicke ("Reinicke") and Allison Garland ("Garland") object to plaintiffs' Statement of Facts



to the extent that such statements are conclusions of law, irrelevant and immaterial, and attempt to add facts which are not part of the record and were not plead or argued in the lower court. For example, plaintiffs' statement that, "Mueller found that Reinicke was involved with illicit drugs" is, and has been throughout this case, irrelevant, immaterial, malicious and defamatory. The lower court ordered such statements stricken from the pleadings. Plaintiffs have disregarded this order and again make the irrelevant allegation on appeal.

Plaintiffs make several statements regarding "bribery payments". Defendants, as part of their Motion to Dismiss Amended Complaint, submitted affidavits of Reinicke and Burt Randall which explained the payments from Reinicke to be for part ownership of a boat. Defendants provided no counter-affidavit or other evidence to refute these sworn affidavits, except by their "affidavit" of Allison Garland, which she withdrew and disavowed subsequent to making.

Plaintiffs state that, "The motive for the burglary appeared to be an attempt by Reinicke to damage Appellants, causing them to default on the purchase contract, enabling Reinicke to retake the business by default according to the contract of purchase." This "fact" has never been alleged by plaintiffs in the proceedings of the lower court. This statement is an attempt to improve plaintiffs' position by adding to the facts.

### SUMMARY OF ARGUMENT

1. The district court properly treated defendants' Rule 12(b) Motion to Dismiss as a Motion for Summary Judgment under Rule 56, Utah Rules of Civil Procedure and properly granted summary judgment.

2. Plaintiffs' claims are barred by applicable statutes of limitation.

3. Plaintiffs have not properly plead allegations which would entitle them to a tolling of the statutes of limitation barring their causes of action. The trial court, therefore, properly held the statutes to have run.

4. Plaintiffs' Amended Complaint fails to plead causes of action for which relief can be granted.

5. Plaintiffs' allegation of racketeering activities fails to set forth the elements of racketeering with sufficient particularity to state a cause of action for which relief can be granted.

6. Plaintiffs were not partners with Reinicke and were not entitled to a dissolution and accounting of the partnership.

7. The entry of a guilty plea by Reinicke and Garland in federal court bribery charges does not give rise to an action for interference with prospective economic relations nor is it a "fraud upon the court."

8. Plaintiffs have had opportunity to amend their complaint and failed to do so. Permitting them to further amend the complaint would be unfair and burdensome to defen-

dants.

## ARGUMENT

### POINT I

THE DISTRICT COURT PROPERLY TREATED DEFENDANTS' RULE 12(b) MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 AND PROPERLY GRANTED SUMMARY JUDGMENT.

Rule 12(b), Utah Rules of Civil Procedure, provides in part:

If, on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

It is within the trial court's discretion whether to consider matters outside the pleadings. Strand v. Associated Students, 561 P.2d 191 (Utah 1977). Once the trial court exercises its discretion to consider those matters, the motion to dismiss is properly treated as one for summary judgment. Lind v. Lynch, 665 P.2d 1276 (Utah 1983).

Defendants motion was one for dismissal for failure to state a claim upon which relief could be granted. The grounds for the motion were, primarily, running of the applicable statutes of limitation and failure to state prima facie causes of action. In addition, defendants submitted affidavits explaining payments made by Reinicke to Burt Randall, which plaintiffs alleged to have been bribes. Plaintiffs submitted

no affidavits in rebuttal.

While the court could have dismissed plaintiffs' complaint with prejudice for failure to state a cause of action, it was proper for the court to treat the matter as one for summary judgment. Since the matter was being treated as one for summary judgment, the provisions of Rule 56, Utah Rules of Civil Procedure apply. Rule 56(e) provides, in part:

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Plaintiffs provided no affidavits or other specific facts in support of the allegations of bribery or any other allegations in their amended complaint. Under those circumstances, the trial court properly concluded that there were no genuine issues of material fact for trial. Busch Corp. v. State Farm Fire & Casualty Company, 743 P.2d 1217 (Utah 1987). The court's award of summary judgment was, therefore, appropriate and proper.

## POINT II

### **PLAINTIFFS' CLAIMS ARE BARRED BY APPLICABLE STATUTES OF LIMITATION.**

Civil actions must be brought within the applicable statutory time periods set forth by statute. Section 78-12-1, Utah Code Annotated (1953) as amended provides:

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

This section is essentially the same as the statute in effect at the time the action was initiated. For purposes of this action, only a properly formulated racketeering cause of action or fraudulent concealment would permit a tolling of the applicable statutes of limitation.

Plaintiffs' allegations of trespass and conversion occurred in 1980. The applicable statutes of limitation are U.C.A. 78-12-26(1) and (2) which provide a three year limit. Both periods had run prior to initiation of the action. All of the limitations for allegations included under plaintiffs' "negligence" cause of action had run.

The allegations of improper interference with contractual relations with EIMCO and interference with prospective economic relations occurred in 1980 and 1981. The period of limitation is four years and had run. U.C.A. 78-12-25(2).

The last event in any alleged racketeering cause of action must have occurred within three years of the time of filing the action. U.C.A. 78-12-26(4). This statutory period had also run.

Plaintiffs have failed to plead any effective cause of action which would fall within the statutory periods of limitation.

### POINT III

PLAINTIFFS HAVE NOT PROPERLY PLEAD ALLEGATIONS WHICH WOULD ENTITLE THEM TO A TOLLING OF THE STATUTES OF LIMITATION BARRING THEIR CAUSES OF ACTION. THE TRIAL COURT, THEREFORE, PROPERLY HELD THE STATUTES TO HAVE RUN.

Plaintiffs have failed, as discussed below, to plead an effective racketeering cause of action which would permit them to benefit from a tolling or extension of statutes of limitation.

Plaintiffs allege on appeal, without having plead such in the lower court, that defendants have fraudulently concealed the alleged conversion of plaintiffs' property. Plaintiffs have, at no point in this action, plead the nine elements necessary to establish a cause for fraudulent concealment. Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980).

Plaintiffs claim that their contract action is not barred by the running of the statute of limitation. To begin with, as in the other causes of action, plaintiffs have failed to clearly state what basis they have for their "contract action". They appear to be relying on a breach of good faith associated with the alleged burglary. Aside from that, they claim, without alleging facts, that "Through intentional and fraudulent means Reinicke successfully concealed the fact that a violation of the contract had occurred." Appellants' Brief, Point IV, Page 15.

Plaintiffs' allegations are not consistent with the facts, as set forth by plaintiffs in their Amended Verified

Complaint, paragraph 9, page 7: (1) A burglary took place June 19, 1980. (2) "At that time there was circumstantial evidence to believe that Helmut [Reinicke] and Burt [Randall] had committed the offense."

In view of these facts, plaintiffs ludicrously would have the court believe that "Reinicke successfully concealed the fact that a violation occurred." There obviously was no fraudulent concealment; therefore, the statute of limitation continued to run and had elapsed before this action was initiated.

Considering that plaintiffs have failed to provide allegations or evidence sufficient to toll or extend the periods of limitation, the trial court could properly find that the statutes had run, barring plaintiffs' causes of action.

#### POINT IV

#### **PLAINTIFFS' AMENDED COMPLAINT FAILS TO PLEAD CAUSES OF ACTION FOR WHICH RELIEF CAN BE GRANTED.**

Aside from the question of limitation, plaintiffs' amended complaint fails to plead the elements necessary to establish their causes of action against defendants. Plaintiffs, in their conversion cause of action, have set forth the law as it relates to conversion, but have pleaded no facts establishing a conversion. Their amended complaint fails to state specifically what property is alleged to have been converted by Reinicke or that he possesses the property, that

they have demanded return and he refuses to return it. Without such facts, there can be no allegation of "a wrongful exercise of control over personal property in violation of the rights of its owner." Frisco Joes, Inc. v. Peay, 558 P.2d 1327, 1330 (Utah 1977). While such "facts" have been set forth in plaintiffs' appellate brief, no such allegations were made in the proceedings in the lower court.

Plaintiffs have also attempted to plead a cause of action for negligence in reliance upon criminal statutes. While statutes may set forth a standard of care, this is not true for every statute drafted by the legislature. The Utah Supreme Court, in Hall v. Warren, 632 P.2d 848, 850 (Utah 1981) has established criteria which a plaintiff must meet to rely on a statute for a standard of care. Plaintiffs must show, "(1) the existence of the statute or ordinance, (2) that the statute or ordinance was intended to protect the class of persons which includes the party, (3) that the protection is directed toward the type of harm which has in fact occurred as a result of the violation, and (4) that the violation of the ordinance or statute was a proximate cause of the injury complained of." Hall at 850, emphasis added.

Plaintiffs have, in fact, shown only the first of these elements, that the statute exists. They then make the conclusory, logical leap to conclude "The violation of any one or combination of the above crimes constitutes a violation of a significant minimum standard of care and duty imposed by law." Amended Complaint, page 22. This does not meet the burden



imposed by the Utah Supreme Court for imposing a standard of care from a statute.

Plaintiffs' allegations of Prima Facie Tort read like a memorandum rather than a properly framed complaint. The general implication is that, if one person feels offended by another, there must certainly be a tort occurring, regardless of the facts of the situation.

Plaintiffs simply have not alleged any actions of defendants which fall within a statutory limitation period and have caused damage to plaintiffs. They have failed to plead causes of action for which the court can grant relief.

#### POINT V

#### **PLAINTIFFS' ALLEGATION OF RACKETEERING ACTIVITIES FAILS TO SET FORTH THE ELEMENTS OF RACKETEERING WITH SUFFICIENT PARTICULARITY TO STATE A CAUSE OF ACTION FOR WHICH RELIEF CAN BE GRANTED.**

A comprehensive discussion of the racketeering cause of action is set forth in defendants' Memorandum In Support of Defendants' Motion to Dismiss, Motion to Strike and Motion for More Definite Statement (in Addendum).

As in plaintiffs' other allegations, they ignore the time factors necessary for the requisite events to properly plead racketeering. In order to fall within the Utah Racketeering Act, U.C.A. 76-10-1601, et seq., at least one event must have occurred after 1981 (the enactment date of the statute). Except for the "ongoing conspiracy" and the payments by Reinicke to others, all of the events alleged by plaintiffs

occurred in 1980.

In addition, the last event must have occurred within three years of the time of filing the action. U.C.A. 78-12-26(4). Plaintiffs have failed to plead an effective cause of action which has satisfied these time requirements and would qualify as an act under U.C.A. 76-10-1602(1).

Nor have plaintiffs plead the elements of racketeering with sufficient particularity. In the only case interpreting the Utah Racketeering Act in civil actions, Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust, 558 F.Supp 1042 (D.C. Utah 1983), the federal district court held the Utah act to be more demanding than the federal RICO act. Where the federal act requires proving injury from a pattern of racketeering "with enough specificity to show there is probable cause the crimes were committed" by the named defendant, Bache at 1045, under the stricter standards of the Utah act,

the predicate crimes must be alleged with particularity. The court can determine whether the pleadings state a violation of the Utah Act only if the facts are sufficient to show that the alleged activity would be illegal in Utah and would fall into one of the enumerated categories.

Bache at 1047, emphasis added.

Plaintiffs rely heavily upon their allegations of conspiracy to support their charges of racketeering. Although conspiracy falls within the enumerated acts of racketeering, "[s]tanding alone, a charge of conspiracy does not state a

cause of action under the Utah Act." Bache at 1048.

To effectively allege conspiracy as part of racketeering activity, the plaintiffs need to show that the parties agreed to commit two or more episodes in furtherance of the conspiracy, and that they actually did anything beyond "conspiring".

Even in their Amended Complaint, plaintiffs fail to allege against these defendants:

- (1) That they agreed to commit two or more such episodes in furtherance of the conspiracy;
- (2) That they did anything beyond conspiring, if drinking together and otherwise associating with the other defendants constitutes conspiring;
- (3) A second episode which took place after 1980;
- (4) Any second episode occurring within five years of of a preceding one and within three years of the filing of the action;
- (5) Any satisfactory allegation, with sufficient particularity, of an enumerated racketeering activity.

Any allegations of an "ongoing" conspiracy must show facts indicating that the conspiracy is, in fact, currently engaged in by the parties and causing damage to the plaintiffs. Allegations of past events, especially ones for which statutes of limitation have run, do not indicate that a "conspiracy" is actively agreed to and engaged in by the parties.

Plaintiffs have failed to meet the time limitations imposed by statute to bring a cause of action for racketeering. In addition, they have failed to allege a satisfactory

set of elements to make out the racketeering cause of action.

#### POINT VI

#### **PLAINTIFFS WERE NOT PARTNERS WITH REINICKE AND WERE NOT ENTITLED TO A DISSOLUTION AND ACCOUNTING OF THE PARTNERSHIP.**

"No person can become a member of a partnership without the consent of all the partners." U.C.A. 48-1-15(7). Though a partner's interest in the partnership may be conveyed to a third person, an assignment of partnership interest does not give the assignee the status of partner. Benton v. Albuquerque National Bank, 701 P.2d 1025 (N.M.App. 1985). An assignee of a partnership interest is expressly limited by statute to (1) profits to which the assigning partner would otherwise be entitled and (2) upon dissolution, the assignor's interest and an accounting of the other partners.

Though defendant Mueller alleged that he had purchased Garland's partnership interest in Progressive Machine, plaintiffs have set forth no facts showing that Garland, in fact, was a partner in Progressive Machine. One obviously cannot convey what one does not own.

Even if Garland were a partner in Progressive Machine, her conveyance of a partnership interest did not make Mueller a partner with Reinicke. Reinicke, at no time, agreed or consented to be a partner with Mueller in Progressive Machine. Under such a scenario, Mueller would merely be assignee of Garland, entitled only to profits and Garland's interest, together with an accounting thereon, upon dissolution. Not

being a partner, Mueller would not be entitled to force a dissolution of the partnership under U.C.A. 48-1-28 or 48-1-29. Because plaintiffs could not force a dissolution, they likewise were not entitled to an accounting from Reinicke.

#### POINT VII

THE ENTRY OF A GUILTY PLEA BY REINICKE AND GARLAND IN FEDERAL COURT BRIBERY CHARGES DOES NOT GIVE RISE TO AN ACTION FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS NOR IS IT A "FRAUD UPON THE COURT".

Plaintiffs rely upon Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982) for the proposition that the bribery of a Morton-Thiokol agent constitutes intentional interference with the prospective economic relations of plaintiffs. This reading of the case clearly expands its applications beyond anything intended by the court.

Plaintiffs have never entered into contractual relations with Morton-Thiokol. Nor have they made attempts to establish economic relations with Morton-Thiokol. They believe that, because they might at some future time do so, they have been damaged.

Such a reading of the case would permit every machine company in the U.S. who might believe they could get contracts from Morton-Thiokol to have a cause of action against defendants.

It is clear that, in order to establish a cause of action for interference with prospective economic relations, there must at least be some demonstrable damage to the plaintiff.

Such damages, in the present case, are clearly speculative and incapable of being proven. Lacking the ability to prove such damages, much less that there was a "prospective economic relation", plaintiffs have no cause of action against defendants.

The guilty plea of Reinicke and Garland to federal bribery charges does not establish that Reinicke and Garland likewise bribed an agent of EIMCO. Nor does Garland's plea make her disavowal of her earlier "affidavit" a fraud upon the court. The pleas are prima facie evidence or conclusive only that they bribed the Morton-Thiokol agent. They are not prima facie evidence or conclusive as to any of the substantive elements of this appeal.

#### POINT VIII

PLAINTIFFS HAVE HAD OPPORTUNITY TO AMEND  
THEIR COMPLAINT AND FAILED TO DO SO.  
PERMITTING THEM TO FURTHER AMEND THE  
COMPLAINT WOULD BE UNFAIR AND BURDENSOME  
TO DEFENDANTS.

Plaintiffs allegations of burglary and bribery have been addressed by jury trial in the Third District Court, Civil No. C-86-7872, Honorable David S. Young presiding. Plaintiffs have consistently attempted to have their allegations heard in two forums, a tactic clearly unfair to defendants.

In addition, plaintiffs have already been given opportunity to amend their original complaint but failed to remove defamatory and irrelevant material or to cure the deficiency of their pleadings.

Plaintiffs have had several opportunities to present their alleged "facts" to two courts, resulting in considerable financial cost to defendants. To allow plaintiffs another opportunity to amend their complaint, in view of the lack of facts presented so far in their pleadings and arguments, would put an unfair financial and emotional burden upon defendants. There should be some point at which this litigation can end.

#### CONCLUSION

The district court properly treated defendants' Motion to Dismiss as a Motion for Summary Judgment and properly entered summary judgment in favor of defendants. Plaintiffs have had several opportunities, in two courts, to present their allegations and have not successfully done so. To permit plaintiffs to once again amend their complaint and embroil defendants in legal action where the facts and law do not justify plaintiffs' allegations imposes an unfair economic and emotional burden upon defendants. The summary judgment entered by the district court should be upheld.

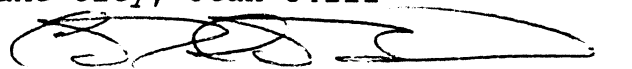
Respectfully submitted this 16th day of May, 1988.



C. Reed Brown  
Attorney for Defendants/  
Respondents

#### CERTIFICATE OF SERVICE

I hereby certify that, on the 16th day of May, 1988, I caused four copies of the foregoing Respondents' Brief to be delivered to Loren D. Martin, Attorney for Appellants, 1200 Beneficial Life Tower, Salt Lake City, Utah 84111



## **ADDENDUM**



C. Reed Brown (No. A0446)  
HINTZE, BROWN, FAUST, BLAKESLEY & McPHIE  
Attorney for defendants Helmut Rienicke  
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Telephone: (8801) 484-7632

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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WASATCH TOOL & DIE, INC., and  
JUERGEN MUELLER,

Plaintiffs,

DEFINITE STATEMENT

vs.

HELMUT E. RIENICKE, et. al.,

Defendants.

:

:

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:

:

:

:

:

:

:

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS, MOTION TO STRIKE,  
AND MOTION FOR MORE :

CIVIL NO. C86-7931

Judge James S. Sawaya

---

Defendants Helmut E. Rienicke and Allison Garland (Rienicke)  
submit the following Memorandum in Support of their Motion to  
Dismiss, Motion to Strike, and Motion for More Definite Statement:

POINT I

VARIOUS STATUTES OF LIMITATION HAVE RUN, BARRING  
PLAINTIFFS' CLAIMS AGAINST THESE DEFENDANTS.  
PLAINTIFFS' ACTION SHOULD, THEREFORE, BE DISMISSED.

Plaintiffs' causes of action against these defendants are  
barred by the running of the statutes of limitation involved. The  
tort claim is limited to four years from the occurrence of the  
tort. Utah Code, Section 78-12-25(2) (1953, as amended).

The statutory periods for burglary and theft (which are criminal, not civil actions) are four years, respectively. Utah Code 76-1-302(1)(a). These periods have run.

Utah Code 78-12-26(2) sets forth a three year statutory period for limitation of conversion actions. The period has run.

Obstructing Justice (a criminal offense) has a two year statute of limitation period. Utah Code 76-1-302(1)(b). The period has run.

"Commercial bribery" (plaintiffs' term) is a class B misdemeanor with a two year statutory period. Utah Code 76-1-302(1)(b). The period has run.

Because the Utah Racketeering Act, Utah Code 76-10-1601 et seq., does not provide otherwise, the statute of limitation is set forth in 78-12-26(4) as three years. The period has run.

The criminal offense of conspiracy carries a limitation period of four years, if determined to be a felony, Utah Code 76-1-302(1)(a) or two years, if determined to be a misdemeanor, Utah Code 76-1-302(1)(b). A civil cause for conspiracy would be limited to three years, Utah Code 78-12-26, or four years, Utah Code 78-12-25(2), depending on the nature of the allegations. All of these periods have run.

Because all of the statutory periods of limitation have run, plaintiffs have failed to state a cause of action for which relief can be granted and plaintiffs' action against these defendants should be dismissed.

## POINT II

PLAINTIFFS HAVE NOT BEEN DILIGENT IN PURSUING THEIR REMEDIES; THEREFORE, THEIR CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES AND SHOULD BE DISMISSED.

Plaintiffs have alleged actions on the part of defendants which allegedly have occurred over a long period of time. In plaintiffs' vague allegation of Violation of Contract Obligations, for example, they claim offenses back to 1980.

Plaintiffs have had sufficient opportunity to pursue their remedies against defendants, have failed to notify defendants of the actions which plaintiffs found offensive, and have made no claims for remedy prior to the present action. This lack of diligence by plaintiffs bars their action against defendants under the doctrine of laches. Plaintiffs' action against these defendants should, therefore, be dismissed.

## POINT III

PLAINTIFFS HAVE ALLEGED ACTIVITIES BY DEFENDANTS WHICH ARE CRIMINAL OFFENSES FOR WHICH THE CRIMINAL CODE PROVIDES NO EXPRESS PRIVATE CAUSE OF ACTION; THEREFORE, PLAINTIFFS HAVE NO CIVIL CAUSE OF ACTION AGAINST DEFENDANTS AND THE ACTION SHOULD BE DISMISSED.

Burglary and Theft are criminal offenses. The elements of burglary are set forth in Utah Code 76-6-201 to 204 and the elements of theft are set forth in Utah Code 76-6-401 to 412. In none of these statutes is there a provision for a private cause of action for burglary or theft. (With the exception of 76-6-412(2), which doesn't apply here).

Obstructing justice is a class B misdemeanor. Utah Code 76-8-306. There is no statutory provision for a private action for

obstructing justice.

What the plaintiff calls "commercial bribery" is a class B misdemeanor under the provisions of Utah Code 76-6-508. The statute sets forth no private cause of action for bribery.

The criminal offense of conspiracy is set forth in Utah Code 76-4-201 to 202. These provisions specify no private cause of action.

All of these causes of action alleged by plaintiffs are criminal activities for which no private cause of action is set forth in the statutes. Because of this, plaintiffs have no civil cause of action for these specific activities and the actions against defendants should be dismissed.

#### POINT IV

PLAINTIFFS' CAUSE OF ACTION FOR PUNITIVE DAMAGES  
DOES NOT STATE A CAUSE OF ACTION FOR WHICH  
RELIEF CAN BE GRANTED AND SHOULD BE DISMISSED.

An allegation that conduct of the defendants constitutes willful and malicious intent and causes damage to plaintiffs does not, by itself, constitute a separate cause of action. While the allegation may be raised as part of another cause of action, by itself, the allegation does not state a cause of action for which relief can be granted. Therefore, this cause of action should be dismissed.

#### POINT V

PLAINTIFFS' CAUSE OF ACTION FOR RACKETEERING  
ACTIVITIES FAILS TO SET FORTH THE ELEMENTS OF  
RACKETEERING WITH SUFFICIENT PARTICULARITY TO  
STATE A CAUSE OF ACTION FOR WHICH RELIEF CAN  
BE GRANTED AND, THEREFORE, SHOULD BE DISMISSED.

Plaintiffs' allegations of racketeering activity give rise to a cause of action under Utah Code Section 76-10-1605(1) which provides, in part:

A person who sustains injury to his person, business, or property by a pattern of racketeering activity, in which he is not a participant, may file an action in the district court. . .

Racketeering activities are specifically enumerated in 76-10-1-602. They include:

- (g) theft, . . . receiving stolen property, . . .
- (h) bribery
- (o) obstructing or hindering criminal investigations or prosecutions
- (x) conspiracy to commit any of the above enumerated offenses.

Section 76-10-1602(4) describes a "pattern of racketeering activity":

"Pattern of racketeering activity" means engaging in at least two episodes of racketeering conduct which have the same or similar objectives, results, participants, victims, or methods of commission, or are otherwise inter-related by distinguishing characteristics and are not isolated events, provided at least one of the episodes occurred after the effective date of this part and the last occurred within five years after the commission of a prior episode of racketeering conduct.

Broken down, this requires:

- (1) At least two episodes of racketeering conduct (enumerated acts under 76-10-1602(1)),
- (2) With the same or similar
  - Objectives
  - Results
  - Participants
  - Victims
  - Methods of commission

- (3) Not isolated events
- (4) At least one event occurring after 1981
- (5) A subsequent event occurring within five years of an earlier event.

The Federal District Court for Utah has interpreted the Utah Racketeering statute in Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F.Supp. 1042 (D.C. Utah 1983). In Bache, the defendant counter-claimed under the Federal RICO Act and the Utah Racketeering Influences and Criminal Enterprise Act.

The Bache court, in holding against the defendant, found the allegations insufficient under the Federal Act and held that the standards of Utah's Act were more demanding than those of the Federal Act. Under the Federal Act, the party bringing the action must prove injury from a pattern of racketeering activity, "with enough specificity to show there is probable cause the crimes were committed." Bache at 1045. The Court stated that:

A private civil action under RICO is grounded upon the premise that a party has twice engaged in "racketeering activity". . . Before a court can assess the merit of a plaintiff's. . .claim it must determine whether there is probable cause to believe the named defendant committed the alleged predicate crimes. That determination is possible if the factual basis of those "acts of racketeering" is set out with particularity.

Bache at 1045, emphasis added.

Addressing the Utah Act, the court held the Utah statute to be more demanding than the Federal RICO Act in that it defines a racketeering activity to be an act illegal under the laws of Utah rather than merely "indictable" as in the Federal Act. The Court

stated:

Like the Federal Act,. . . the Utah Racketeering Act suggests that the predicate crimes must be alleged with particularity. The court can determine whether the pleadings state a violation of the Utah Act only if the facts are sufficient to show that the alleged activity would be illegal in Utah and would fall into one of the enumerated categories.

Bache at 1047, emphasis added.

The Bache court also addressed the allegation of conspiracy as an element of a racketeering activity. The court held that the mere allegation of a conspiracy is insufficient to constitute a RICO conspiracy. "Thus, under RICO, a civil conspiracy charge requires an allegation that a party agreed to commit two predicate crimes in furtherance of the conspiracy." Bache at 1047, emphasis added. The court also observed that:

Although conspiracy is one of the enumerated acts of racketeering,. . . conspiracy is not a separate basis for recovery. It is merely a crime that may qualify as one of the predicate acts needed to show a pattern of racketeering activity. Standing alone, a charge of conspiracy does not state a cause of action under the Utah Act.

Bache at 1048.

Plaintiffs, though making broad allegations against defendants, have failed to allege with particularity the racketeering activities which would form the basis for a cause of action under the Racketeering Act. Plaintiffs' allegations lack sufficient factual particularity to permit a court to "determine whether there is probable cause the defendants committed the alleged predicate crimes."

It is significant that, regarding the burglary, even according to plaintiffs' Complaint, "the police did not believe there was sufficient information for criminal charges". Plaintiff's Complaint, paragraph 5 k. at page 9. If the information regarding the alleged burglary was insufficient to provide probable cause of the offense, then plaintiffs' more general allegations of the other offenses certainly cannot meet the threshold requirement for "probable cause".

Since plaintiffs' complaint does not satisfy the threshold requirement of probable cause under the Utah Racketeering Act, plaintiffs have failed to state a cause of action for which relief can be granted. Therefore, the action for racketeering activity should be dismissed.

#### POINT VI

PLAINTIFFS' ALLEGATIONS OF DRUG USE, DRINKING AND CRIMINAL ACTIVITY BY DEFENDANTS ARE IMMATERIAL, IRRELEVANT, MALICIOUS AND DEFAMATORY AND SHOULD BE STRICKEN FROM THE COMPLAINT PURSUANT TO RULE 12(f), UTAH RULES OF CIVIL PROCEDURE.

Plaintiffs have alleged that defendants, especially defendant Helmut Rienicke, used drugs, drank frequently and conducted himself in a criminal manner. These allegations are immaterial and irrelevant to the causes of action set forth by plaintiffs and are malicious and defamatory.

The allegations of drug use have absolutely nothing to do with the causes of action asserted by plaintiffs. They should be stricken.

Plaintiffs rely on the allegations of frequent drinking by



Helmut Rienicke and his social involvement with others in places where drinks are served as the basis for their allegations of conspiracy among the defendants. The alleged drinking activities have no rational relationship with any of the causes of action which plaintiffs put forth. They serve only to defame defendants in a malicious manner. These allegations should be stricken from the Complaint.

Plaintiffs frequently allege that defendant, Helmut Rienicke, committed a burglary of plaintiffs' premises. Though such an allegation might be properly raised in support of plaintiffs' claims of racketeering activity, the allegation is not set forth in the racketeering cause of action. The allegations are spread throughout the complaint.

If, in fact, such an offense occurred, any liability therefore has long since expired with the running of the statutory period of limitation. The only purpose for continually raising this allegation is to cast a pall upon defendants' characters. This is a defamatory use of the Complaint and all such allegations should be stricken.

Because all of these allegations are immaterial, irrelevant, malicious, and/or defamatory, they should be stricken from the Complaint under the provisions of Rule 12(f), Utah Rules of Civil Procedure, as "immaterial, impertinent, or scandalous matter."

#### CONCLUSION

Plaintiff's wide ranging allegations fail to state a cause of action against these defendants for the reasons set forth above,

and the action against defendants Helmut Rienicke and Allison Garland (Rienicke) should be dismissed.

In the alternative, the court should strike all of the immaterial, irrelevant, and defamatory allegations of the complaint and instruct plaintiffs to make a more definite statement of their causes of action against these defendants.

Respectfully submitted this \_\_\_\_ day of November, 1986.

HINTZE, BROWN, FAUST,  
BLAKESLEY & MCPHIE

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C. REED BROWN  
Attorney for defendants Helmut  
E. Rienicke and Allison  
Garland

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Memorandum in Support of Defendants' Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement, postage prepaid, on the \_\_\_\_ day of November, 1986 to:

Loren D. Martin  
Attorney for plaintiffs  
1200 Beneficial Life Tower  
Salt Lake City, Utah 84111



failed to allege specific facts which would support their allegations against these defendants. In support of these assertions, defendants incorporate herein their previous Memorandum in support of Motion to Dismiss and set forth the following:

DEFAMATORY AND IRRELEVANT ALLEGATIONS

Plaintiffs have failed to remove defamatory and irrelevant allegations from their Amended Complaint. Though they have changed the allegations of burglary and theft to "trespass" and "conversion", this does not cure the offense. On page 4 of the Amended Complaint, plaintiffs allege "an argument related to the use of drugs." On page 5, plaintiffs allege that Reinicke had "been growing what appeared to be and was admitted to be a marijuana plant" and that he had been "distributing to and engaging with employees in the use of intoxicating liquor and what appeared to be marijuana," and that Reinicke used "drugs with employees on the job." All of these allegations are defamatory and irrelevant to any of the causes of action claimed by plaintiffs.

THE ENUMERATED CAUSES OF ACTION AGAINST DEFENDANT REINICKE  
Trespass.

The plaintiffs have alleged against defendant Reinicke a "trespass" which occurred in 1980. The applicable statute of limitation is U.C.A. 78-12-26(1) which provides for a three year limitation. This period has long since run.

Conversion

Plaintiffs have failed to allege the elements of conversion, including the specific property alleged to have been conver-

ted by defendant Reinicke. They prefer to set forth the law rather than the facts. In addition to improperly pleading the conversion, plaintiffs have waited beyond the three year period of limitation set forth in U.C.A. 78-12-26(2) for bringing their action.

#### Negligence

Plaintiffs have attempted to use the criminal statutes to impose upon defendants a new standard for negligence. While statutes may set forth a standard of care, this is not true for every statute drafted by the legislature. The Utah Supreme Court, in Hall v. Warren, 632 P.2d 848, 850 (Utah 1981), has established criteria which a plaintiff must meet in order to rely on a statute for a standard of care. The plaintiff must show, "(1) the existence of the statute or ordinance, (2) that the statute or ordinance was intended to protect the class of persons which includes the party, (3) that the protection is directed toward the type of harm which has in fact occurred as a result of the violation, and (4) that the violation of the ordinance or statute was a proximate cause of the injury complained of." Hall at 850, emphasis added.

Plaintiffs have, in fact, shown only the first of these elements, that the statute exists. They then make the conclusory, logical leap to conclude "The violation of any one or combination of the above crimes constitutes a violation of a significant minimum standard of care and duty imposed by law." Amended Complaint, page 22. This does not meet the burden imposed by the Utah Supreme Court for imposing a standard of care from a statute.

Since plaintiffs rely on a non-existent standard of care,

they are unable to allege a violation of a standard sufficient to support a claim of negligence against defendant Reinicke.

As with plaintiffs' other allegations, the statutes of limitations for all of the offenses included under their "negligence" cause of action have run.

#### Improper Interference With Contract

Plaintiffs allege that Reinicke improperly interfered with plaintiffs' contractual relations with EIMCO. This cause of action fails on several accounts. First, the alleged actions and damages occurred in 1980 and 1981. The statutory period of limitation for this type of action is four years. U.C.A. 78-12-25(2). Plaintiffs have failed to take action within the prescribed period.

Second, the sale of defendant Reinicke's interest in Wasatch Tool to Mueller did not include any sort of non-competition agreement. Defendant Reinicke was free to enter business in competition with Wasatch Tool. This includes competition for work from a major customer like EIMCO. The mere fact that plaintiffs' work from EIMCO amounted to an increasingly smaller percentage of plaintiffs' overall business does not, of itself, imply an improper interference by Reinicke, but could be a result of legitimate competition.

Plaintiffs allege that payments made by Reinicke to defendants Burt Randall and John Ward constituted bribes to divert work from plaintiffs to defendant Reinicke. However, plaintiffs acknowledge that Ward did work for Reinicke, though they imagine this work to be a subterfuge to conceal the purpose of the payments.

They do not adequately explain why someone would work for money which is allegedly already given to him as a bribe.

Regarding payments made by Reinicke to defendant Burt Randall, the Court has affidavits of both parties which explain that the payments were made for the purchase of a half-interest in a boat owned by both men. Plaintiffs have failed to allege contrary facts which would support their bribery claims.

Interestingly, plaintiffs also fail to allege facts which show the existence of an enforceable contract between plaintiffs and EIMCO which defendants could have interfered with. Plaintiffs also have made no effort to bring an action against EIMCO for breach of their "contract", an indication that perhaps no contract existed.

Because the statute of limitation has run and because there are no facts supporting plaintiffs' allegations, plaintiffs have failed to plead a cause of action for interference with contract for which relief can be granted.

#### Interference With Prospective Economic Relations

Plaintiffs' claim for this cause of action relies heavily on the allegations of commercial bribery based on payments made by Reinicke. These payments have been explained above.

Even if these allegations made out a cause of action, it would be barred by the running of the statute of limitation as in all of plaintiffs' other allegations.

Since there was no improper means of interference, i.e. commercial bribery, defendant Reinicke's competition with plain

tiffs for work from EIMCO amounted to free enterprise competition for which the defendant cannot be criticised. Plaintiffs have again failed to plead an action for which relief can be granted.

#### Prima Facie Tort

Plaintiffs' allegations of Prima Facie Tort read like a memorandum rather than a properly framed complaint. The general implication is that if one person feels offended by another, there must certainly be a tort occurring, regardless of the facts of the situation. Plaintiffs simply have not alleged any actions of defendant Reinicke which fall within a statutory limitation period and have caused damage to plaintiffs.

#### Racketeering Activity

For a more comprehensive discussion of the racketeering cause of action, see defendants' previous Memorandum in support of Motion to Dismiss. As in the other allegations, plaintiffs ignore the time factors necessary for the requisite events. For example, in order to fall within the Utah Racketeering Act, U.C.A. 76-10-1601 et seq., at least one event must have occurred after 1981 (the enactment date of the statute). All of the events alleged by plaintiffs, except for the "ongoing conspiracy" and the payments to other defendants, occurred in 1980. The payments are explained above, and the "conspiracy" discussed below.

In addition, the last event must have occurred within three years of the time of filing the action. U.C.A. 78-12-26(4). Plaintiffs have failed to plead an effective cause of action which has satisfied these time requirements and would qualify as an act



under U.C.A. 76-10-1602(1).

In the only case interpreting the Utah Racketeering Act, Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust, 558 F.Supp 1042 (D.C.Utah 1983), the court held the Utah act to be more demanding than the Federal RICO Act. Where the federal act requires proving injury from a pattern of racketeering "with enough specificity to show there is probable cause the crimes were committed" by the named defendant, Bache at 1045, under the stricter standards of the Utah act,

the predicate crimes must be alleged with particularity. The court can determine whether the pleadings state a violation of the Utah Act only if the facts are sufficient to show that the alleged activity would be illegal in Utah and would fall into one of the enumerated categories.

Bache at 1047, emphasis added.

Plaintiffs rely heavily upon their allegations of conspiracy to support their charges of racketeering. Although conspiracy falls within the enumerated acts of racketeering, "[s]tanding alone, a charge of conspiracy does not state a cause of action under the Utah Act." Bache at 1048.

To effectively allege conspiracy as part of racketeering activity, the plaintiffs need to show that the parties agreed to commit two or more episodes in furtherance of the conspiracy, and that they actually did anything beyond "conspiring".

Even in their Amended Complaint, plaintiffs fail to allege against these defendants:

- (1) That they agreed to commit two or more such episodes in furtherance of the conspiracy;

- (2) That they did anything beyond conspiring, if drinking together and otherwising associating with the other defendants constitutes conspiring;
- (3) A second episode which took place after 1980;
- (4) Any second episode occurring within five years of of a preceeding one and within three years of the filing of the action;
- (5) Any satisfactory allegation, with sufficient particularity, of an enumerated racketeering activity.

Any allegations of an "ongoing" conspiracy must show facts indicating that the conspiracy is, in fact, currently engaged in by the parties and causing damage to the plaintiffs. Allegations of past events, especially ones for which statutes of limitation have run, do not indicate that a "conspiracy" is actively agreed to and engaged in by the parties.

Plaintiffs have failed to meet the time limitations imposed by statute to bring a cause of action for racketeering. In addition, they have failed to allege a satisfactory set of elements to make out the racketeering cause of action.

#### Violation of Contract Obligations

Plaintiffs' allegations under this heading appear to be for conversion, which was discussed above. This cause of action also fails to fall within the statutory period of limitation and is further barred by the doctrines of laches and waiver.

Moreover, the proper forum for this particular cause of action would be in the court hearing Reinicke's previously filed action against these plaintiffs for breach of contract. The "violation of contract obligations" should be raised in that forum

as a counter-claim rather than in this court as a separate cause of action.

#### Division of Partnership and Accounting

Plaintiffs have failed to show that they are, in fact, legal partners of defendant Reinicke. To begin with, defendant Allison Garland did not have a partnership interest in the business with defendant Reinicke. Even if she did have such an interest, she could not have validly transferred that partnership interest to another party without the dissolution of the partnership and the new parties forming a new partnership. Plaintiffs did not, in fact, enter into a partnership agreement with defendant Reinicke and therefore have no partnership interest which gives rise to the provisions cited by plaintiffs.

#### THE ENUMERATED CAUSES OF ACTION AGAINST DEFENDANT GARLAND

All of the above discussion of the causes of action against defendant Reinicke also apply to plaintiffs' causes of action against defendant Allison Garland and are herein incorporated as they apply.

Plaintiffs would have the Court believe that, by merely saying so, they can impute to another defendant, Allison Garland, all of the activities alleged against defendant Reinicke. This appears to fall under the "guilty by association" theory. Simply knowing of the activities of another defendant, if that in fact was the case, does not amount to participating in the same activity to the same degree.

The conspiracy allegations fail due to the arguments set

forth above. The other allegations against this defendant are barred from becoming a cause of action by the various statutes of limitation involved. Plaintiffs have failed to allege any factual circumstances which would state a cause of action against this defendant for which relief can be granted.

The "Violation of Contract" alleged against defendant Garland does not constitute a cause of action. If defendant Garland could have and did transfer her interest to plaintiffs, they have no rights against her for division and accounting. Since, in fact, defendant Garland could not, under the laws of Utah, transfer her interest in the partnership to plaintiffs, plaintiffs still have no right to a division and accounting. Plaintiffs have failed to allege any other contractual facts which would amount to this "Violation of Contract."

#### CONCLUSION

Plaintiffs have failed to amend their complaint to plead a satisfactory cause of action against these defendants. They have failed to remove the defamatory and irrelevant material. They have alleged no facts occurring within the applicable statutes of limitations. They have not plead sufficient causes of action for which this court can grant relief.

Because plaintiffs' claims are all barred by the running of statutory periods of limitation and because plaintiffs are unable to amend their complaint to make out satisfactory causes of action, the complaint against defendants Helmut E. Reinicke and Allison Garland should be dismissed with prejudice.

Respectfully submitted this \_\_\_\_ day of December, 1986.

---

C. Reed Brown  
Attorney for defendants Helmut  
Reinicke and Allison Garland

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss, postage prepaid, on the \_\_\_\_ day of December, 1986 to:

Loren D. Martin  
Attorney for plaintiffs  
1200 Beneficial Life Tower  
Salt Lake City, Utah 84111