

1978

Keene Corporation v. R. W. Taylor Steel Company et al : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KEENE CORPORATION,
a corporation,

Plaintiff and
Respondent,

vs.

Case No. 15787

R. W. TAYLOR STEEL
COMPANY, a corporation,
RALPH W. TAYLOR and
DU JEAN M. TAYLOR,

Defendants and
Appellants.

BRIEF OF PLAINTIFF-RESPONDENT
KEENE CORPORATION

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

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R. W. TAYLOR STEEL
COMPANY, a corporation,
RALPH W. TAYLOR and
LOU JEAN M. TAYLOR,

Defendants and
Appellants.

BRIEF OF PLAINTIFF-RESPONDENT
KEENE CORPORATION

STATEMENT OF THE CASE

Plaintiff-respondent Keene Corporation ("Keene") was awarded judgment by the District Court in the amount of \$66,674.16 as the agreed price for goods ordered by and sold and delivered to Grating, Inc., plus interest and attorney's fees, pursuant to absolute and unconditional trade account guarantees by defendants-appellants R. W. Taylor Steel Company ("Taylor Steel"), Ralph W. Taylor and Lou Jean M. Taylor ("Taylors").

DISPOSITION IN THE LOWER COURT

In their Answer to plaintiff's Complaint, the defendants admitted that the subject goods had a reasonable value of \$40,000.00 (R. 21) and asserted an assortment of affirmative defenses. (R. 22-23.)

After Keene filed its Notice of Readiness for Trial (R. 77), the Taylors moved to stay the action in its entirety. (R. 78.) The District Court granted in part and denied in part that motion, ruling that the action would come on regularly for trial except for the defenses set forth in the Answer based upon violations of the federal antitrust laws which would be stayed until resolution of Grating, Inc. v. Keene Corporation and Harsco, Civil No. NC-75-21, pending in the United States District Court of Utah, Northern Division. (R. 110-111.)

Trial of the case was then set for February 7, 1977. Faced with this firm trial setting, the defendants by Stipulation, Motion and Order of January 26, 1977 (R. 115-119) voluntarily admitted each and every factual allegation set forth in Keene's Complaint and abandoned with prejudice all defenses except certain antitrust claims which had been placed in issue by Grating, Inc. in its federal suit. Since these antitrust defenses had been stayed and all other claims and defenses resolved, the February 7, 1977 trial date was stricken. (R. 117, 118 at 117, 118 at 118.) The defendants, as absolute and

unconditional trade account guarantors of Grating, Inc., admitted that Grating, Inc. ordered steel grating from Keene's price lists in the amount of \$56,674.16, received and accepted the steel grating from Keene, and then refused to pay the invoiced list price or any part of it. (R. ¶1, 2, 3, 4, and 5, at 115-116.)

Keene then moved for Summary Judgment on the grounds that the Taylors had stipulated that Grating, Inc. had failed to pay Keene the agreed price of goods admittedly received; that the Taylors had executed the unconditional trade account guarantees of Grating, Inc.'s debts to Keene; that the Taylors had waived all defenses to the debt except those based on alleged antitrust violations; and that, by the overwhelming weight of authority, such alleged antitrust violations could not, as a matter of law, be asserted as a defense to a claim for the agreed price of goods sold and delivered. (R. 120-129.)

The lower court granted in part Keene's Motion for Summary Judgment by:

- 1) Striking the antitrust defenses from the Taylors' answer as being unavailable as a matter of law (R. 165); and
- 2) Vacating the Court's previous Order staying this action pending the resolution of these antitrust defenses (R. 161); and
- 3) Awarding Keene partial judgment in the amount of

\$40,000.00 since the Taylors had admitted in their Answer and in their own damage study that the goods were worth at least that amount. (R. ¶4 at 186 and 187.)

The District Court did not grant judgment for the entire \$66,574.16 sought by Keene because it granted an oral motion by counsel for the Taylors and Taylor Steel to be relieved on the grounds of excusable neglect of his waiver with prejudice of the contractual defense that the written purchase orders by Grating, Inc. and the invoices of Keene had been orally modified so that "one of the terms and conditions of the sale of goods by [Keene] to Grating, Inc. was that Grating, Inc. would be charged no more than the price charged by other manufacturers for similar goods." (R. 164-165.) *

Trial was held November 29 and 30, 1977, on this one remaining defense of the Taylors. (R. 254-429.) By Findings of Fact and Conclusions of Law entered January 24, 1978 (R. 223-233), the District Court held:

1) Keene did not agree to charge Grating, Inc. no more than other manufacturers charged their customers. (R. ¶18 at 226.)

2) At the most, due to a mutual friendship between certain representatives of Keene and Grating, Inc., "Grating, Inc.

* Counsel for the Taylors was also relieved of the waiver of one other contractual defense on the grounds of excusable neglect (R. 164-165) but later voluntarily abandoned that defense. (R. 185-186.)

sought and received assurances that it was purchasing steel grating from Keene at a competitive price which would enable Grating, Inc. to resell such steel grating at a reasonable profit." (R. ¶19 at 226-227.)

3) Although such assurances did not amount to a contract, they were in fact fully performed by Keene in that (a) with regard to the price lists of the two other manufacturers that allegedly were lower than Keene's, one was not in effect in the area where Grating, Inc. did business and only very limited and insufficient amounts of product were available from the manufacturer with the other (R. ¶s 24 and 25, at 227- 228); (b) Grating, Inc. resold the steel grating it purchased from Keene (which was the subject of the action below) at a substantial profit considerably above its normal margin (R. ¶26 at 228); and (c) Keene had kept Grating, Inc. fully competitive by providing its full requirements of product during a period of severe shortage, providing it price protection, providing it Keene's own experienced personnel to aid in selling and providing other marketing assistance. (R. ¶s 27, 28, 29, at 228-229).

4) Grating, Inc. picked up at least part of the steel grating which is the subject of this action with no intention of paying for it, in that Grating, Inc. sued Keene in federal court for millions of dollars for antitrust violations within one day of Grating, Inc.'s receipt of the last of the shipments (R. ¶30

at 229-230). Therefore, the District Court refused defendants' application for equitable relief (R. ¶14 at 232) at least in part due to Grating, Inc.'s lack of "clean hands" and good faith.

5) In any event, any such alleged oral agreement was not available to the Taylors and Taylor Steel as a defense under various provisions of the Uniform Commercial Code as enacted in Utah. (R. ¶s 10, 11, 12, and 13 at 232.)

Judgment was entered January 24, 1978, in the amount of \$66,674.16 plus interest, costs, and attorney's fees in an amount to be determined by the Court. (R. 234-235.) At a later date, after a hearing, the District Court entered judgment for attorney's fees and costs in the amount of \$14,501.16 against the Taylors and Taylor Steel. (R. 245-246.)

The Taylors and Taylor Steel filed an extensive and detailed motion to amend the Findings of Fact and Conclusions of Law. (R. 208-214.) The District Court denied that motion after hearing. (R. 237- 238.)

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent Keene Corporation seeks the affirmation by this Court of the District Court's Order of October 25, 1977, striking the federal antitrust defenses, the Judgment and Findings of Fact and Conclusions of Law on the merits entered January 24, 1978; the Judgment and Findings of Fact and Conclusions of Law as to costs and attorney's fees of March 17, 1978.

and the Order denying the Motion to Alter or Amend the Findings of Fact and Conclusions of Law dated March 17, 1978.

STATEMENT OF FACTS WITH
CITATIONS TO THE RECORD

On April 26, 1973, the Taylors and Taylor Steel for valuable consideration entered into trade account guarantees by the terms which they absolutely and unconditionally guaranteed payment of all trade accounts thereafter incurred by Grating, Inc. to Keene plus interest and attorney's fees. (Exhibit 1P, Trade Account Guarantees of the Taylors and Taylor Steel.) Ralph W. Taylor is the President and sole owner of Grating, Inc. and also of R. W. Taylor Steel Company. Lou Jean M. Taylor is Ralph W. Taylor's wife. These unconditional trade account guarantees were obtained by Keene because Grating, Inc. had run up an unpaid trade account of some \$200,000.00 just prior to that time. (Exhibit 10P)

During January and March, 1975, Grating, Inc. ordered steel grating from Keene in the total amount of \$66,574.15 by written purchase orders prepared and executed by Grating, Inc.'s General manager. Grating, Inc. knew the prices Keene charged from price lists which had been previously provided. By inserting these prices from Keene's price lists in the purchase orders and executing them, Grating, Inc. agreed to pay these stated prices. (Purchase orders contained in Exhibits 2P, 3P, 4P, 5P, 6P, 7P, 8P and 9P.) From March 31, 1975, to April 17,

1975, Grating, Inc. accepted and received steel grating from Keene in the quantity and description and at the price specified by Grating, Inc. in its purchase orders and as set forth in the invoices sent by Keene to Grating, Inc. (Exhibits 2P through 9P.) Grating, Inc. and the defendants after repeated demands refused to pay Keene the invoiced indebtedness.

The purchase orders and invoices reflecting the purchase and sale of these goods at an agreed price were the written contractual documents between Grating, Inc. and Keene. Previous written agreements between these entities relating to the purchase of steel grating by Grating, Inc. had expired long ago in 1968. These previous written agreements did not contain any suggestion that Grating, Inc. would be charged no more than the price charged by other manufacturers for similar goods.

At no time between 1968 and April 18, 1975, did Keene and Grating, Inc. agree orally or in writing that the purchase orders and invoices for sales between these entities would be modified so that Grating, Inc. would be charged no more than the price charged by other manufacturers for similar goods. At the most, certain representatives of Keene and of Grating, Inc. developed a mutual friendship pursuant to which Grating, Inc. sought and received assurance that it was "competitive". (Trial Transcript R. pp. 274, 275 and 279, testimony of Ralph W. Taylor; pp. 331, 332 and 333, testimony of Brent Cox; pp. 376,

399 and 400, testimony of Jerry McGee; pp. 406, 407, 408, and 411, testimony of Theron John.) These representatives of Keene and Grating, Inc. were all persons of substantial experience in the business of purchasing, selling, and fabricating steel grating and had equal opportunity to determine the prices charged by other manufacturers. (Trial Transcript R. p. 264, testimony of Ralph W. Taylor; pp. 327 to 328, testimony of Brent Cox.)

During March and April, 1975, Grating, Inc. discovered that certain other manufacturers including HARSCO and Dravo, currently had lower price lists for steel grating than Keene. (Trial Transcript R. pp. 275 and 276, testimony of Ralph W. Taylor; Exhibit 13D Dravo Price List and Exhibit 16D HARSCO Price List.) The price lists of these two companies were lower than Keene because HARSCO and Dravo each had a "mill or factory position" with steel manufacturers entitling them to purchase steel at lower prices than Keene could purchase the same material. (Trial Transcript R. pp. 307 and 308, testimony of Glenn I. Johnson; p. 323, testimony of Allen H. Streeter; p. 377, testimony of Jerry McGee.) Keene's price to Grating, Inc. was increased at approximately the same percentage rate as the price Keene was forced to pay for steel it purchased. (Trial Transcript R. pp. 376-377, testimony of Jerry V. McGee.)

Moreover, the price list of HARSCO in effect during

January through April, 1975, was not applicable in the geographic territory in which Grating, Inc. sold. (Price List dated 6-12-74 of Exhibit 16D; Trial Transcript R. pp. 314, 315 and 316, testimony of Allen H. Streeter.) In fact, sales of steel grating by HARSCO in the area in which Grating, Inc. did business during December through April, 1975, were very close to the prices Keene charged Grating, Inc. (Trial Transcript R. pp. 318, 319, 320 and 323, testimony of Allen H. Streeter.) Therefore, the prices at which HARSCO actually sold in this market were competitive with the prices at which Grating, Inc. bought material from Keene, and vice-versa.

With regard to the price list of Dravo, only very limited quantities of steel grating with substantially delayed delivery were available from the Dravo price list in effect during January through April, 1975, and the entire quantity available for this market was sold to Mesco-Utah Sprocket. Dravo's sole representative in the geographical area where Grating, Inc. did business. (Trial Transcript R. pp. 307-310; testimony of Glenn T. Johnson; October 15, 1974 Dravo Price List of Exhibit 13D.) Consequently, Dravo's price list had no material effect on Grating, Inc.'s ability to be competitive.

Although there was no agreement or understanding that Keene Corporation would sell as low or lower than any other manufacturer of steel grating, since Grating, Inc. was the sole

seller of Keene Corporation's grating products in the Utah market area, Keene was determined to and did keep Grating, Inc. fully competitive. (Trial Transcript R. p. 360, testimony of Jerry McGee.)

That Keene kept Grating, Inc. competitive as to price with regard to the specific goods involved in this case is evident from the fact that Grating, Inc. readily resold the steel grating it purchased from Keene (assuming Keene had been paid for such grating) at a substantial profit ranging from approximately 15% to in excess of 30%, which was considerably more than Grating, Inc.'s normal profit margin. (Trial Transcript R. pp. 267 and 288, testimony of Ralph W. Taylor; pp. 349 through 351 and 368, testimony of Brent Cox, Exhibits 12P, 24P, 29P, 30P, 31P, 32P, 33P, 34P, 35P, 36P, 37P, 38P and 39P.)

Furthermore, Keene kept Grating, Inc. competitive as to price generally because during Grating, Inc.'s fiscal year 1974 (April 1, 1974 through March 31, 1975) Grating, Inc. had net earnings of \$128,031.00 which was far in excess of what Grating, Inc. had made in any previous year. These earnings were exclusive of a salary payment to Ralph Taylor as Grating, Inc.'s chief executive officer of \$127,610.00, even though Mr. Taylor spent very little time on behalf of Grating, Inc. (Trial Transcript R. pp. 292-294, testimony of Ralph W. Taylor; p. 338, testimony of Brent Cox.)

Because of the steel shortage in effect from the fall of 1973 through the spring of 1975, the most significant requirement to be competitive was the obtaining of an adequate supply of steel grating. If the product could be obtained, it could be easily resold at a substantial profit. Keene kept Grating, Inc. competitive during the steel shortage by promptly supplying it with its full requirement of steel grating at a time when Keene did not have adequate steel grating even to supply its own needs. (Trial Transcript R. p. 285, testimony of Ralph W. Taylor; p. 309, testimony of Allen H. Streeter; p. 358, testimony of Brent Cox; pp. 377-379, 382, 399-400, testimony of Jerry McGee.)

Keene also kept Grating, Inc. competitive by providing it with price protection, so that Grating, Inc. could bid for jobs with guarantees against any future price increases. This was important because the price of steel charged Keene by steel manufacturers was rapidly rising. Neither HARSCO nor Dravo provided such price protection to their customers. (Trial Transcript R. pp. 291 to 292, testimony of Ralph W. Taylor; pp. 380 to 381, testimony of Jerry McGee.)

Keene also kept Grating, Inc. competitive by Keene's own regional sales manager, at Keene's own cost and expense, frequently visiting the Grating, Inc. market area to assist Grating, Inc. in its sales effort by calling on its customers and the like. Neither HARSCO nor Dravo so assisted them.

customers. (Trial Transcript R. pp. 285 and 286, testimony of Ralph W. Taylor; pp. 358 and 359, testimony of Brent Cox; pp. 378 and 380, testimony of Jerry McGee; pp. 405 and 406, testimony of Theron John.)

Keene further kept Grating, Inc. competitive by providing it special low prices on large jobs. In fact, Keene substantially discounted to Grating, Inc. some of the very steel grating which is the subject of this action. (Exhibit 25P; Trial Transcript R. pp. 349, 368, testimony of Brent Cox.)

Keene never sold to other customers at a price lower than it charged Grating, Inc. (Trial Transcript R. p. 380, testimony of Jerry V. McGee.)

Grating, Inc. picked up and accepted delivery at Keene's plant in Santa Fe Springs, California of at least part of the steel grating which is the subject of this action, with full knowledge that other manufacturers may have been charging less for the same product to the extent that such product was available. (Trial Transcript R. p. 275, testimony of Ralph W. Taylor, Finding of Fact R. ¶30 at pp. 229 - 230). Grating, Inc. accepted delivery of Keene's goods without objecting to Keene's stated price and apparently without the intention of paying for them, because on April 18, 1975, at or about the same time it accepted delivery of some of the goods and before actually using such goods, Grating, Inc. sued Keene in the United States District Court for the District of Utah, Northern Division for

several million dollars for alleged antitrust violations. Keene was advised in response to repeated demands for payment that Grating would not pay either in whole or in part for such goods. (Trial Transcript R. p. 281, testimony of Brent Cox; Exhibit 9; Complaint and Request for Trial by Jury, Exhibit 11D.)

ARGUMENT

POINT I.

THE DISTRICT COURT CORRECTLY DETERMINED THAT A VIOLATION OF SECTION 1 OF THE SHERMAN ANTITRUST ACT MAY NOT BE ASSERTED AS A DEFENSE TO THIS SIMPLE COLLECTION ACTION BROUGHT IN THE STATE COURT TO RECOVER THE AGREED PRICE OF GOODS SOLD AND DELIVERED.

(a) Since The Construction And Enforcement Of The Antitrust Laws Of The United States Are Placed Exclusively In The Federal Courts By Section 15 Of The Clayton Antitrust Act, Violations Of The Antitrust Laws May Not Be Asserted In State Courts Either By Way Of Counterclaim Or Defense.

Enforcement of the antitrust laws of the United States is placed exclusively in the federal courts by statute. Section 15 of the Clayton Antitrust Act, 15 U.S.C.A. Section 15. Therefore, when a party seeks to assert a violation of the antitrust laws of the United States either as a defense or counterclaim to a suit brought in state court, the state courts have stricken

the defense or counterclaim. American Broadcast v. American
Mfrs. Mut. Ins. Co., 249 N.Y.S.2d 431 (1963); General Talking
Pictures Corporation v. De Marce, 279 N.W. 750 (Minn. 1938); AMF
Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 348
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California v. Joseph Chandler, 84 Cal. Rptr. 756 (Ct.App. 1st
Dist. Cal. 1970); Sessions Company v. W. A. Sheaffer Pen Com-
pany, 344 S.W.2d 180 (Tex. Civ. App. 1961). As the Supreme
Court of Minnesota held in General Talking Pictures v. De Marce,
supra:

Whether by way of attack or defense, once raised,
the issue is the same. Its determination in either
case would require this court to apply federal law,
the construction of which is expressly and exclu-
sively placed with the federal courts. Id. at 753.

The District Court, therefore, correctly struck defen-
dant's antitrust defenses in this action as not being cognizable
by the courts of this state.

Grating, Inc., as previously stated, has commenced an
action in the United States District Court for the District of
Utah alleging various antitrust violations against Keene Corpo-
ration. Since the courts of this State cannot and should not be
required to interpret and construe the antitrust laws of the
United States, the resolution of Grating, Inc. is antitrust

claims must be left to the federal court.

(b) By The Overwhelming Weight Of The Case Law, As Well As The Specific Remedies Provided By Federal Law For Any Violation Of Section I Of The Sherman Antitrust Act, Private Contracts For The Agreed Price Of Goods Sold And Delivered May Not Be Avoided Even In Federal Courts (Which Have Jurisdiction To Consider Federal Antitrust Laws) On The Basis Of An Alleged Violation Of The Federal Antitrust Laws.

As previously indicated, Keene received judgment for \$66,674.16 plus costs, interest and attorney's fees in this action, under unconditional trade account guarantees of the Taylors and Taylor Steel for goods sold and delivered to Grating, Inc. at the price and in the quantity Grating, Inc. itself provided on purchase orders sent to Keene. The Taylors and Taylor Steel attempted to set forth as a defense to the collection of this admitted debt that Keene had violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1. Thus, according to defendants, Keene owed Grating, Inc. more money than Grating, Inc. owed Keene. Grating, Inc.'s federal antitrust claims were the subject of an action pending in the United States District Court for the District of Utah, Northern Division. Grating, Inc.

v. Keene Corporation and Harsco, WC-75-21, filed April 18, 1975. Defendants claim the District Court below erred in striking this defense.

The U. S. Supreme Court on several occasions has held that federal antitrust violations may not be asserted as a defense to a contract action even in federal court, and in particular, an action to recover the agreed price of goods sold and delivered. Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed. 2d 475 (1959); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902); D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 57 S.Ct. 1015, 91 L.Ed. 1219 (1947); A. B. Small Co. v. Lamborn & Co., 267 U.S. 248, 45 S.Ct. 300, 69 L.Ed. 597 (1925).

In Kelly v. Kosuga, supra, for example, a purchaser of many carloads of onions set up an antitrust defense to a seller's action for the purchase price. In refusing to permit the defense, the U. S. Supreme Court stated:

As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. (Citing Connolly, supra; D. R. Wilder Mfg. Co., supra; and A. B. Small Co., supra.) 358 U.S. at 518, 79 S.Ct. at 431. (Emphasis Added)

The courts have indicated several reasons for not permitting alleged antitrust violations to be asserted in actions

for the agreed price of goods sold and delivered. Each of these reasons is applicable to this case.

First, an express remedy is provided by federal law for violation of the Sherman Act, i.e., treble damages. 15 U.S.C. §15. "[T]he Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction." Kelly v. Kosuga, supra, 358 U.S. at 519, 79 S.Ct. at 431, (citing D. R. Wilder Mfg. Co., supra, 236 U.S. at 174-175, 35 S.Ct. at 401-402). "[T]he federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act." Kelly v. Kosuga, supra, 358 U.S. at 519, 79 S.Ct. at 431.

Second, no need exists to expand the substantial remedy of treble damages to permit antitrust defenses to contract actions. Defendants argue that if Keene's alleged antitrust violations were permitted as a defense and in fact proved, Keene would be entitled only to a recovery of \$40,000.00 as the reasonable value of the goods, rather than the contract price of \$66,674.16. Keene's entitlement to the remainder, say to the defendants, must await the resolution of the federal antitrust case. However, the U. S. Supreme Court decisively disposed of this argument in Bruce's Juices v. American Can Co., supra. In Bruce's Juices, Bruce's sought to defend a state court action for the agreed price of goods sold by asserting an antitrust

violation by the American Can Company as a defense. Bruce's, as
do defendants in this action, also sued the Can Company for
treble damages in federal court for an antitrust violation. 330
U.S. at 752, 67 S.Ct. at 1019. In affirming the Florida Supreme
Court's holding that federal law would not permit the antitrust
defense in the state court action, the U. S. Supreme Court held:

No reason suggests itself why Congress should have
intended a remedy by which the victim of discrimi-
nation could recover by defense [in a state court
action for the agreed price of goods sold] only
one-third of what he could recover, on the same
proof, by offense [in the federal court antitrust
action]....Since the remedy embodied in [permitting
an antitrust defense in the state court action]
would be but a weak one-third shadow of the one
Congress expressly gave, we cannot see the need for
judicial reduplication in miniature. 330 U.S. at
757, 67 S.Ct. at 1022; (Material in brackets
added). See also Dickstein v. Dupont, 443 F.2d 783
at 786 (First Cir. 1971).

The same is, of course, true in the case at bar. No need exists
to permit defendants in this case to assert that Keene is enti-
tled to only a partial recovery of \$40,000.00 because of an
antitrust defense. This would not further any policy of deter-
ring antitrust violations (as defendants claim in their brief,
pages 15-16), since if they can prove such violations in their
federal court action, their remedy is trebled by virtue of the
federal statute.

Third, if the antitrust defense were permitted to the
Particular sale of goods here involved by Keene to Grating,

Inc., all Keene's sales to anyone would be similarly tainted.

As the U. S. Supreme Court has indicated:

If this view is taken, certainly the remedy would soon end illegal [alleged antitrust violations] - by ending [Keene's] business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. It must not be forgotten that such a decision would have retroactive effect for several years and unsettle many accounts. We cannot justify a judicial declaration to this effect. Bruce's Juices v. American Can Co., 330 U.S. at 754, 67 S.Ct. at 1020. (Material in brackets added).

Fourth, the availability of antitrust defenses "would tend to prolong and complicate contract disputes." Dickstein v. Dupont, 443 F.2d at 78, (First Cir. 1971). This simple collection action for the agreed price of goods sold was filed June, 1975 and judgment was rendered in January, 1976. Already defendants have avoided judgment on this admitted debt for over three years by merely asserting an antitrust defense. Such delay would increase geometrically if the antitrust defense were permitted. Collection should not be required to await trial in a protracted antitrust case.

Thus, since this case falls squarely within each reason the U. S. Supreme Court has articulated why antitrust defenses to contract actions are seldom, if ever, permitted, the defendants must convincingly demonstrate that this case falls within the narrow ambit of circumstances where the defense has been

permitted as discussed next below.

(c) The District Court's Enforcement Of The Price And Quantity Terms Of Grating, Inc.'s Own Purchase Orders To Keene Corporation Which Are The Subject Of This Action Was Not So Clearly Intrinsically Or Inherently Illegal As To Make The Court Party To Enforcing The Precise Conduct Or One Of The Very Restraints Forbidden By The Antitrust Laws.

The U. S. Supreme Court has recognized a very limited and narrow exception to the assertion of an antitrust defense to a contract claim. The defense is permissible only where the intrinsic or inherent illegality of the contract is so clear that enforcement would make a court party to the precise conduct or to the carrying out of one of the very restraints forbidden by law. Dickstein v. Dupont, supra; Kelly v. Kosuga, supra, Small v. Lamborn, supra. As the Court stated in Kelly v. Kosuga, the test is that

... past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." 358 U.S. 520-521, 79 S.Ct. 432. (Emphasis added).

As far as Keene can ascertain from defendants' brief (pp. 15-18) they rely upon this narrow exception to the general rule.

In their brief, defendants set forth (pp. 8-9) a "Preliminary Statement Concerning Pending Federal Antitrust Claims" without any citations to the record. In this so-called "Preliminary Statement", it is asserted that the pending federal court antitrust action between Grating, Inc. and Keene involves a scheme whereby Keene somehow forced Grating, Inc. to resell fabricated steel grating at a price set by Keene which in turn permitted Keene to overcharge Grating, Inc. for steel grating at the wholesale level, i.e., to charge Grating, Inc. more than other manufacturers charged for the same product. Later on defendants confusingly assert that this is not the particular claim involved in the federal court antitrust action but, instead, that "...Keene was guilty of unlawfully fixing prices, --presumably of the steel grating it sold to Grating, Inc. (p. 17, Appellants' brief.)

Next, defendants claim that the "undisputed fair market value" of the steel grating in issue in this action was \$40,000.00. (p. 15, Appellants' Brief) Hence, conclude defendants, the lower court should have limited its judgment to that amount and should have stayed that judgment, as well as the action for the balance of the contract price, pending the

outcome of the antitrust action. According to defendants, this course of action would have balanced competing policies of the law by preventing defendants from being "unjustly enriched" while at the same time preventing the court from any possibility however remote of enforcing agreements which tangentially relate to alleged violations of the antitrust laws. (Appellants' brief, pp. 15-18.)

The argument is invalid for a number of reasons:

First, defendants are playing fast and loose with this Court if they are, in fact, representing that Keene and HARSCO, the other defendant in the antitrust action, fixed the price of the steel grating sold to Grating, Inc. so that the District Court's enforcement of the purchase orders and invoices involved in this case enforced the "precise conduct" forbidden by the Sherman Act. Defendants themselves proved at the trial of this case that Keene's price lists to Grating, Inc. and HARSCO's price lists to others were, in fact, very different. (Exhibit 16D containing HARSCO's prices and Exhibit 41D containing Keene's prices.) Indeed, defendants' entire criticism of Keene in this action is that Keene charged Grating, Inc. a price higher than charged by other manufacturers to Grating, Inc.'s competitors. Therefore, no possible antitrust defense can be permitted based on defendants' assertion of a price fix between Keene and HARSCO of the steel grating sold to Grating, Inc.

Defendants themselves have disproved such a pricing arrangement.

Second, if defendants are arguing that the federal antitrust action involves the claim that Keene was charging Grating, Inc. more than other manufacturers were charging their customers, no such claim is cognizable under the antitrust laws. Moreover, even if such alleged overcharge were linked with some other antitrust violation involving Grating, Inc.'s sale price to its customers, the enforcement of a contract for the agreed price of goods sold and delivered to Grating, Inc. such as reflected by the purchase orders and invoices involved in this action (Exhibits 2P through 9P) would not constitute the enforcement of the "precise conduct" or "one of the very restraints" forbidden by the Sherman Act. Obviously, it is not a violation of law for Keene to prove that steel grating was sold and delivered to Grating, Inc. at a stated price. As the United States Supreme Court said in Bruce's Juices:

...[plaintiff] can prove that cans were sold and delivered at a stated price. That is no violation of law. 330 U.S. 743 at 756, 67 S.Ct. 1015 at 1021.

Third, every case, both state and federal, which has interpreted Kelly v. Kosuga, has held without qualification that an antitrust defense based on the Sherman Act or otherwise can never be asserted to a contract claim if the contract involved is one for the agreed price of goods sold and delivered. In other words, all courts interpreting Kelly v. Kosuga have

concluded that the enforcement of a contract for the agreed price of goods sold and delivered never can be enforcing the 'precise conduct' made illegal by the Sherman Act. As the court stated in Warner Bros. Distributing Corp. v. Jerry Theatres, Inc., 1973-1 Trade Cases, Par. 74,578 at 94,551 (N.Y. S.Ct. 1973):

The defense of violation of the antitrust laws does not lie to permit a purchaser to avoid paying for goods or services admittedly received. (Citing Kelly v. Kosuga, supra.)

In Exxon Corp. v. Time Industries, Inc., 1974-1 Trade Cases, Par. 74,926 at 94,146 (E.D. Mich. 1974), the Court held that it was "settled" that violations of the antitrust laws could not be asserted by either a principal debtor or an unconditional trade account guarantor "where the plea has been made by the purchaser in an action to recover from him the agreed price of goods sold." Id. (quoting Kelly v. Kosuga.) In Viacom International Inc. v. Tandem Productions, Inc., 368 F. Supp. 1264, 1974-1 Trade Cases, Par. 74,866 (S.D. N.Y. 1974), the Court recognized that there was perhaps an implied exception to the rule that antitrust defenses could not be asserted on contract claims "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the act...." or where "the invalidity is inherent to the contract." The Court, however, held this implied exception could never be found in a contract for the sale of goods:

Such inherent invalidity may perhaps be found in resale price maintenance agreements, exclusion from territories agreements, group boycotts, or overall illegal schemes to monopolize. These are merely illustrative of what I take to be inherently invalid agreements. A contract for the sale of goods..., regardless of background, is not inherently invalid...[U]nless the act ordered by the Court is itself illegal, the contract is not subject to the antitrust defense. 368 F.Supp. at 1278, 1974-1 Trade Cases, Par. 74,866 at 95,859. (Emphasis Added)

In Crivello v. Four Brothers, Inc., 1976-2 Trade Cases ¶ 61,191 at 70,404 (E.D. Wis. 1976), an action for food, supplies and advertising expense, the Court held "the clear import of Kelly is the rejection of the plea of Sherman Act illegality as a defense to a contract action." Id.

Lastly, defendants claim that Keene would be unjustly enriched if the antitrust defense were not permitted. Defendants assert that if Keene received a deferred judgment of \$40,000.00 and its entitlement to the remainder up to \$66,674.40 awaited the outcome of the federal antitrust case, this would prevent Keene from being unjustly enriched. But at no time do Keene agree that the reasonable value of the goods in issue was \$40,000.00. The District Court entered partial summary judgment in that amount as its order reflects because defendants' Answer admitted the goods were worth that amount and defendants' deposition study showed they owed Keene at least that amount. (Order of Partial Summary Judgment, R. ¶¶ 186-187.) Without citation

the record on argument defendants seek a stay pending resolution of the antitrust case, not only for the difference between the agreed contract price and \$40,000.00 but also for the \$40,000.00 as well (p. 24, Appellant's brief). However, as previously indicated, the courts, including the U. S. Supreme Court, have already considered the balancing of the policies of preventing unjust enrichment while also insuring compliance with the antitrust laws. They uniformly have ruled that antitrust defenses are not available to contract actions except in the narrow situation where the court is asked to enforce the precise conduct made illegal by the Sherman Act. Thus, the courts have determined, as defendants recognize in their brief (p. 16) that the policy of not furthering the purposes of violators of the antitrust laws is less important than preventing people from getting other people's property for nothing when they purport to be buying it. Furthermore, defendants themselves most certainly would be enriched unjustly if this action were stayed in whole or in part and the antitrust defenses were permitted. It is undisputed that Grating, Inc. ordered, received, resold at a substantial profit and refused to pay for \$66,674.16 worth of grating from Keene and then immediately sued Keene for alleged antitrust violations. Thus, Grating, Inc. obtained a war chest at Keene's expense for prosecution of its antitrust suit. No clearer case of unjust enrichment could exist than to permit

defendants to obtain Keene's goods under the guise of purchasing them, refusing to pay, making large profits on the goods; resale and financing a lawsuit against Keene with the proceeds.

Defendants have cited only two cases where an antitrust defense has been permitted in a contract action, one in 1909 and the other in 1935. Continental Wall Paper Co. v. Louis Voight Sons Co., 212 U.S. 227 (1909); Marathon Oil Co. v. Hadley, 15 S.W.2d 883 (Tex. Civ. App. 1935) (miscited by defendants as 15 S.W.2d 883). In Continental Wall Paper Co., nearly all the manufacturers of wallpaper in the United States formed a corporation to purchase all their wallpaper supplies at prices fixed by them. These manufacturers then only made wallpaper available and only filled orders placed with the corporation representing the pool. All wholesalers who purchased the wallpaper were forced to do so from the pool's corporation at prices fixed by the manufacturers otherwise they could get no paper. If the wholesalers did not come into the agreement, the manufacturers could drive them out of business. In a suit for the price of goods sold brought by the pool corporation against a wholesaler who was a party to the price fix agreement, the U. S. Supreme Court voided the contract.

But nothing like this egregious set of circumstances exists in the present case. Grating, Inc. does not claim it was forced to become a member of an industry wide illegal price

fixing scheme. Grating, Inc. does not claim Keene was a nominal seller on behalf of other grating manufacturers in the U. S. Grating, Inc. cannot claim, and in fact, itself disproved at the trial of this action, that the price of the steel grating it purchased from Keene was fixed. The fact situation of this action, therefore, is in no way similar to the nationwide price fixing scheme in the Continental Wall case, where the defendant was part and parcel of the illegal agreement. Further, Continental Wall apparently has never been followed by any other court, including the United States Supreme Court. It has only been distinguished. D.R. Wilder Mfg. Co. v. Corn Products Refining Co., 230 U.S. at 177-178; A.B. Small Co. v. Lamborn & Co., 267 U.S. at 252, 45 S.Ct. at 302; and Kelly v. Kosuga, 358 U.S. at 520-521, 79 S.Ct. at 432. One eminent commentator has stated:

Although not expressly overruling the Continental Wall Paper case, the Court abandoned the distinction made there between contracts inherently illegal and those which are only collateral to the illegal activities. In Kelly, the Court held that the adequacy of antitrust violations as a defense to an action on a contract depends not upon whether the violations were inherent in the contract sued upon, but upon whether the Court, in enforcing the contract, "would itself be enforcing the precise conduct made unlawful by the Act." Von Kalinowski, Antitrust and Trade Regulation, Volume 15, §109.06 at 109-81 and 109-82.

Another commentator has stated: "Continental Wall Paper has never been followed in the almost 62 years that have passed

since it was decided." Sobel, Antitrust Defenses to Contract Actions: A Question of Policy Priorities, 16 Antitrust Bulletin 455 at 460 (1971).

Marathon Oil Co. v. Hadley, *supra*, the other case relied upon by defendants is completely inapposite to this action. That case involved the question of whether the antitrust laws of the State of Texas, not those of the United States, would void a contract. Based on Texas statutes, the contract was held void. But in 1961, the Court of Civil Appeals of Texas faced the same question involved in the instant case in Sessions Company v. A. Sheaffer Pen Company, *supra*. The Texas court, notwithstanding Marathon Oil, but relying on Kelly v. Kosuga, refused to permit an alleged violation of federal antitrust laws to be asserted as a defense in an action for debt for merchandise which had been delivered. 344 S.W.2d at 184.

The various law review articles cited by defendants are in accord with the overwhelming weight of the case law to the effect that the federal antitrust laws may not be asserted as a defense to an action for the agreed price of goods sold and delivered. "...[W]henver a plaintiff sued to recover the price of property rights sold and delivered, the defendant would not be permitted to raise alleged antitrust violations in defense." Sobel, Antitrust Defenses to Contract Actions: A Question of Policy Priorities, 16 Antitrust Bulletin, 455 at 467 (1971).

Defendants also cite Section 50-1-6. Utah Code Annotated, pertaining to unlawful combinations to control prices. This section was never raised as a defense by the defendants in this action nor has Grating, Inc. sued Keene under this section in the federal antitrust action. Defendants' reference to this section is, therefore, completely irrelevant.

No reason whatsoever exists to intermingle this action for the agreed price of goods sold and delivered with a pending federal antitrust action. This action has run its course and the federal antitrust action will do the same. Since antitrust defenses may never be asserted in an action for the agreed price of goods sold and delivered, there is no way that the facts in this case can be twisted to support a claim that a judgment in favor of Keene would make the State Court a party to enforcing the "precise conduct" made illegal by Section 1 of the Sherman Act.

POINT II.

THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS THAT EQUITY WOULD NOT PREVENT THE ENFORCEMENT OF A CONTRACT FOR THE AGREED PRICE OF GOODS SOLD AND DELIVERED BECAUSE OF THE FRIENDSHIP OF THE PARTIES IS FULLY SUPPORTED BY THE LAW AND THE FACTS.

Grating, Inc. by purchase orders it prepared specifying quantity and price, ordered goods from Keene in the amount of \$66,674.16. Keene delivered an invoice in that amount.

(Exhibits 2P through 9P.) Defendants admitted this very contract for the agreed price of goods sold and delivered. Defendants' only remaining defense not waived by them or stricken as a matter of law was that Keene and Grating, Inc. orally modified these invoices and purchase orders by agreeing that Keene would charge Grating, Inc. no more than other manufacturers charge for the same goods.

After hearing conflicting testimony, the District Court found that Keene and Grating, Inc. did not agree orally that Grating, Inc. would be charged no more than other manufacturers but only that a mutual friendship existed pursuant to which Grating, Inc. sought and received assurances that it would be kept "competitive". (Findings of Fact Nos. 18 and 19, R. pp. 226-227; Trial Transcript R. pp. 274, 275 and 279, testimony of Ralph W. Taylor; pp. 331, 332, 333, testimony of Brent Cox; pp. 376, 399 and 400, testimony of Jerry McGee; pp. 405, 406, 407, 410 and 411, testimony of Theron John.)

Defendants, after quoting out of context an abbreviated part of the District Court's Memorandum Decision (and ignoring the District Court's Findings and Conclusions), argue for the first time on appeal on pages 19-20 of their brief that Keene's supposed failure to live up to its friendship with Grating, Inc. resulted in a violation by Keene of Section 70A-1-203, U.C.A. (1953), the section of the Utah Uniform Commercial Code:

mandating "good faith" in the performance of contracts, and Section 70A-1-201(19) U.C.A. (1953) defining "good faith" as "honesty in fact in the conduct or transaction concerned."

In making this argument, defendants ignore the Utah Rules of Civil Procedure and fundamental appellate principles.

First, defendants impermissibly rely on the lower court's Memorandum of Decision, rather than its Findings of Fact and Conclusions of Law. Unlike Rule 52 of the Federal Rules of Civil Procedure permitting the Court to enter a Memorandum of Decision in lieu of Findings of Fact and Conclusions of Law, Rule 52 of the Utah Rules of Civil Procedure permits no other procedure than Findings of Fact and Conclusions of Law. Defendants entirely fail to refer to the trial court's Findings and Conclusions in this proceeding. Such Findings and Conclusions were entered by the District Court and reaffirmed by it after defendants' lengthy and detailed Motion to Alter or Amend them.

Second, by reference to the lower court's Findings of Fact (and, indeed, its Memorandum of Decision), it is evident that the District Court found against defendants on disputed evidence by ruling that no oral agreement such as claimed by defendants existed modifying the written purchase orders and invoices. The District Court, in its Memorandum of Decision also so ruled. (§2, §7, §8. R. 189-192) The Findings and

Conclusions make the same determination. (¶18, ¶19 R. 226-227) Obviously, if the lower court so decided, even if there exists some contradictory evidence, this Court would not interfere unless the Findings were against the clear weight of the evidence. Doe v. Doe, 48 Utah 200, 158 P. 781 (1916); Elton v. Utah State Retirement Board, 28 Utah 2d 368, 503 P.2d 811 (1972). It is evident from the citations to the record here set forth that the Court's findings as to the non-existence of any oral modification of the purchase orders and invoices are amply supported.

Third, Section 70A-1-203, U.C.A. (1953) was not asserted by defendants as a defense or adverted to in any way in their Answer. (R. 21-24.) The first time defendants have cited this statute is in this appeal. It is too late for defendants to raise this defense at this date. Rule 12(h), Utah Rules of Civil Procedure, unambiguously provides that except in certain instances not here material, "[a] party waives all defenses... which he does not present...in his answer...."

Fourth, although finding that no oral agreement existed modifying the written purchase orders, the lower court also made alternative findings fully supported by the evidence that Keen did, in fact, keep Grating, Inc. fully competitive. (Findings of Fact Nos. 26, 28, and 29, R. at 228-229; see Statement of Facts herein, pp. 9-14). For example, Grating, Inc. was able to

resell the grating it purchased from Keene which is the subject of this action at a substantial profit. Grating, Inc. had a very profitable year. Keene kept Grating, Inc. fully supplied with product during a period of shortage when, if product could be obtained at any price, it could be resold at a premium profit. Keene provided Grating, Inc. price protection when prices of steel to Keene were increased. Keene's own sales manager helped Grating, Inc. market its product. Keene frequently gave Grating, Inc. discounts off its list price for large jobs. Defendants do not even discuss these alternative findings of the District Court that although no oral agreement existed, Grating, Inc. was fully competitive in price as well as in other areas of marketing.

Fifth, defendants completely fail to advert to the District Court's Findings (Nos. 23, 24, and 25, R. at 227-228) fully supported by the evidence (see citations to the record in the Statement of Facts above pp. 9-11) that with respect to the particular price lists put in evidence by defendants supposedly to establish that other manufacturers charged less than Keene, HARSCO's price list was not effective in the area where Grating, Inc. did business and actual sales by HARSCO in Grating, Inc.'s market area were at a price only a few cents below Keene's. As to the price list of Dravo, little, if any product was available for sale from it. Therefore, even assuming an oral modification

existed to the subject written purchase orders and invoices that Keene would charge no more than other manufacturers, defendants themselves proved through their own witnesses (Mr. Streeter for HARSCO and Mr. Johnson for Dravo) that Keene, in fact, charged approximately the same prices as HARSCO and that Dravo had little, if any, grating for sale.

Sixth, defendants fail to discuss their own complete lack of good faith and unclean hands as found by the Court below. As discussed under Point I above, Grating, Inc. ordered goods from Keene with no intention of paying for them and sued Keene for millions of dollars for antitrust violations the day after receiving the last of the grating ordered. This was done for the apparent purpose of financing an antitrust action with Keene's money. Grating, Inc. still refused to pay all or any part of the debt it agreed was owing even after reselling the grating at a handsome profit. As the Court below concluded, equity will not relieve such a party from its written purchase orders and invoices for the agreed price of goods sold and delivered. (Conclusion of Law No. 14, R. 232.)

Seventh, defendants also fail to discuss the District Court's alternative Conclusions of Law that the oral modification of the written purchase orders and invoices (Exhibits 2 through 9P) argued for by defendants could not be asserted as a defense because (1) under the Uniform Commercial Code,

70A-2-607-(1), Grating, Inc. and therefore defendants had to pay the full contract price because the goods had been accepted unconditionally (Conclusion of Law No. 10, R. p. 232.); (2) Grating, Inc. and therefore defendants were barred from any remedy for failure to notify Keene of any alleged breach of the alleged oral agreement under Section 70A-2-607(3). U.C.A. (1953); (3) the parol evidence rule of the Utah Uniform Commercial Code, §70A-2-202 U.C.A. (1953) prevented any such oral modification of a written contract; and (4) the statute of frauds of the Utah Uniform Commercial Code Section 70A-2-201 and Section 70A-2-209, U.C.A. (1953) prohibited any such oral contract. (Conclusions of Law 10, 11, 12 and 13, R. p. 232.) Each of these conclusions is clearly correct and results in the same judgment in this case.

POINT III

THE FINDINGS OF FACT ENTERED BY THE DISTRICT COURT WERE FULLY SUPPORTED BY THE EVIDENCE AT THE TRIAL.

On pages 22 and 23 of their brief, defendants assert that the Findings of Fact by the Court Nos. 18, 19, 20, 23, 24, 25, 26, 28, 29 and 30, (R. pp. 226-230.) are not supported by the evidence. No citations to the record are made to support such an argument. Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, requires that a brief contain a statement of facts "citing the pages of the record supporting such statement."

(Emphasis Added.) Failure to do so results in the appeal being treated as being from the judgment roll alone. In re Lavelle's Estate, 122 Utah 253, 248 P.2d 372 (1952) (quoting from an earlier decision).

Keene suggests that perhaps defendants purposefully have omitted citing the record in order to do so in a Reply Brief, thus preventing Keene from responding. This tactic, of course, would violate Rule 75(p)(2) limiting Reply Briefs to "new matter set forth in respondent's brief." To obviate this possibility and for the assistance of this Court, Keene has provided a summary of each of the District Court's Findings under its Statement of Facts herein, together with citations to the record, including Trial Transcript and Exhibits. These establish that each finding challenged by defendants is fully supported by the record.

POINT IV

THE DISTRICT COURT'S REFUSAL TO EXERCISE ITS EQUITABLE POWER TO STAY THIS ACTION PENDING THE OUTCOME OF THE FEDERAL ANTITRUST ACTION WAS NOT AN ABUSE OF DISCRETION.

As previously indicated herein (pages 2 and 3, Disposition in the Lower Court), the District Court, after a hearing, denied defendants' motion to stay this action and, in particular, struck the defendants' antitrust defenses. It is axiomatic that a court may, in the exercise of its equitable power, stay

proceedings in its sound discretion. On page 24 of their brief, defendants assert without any discussion whatsoever that this Court should instruct the District Court to "stay all proceedings, including any proceedings to collect the Partial Summary Judgment for \$40,000.00, until the completion of the federal antitrust action." Defendants make no argument and cite no authority as to why this Court should so instruct the District Court.

An examination of the record herein clearly reveals that the District Court in no way abused its discretion in refusing to exercise its equitable power to stay this action until completion of a lengthy antitrust action. In order to receive equity, one must do equity. As we have seen, Grating, Inc. ordered and received goods from Keene Corporation with no intention of paying for them, resold those goods at a substantial profit, and refused to pay all or any part of the agreed price. It is obvious that the monies received by Grating, Inc. after selling Keene's goods were and are being used to finance the prosecution of a federal antitrust action against Keene. The District Court below refused to be a party to such conduct and refused to permit defendants to avoid paying for goods sold and delivered. Such a ruling cannot constitute an abuse of discretion.

No stay of this action is necessary because Grating, Inc. and defendants will receive whatever remedy they are entitled to from the antitrust claims against Keene in the pending federal action. If Grating, Inc. loses that action and this Court were to grant a stay, then Grating, Inc. would have been successful in financing a nonmeritorious action with Keene's money. If Grating, Inc. is successful, it will receive treble damages as the express and exclusive statutory remedy for violation of the federal antitrust laws. Such remedy certainly would be sufficient, and therefore no stay of this action is indicated.

CONCLUSION

Since antitrust defenses based upon violations of the Sherman Act have been rejected overwhelmingly by the courts, including the U. S. Supreme Court, the District Court below was correct in striking defendants' antitrust defenses in this action and leaving them to their remedy in the federal court antitrust action.

The lower court's Findings and Conclusions rejecting any oral modification of the written purchase orders and invoices as claimed by defendants were fully supported by the evidence and the law, not only in the particulars challenged by defendants but also for the several other reasons recited by the District Court.

It is respectfully submitted, therefore, that the judgment and ruling of the District Court below should be affirmed.

DATED this 8th day of September, 1978.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By *Dennis McCarthy*
Dennis McCarthy

By *David A. Greenwood*
David A. Greenwood

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Plaintiff-Respondent Keene Corporation was mailed this 8th day of September, 1978, postage prepaid. to:

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