

1988

# George Ronald Wright v. Westside Nursery and Darrel Humphries : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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GEORGE RONALD WRIGHT,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No. 880544-CA
WESTSIDE NURSERY, a Utah	)	Priority No. 14b
limited partnership, and	)	
DARREL HUMPHRIES, an	)	
individual,	)	
Defendants and Respondents.	)	

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

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APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN  
AND FOR WASHINGTON COUNTY, STATE OF UTAH,  
THE HONORABLE J. PHILIP EVES, JUDGE PRESIDING

---

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and Cross-Appellants

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COURT OF APPEALS

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- B. Exhibit 2, Contract for Management Services.
- C. Exhibit 69, Letter from Hans Q. Chamberlain to  
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- D. Exhibit 75, Letter from Hans Q. Chamberlain to  
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- E. Exhibit 17, Balance Sheet of Westside Nursery &  
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- F. Exhibit 27, Weber County Building Moratorium.
- G. Exhibit 52, Title Insurance Commitment for subject  
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- H. Exhibit 67, Wright's handwritten notes.
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individual, )  
Defendants, Respondents,  
and Cross-Appellants.

BRIEF OF RESPONDENT/CROSS-APPELLANT

JURISDICTION OF COURT OF APPEALS

Jurisdiction is conferred upon this Court by Utah Code Ann. § 78-2a-3(2)(j) (1953, as amended).

NATURE OF THE PROCEEDINGS

The parties entered into a Purchase Agreement and Management Agreement in October 1985. Humphries, by and through counsel, sought to rescind that transaction without the necessity of litigation. That offer was rejected, and Plaintiff initiated this action seeking to enforce the terms of the Purchase Agreement, but denying liability for his obligations under the Management Agreement. Humphries



counterclaimed and sought rescission of the contract, damages for fraudulent misrepresentation arising from the Purchase Agreement, indemnification for certain obligations assumed by Humphries on Wright's behalf, and damages arising from the termination of the Management Agreement.

Prior to trial, the Court specifically enforced the Purchase Agreement and the Management Agreement, ordered Humphries paid pursuant to the Management Agreement while he served as manager, and reserved all other issues for trial.

After a five-day jury trial in April of 1988, the matter was submitted to the jury on special interrogatories. The jury found that Wright had fraudulently misrepresented the value of his property and awarded appropriate damages to Humphries. The jury also found that Wright had wrongfully terminated Humphries as the manager, and awarded damages of \$15,000. The jury further determined that Wright should pay a certain \$30,000 promissory note, that Humphries should pay the \$15,000 promissory note addressed in the Purchase Agreement, and that Humphries was entitled to attorney's fees in the amount of \$10,000. Finally, the jury ordered Humphries to pay Wright certain monies used by Humphries while in control of the nursery, which resulted in an offset against the total amount awarded Humphries.

Post-trial, the Court took away the judgment in favor of Humphries arising from Wright's breach of the Management

Contract, resulting in a net judgment in favor of Humphries of \$68,780.21. The Court also denied Wright's motions for judgment notwithstanding the verdict and for a new trial and Wright thereafter appealed.

Humphries cross-appealed, seeking to have the wrongful termination award of \$15,000 reinstated, awarding him pre-judgment interest on damages for the fraud committed, and indemnification for interest and attorney's fees as set forth in the \$30,000 promissory note which the jury found Wright was obligated to pay.

#### STATEMENT OF THE ISSUES

In addition to the issues identified by Wright in his brief, the following issues also remain on appeal:

1. Based on standards of appellate review, has Wright demonstrated that the facts most favorable to the trial court's judgment are insufficient to support the judgment?

2. Has Wright sustained his burden on appeal that the jury's verdict was totally unsupported by the evidence?

3. Did the trial court err in dismissing, post-verdict, Humphries' claim for wrongful termination, for which the jury awarded Humphries damages in the sum of \$15,000?

4. Did the trial court err in ruling, post-trial, that Humphries was not entitled to pre-judgment interest on the damages awarded to him?

5. Did the trial court err in ruling, post-trial, that Wright was entitled to pre-judgment interest on the amounts that Humphries was ordered to pay?

6. Did the trial court err by failing to totally indemnify Humphries by: (1) refusing to order Wright to pay post-judgment interest at the rate set forth in the promissory note for \$30,000; and (2) refusing to order Wright to pay attorney's fees and other costs required in said promissory note in the event of a default?

#### DETERMINATIVE CONSTITUTIONAL PROVISIONS

Neither Wright nor Humphries takes the position that there are determinative constitutional provisions, statutes, ordinances or rules which control, or are applicable in, this matter.

#### STATEMENT OF THE CASE

##### THE NURSERY BEFORE THE SALE

Westside Nursery had been in business for a number of years prior to October 4, 1985. It was owned by a limited partnership, and the premises were leased from one of the limited partners (T.71-75). It was located on the main highway between St. George and Santa Clara, and thus had good exposure to the traveling public. Books and records

were maintained by the partnership, with the accounting done by Grant Tucker, an accountant with considerable experience (T.879-881).

Prior to the sale of the nursery on October 4, 1985, the books and records were made available by Humphries to Wright (Exhibit 1, paragraph 9(c); Addendum A). In addition, Wright received a balance sheet for Westside Nursery dated July 31, 1985 (Exhibit 14) indicating net worth of \$144,433.52 (T.781). Wright also received a balance sheet dated September 20, 1985 showing net worth of \$140,939.03 (Exhibit 16). Prior to the sale, and in an attempt to determine actual value, Humphries and his employees took an inventory of plant materials and supplies (Exhibits 22 and 23). To this amount was added current assets as identified on the respective balance sheets. Therefore, the balance sheet of October 1, 1985 revised the inventory from \$134,027.40 down to \$60,000 resulting in a net value of the nursery as per the balance sheet prepared by the accountant in the sum of \$95,536.11 (T.837, Exhibit 17, Addendum E).

Even after the nursery was sold to Wright, the balance sheet of October 30, 1985 still showed inventory of \$60,950.00, plus other fixed assets, with a net worth of \$97,828.85 (Exhibit 18).

It has always been Humphries' position, as the manager and general partner of Westside Nursery, that the nursery

was worth \$90,000 to \$100,000 when he sold it to Wright. (T.703, Exhibit 69, Addendum C, Exhibit 75, Addendum D).

At the time of trial, the nursery had been closed for business for some time at Wright's election.

#### THE PARTIES

Humphries met Wright in the summer of 1985 when Humphries assisted in the landscaping of Wright's recently acquired home at Green Valley. Wright had a passion for exotic plants and thought it would be both a great idea and a financially attractive proposal to introduce exotic plants into the St. George area and particularly, eucalyptus trees that would not lose their leaves during the winter (T.86-87). To do that, he needed to acquire an existing facility, so negotiations began after Wright and Humphries developed a friendship between themselves and their wives (T.124-126). Humphries testified that he had a great deal of love, admiration and respect for Wright before any dispute arose (T.694-5, 698-99). Wright had been in the real estate development business since 1957 (T.1032).

#### NEGOTIATIONS AND DOCUMENTS

In August of 1985, Wright flew Humphries in his private plane, using his personal pilot, from St. George to Ogden. Humphries spent the night at Wright's home, but Wright did

not show Humphries the Ogden property at that time (T.82-83).

The parties and their wives returned to Ogden by vehicle on October 2, 1985. Wright picked up the Purchase Agreement and the Management Agreement (Exhibits 1 and 2, Addendums A and B) drafted by his attorney after picking up Humphries and his wife, but did not disclose that he had done so until October 5, 1985 when the documents were ultimately signed (T.91-93). Humphries testified that the agreements were signed before he was shown the land by Wright (T.94).

After signing the documents, the parties went to a local title company in Ogden where Wright signed the deeds. Wright represented in the Purchase Agreement that title to the property was free and clear of encumbrances and agreed to provide at his own expense a policy of title insurance covering the value of the land conveyed (Exhibit 1, paragraph 2(a); Addendum A). Humphries has never received a policy of title insurance for the value of the property conveyed as required by the Purchase Agreement. An examination of (Exhibit 52, Addendum G) the Commitment for Title Insurance obtained by Wright, reveals Wright's dilemma. The Commitment fails to indicate the "amount" that the property was to be insured for in favor of Humphries. If Wright had directed the title company to provide the

title insurance that he was required to provide under the Purchase Agreement, and if he had insured Humphries' property for \$90,000, then he could not take the position that his property was worth anything less than that amount. If Wright insured the property for less than \$90,000, Humphries would have been on notice that he had not received property having a value of \$90,000 in exchange for the nursery. Rather than do either, Wright did nothing, and the jury justifiably found that Wright breached the Purchase Agreement by failing to provide a policy of title insurance insuring the value of the land conveyed, together with other breaches of the contracts in question.

At the time Humphries received title, the property was encumbered by unpaid real property taxes in the sum of \$398.06 for taxable years 1981 through 1984 (Exhibit 52), and those taxes were not paid by Wright until March of 1986, well after the litigation was underway (T. 586).

Prior to the time the agreements were executed, Wright told Humphries the three acres he was going to deed to him were worth \$30,000 per acre or collectively \$90,000 (T. 710, 775, 776). Simultaneously, Humphries told Wright the value of the nursery was between \$90,000 and \$100,000 and testified that they (meaning Wright and Humphries) had come to an agreement on what Wright valued his property to be worth and what Humphries valued the nursery to be worth

(T.710). Prior to the sale, Wright also told the accountant for the nursery, Grant Tucker, that the subject property had a value of \$90,000 and did so in the presence of Humphries (T.883). Wright made this statement when Tucker said he thought the nursery was worth more than \$90,000. After the sale, Wright told his employee, Chad Eskelson, that the property was worth at least \$100,000 (T.592) Eskelsen was also a good friend of Humphries. After Humphries became concerned and voiced it to Wright, Wright again told Humphries and his wife that the property had a value in excess of \$90,000 (T.595).

After the documents were signed, the parties went to view the property, during which Wright told Humphries that he had been a real estate developer in Ogden and that his subdivisions had been successful (T.713). Concerning the subject property, Humphries testified Wright told him:

"Darrel, this is the last of the property. This is my most prime piece of ground that we have left. It is the last one yet to develop. And when I finish developing this particular acreage that I am going to be showing you, then my dream would (sic) have been completed for Ogden." (T.713).

Humphries specifically testified that Wright did not tell him about any of the problems relating to the subject property, and specifically did not mention any problems concerning the potential building moratorium and how it might prevent future development (T.715). Nor did Wright



make any mention to Humphries of the recent conversations he had had with the representatives of the Weber County Planning and Zoning Commission. On cross-examination, Wright admitted that he received the following information from the Weber County officials prior to the time he transferred the property to Humphries:

1. That there existed the possibility that a building moratorium might be enacted for the area of the subject property and that it would affect Wright's property (T.555-556).

2. That there had been septic tank problems up on the hillside in the area of the subject property resulting in elevated coliform levels in the water; that there were some political influences being exercised to get the area condemned for low interest money from the state; and that the state governmental officials had been out and looked at the problem (T.559).

3. That there had been a group of citizens complaining about existing problems for the area in question (T.561).

4. That the county had been getting a lot of pressure to close the area down which would stop subdividing so that the county could get a lower interest rate on needed improvements (T.563).

5. That the county would have to come out and judge each parcel on a piece-by-piece basis and that there would not be any more subdivisions in the county wherein Weber County would give blanket approval of a subdivision without inspection (T.563-564).

6. That one of the tests to be performed by the county would be a "perc test" to see if adequate water percolation on the land existed. If the land didn't pass a perc test, then approval would be denied (T.564-565, 855).

On cross-examination, Wright admitted that he never told Humphries of the existence of any of the problems outlined above prior to the time he deeded the property to him (T.565-67). Humphries confirmed that prior to the sale, Wright did not disclose to him any of the problems outlined above (T.715-16).

After the dispute arose, Wright reaffirmed his representation to Humphries that the property had a value of \$90,000 (T.736-37). However on cross-examination, Wright finally admitted that he earlier testified at his deposition that he did not know the value of the subject property at the time he told Humphries it was worth \$90,000 (T.1032).

The building moratorium (Exhibit 27, Addendum F) was enacted on October 15, 1985, eleven days after Wright deeded the property to Humphries.

#### WHY THE CONTROVERSY AROSE

After the parties executed the agreements and Wright became the owner of the nursery, Humphries continued to manage it pursuant to the Management Agreement. Wright began ordering exotic plants while attending shows in Reno and Louisiana (T.124). Humphries began to hear stories concerning Wright's lack of integrity (T.130, 1015-16). By late November of 1985, Humphries became concerned about the value of the property in Weber County based on what he had

heard about Wright (T.131). He also became concerned because he had not received copies of the agreements, even though he had requested copies from Wright four to six times (T. 740). Finally, Humphries had to resort to a "cloak and dagger" scheme to get copies by wrestling them from Wright as he was leaving the public library (T.140-43).

As previously indicated, Wright also breached the Purchase Agreement by failing to provide Humphries with a policy of title insurance insuring the value of the land at \$90,000, and by failing to convey the land free and clear at closing.

Because Humphries became concerned that he had received property having a value far less than that of the nursery, and after he obtained copies of the documents, he contacted his attorney and also obtained a preliminary appraisal which indicated that the property had a value of as little as \$35,000 (T.918-19). In an attempt to settle the matter short of litigation, Humphries had his attorney send Wright a letter, certified mail, dated December 10, 1985, which Wright refused to accept (Exhibit 69, Addendum C). By December 18, 1985, Humphries had received a written appraisal confirming the value of the property to be as low as \$35,000, and therefore on that date, Humphries had his attorney send Wright another letter in an attempt to resolve the matter short of litigation. The letter included a

proposed agreement to rescind the transaction (Exhibit 75, Addendum D). Wright rejected any attempt to resolve the matter and filed suit shortly thereafter.

#### CONDUCT OF THE PARTIES POST-SALE AND DURING INITIAL LITIGATION

After the sale of the nursery, Wright and Humphries, by mutual agreement, continued to use the same checking account, but Wright did not add his name as a signator, leaving the management decisions and payment of bills up to Humphries (T.721). Until the incident at the public library on December 5, 1985, the parties were on an extremely friendly basis, which even continued for a period of time thereafter until Humphries sought the aid of counsel.

Even though Wright obtained a Temporary Restraining Order in December of 1985, he did not seek to have Humphries removed as the manager until March of 1986.

The best months for a nursery in St. George are March, April and May, with a slow down for the next few months, and a moderate resurgence in September, October and November. Because spring comes much earlier in Utah's Dixie than the rest of the state, a nursery in that area starts buying plants, seeds and related products and begins planting in the greenhouses as early as November or December of each year. This naturally creates a demand for money to pay for

products purchased, but without a resulting cash flow until the high sales volume occurs in March.

Prior to the sale, Humphries had obtained a line of credit with Zions First National Bank in St. George, and had initially obtained a \$15,000 loan, the repayment of which is addressed in the Purchase Agreement.

Being somewhat naive in business matters, Humphries continued to use his line of credit to borrow additional funds for the nursery even though he had sold the nursery to Wright. Because of the pressing financial needs of the nursery and an overdraft checking account, Humphries signed a second promissory note for \$30,000 in favor of Zions on December 10, 1985 (Exhibit 20, T.797, 991). Humphries actually made arrangements to obtain the funds prior to December 5, 1985 (T.143). Humphries drew \$15,000 against the note on December 13, 1985, an additional \$5,000 on December 30, 1985, and a final \$10,000 on January 6, 1986. All draws were deposited, in full, into the Westside Nursery account (T.991).

Wright testified that his agreement with Humphries was that if money had to be borrowed on the Zions account, he would co-sign the note so the money would be repaid, but he had to approve the loan in advance, and it had to be for nursery business (Summary of Wright's testimony by the trial court, T.526). Wright initially testified that after

October 4, 1985, he never considered or asked Darrel Humphries to go to Zions and borrow additional funds (T.527). However, Wright's testimony was clearly impeached on that issue (T.527-31). On cross-examination Wright was given his handwritten notes which he identified as being written prior to November 11, 1985, notes he did not know Humphries had in his possession. Under the heading "Things to do for \$" we find in Wright's personal handwriting: "Have Darrell (sic) get Loan to cover new materiels (sic)" (Exhibit 67 p.2, Addendum H). Wright conceded on cross-examination that the \$30,000 loan was used to purchase plant and other materials (T.1030), having earlier signed an affidavit to that effect on February 15, 1986.

The jury found that Wright should pay the \$30,000 note and Humphries was awarded judgment by the trial court in the sum of \$37,305.21, which was the principal plus accrued interest as per the terms of the note as of the date of trial (R.245; Addendum I, p.6, l.14). Of course, Humphries remains personally liable on the note and has only a judgment against Wright for the amount specified less offsets in Wright's favor. It is Humphries' position that the court erred in not awarding a continuing judgment against Wright for interest Humphries will have to pay according to the terms of said note, plus attorney's fees Humphries will also have to pay if Zions forecloses. The

basis of this argument is that Wright testified that if money was needed to be borrowed at Zions, he would sign a note due the same date as the money was to be repaid. The court so summarized Wright's testimony, but thereafter denied Humphries' request to completely indemnify Humphries consistent with the terms of the promissory note Humphries signed and for which he will ultimately be responsible.

From October 4, 1985 through March 19, 1986, Wright only deposited enough money in the nursery account to pay two months rent, or approximately \$6,000, leaving the business to operate on borrowed money or existing cash flow (T.122-23). He did this in spite of a substantial increase in inventory and the "gearing up" for the spring and summer months. Humphries had to borrow money in order to keep the business operational and to perform as his Management Agreement required. The efforts made by Humphries on Wright's behalf from October 4, 1985 through March 19, 1986 are depicted in the photographs taken at the time Humphries was removed as manager and possession of the nursery given to Wright (Exhibit 47, photograph binder). At trial it was apparent to the jury that Wright intentionally left Humphries in as manager until late March so that he could utilize his expertise in the field and have the nursery in top shape for the spring season, with full knowledge that Humphries could not compete with Wright because of the non-

competition clause in favor of Wright in the Management Agreement earlier enforced by the trial court. The jury found that Wright breached the Management Agreement and awarded Humphries six months pay at the rate of \$2,500 per month for a total of \$15,000. Humphries testified that he was not able to find gainful employment for six months after he was removed as manager (T.812-13).

The jury also found that Humphries breached the parties' agreements and awarded Wright damages in the amount of \$6,805, basically reimbursing Wright for monies spent by Humphries for Humphries' personal benefit while he was the manager (R.242). The court also ordered Humphries to pay Wright for all accounts payable in excess of \$5,000 owed as of October 4, 1985, or the sum of \$6,772. Humphries never denied he didn't owe accounts payable in excess of \$5,000 (R.245). The court, post-trial, awarded Wright pre-judgment interest on \$13,577, but refused to award Humphries pre-judgment interest on \$20,198.21 Wright was ordered to pay after offsets, and likewise refused to grant pre-judgment interest on damages awarded by reason of the fraud committed by Wright (R.245-46). Specifically, the court refused to grant pre-judgment interest to Humphries on the \$38,582 from and after October 4, 1985 until the time of judgment (R.246). Of course, no pre-judgment interest was awarded Humphries on the \$15,000 originally awarded by the jury,



because the court took that award away from Humphries, post-trial. Humphries contends that it was error for the court to award pre-judgment interest to Wright for damages in his favor but to deny Humphries pre-judgment interest on the amounts awarded to him.

#### SUMMARY OF THE ARGUMENT

The jury properly concluded and the trial court properly sustained the jury verdict that (1) Wright misrepresented the value of the property conveyed to Humphries and (2) that Wright should pay Humphries for the \$30,000 note borrowed by Humphries and deposited to the Westside Nursery account and spent on nursery debts. Wright has failed to establish, as appellate review requires, that the facts most favorable to the trial court judgment are insufficient to support that judgment.

The evidence not only establishes misrepresentations concerning value that substantiate a finding of fraud, but supports a finding that Wright made statements concerning the value of the Ogden property recklessly or with knowledge that said statements were false. Furthermore, the failure to disclose vital information concerning value or restrictions on the development potential of the property negates Wright's claim that an opinion concerning value stated in good faith is not actionable as fraud.

The trial court should not have taken away the jury verdict in favor of Humphries for \$15,000 arising from Wright's breach of the Management Agreement, despite Wright's defense of justification, when in fact the jury found, and the trial court sustained a finding, that Wright breached both the Purchase Agreement and the Management Agreement, particularly since Wright did not object to the form of the Special Verdict before it was filed.

Finally, the trial court erroneously awarded Wright pre-judgment interest on damages running in his favor while at the same time, denied pre-judgment interest for damages running in favor of Humphries.

As a result of the foregoing, this Court should affirm the finding of fraud and indemnification in favor of Humphries, reverse the trial court and reinstate the \$15,000 awarded Humphries for breach of the Management Agreement, grant pre-judgment interest in favor of both parties, affirm Humphries' award of attorney's fees in the sum of \$10,000, and grant Humphries further indemnification on the \$30,000 promissory note according to the terms thereof.

#### ARGUMENT

##### POINT I

WRIGHT HAS FAILED TO DEMONSTRATE THAT THE FACTS MOST FAVORABLE TO THE TRIAL COURT'S JUDGMENT ARE INSUFFICIENT TO SUPPORT THAT JUDGMENT

Because Wright's appeal is based, for the most part, on claims of insufficiency of the evidence, this Court must uphold the judgment of the trial court unless Wright is able to demonstrate that the facts most favorable to that judgment are insufficient to support it.

In Harline v. Campbell, 728 P.2d 980 (Utah 1986), the Supreme Court stated:

Under familiar rules of appellate review, the Court views the evidence in the light most favorable to the judgment of the trial court, and the findings of the trial court will not be disturbed unless there is no substantial record evidence to support them. It is incumbent upon the appellant to marshal all of the evidence in support of the trial court's findings and to then demonstrate that even when viewed in the light most favorable to the factual determinations made by the trial court, that the evidence is insufficient to support its findings.

728 P.2d at 982.

In at least four cases, the appellate courts have declined to consider an attack based on the insufficiency of the evidence where the appellant failed, as Wright has failed, to first marshal the facts in support of the trial court's findings. See Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985); J&M Const. Co. v. Southam, 722 P.2d 779 (Utah 1986); Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. 1987); Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987).

The standard is equally applicable to jury verdicts. In Lee v. Howes, 548 P.2d 619 (Utah 1976), the jury, on special interrogatories, returned a verdict for defendant,

and plaintiff appealed citing evidence favorable to her own point of view. The Supreme Court, at page 620, stated that plaintiff's argument was "based on the fallacy so prevalent in cases of this kind; that of basing a hypothesis on a view of the evidence favorable to one's own purpose and desires. This invades the province of the jury, whose prerogative it was to decide what evidence to believe." The jury verdict was affirmed.

The general rule was more recently articulated in Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078, 1082 (Utah 1985), the Court stating, "Where evidence is in conflict in a jury trial, we assume that the jury believed those facts that support its verdict, and we review the facts and reasonable inferences that arise from those facts in a light most supportive of the jury's verdict."

Despite Wright's contention to the contrary, appellate courts do not review findings of fraud by the "clear and convincing" standard. In Faw v. Greenwood, 613 P.2d 1338 (Idaho 1980), the plaintiff bought a business from the defendant. Prior to the sale, the defendant presented plaintiff with profit and loss statements and plaintiff examined the business books. Plaintiff later alleged that defendant had defrauded him and brought suit. Defendant counterclaimed for breach of contract. The trial court ruled in favor of defendant on both plaintiff's complaint

and defendant's counterclaim, and plaintiff appealed. The Idaho Supreme Court, at page 1340, stated, "The issue as to whether fraud has been proven by clear and convincing evidence is for the determination of the trier of fact. On appeal that determination will not be reversed where supported by competent, substantial though conflicting evidence." Our Supreme Court also has recognized the "substantial and competent" test as the proper standard for reviewing findings of fraud. See Von Hake v. Thomas, 705 P.2d 766 (Utah 1985) at page 769. See also Stauth v. Brown, 734 P.2d 1063 (Kan. 1987).

## POINT II

### HUMPHRIES CLEARLY ESTABLISHED A PRIMA FACIE CASE OF FRAUDULENT MISREPRESENTATION

#### A.

#### ELEMENTS OF FRAUD

For purposes of consistency, Humphries will address the elements of fraud in the same order as identified by Wright.

The jury was instructed consistent with Pace v. Parrish, 122 Utah 144, 247 P.2d 273 (1952), concerning the nine elements necessary to find fraud. They are as follows:

- (1) That a representation was made;
- (2) concerning a presently existing material fact;
- (3) which was false;
- (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;

(5) for the purpose of inducing the other party to act upon it; (6) that the other party acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

247 P.2d at 274-75.

Before discussing these respective elements, the Court's attention is directed to Wright's failure to acknowledge or address the material facts concerning elements (2), (3), (4) (a) (b) and (5) above, discussed on pages 8-11 of this brief.

#### B.

##### STATEMENTS REGARDING VALUE AS AN ELEMENT OF FRAUD

Wright cites what he claims to be the case most directly on point, to-wit, Baird v. Eflow Inv. Co., 76 Utah 232, 289 P. 112 (1930). Not only is the case distinguishable on its facts, but the general rule is not quoted in its entirety in appellant's brief. The court stated:

It is the general rule that misrepresentations as to value do not ordinarily constitute fraud, as they are regarded as mere expressions of opinion or "trader's talk" involving matter of judgment and estimation as to which men may differ. [Citations omitted]. For such representations to be actionable they must be coupled with concealment of material facts or with artifice or misrepresentation used to prevent the hearer from learning the truth, or be made under such circumstances as to indicate that the hearer will rely on them, as when the truth of the speaker's statement is a controlling element of the transaction, or because confidential relations exist.

289 P. at 114.

Baird is further distinguishable in that the owner of the ranch in Montana employed defendants as brokers to find a purchaser for it and ultimately the brokers acted for both parties. Also, the buyer had substantial information available to him. The court stated:

The plaintiff knew that the brokers were acting for both sides to the trade. He, with his wife, made a trip to Salt Lake City from Montana for the purpose and did inspect the apartments. He consulted a banker in Montana, who he said was his business adviser, concerning the trade before he made it. He also consulted a lawyer of his own selection in Salt Lake City concerning the legal phases of the matter. He inquired repeatedly about the details of the income and expenses of the apartments, and was furnished a true statement thereof before he completed his contract. There was nothing done by defendants to prevent the plaintiff from making the fullest inquiry and investigation concerning the value of the apartments.

289 P. at 114.

There is a great difference between a representation made as statement of opinion and a representation made as statement of fact. As stated in 37 Am. Jur. 2d Fraud and Deceit § 112 (1968):

Whether a misrepresentation as to value is merely an expression of opinion, or an affirmation of fact or intentional misrepresentation to be relied upon, is generally regarded as a question of fact to be determined by the trier of facts.

As further clarified in 37 Am. Jur. 2d Fraud and Deceit § 115 (1968):

There are many exceptions to the general rule that statements of value are not a sufficient basis for

a charge of fraud, such exceptions arising out of the special circumstances under which the representations are made. It cannot be laid down as a matter of law that value is never a material fact. For example, the general rule that such statements are not actionable applies only where the parties stand on an equal footing and have equal means of knowledge, with no relation of trust or confidence existing between them. Likewise, a statement of value may be of such a character, so made and intended, and so received, as to constitute fundamental misrepresentation; and if it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud. Moreover, a statement of value involving and coupled with a statement of a material fact is fraud.

After the contract was signed and while the parties were enroute to the subject property, Wright made representations to Humphries that the surrounding property consistently sold for \$30,000 per acre (T.588-90), and that the subject property in a developed state would bring \$30,000 per lot (as compared to \$30,000 per acre) (T.590). Approximately two years after the transaction, the subject property sold for only \$18,233 per acre.

The following statement from 37 Am. Jur. 2d Fraud and Deceit § 118 (1968), entitled "Market value or market price", has direct application:

While different conclusions have been reached under varying fact situations, most of the courts support the proposition that representations of market price or market value are not necessarily mere representations of opinion, but are, or at least under some circumstances may be, representations of fact on which fraud may be predicated. For instance, a representation that a certain kind of property, constantly sold, has a market at



certain figures and that it readily sells at those figures, has been held to be not a statement of opinion, but one of fact, upon which fraud may be predicated. Emphasis added.

As stated in 37 Am. Jur. 2d Fraud and Deceit § 119 (1968), other exceptions exist to the general rule that an opinion concerning value is not actionable:

This is particularly true where the vendor or seller holds a position of trust and confidence toward the vendee which gives the latter the right to rely on the representation, or where the vendor or seller assumes to have special knowledge of the value, and the vendee, to the former's knowledge, trusts entirely to the vendor's representations. In such cases the vendor or seller may justly be held liable for his false representations, because by them the purchaser is fraudulently induced to forbear inquiry as to their truth. This principle is especially applicable where land was situated at a great distance and the vendor knew that the purchaser was not conversant with the general value of the land in the locality and relied on his representations in respect thereto. Citations omitted.

Wright also cites the case of Dolson Co. v. Imperial Cattle Co., 624 P.2d 993 (Mont. 1981), regarding opinion statements as elements of fraud, but that case can likewise be distinguished. The Supreme Court of Montana affirmed the trier of fact and stated:

We emphasize, however, that it is singularly within the province of the District Court to determine whether fraud has been perpetrated on an innocent purchaser. The District Court is in the best position to weigh the factors involved, assess the credibility of witnesses, and conclude whether the statements regarding value constitute fact or opinion.

The Dolson court determines that it must view the evidence in a light most favorable to the prevailing party and presume the correctness of the District Court's judgment. The court clearly states that it is up to the trier of fact to determine if the representations as to value were opinion (not actionable), as compared to declarations of fact (actionable), and concludes that it is not the proper function of the Supreme Court to exchange its opinion for that of the trier of fact, even if a different conclusion might have been reached.

Wright cites the Arizona case of Frazier v. Southwest Sav. & Loan Ass'n., 653 P.2d 362 (Ariz. App. 1982), in support of his position that fraud was not established. Frazier deals with both fraud and negligent misrepresentation. One of the alleged fraudulent misrepresentations was that the subdivision was "ready to go". The court concluded that no fraud existed because there was no evidence of Southwest's knowledge that the "ready to go" statements were made nor that Southwest knew that those representations were false. In the instant case, however, Wright admitted that he did not know the value of the property at the time the representations were made (i.e., reckless misrepresentation), and that even though he knew of the potential for a building moratorium, he did not disclose the same to Humphries (i.e., concealment). In Frazier, the court

further described the relationship between the court and the jury in determining whether a duty to speak exists, citing with approval the following statement from Restatement (Second) of Torts § 551, Comment m (1977):

Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court. If there are disputed facts bearing upon the existence of the duty, as for example the defendant's knowledge of the fact, the other's ignorance of it or his opportunity to ascertain it, the customs of the particular trade, or the defendant's knowledge that the plaintiff reasonably expects him to make the disclosure, they are to be determined by the jury under appropriate instructions as to the existence of the duty.

653 P.2d at 368.

Finally, Frazier is distinguishable in that Southwest had appraised the property because by law it could only loan 75% of the appraised value. In the instant case, Wright did not have the property appraised and did not know the value of the property at the time he made factual representations as to its value which he admitted he intended Defendants to rely upon, and upon which Defendants did in fact rely in determining whether or not to consummate transaction.

### C.

#### CONCEALMENT AS FRAUD

Contrary to Wright's position, the building moratorium declared by the Weber County Commission eleven days after

the transaction was consummated had significant impact on the value of the property. The appraiser called by Humphries, Les Froerer, testified as follows:

Q. [BY MR. CHAMBERLAIN] Did you rely on that moratorium in determining value?

A. [BY MR. FROERER] I relied on that moratorium in attempting to get the highest and best use. But yes, it -- indirectly, yes.

Q. And just tell us why that moratorium would aid you in determining highest and best use.

A. Either you can build homes on it, or you can't build homes on it. And the difference between being able to or not able to drastically affects value -- changes the use.

If it had to go back into agricultural use, you're going down to a much -- to a nominal value. (T.920).

In Elder v. Clawson, 384 P.2d 802 (Utah 1963), the facts somewhat parallel the instant case. In Elder, the evidence showed that the seller knew that a quarantine existed on the farm premises to be sold, that the existence thereof could materially affect the economic operation of the farm, and that he failed to disclose the same to the buyer. The Supreme Court reversed the lower court's dismissal of plaintiff's suit to rescind and remanded for further proceedings in accordance with the views expressed in the opinion. The court noted that the buyer had no occasion to make an independent investigation of the quarantine of which he knew nothing. In the instant case,

Wright knew that a building moratorium was imminently likely, and that the moratorium was not of public record. Humphries, acting reasonably, could not have discovered the facts necessary to require him to make an independent investigation. The court concluded in Elder that there was a suppression of the truth, which the party with superior knowledge had a duty to disclose, and that the same amounted to fraud. The Supreme Court in support of its decision, citing American Jurisprudence, stated:

One of the fundamental tenets of the Anglo-American law of fraud is that fraud may be committed by the suppression of the truth \* \* \* as well as the suggestion of falsehood \* \* \* \*.

Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances \* \* \* .

The principle is basic in the law of fraud as it relates to nondisclosure that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent \* \*.

Although the pertinent inquiry in any case where fraud on the basis of nondisclosure is asserted is whether, upon any particular occasion, it was the duty of the person to speak on pain of being guilty of a fraud by reason of his silence, except in broad terms the law does not attempt to define the occasions when a duty to speak arises. On the contrary, there has been adopted, as a leading principle, the proposition that whether a duty to speak exists is determinable by reference to all the circumstances of the case and by comparing the

facts not disclosed with the object and end in view by the contracting parties. The difficulty is not so much in stating the general principles of law, which are pretty well understood, as in applying the law to particular groups of facts \* \* \*.

Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor in determining that a duty of disclosure is owing. There is much authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain.

384 P.2d at 804-05. Emphasis added.

#### D.

##### KNOWLEDGE OF FALSITY OR REPRESENTATIONS MADE RECKLESSLY AS AN ELEMENT OF FRAUD

Wright claims "good faith" because of an opinion letter (Exhibit 32) stating that 5.39 acres located on the south end of the same 22 acre tract had a value of \$32,500 per acre. The letter is dated May 8, 1985 and directed to Ed Suppington, St. George, Utah, not Wright. There is nothing in the record to indicate when Wright obtained a copy of the letter or knew of its contents prior to the sale to Humphries, save and except that the bank to which the letter

was directed loaned Wright money based on the land having a value of \$20,000 per acre, not \$32,500 per acre. The only evidence at trial was that Wright showed Humphries this letter after Humphries became concerned that he had been defrauded (T.596-600).

The fact that Wright did not have an opinion for the value of the property at the time of the transaction and thereafter made reckless representations concerning value is supported by the record. At trial, Wright was asked if he had previously testified that he did not have an opinion as to the value of the three acres he deeded to Humphries as of the date of the transfer. Wright denied having given that previous testimony. He was then asked to read from his deposition taken on February 20, 1986, and the following exchange appears in the trial transcript:

Q. [BY MR. CHAMBERLAIN] Did I ask you the question: "You've been involved in the real estate business since 1957, at least; is that correct?"

A. [BY MR. WRIGHT] Yes.

Q. Your answer was "yes." "Q. On October 4, 1985, did you have an opinion as to the value of the three acres you deeded to Mr. and Mrs. Humphries?" What was your answer?

A. "No."

Q. "Q. You couldn't form an opinion as to value?" What was your Answer?

A. "No."

Q. Then did I ask you: "Who do you believe would be a qualified person to form an opinion as to the value of that property?" What was your answer?

A. "The buyer who may buy it. You know, whomever may buy it." (T.1032-1033).

In spite of the fact that Wright had no opinion concerning the value of the three acres of property on October 4, 1985, the testimony from both Wright and Humphries was that Wright consistently told Humphries the property was worth at least \$90,000.

In Jardine v. Brunswick Corp., 423 P.2d 659 (Utah 1967), the court recognized the principle that under some circumstances there may be a cause of action for fraud for a reckless or negligent misrepresentation:

Where one having a pecuniary interest in a transaction, is in a superior position to know material facts, and carelessly or negligently makes a false representation concerning them, expecting the other party to rely and act thereon, and the other party reasonably does so and suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present.

423 P.2d at 662.

The footnote to the language just cited further clarifies the court's position:

This is a variant of one of the traditionally accepted elements of fraud as set forth in Pace v. Parrish, 122 Utah 141, 247 P.2d 273, Element No. (4), that the representor either (a) knew to be false, or (b) makes recklessly, knowing he had insufficient knowledge upon which to base such a representation; see also Stuck v. Delta Land & Water Co., 63 Utah 495, 227 P.791.

423 P.2d at 662.



Schwartz v. Tanner, 576 P.2d 873 (Utah 1978), affirms the fact that reckless conduct can be actionable. In Schwartz, Justice Gordon Hall writing the unanimous opinion, affirmed the trial court's finding of fraud, and stated:

Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to in order to gain advantage over another. In its general or generic sense, it comprises all acts, omissions and concealments involving a breach of legal or equitable duty and resulting damage to another.

\* \* \* \*

The elements of actionable fraud to be proved are a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon, upon which plaintiff reasonably relies to his detriment. (Citing Pace v. Parrish, 247 P.2d 273 (Utah 1952)). Emphasis added.

576 P.2d at 875.

Wright claims that the failure to disclose the building moratorium or elevated coliform levels was not a material omission on his part and was not a serious factor in determining the value of the subject property. The jury and the trial court both heard this same argument and chose to reject it.

In Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369 (Utah 1980), the court made note of the fact that the potential buyer could have discovered by inquiry into the public records that Defendant owned no interest in the subject property. The evidence in the instant case is that

a preliminary title report was presented to Humphries at closing, which failed to indicate a building moratorium, or the potential for one. In Sugarhouse Finance, the court recognized that misrepresentation may be made either by affirmative statement or by material omission where there exists a duty to speak, but that such a duty will not be found where the parties deal at arms length, and where the underlying facts are reasonably within the knowledge of both parties. Clearly, in the instant case, the potential for a building moratorium and other problems with the property were not within the knowledge of both Wright and Humphries, and therefore Wright had an obligation to disclose the same.

### POINT III

#### THE EVIDENCE CLEARLY ESTABLISHES THE OBLIGATION OF WRIGHT TO INDEMNIFY HUMPHRIES ON THE \$30,000 NOTE

After the Purchase Agreement and Management Agreement were signed, Wright opted to continue to use the existing Westside Nursery checking account and did not even request that he become a signatory on the account (T.726). Likewise, Wright asked Humphries not to tell anyone that the nursery had been sold because Wright had not established a credit rating in the St. George area and particularly with Zions Bank (T.721, 724). In late October, Wright, Humphries and their wives, drove to the west coast in Wright's motor

home to buy new materials (T.722). Humphries estimates that they spent somewhere between \$15,000 and \$20,000 in buying new materials for the nursery (T.723). Humphries testified that he had a discussion with Ron Wright that there was not sufficient money in the checking account to cover checks in that amount, and because it would put the checking account in an overdraft position, Wright gave Humphries directions to borrow an additional \$30,000 from Zions Bank (T.723; also Exhibit 67, Addendum H). Because Humphries had established a good relationship with Zions, he obtained the \$30,000, using his line of credit, the implication being that Wright did not want to sign any promissory note if he wasn't forced to do so. Of significance is the fact that Section 1 of the Contract for Management Services (Addendum B) requires Humphries to "perform pursuant to the orders, advice and direction of owner".

Humphries made arrangements for and signed the promissory note on December 10, 1985, approximately two weeks before he was served with any restraining order. Only as demands on the checking account required funds, did he draw against that line of credit (Exhibits 70 through 74, consisting of bank statements and check stubs for 1985 and 1986).

Wright claims Humphries should be denied indemnification for three reasons cited on page 43 of his brief. Those

same arguments were made to the court, in his JNOV motion, and were rejected based on a review of the evidence and the jury verdict. The jury could have easily believed that Humphries was only following the directions he had been given by Wright, and clearly, there was a need to cover the purchase of new plant materials due to the various buying trips. Furthermore, when Wright had Humphries served with a Temporary Restraining Order, he did not elect to terminate his employment as the manager of Westside Nursery, and the jury could have easily determined that this was an affirmation that Humphries was doing a good job and the funds were in fact needed. Finally, all of the funds were deposited into the bank account of Westside Nursery and used to pay bills and other obligations. For the money the jury found Humphries to have wrongly spent from the account, Humphries is now obligated to repay Wright those exact amounts. In other words, Wright, not Humphries, benefited from the \$30,000 borrowed, and the jury concluded that because Humphries was instructed to borrow the money, and because Wright received the benefit of the money, that Wright should pay the obligation.

This issue was a factual issue to be decided by the jury and the jury decision in that regard should not be disturbed. The jury, in essence, completed an accounting and found that Humphries paid over to his employer all money

or other property he had received as manager, save and except the sum of \$6,805 that Humphries was ordered to pay to Wright.

#### POINT IV

##### HUMPHRIES IS ENTITLED TO ATTORNEY'S FEES

Contrary to Wright's position, Humphries succeeded in the enforceability of the contracts. He succeeded in obtaining a judgment of indemnification, which the jury could have found he was entitled to under either the Purchase Agreement or the Management Agreement. Likewise, he prevailed in that the jury found that Wright breached the Purchase Agreement by not transferring property having a value of \$90,000 to Humphries. Furthermore, the evidence is un rebutted that Wright never provided Humphries with a policy of title insurance insuring the value of the subject property for \$90,000 and did not convey clear title at closing. Finally, the jury awarded Humphries \$15,000 damages because Wright breached the Management Agreement, which should be reinstated by this court and would thus entitle Humphries to attorney's fees.

Through trial Humphries incurred in excess of \$30,000 in attorney's fees (T.1039-43, Exhibit 84). The jury awarded less than one-third of attorney's fees incurred, requiring Humphries to absorb the difference. This Court

should affirm the lower award of fees and award Humphries additional attorney's fees incurred in this appeal pursuant to the language of the Purchase Agreement.

#### POINT V

##### THE INJUNCTION BOND SHOULD NOT BE EXONERATED

The court required Wright to post a bond when it gave possession of the nursery to him and issued a pre-judgment writ of attachment against Humphries' property. At that time, Humphries could not compete with Wright due to the non-competition clause. If this court reinstates the judgment in the sum of \$15,000 for breach of the Management Contract, then the injunctive bond serves to guarantee that Humphries will be paid because he was wrongfully enjoined after March 1986.

Had Humphries been entitled to remain as manager of the nursery, and in control of the checking account as per the original agreement of the parties, he could have repaid the monies borrowed from Zions Bank in the normal course of business. Because he was restrained from doing so, and because the court ordered Wright to indemnify Humphries on the note, the Injunction Bond should remain in effect to also protect Humphries on that claim.

Wright posted a \$75,000 cash supersedeas bond for this appeal. Within three months thereafter, he filed for

protection under Chapter 11 of the Bankruptcy Act. His bankruptcy attorney, Gerald H. Suniville, has advised Humphries' counsel that he may challenge the posting of the supersedeas bond as a preferential transfer. If that challenge is successful, Humphries will be left to seek collection of his judgment against a bankrupt individual.

The better approach is to leave the Injunction Bond in place, and if the judgment is affirmed on appeal, allow the issue of the surety's liability to Humphries to be litigated in the district court.

#### POINT VI

THE TRIAL COURT COMMITTED ERROR WHEN IT DISMISSED,  
POST-TRIAL, THE JURY AWARD ARISING FROM THE BREACH  
OF THE MANAGEMENT CONTRACT BY WRIGHT

In support of Wright's JNOV Motion, Wright claimed that the special interrogatories submitted to the jury were somehow defective. Wright did not submit a Special Verdict as did Humphries, did not raise objection as to the form of the Special Verdict used by the Court, and did not object to the filing of the verdict before the jury was dismissed (T. 1141, 1146).

In Schow v. Guardtone, Inc., 417 P.2d 643 (Utah 1966), the court, at page 644, stated, "The trial judge's prerogative to enter a judgment notwithstanding the verdict can properly be exercised only in a situation where there is

no reasonable basis in the evidence to justify the verdict of the jury." In the Schow case, plaintiffs had sued to have certain agreements declared void for fraud. On special interrogatories, the jury found for plaintiff. However the judge granted a JNOV Motion and plaintiffs appealed. The appellate court considered a "survey" of the evidence which revealed several facts which could have supported plaintiff's contention of fraud, and consequently remanded the case to the trial court for judgment in accordance with the jury verdict.

In order for the trial court's JNOV on Wright's breach of the Management Agreement to stand, the trial court had to find as a matter of fact (not law) that no evidence existed to support the jury's verdict which rejected Wright's argument of justification. What the trial court failed to recognize is that the special interrogatory asks whether or not Humphries breached the agreements. The jury could have readily concluded that Humphries breached the Purchase Agreement, as compared to the Management Agreement, and since Plaintiff failed to request a separate interrogatory concerning the breach of the Purchase Agreement versus the Management Agreement, it was error for the court to take away the jury verdict awarding Humphries \$15,000 for Wright's breach of the Management Agreement.

Furthermore, the fact that Wright was awarded damages by the jury for the breach by Humphries under one of the



agreements indicates that the jury took into account the breach and awarded damages based upon the evidence, but rejected Wright's claim of justification in firing Humphries.

The jury specifically found that Wright breached the Management Agreement and awarded damages in the sum of \$15,000. However, the jury also found that Wright breached the agreements in other respects, but awarded no damages. In other words, the jury apparently determined that both parties breached one agreement or the other, and awarded damages based upon the proof submitted. For the trial court to take away \$15,000 on the theory of justification simply because the jury found Humphries breached the agreements (without a specific finding as to which agreement) and is thus barred from recovering under the Management Agreement is simply not supported by the evidence nor applicable law.

Humphries maintains that the Special Verdict was clear, concise and unambiguous. However, if this Court should find otherwise, the Utah Supreme Court, in the recent case of Bennion v. LeGrand Johnson Const. Co., 701 P.2d 1078 (Utah 1985), has stated the rule and the duty imposed upon the parties and in this case on Wright:

When special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or to move that the cause be resubmitted to the jury for clarification. If a party fails to take

appropriate action before the discharge of the verdict, that party generally may not later move for a new trial on the ground that the verdict was defective.

701 P.2d at 1083.

The court further states that only when the verdict is so ambiguous, contradictory or illogical that it does not clearly indicate for whom the verdict is rendered, should the trial court intervene. The fact the Humphries was awarded attorney's fees and Wright was not, is a clear indication that Humphries, and not Wright, prevailed. The Bennion opinion also explains that the rule requiring a timely objection serves to avoid the expense and additional time for a new trial in having the jury which heard the facts clarify the ambiguity while it is still able to do so.

In the instant case, a reading of the Special Verdict does not place the Court in the position of having no alternative but to guess at what the jury intended as suggested by Wright. Wright would have the Court adopt a holding to the effect that simply because the jury found that Humphries breached one of the agreements, he is not entitled to recover under the Management Contract. The jury found that Wright breached the Management Contract and awarded damages. The Special Verdict could not have been clearer. Plaintiff's failure to submit a Special Verdict, and his subsequent failure to object to the filing of the

verdict or to move that the matter be resubmitted to the jury before discharge constitutes a waiver on the part of Plaintiff, thus directing the trial court to adopt the findings of the jury.

Wright further argued to the trial court that "justification" for termination was not decided by the jury. Quite the contrary is true. The jury specifically found in Special Interrogatory No. 3 that Wright wrongfully terminated Humphries as an employee under the Management Agreement. If he was justified, it would not have been wrongful. By finding that Humphries was wrongfully terminated, the jury concluded that justification on the part of Wright to do so did not exist, and specifically rejected the reasons stated by Wright for terminating Humphries outlined in Wright's hand-written letter to Humphries dated March 19, 1986 (Exhibit 29, Addendum J).

#### POINT VII

##### THE TRIAL COURT COMMITTED ERROR IN HOW IT CALCULATED PRE-JUDGMENT INTEREST

In L & A Drywall, Inc. v. Whitmore Const. Co., 608 P.2d

626 (Utah 1980), the court stated:

Prejudgment interest represents an amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation.

608 P.2d at 629.

In Bjork v. April Indust., Inc., 560 P.2d 315 (Utah 1977), the Utah Supreme Court stated:

[T]he law in Utah is clear, viz: Where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment.

560 P.2d at 317.

In this case, Humphries was entitled to receive property having a value of \$90,000 on October 4, 1985, a date certain. His damages arose from a contract, as compared to a personal injury, wrongful death, defamation of character, or false imprisonment (see Bjork, supra). He should therefore receive pre-judgment interest from October 4, 1985 to date of judgment on \$38,582.

Humphries' entitlement to interest on damages awarded him by reason of indemnification on the \$30,000 promissory note, is discussed above. Wright should be obligated to pay Humphries all amounts Humphries incurs arising from the \$30,000 promissory note, including interest as set forth in the note, together with any costs or attorney's fees Humphries may be required to pay. To hold otherwise would award Humphries damages only through date of trial, plus the judgment rate of interest (12%), and allow Wright to escape liability for the promissory note rate of interest (prime plus three percent) as well as any attorney's fees and costs

Humphries will incur because he has not been able to pay the note that is due on demand.

#### POINT VIII

##### COUNSEL'S REPLY TO ETHICAL ISSUE

Wright's counsel's statement concerning the undersigned's alleged ethical violation on page 39 of Appellant's Brief mandates a reply, even though Mr. Pendleton fails to recognize the appropriate forum to raise an ethical issue. The undersigned hesitates to utilize this brief to respond and the space taken could be better used to address issues at hand. However, failing to respond may be deemed acquiescence and therefore the court needs to understand the correct facts.

1. After Humphries' brief in opposition to Wright's Motion for Judgment NOV was filed, Mr. Pendleton could have filed a motion to strike improper argument before submitting the same for decision to the trial court. He did nothing.

2. To claim that Wright testified consistent with the depositions of Graham Shirra and Richard Schwartz is to state facts that are not of record and therefore improper, because neither Shirra nor Schwartz testified at trial, nor were their depositions used. In fact, Wright's testimony is not totally consistent with their depositions.

3. If Mr. Pendleton thought the testimony of Shirra and Schwartz to be consistent with that of Wright, he was

free to call them as witnesses or read their depositions to support his client's position, and thereafter argue that significance to the jury. He chose to do neither.

4. When Wright testified on direct examination in his case in chief, he was not asked, nor did he volunteer, the detailed conversations concerning the potential building moratorium, elevated coliform levels or discussions concerning water. That information had to be obtained by Humphries' counsel on cross-examination and by requiring Wright to testify from his previously given deposition. Wright's "convenient memory" was always at issue.

5. What Wright may have known concerning problems with the land and surrounding area may not have been limited to what he was told by Schirra and Schwartz. He had developed land in that area before and knew of flooding that occurred in the spring of 1982 that resulted in "Mustang Pond" at the lower end of his remaining undeveloped land which included the subject property.

6. The statement that Wright may well have known more than he disclosed to the jury was made in a post-trial brief, not to the jury. Counsel is not precluded from arguing, either to the jury or to the Court, as to whether a witness testified accurately and completely, particularly since the credibility of the witnesses in this case was of critical importance. Chad Eskelsen testified without

objection that Wright's reputation for truthfulness in St. George was very bad (T.1009). Eskelson was a former employee of Wright.

7. Fraud is a multi-faceted principal of law. To suggest that arguing the credibility of a witness and suggesting that he did not disclose all the information he knew in a fraud case (given Wright's ultimate admission that he did not disclose material facts), and to imply that such an approach creates a new standard in the area of fraud, simply ignores the proven facts in this case and the correct application of law. It is not an attempt to expand existing principals.

The undersigned is personally offended by an accusation of unethical behavior and to make that accusation to this court makes it that much more offensive. If Mr. Pendleton has a serious complaint, he should lodge it with the office of the Utah State Bar Counsel, not this court. (See Rule 8.3 of the Utah Rules of Professional Conduct, effective January 1, 1988).

#### CONCLUSION

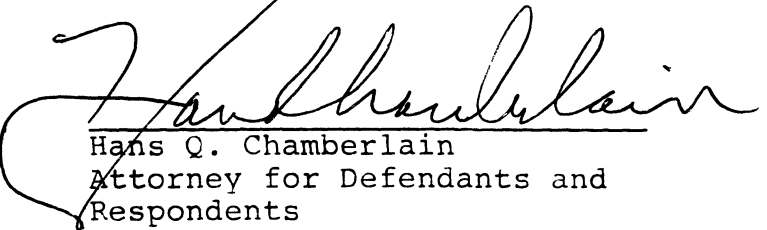
This Court should affirm the jury verdict of fraud and indemnification and also reinstate the \$15,000 awarded Humphries for breach of the Management Agreement.

This Court should direct the trial court to totally indemnify Humphries on the \$30,000 promissory note and direct the trial court to properly calculate pre-judgment interest on all damages.

Finally, this Court should sustain the attorney's fees awarded at trial, and award additional attorney's fees arising from this appeal.

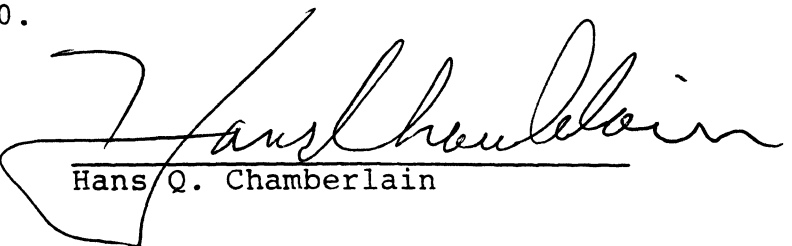
DATED this 20<sup>th</sup> day of March, 1989.

CHAMBERLAIN & HIGBEE

  
Hans Q. Chamberlain  
Attorney for Defendants and  
Respondents

CERTIFICATE OF MAILING

I hereby certify that on this 20<sup>th</sup> day of March, 1989, I mailed four true and correct copies of the above and foregoing BRIEF OF RESPONDENT/CROSS-APPELLANT to Gary W. Pendleton, Attorney for Plaintiff, 150 North 200 East, Suite 202, St. George, Utah 84770.

  
Hans Q. Chamberlain



## ADDENDUM A

~~FINAL AGREEMENT~~ ~~DRAFT - REVISIONS IN PROGRESS~~

AGREEMENT FOR PURCHASE OF ASSETS

THIS AGREEMENT is entered into as of this ~~4th~~ <sup>10th</sup> day of ~~September~~ <sup>October</sup>, 1985, by and between WESTSIDE NURSERY, a Utah Limited Partnership ("Seller"), and its principal general partner DARREL HUMPHRIES, an individual of ~~Utah~~ <sup>ST. GEORGE, Utah</sup> ("Humphries"), and GEORGE RONALD WRIGHT, an individual ("Buyer").

RECITALS OF FACT

A. Seller is a Utah Limited Partnership in the business of operating a nursery in St. George, Utah. the Limited Partnership has also improved and maintained certain leasehold property used in connection with its business at 1425 West Sunset Boulevard, St. George, Utah.

B. Seller and Humphries desire that Seller sell, and Buyer purchase, substantially all of the assets of Seller, except the leasehold interest of Seller, as hereinafter detailed.

C. Humphries desires to remain as the manager of the nursery business at the presently existing location under a management contract with Buyer, to which the parties have agreed pursuant to a separate Employment Agreement related hereto.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, it is hereby represented, agreed and covenanted between the parties as follows:

1. Subject of Sale. The property to be sold ;  
to this Agreement (collectively referred to as the  
herein) shall consist of substantially all of the As  
Seller, including, without limitation:

(a) All of the rights to the nursery  
presently belonging to Seller, rights of assign  
business licenses and other intangibles  
thereto;

(b) The right to use the trade name of "W  
Nursery" or any variation thereof, for the exclu  
of Buyer;

(c) All personal property belonging to Se  
pertaining to the nursery business includ  
inventory on the premises of Seller as of the da  
of, together with all tools, equipment, machiner  
vehicles and all appurtenances thereto as mor  
detailed and scheduled on Exhibit A attached her

(d) Accounts receivable held on the book  
belonging to Seller.

In addition, it has been agreed among the part  
Seller shall continue to lease the premises but shall all  
to operate the business to whatever extent it deems app  
so long as the terms of the lease are not violated by suc

2. Terms of Sale. Seller will sell the  
pursuant to this Agreement and Buyer hereby purchases th  
for the amounts and payable for the following considerati

Q. 1  
(a) Buyer shall deliver to Seller, certain real estate located in Weber County, Utah, specifically described on the deeds attached hereto as Exhibit B. The original deeds transferring title to the property shall be executed and delivered as a part of this Agreement. Buyer warrants that title thereto is free and clear, subject to taxes which are unpaid and due for the year 1935. In addition, Buyer shall provide at its own expense a policy of title insurance covering the value of the land conveyed.

(b) Buyer shall contract with Humphries to provide management services on a contract basis as hereinafter set forth in the Contract for Management Services which is incorporated herein by reference as Exhibit C.

(c) Seller shall assume all debts and obligations incurred by the business prior to the date of this Agreement. Seller represents that such debts and obligations are fully described on the attached Exhibit "D".

(d) All accounts receivable incurred by Seller, and/or Humphries in connection with the operation of the business as described herein. A list of such accounts is attached hereto as Exhibit E.

(e) Buyer shall not assume any liabilities or obligations of Seller and Humphries, and Seller and

Humphries hereby warrant and represent to Buyer that none of them shall have any remaining obligations to or claims of creditors upon closing of this transaction, except a Promissory Note to Zion's First National Bank in the amount of \$ 15,000 <sup>plus interest to date of payment</sup> which shall be paid by Oct 30, 1985 or prior <sup>exclusive thereof</sup>, and miscellaneous trade accounts payable not more than \$ 5,000 <sup>plus interest to date of payment</sup> to be assumed by Buyer.

3. Trade Names. By reason of the assignment to Buyer hereunder the right to use the name "West Side Nursery" and any derivative thereof, Seller agrees not to use said names or names similar thereto in connection with any other business engaged in by Buyer. Humphries makes the same covenant to Buyer to the extent that Humphries, in the future, may engage in any business. Seller further agrees that it will change its name in accordance with such laws in order to avoid any possible conflict with the business purchased by Buyer hereunder.

4. Sales Taxes. Seller agrees that, in liquidating the accounts receivable, it will pay all Utah sales and use taxes due for all periods ending as of the date hereof. Buyer will be liable for all such taxes from and after such date.

5. Bulk Sales Compliance. Seller agrees that it will satisfy any creditors of Seller who would not be paid in due course of business by Buyer pursuant to Paragraphs 1 and 2(a) hereof, Seller has

obtained waivers of the application of the Bulk Sales Act of the laws of the State of Utah or can establish an exemption from such law, and Seller will obtain an opinion of its counsel supporting the representations of this paragraph.

6. Management. Pursuant to the Contract for Management Services, Exhibit C, Buyer has agreed to contract Humphries, and Humphries has agreed to perform services, as the manager of the nursery business at 1425 West Sunset Boulevard, St. George, Utah, as set forth in the Contract for Management Services attached hereto as Exhibit C. Furthermore, both Seller and Humphries have agreed to a noncompetition covenant for a period of ~~THREE (3) YEARS~~ <sup>12 MONTHS</sup> after the termination of Humphries' contract covering the geographical service area of Buyer at the time of termination. In addition to contractual arrangements with Humphries, it is agreed that Buyer shall be responsible for employing and paying employees as may be necessary for the continued operation of the nursery business. However, Humphries shall be responsible for day-to-day supervision of Buyer's employees.

~~7. Repurchase: In the event of the death or disability of Buyer within a period of one year from the date hereof, Seller shall have the right to repurchase any and all of the rights conveyed hereunder for the then fair market value of the property originally transferred by Buyer to Seller as of the date of such death or disability, plus the value of any~~

omit  
A. R. L.  
E. J.

~~indebtedness of Seller assumed by Buyer as of the date of~~  
~~Agreement, with interest accrued at the rate of fifteen~~  
~~(15%) per annum during the one-year period. Fair market~~  
~~shall be established by appraisal of the property transferred~~  
~~Buyer to Seller. Seller shall pay the cost of such appraisal.~~  
~~In the event the parties are not in mutual agreement with the~~  
~~findings of the appraiser hired by Seller, then each shall hire~~  
~~additional appraisers who shall then select an appraiser to~~  
~~perform an appraisal, the results of which shall be presumed to~~  
~~be the proper considerations for the repurchase. For purposes of~~  
~~this section, disability shall mean one hundred percent~~  
~~disability as certified by a medical doctor.~~

~~The foregoing repurchase provision is subject to the~~  
~~right of any member of Buyer's immediate family to take over and~~  
~~continue the business in the place of Buyer and assume to~~  
~~perform all of the Buyer's obligations under this Agreement and~~  
~~the Contract For Management Services, Exhibit C, entered into~~  
~~simultaneously herewith. The election by a member of Buyer's~~  
~~immediate family to continue the business must be made in writing~~  
~~to Seller within Ten (10) days of Seller's written request that~~  
~~Buyer to exercise the repurchase provisions of this section.~~

8. Maintenance of Lease. Buyer shall, on or before the  
19th day of each month, pay the amount due under Seller's  
Agreement with James La Vae Smith, dated February 23, 1985

ten percent (10%). Seller shall maintain and keep the lease of the premises paid up and current at all times. In the event any Notice of Default is delivered to Seller, Seller shall deliver a copy of the same to Buyer and cure such default within Ten (10) days of such notice. In the event Seller fails to cure default within Ten (10) days, Buyer may, at his discretion make the lease payment in the Seller's stead and may, at his discretion, terminate the contract for Management services, Exhibit C.

9. Representations of Seller. In addition to covenants and representations hereinabove stated, Seller hereby represents to Buyer as follows:

(a) Seller is a Utah Limited Partnership duly organized and existing under the laws of the State of Utah with full power to enter into this Agreement and execute all documents pertaining hereto;

(b) Seller has been duly authorized by its General Partner to sell substantially all of the Assets and otherwise carry out the terms of this Agreement and perform its covenants hereunder; and

(c) Seller has provided to Buyer ample opportunity to inspect the Assets sold hereunder together with the books of account and other documents and records pertaining thereto, and has no knowledge of any material obligations or contingent liabilities of Seller which would impact this Agreement and which have not already been disclosed to Buyer or would be easily discoverable



by an examination of the books and records of Sel

10. General.

(a) It is expressly understood that Buyer has no indebtedness or obligation of any nature present at any time in the future owed to any creditor by or Humphries, except as expressly set forth in this Agreement, and Buyer disclaims any intent that this Agreement or any document related hereto shall be construed to create benefits for any other creditor.

(b) This Agreement shall be governed by the laws of the State of Utah in its interpretation.

(c) In the event of any legal action brought by either party for the purpose of enforcing performance of any covenant or representation hereunder or for breach thereof, the prevailing party shall be entitled to recover from the breaching party all reasonable fees and costs as shall be determined by the Court.

(d) In the event any written notice is required under this Agreement, the parties shall agree to deliver such notice either by personal delivery or delivery by U.S. mail, first class postage prepaid, addressed to the party opposite the signatures hereunder or any other address which either party may subsequently confirm in writing to the other.

IN WITNESS WHEREOF, the parties have hereunto executed  
this Agreement effective as of the day and year first above  
written.

WESTSIDE NURSERY,  
a Utah Limited Partnership

By Darrel E. Humphries  
Darrel Humphries, General Partner

SELLER:

Darrel E. Humphries  
Darrel Humphries

BUYER:

George Ronald Wright  
George Ronald Wright

A1-20

EXHIBIT "A"

PERSONAL PROPERTY OF SELLER

*ALL PLANT MATERIALS, SUPPLIES, AND PERSONAL PROPERTY  
AT THE WEST SIDE NURSERY*

EXHIBIT "E"

DEEDS TO OGDEN PROPERTY

EXHIBIT "D"

SCHEDULE OF DEBTS AND OBLIGATIONS OF SELLER

- (1) Zions Bank unsecured loan principal unpaid balance ---
- (2) Accounts payable less than 5,000<sup>00</sup> ---
- (3) 1984 TRUCK FORD GAS 3/4 TON 4 wheel Drive ---
- (4) 1983 Mercury Cougar ---

## ADDENDUM B

CONTRACT FOR MANAGEMENT SERVICES

AGREEMENT made between DARREL HUMPHRIES, of Veyo, Utah, County of Washington, State of Utah, ("Contractor") and GEORGE RONALD WRIGHT, whose principal place of business is located at City of St. George, County of Washington, State of Utah, ("Owner").

RECITALS

1. Owner is engaged in the business of operating a plant nursery at wholesale and retail and related products, and maintains or will maintain an ongoing business in St. George, County of Washington, State of Utah.

2. Contractor has been engaged and has had a great deal of experience in the above-designated business.

3. Contractor is willing to perform services and Owner is willing to engage Contractor for management services on the terms, covenants, and conditions hereinafter set forth.

4. Owner has purchased the nursery from, among others, Contractor himself as of the date hereof.

For the reasons set forth above, and in consideration of the mutual promises and agreements hereinafter set forth, Owner and Contractor agree as follows:

APR 25 1988

## SECTION ONE

### TERMS OF PERFORMANCE

Owner hereby engages Contractor as a manager of Side Nursery and Contractor hereby accepts and agrees to the engagement, subject to the general supervision and pursuant to the orders, advice, and direction of Owner. Contractor shall perform such other duties as are customarily performed by a person holding such position in other, same, or similar business enterprises as that engaged in by Owner. It is understood that Contractor is an independent proprietor and not an employee of Owner.

## SECTION TWO

### BEST EFFORTS OF CONTRACTOR

Contractor agrees that he will at all times faithfully and industriously, and to the best of his ability, experience, and talents, perform all of the duties that may be required from him pursuant to the express and implicit terms of the contract to the reasonable satisfaction of Owner.

## SECTION THREE

### TERM OF CONTRACT

The term of this Agreement shall be a period of one year, commencing Oct 4 ~~September~~, 1985, and terminating Oct 4 ~~September~~, 1986, subject, however, to prior termination as hereinafter provided. At the expiration date this contract may be renewed for periods of one year subject to negotiation and further agreement between the parties.



## SECTION FOUR

### COMPENSATION

Owner shall pay Contractor, and Contractor shall accept from Owner, in full payment for Contractor's services hereunder, compensation at the rate of \$30,000<sup>00</sup> Thousand Dollars (\$ 30,000<sup>00</sup>) per year, payable twice monthly as of the 1st and 15th day of each month while this Agreement shall be in force.

Owner shall reimburse Contractor for all necessary expenses incurred by Contractor while traveling pursuant to Owner's directions.

## SECTION FIVE

### TERMINATION DUE TO DISCONTINUANCE OF BUSINESS

Anything herein contained to the contrary notwithstanding, in the event that Owner shall discontinue operating its business at St. George, State of Utah, then this Agreement shall terminate as of the last day of the month on which Owner ceases operations at such location with the same force and effect as if such last day of the month were originally set as the termination date hereof.

## SECTION SIX

### OTHER TIME OBLIGATIONS

Contractor shall devote substantially all of his time, attention, knowledge, and skills solely to the business and interest of Owner, and Owner shall be entitled to all of the benefits, profits or other issues arising from or incident to all

work, services, and advice of Contractor, and Contractor not, during the term hereof, serve as officer, director, employee, or in any other capacity in any other business to Owner's business or any allied trade; provided, however, nothing herein contained shall be deemed to prevent or limit the right of Contractor to manage personal and family interests that do not compete with Owner's business.

#### SECTION SEVEN

##### RECOMMENDATIONS FOR IMPROVING OPERATIONS

Contractor shall make available to employer all information of which Contractor shall have any knowledge and shall make all suggestions and recommendations that will be of mutual benefit to Owner and himself.

#### SECTION EIGHT

##### TRADE SECRETS

Contractor shall not at any time or in any manner either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever information concerning any matters affecting or relating to the business of Owner, including without limiting the generality of the foregoing, any of its customers, the prices it obtains or to be obtained from the sale of, or at which it sells or has sold its products, source of supply, or any other information concerning the business of Owner, its manner of operation, its plant and processes, or other data without regard to whether all of the foregoing matters will be deemed confidential, material, or

tant, the parties hereto stipulating that as between them, the same are important, material, and confidential and gravely affect the effective and successful conduct of the business of Owner, and Owner's good will, and that any breach of the terms of this paragraph shall be a material breach of this Agreement.

#### SECTION NINE

##### AGREEMENTS OUTSIDE OF CONTRACT

This contract contains the complete agreement concerning the arrangement between the parties and shall, as of the effective date hereof, supersede all other agreements between the parties. However, this contract shall be consistent with a Purchase of Assets Agreement of even date herewith. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement or any representations including the execution and delivery hereof except such representations as are specifically set forth herein and each of the parties hereto acknowledges that he or it has relied on its own judgment in entering into this Agreement. The parties hereto further acknowledge that any payments or representations that may have heretofore been made by either of them to the other are of no effect and that neither of them has relied thereon in connection with his or its dealings with the other.

#### SECTION TEN

##### MODIFICATION OF CONTRACT

No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be

valid unless in writing and duly executed by the party charged therewith and no evidence of any proceeding, arbitration or litigation between the parties hereto arising or affecting this Agreement, or the rights or obligations of the parties hereunder, unless such waiver or modification is in writing, duly executed as aforesaid, and the parties further agree that the provisions of this section may not be waived orally herein set forth.

#### SECTION ELEVEN

##### TERMINATION

In the event of any violation by Contractor of the terms of this contract, Owner thereon may terminate the Management Agreement without notice and with pay only to the Contractor for the period of such termination. It is further agreed that any breach or evasion of any of the terms of this contract by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunctive relief, specific performance as well as to all other legal or equitable remedies to which such injured party may be entitled hereunder.

#### SECTION TWELVE

##### NONCOMPETITION COVENANT

Upon termination of this contract for cause or expiration hereof by its terms, Contractor agrees to a period of ~~five (5) years~~ <sup>TWO (2) YEARS</sup> after the date of such termination shall not compete with the nursery, gardening sales and related business of Owner by serving in any capacity

proprietorship, partnership, corporation or otherwise, in the States of Utah, Nevada, Oregon or Arizona. Contractor acknowledges that the restrictions above stated are reasonable. It is agreed between the parties that the consideration for the non-competition covenant is the Agreement for Partial Purchase of Assets executed on the same date hereof, pursuant to which Owner purchased the personal property assets of West Side Nursery, the former business owned by Contractor in his capacity as General Partner.

#### SECTION THIRTEEN

##### SEVERABILITY

All agreements and covenants contained herein are severable, and in the event any of them shall be held to be invalid by any competent court, this contract shall be interpreted as if such invalid agreements or covenants were not contained herein.

#### SECTION FOURTEEN

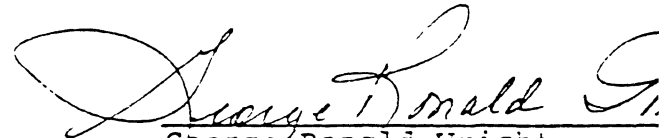
##### CHOICE OF LAW

It is the intention of the parties hereto that this Agreement and the performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of Utah.

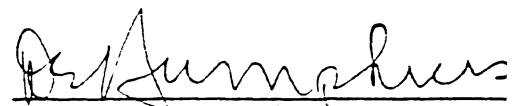
IN WITNESS WHEREOF, the parties have hereunto executed

this contract effective as of <sup>Oct 4</sup>~~September~~ \_\_\_\_\_, 1985.

OWNER:

  
George Ronald Wright

CONTRACTOR:

  
Darrel Humphries

A1-21

## ADDENDUM C

December 10, 1985  
Certified Mail - Return  
Receipt Requested

Mr. George Ronald Wright  
138 S. Valley View Dr.,  
The Park - Green Valley  
St. George, Utah 84770

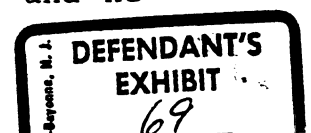
RE: Westside Nursery

Dear Mr. Wright:

Please be advised that I represent Darrel Humphries of St. George, Utah, concerning the business relationship the two of you have established over the past few months.

As you know, Mr. Humphries has been advised that the property you traded to him located in Ogden, Utah is basically worthless at the present time, and we should have in our possession appraisals that will substantiate this position within the next couple of days. Because the property does not have the value you represented, to-wit, \$90,000, it is Mr. Humphries' position as follows:

1. That he be paid the sum of \$60,000 cash upon receipt of this letter, or that you obtain an appraisal from an MIA appraiser that the property does in fact have a value of \$90,000.
2. That the note owed to Zions First National Bank in the sum of \$15,000 be paid by you immediately.
3. That you deposit such funds as may be necessary to cover the overdraft in the business account of approximately \$11,000 to \$12,000.
4. That Mr. Humphries retain both the 1984 Ford 3/4 ton 4-wheel drive pickup and the 1983 Mercury, with Mr. Humphries to assume and pay all encumbrances thereon.
5. That if you comply with the above, Mr. Humphries will agree to stay on at the nursery as long as you want him to at the same salary he currently receives and he will train all personnel you desire.





Mr. George Ronald Wright  
December 10, 1985  
Page 2

Re: Westside Nursery

If you choose not to perform as set forth above, then Mr. Humphries would request the following:

1. That you return the nursery, together with all inventory and other personal property to him.
2. That you pay to Mr. Humphries the sum of \$4,000 he has incurred in labor costs, together with the sum of \$2,000 he has incurred in heating the nursery during the interim period, for a total of \$6,000, and to pay that amount at the time the nursery is returned.
3. That you provide him with all documentation necessary so he can establish what merchandise has been ordered, and to reject merchandise he may not elect to retain.

Mr. Humphries is hopeful that this matter can be resolved short of litigation. However, because of the critical time of the year and the need to plan and plant for the spring season, we must request a decision from you within five (5) days from receipt of this letter. If we do not hear from you within that time frame, we will assume that any offer to settle this matter short of litigation has been rejected and will proceed accordingly.

So there is no misunderstanding concerning this matter, this letter is also to serve notice that Mr. Humphries elects to rescind the purported Agreement for Purchase of Assets and the contract for management services based upon his recently acquired knowledge concerning the value of the property you traded to him in exchange for the business known as the Westside Nursery.

Please direct all correspondence or other communication to my office as set forth above.

Yours very truly,

CHAMBERLAIN & HIGBEE

Hans Q. Chamberlain

HQC/db

## ADDENDUM D

CHAMBERLAIN & HIGBEE

ATTORNEYS AT LAW

HANS O. CHAMBERLAIN  
THOMAS M. HIGBEE  
FLOYD W. HOLM

P. O. BOX 726  
250 SOUTH MAIN  
CEDAR CITY, UTAH 84720

AREA CODE 801  
TELEPHONE 586-4404

December 18, 1985

Mr. George Ronald Wright  
1021 S. Valley View Dr., #138  
The Park - Green Valley  
St. George, Utah 84770

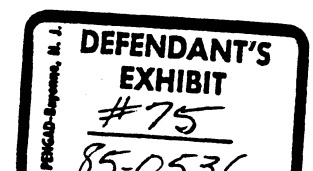
RE: Westside Nursery

Dear Mr. Wright:

I enclose herewith a copy of my letter to you dated December 10th, 1985, that was sent certified mail - return receipt requested. It appears that you have intentionally failed to receipt for this letter and I am therefore having you served personally with a copy of the same. However, all offers to settle this matter set forth in said letter are hereby revoked. Mr. Humphries is willing, however, to discuss a cash settlement if you still desire to purchase the Westside Nursery.

We now have in our possession an appraisal which indicates that the property you have deeded to Mr. and Mrs. Humphries has a present value of \$35,000, and not the value of \$90,000 that you represented it had. In addition, we have clear evidence that you met with Mr. Graham Shirra of the Weber Planning Commission 3 to 4 months prior to the sewer moratorium and that you were advised that a moratorium would be placed on the subject property many months prior to the time it was enacted on October 15th, 1985. The fact that you deeded the subject property to Mr. and Mrs. Humphries some 11 days prior to the moratorium becoming effective gives rise to other speculation as to the timeliness of that transaction.

It is therefore the position of Mr. Humphries that the purported Sales Agreement dated October 4th, 1985, between Westside Nursery, a Utah limited partnership, as seller and yourself as buyer, and the Contract for Management Services of the same date, are hereby cancelled and rescinded on the basis that the seller therein, Westside Nursery, did not receive property having a value you represented it to have, to-wit, \$90,000, that the property cannot be developed because of a building moratorium placed upon the property, and for other misrepresentations which will not be detailed at this time.



CHAMBERLAIN & HIGLEY  
ATTORNEYS AT LAW

Mr. George R. Wright  
December 18, 1985  
Page 2

Re: Westside Nursery

Enclosed herewith are copies of deeds that I have prepared wherein Darrel Eugene Humphries and Karen Ann Humphries, his wife, deed back the property located in Weber County, Utah, you previously deeded to them by deed dated October 4th, 1985. These deeds should be recorded in Weber County by you upon receipt. By reason of the same, it is the position of Mr. Humphries and Westside Nursery that said business is still owned by Westside Nursery, a Utah limited partnership, and that in an attempt to restore the parties to their positions prior to the purported sale on October 4th, 1985, that the following terms shall control:

1. That since Mr. and Mrs. Humphries have deeded back the real property conveyed by you to them, that you likewise release in writing any interest you had in the business known as Westside Nursery so that there is no misunderstanding as to the status of this matter. In that connection, I enclose an Agreement that I would ask you to sign before a notary public and return the same to my office in the enclosed stamped, self-addressed envelope. This agreement has already been signed by my clients.

2. That you remove, within five (5) days from receipt of this letter, all of the furniture, self-watering containers, brass, copper and ceramic items you purchased and had delivered to the premises. The removal of these items should take place in the presence of Mr. Humphries.

3. Because the eucalyptus trees purchased by you are fragile and cannot be simply moved outdoors, Mr. Humphries is agreeable to resolve this particular item on one of the following bases:

- A. That you sell the eucalyptus trees to Mr. Humphries at the original price you purchased them for. Upon documented proof that the trees have in fact been paid for (i.e., a copy of your cancelled check, charge card receipt or other proof of payment), a cashier's check will be delivered to you in that amount.

- B. That if you want to retain ownership of the trees until you can relocate them to another nursery or place of your choosing, that you pay to Westside

CHAMBERLAIN & HIGBI

ATTORNEYS AT LAW

Mr. George R. Wright  
December 18, 1985  
Page 3

Re: Westside Nursery

Nursery the sum of \$2.50 per month per tree, payment to be made in advance for six (6) months, to-wit, for October, November, and December, last past, and for January, February and March, in the future. The number of trees can be determined by a mutual count to be conducted by yourself and Mr. Humphries or someone else if you determine that would be most appropriate.

C. That if number A or B above are not acceptable, that you immediately remove the trees from the premises and reimburse Mr. Humphries for expenses incurred to date in caring for the trees in the form of labor, soil, greenhouse expenses, and containers, at the rate of \$2.00 per tree times the total number of trees located in the greenhouse. If you elect to accept this alternative, the trees must be removed within five (5) days, since Mr. Humphries simply must have the greenhouse space to commence the planting for the springtime season in St. George which is approximately 6 to 8 weeks away. Time is extremely critical and Mr. Humphries cannot wait beyond this five (5) day period to commence planting; he simply must do that immediately.

4. In the event you simply fail to do nothing in response to the requests outlined above, Mr. Humphries will assume ownership of all growing materials you have purchased and caused to be placed upon the subject property and pay for the same, be it yourself or the actual supplier of the product. Everything else that you purchased and caused to be delivered to the nursery will be delivered to your driveway five (5) days after you are served with this document.

On behalf of Mr. Humphries, this letter constitutes an offer to reconvey any property obtained from you under both contracts dated October 4th, 1985, to you and to restore everything of value which was received from you, and to surrender the possession of the property you deeded located in Weber County, Utah, and to do and perform all acts and things which might be necessary or proper in order to fully and immediately restore to you all of the properties and things of value received

CHAMBERLAIN & HIGBEE

ATTORNEYS AT LAW

Mr. George R. Wright  
December 18, 1985  
Page 4

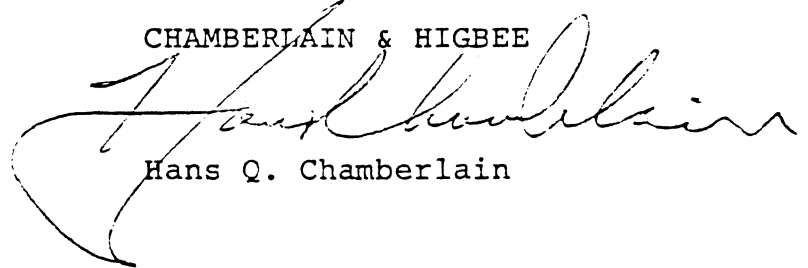
Re: Westside Nursery

from you, as fully and completely as if said contracts had never been made.

Please govern yourself accordingly.

Yours very truly,

CHAMBERLAIN & HIGBEE

A handwritten signature in cursive script, appearing to read "Hans Q. Chamberlain", written over the typed name.

Hans Q. Chamberlain

HQC/db  
enclosures

xc: Mr. Darrel E. Humphries

## ADDENDUM E

# BALANCE SHEET

## WESTSIDE NURSERY & FLORALE

as of October 1, 1985

### Assets

#### ASSETS

CASH IN ZIONS 1ST NAT'L	(\$3,290.83)
ACCOUNTS RECEIVABLE	8,850.00
INVENTORY	60,000.00

#### CURRENT ASSETS

\$65,559.17

#### FIXED ASSETS

AUTO AND TRUCKS	\$15,204.00
AUTO & TRUCKS DEPRECIAT	0.00
EQUIPMENT AND FIXTURES	24,888.79
EQUIP & FIXTURE DEFREC.	0.00
LEASE IMPROVEMENTS	6,390.78
LEASE IMPROVEMENT DEPRECI	0.00

#### FIXED ASSETS

46,483.57

#### TOTAL ASSETS

\$112,042.74

#### Total Assets

\$112,042.74

### Liabilities

ACCOUNTS PAYABLE	\$0.00
NOTES PAYABLE OVER 1 YR.	7,545.35
SALES TAX PAYABLE	0.00
NOTES PAYABLE ZIONS BANK	1,641.55
NOTES PAYABLE #2 ZIONS	7,319.73
TRUCK PAYMENTS BALANCE	0.00

#### CURRENT LIABILITIES

\$16,506.63

#### CURRENT LIABILITIES

#### CURRENT LIABILITIES

#### CAPTIAL ACCOUNT

CAPITAL VALUE	\$95,536.11
CURRENT EARNINGS	0.00
RETAINED EARNINGS	0.00

#### CAPITAL ACCOUNT

95,536.11

#### TOTAL LIABILITIES

\$112,042.74

#### Total Liabilities

112,042.74

**DEFENDANT'S  
EXHIBIT**



## ADDENDUM F

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS  
OF WEBER COUNTY, UTAH

6-58  
mvd  
JK

WHEREAS, the public health and welfare concerns of citizens of Weber County dictate that it is necessary to impose a limited moratorium on development of any property located within the boundaries of the Uintah Highlands Water and Sewer Improvement District.

NOW, THEREFORE, IT IS RESOLVED AND ORDERED, pursuant to the authority of the Weber County Commission granted under Utah Code Annotated Sections 17-5-35, 17-5-49, and 17-5-77, that a limited moratorium on the development of any property located within the boundaries of the Uintah Highlands Water and Sewer Improvement District is hereby implemented under the following terms until an adequate, approved public sewer system has been constructed and is operational:

1. As of the effective date of this moratorium, no new subdivisions in the Uintah Highlands Water and Sewer Improvement District will be approved.

2. Any proposed exception to paragraph 1 must be approved by the Weber County Commission and be substantiated by a written statement from the Weber-Morgan District Health Department that the subdivision is located in an area where its development will not contaminate, aggravate, depreciate, or in any manner have a negative impact on present soil, groundwater, surface water, drainage conditions in the Uintah Highlands Water and Sewer Improvement District.

3. Prior to the development of any individual lot, including those located in existing subdivision, the developer must first obtain written approval from the Weber-Morgan District Health Department to ensure that:

a. A current, comprehensive soils and groundwater evaluation has been made of the site;

APR 25 1988

DEFENDANT'S  
EXHIBIT

b. Soil and groundwater conditions are in full compliance with all state and local rules, regulations, codes and ordinances pertaining to individual wastewater disposal systems; and

c. The proposed development will not contaminate, aggravate, depreciate, or in any manner have a negative impact on present soil, groundwater, surface water or drainage conditions in the Uintah Highlands Water and Sewer Improvement District.

d. It is contemplated that these lots will be considered and approved or rejected on an individual, case-by-case basis.

In the opinion of the Weber County Board of Commissioners, it is necessary that this policy go into effect immediately upon publication in order to preserve the health of the inhabitants of Weber County.

PASSED AND ADOPTED by the Board of County Commissioners of Weber County, Utah at a regular meeting thereof held on the 15 day of October, 1985.

BOARD OF WEBER COUNTY COMMISSIONERS

  
ROGER F. RAMSON, Chairman

  
ROBERT A. HUNTER

  
WILLIAM BAILEY

ATTEST:

RICHARD GREENE

By   
DEPUTY CLERK

## ADDENDUM G

COMMITMENT FOR TITLE INSURANCE

ISSUED BY

Security Title Company

205 - 26TH STREET • OGDEN, UTAH 84401  
(801) 627-1320

George R. Wright  
St. George Utah.

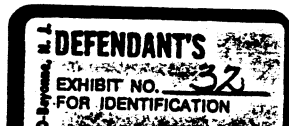
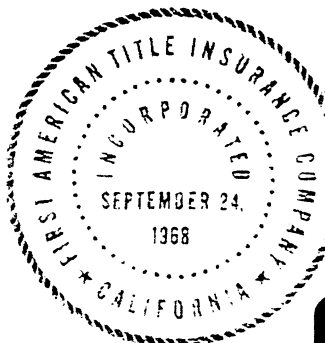
Order No: 58694

FIRST AMERICAN TITLE INSURANCE COMPANY, herein called the Company, for valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by the Company, either at the time of the issuance of this Commitment or by subsequent indorsement.

This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six (6) months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company. This Commitment shall not be valid or binding until countersigned by an authorized officer or agent.

IN WITNESS WHEREOF, the Company has caused this Commitment to be signed and sealed, to become valid when countersigned by an authorized officer or agent of the Company, all in accordance with its By-Laws. This Commitment is effective as of the date shown in Schedule A as "Effective Date."



*First American Title Insurance Company*

BY *[Signature]*

PRESIDENT

ATTEST *William C. Baerling*

SECRETARY

BY *[Signature]*

COUNTERSIGNED

## SCHEDULE A

1. Effective Date: October 1, 1985 @ 7:55 a.m.      Commitment No: 58694
  
2. Policy or Policies to be issued: Amount
  - (a) ☒ ALTA Owner's Policy For amount To Be Determined \$ TBD  
Proposed Insured:
  
  - (b) ☐ ALTA Loan Policy \$  
Proposed Insured:
  
  - (c) ☐ \$
  
3. The estate or interest in the land described or referred to in this commitment and covered herein is fee simple and title thereto is at the effective date hereof vested in:

GEORGE R. WRIGHT

4. The land referred to in this commitment is

**PARCEL 1: (Serial No. 07-086-0007)**

A part of the Northwest Quarter of Section 23, Township 5 North, Range 1 West, Salt Lake Base and Meridian, U. S. Survey: Beginning at the Southwest Quarter corner of the Northeast Quarter of said Northwest Quarter of said Section; thence Northeasterly 130 feet more or less, along the South line of the Cory Combe property, to a point 33 feet perpendicularly distant Southwesterly from the centerline of Combe Road; thence Southeasterly 130 feet, more or less along the Southwesterly line of Combe Road to a Point on the 1/16th Section line; thence West 205 feet, more or less, along said 1/16 Section line to the point of beginning.

**PARCEL 2: (Serial No. pt 07-086-0003)**

A part of the Northwest Quarter of Section 23, Township 5 North, Range 1 West, Salt Lake Base and Meridian. U. S. Survey: Beginning at the most Easterly corner of Lot 55, Uintah Highlands Subdivision No. 4, in Weber County, Utah; and running thence along the Northeasterly boundary of said Subdivision the following four (4) courses: North 67°47'50" West 117.54 feet; North 4°47' West 104.12 feet; North 74°41'57" West 109.40 feet; and North 23°20' West 324.03 feet; more or less to the North line of the Southwest Quarter of said Northwest Quarter; thence East 255 feet more or less to a point 33 feet perpendicularly distance Southwesterly from the centerline of Combe Road; thence Southeasterly 178 feet, more or less, along the Southwesterly line of Combe Road; thence Southwesterly 455 feet more or less to the point of beginning.

**SCHEDULE B — Section 2**  
**Exceptions**

No. 58694

The policy or policies to be issued will contain exceptions to the following unless the same are disposed of to the satisfaction of the Company.

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easement or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.
7. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this commitment.
8. *Taxes for the year 1985, payable but not delinquent. (Serial No. 07-086-0007 and part of 07-086-0003).*
9. *Any charges and/or assessments that may be levied by the Weber Basin Water Conservancy District, the Uintah-Highland Water and Sewer Improvement District, the Central Weber Sewer Improvement District, and the Weber County Fire Protection Service Area #4.*
10. *The right to construct, operate, and maintain its line of telephone and telegraph over and across the West half of the Northwest Quarter of Section 23, Township 5 North, Range 1 West, (exact location not disclosed), as conveyed to Mountain States Telephone and Telegraph Company, by Instrument recorded November 1, 1918 in Book N, Page 176 of Records.*
11. *Rights of Way for roads, ditches, canals or transmission lines, if any, now existing over and across said property.*

CONTINUED

SCHEDULE "B" CONTINUED

12. A Perpetual Easement to construct, reconstruct, operate, repair, replace and maintain a culinary water line over and across Parcel 1 as follows: A 15 foot wide permanent easement, 10 feet on the West side and 5 feet on the East side of the following described centerline: A part of the Northwest Quarter of Section 23, Township 5 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point on the subdivision boundary of Uintah-Highlands Subdivision No. 4, Weber County, Utah, being South 74°41'57" East 12.80 feet from the Southeast corner of Lot 49 in said Subdivision; running thence North 23°20' West 206.71 feet; thence North 0°04'30" West 451.10 feet to the North line of the Grantors property in Combe Road, as conveyed to UINTAH-HIGHLAND WATER AND SEWER IMPROVEMENT DISTRICT, by Instrument recorded January 15, 1981 in Book 1374, Page 1660 of Records.
13. Application for Assessment and Taxation of the subject property as Agricultural Land recorded December 23, 1975 in Book 1109, Page 477 of Records. Said Application contains a five year rollback provision which becomes effective upon change in use of all or part of the subject property.
14. Special Assessments in favor of UINTAH-HIGHLAND WATER AND SEWER IMPROVEMENT DISTRICT, as set forth in Instrument recorded January 18, 1985 in Book 1461, Page 17 of Records.
15. Delinquent taxes for the years 1981, 1983 and 1984 in the total amount of \$398.06 as to Serial No. 07-086-0007.

\* \* \*

1985 taxes are \$158.54 including \$000 personal property valuation as to Serial No. 07-086-0007 and taxes for Serial No. 07-086-0003 are not segregated.



## **COMMITMENT**

### **Conditions and Stipulations**

1. The term "mortgage," when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.
3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate of interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the Insuring provisions, exclusion from coverage, and the Conditions and Stipulations of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest or the lien of the insured mortgage covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this Commitment.

## ADDENDUM H

# N.E.I. INC.

## (1) Acquire Plants For Indoors:

- STUDY WHICH EXOTICS QUALIFY
- PLANTS FOR SHADE
- ARTIFICIALS
- REGULAR

## (2) Nursery Stock For West Side:

- MORE TALL + REGULAR YUCCAS
- FLOWERING PLANT MATERIALS FOR INDOORS
- SPECIAL FERN FROM DALLAS.

## (3) QUICKLY STUDY FOR EXOTICS:

- GRD COVERS
- BUSHES + SHRUBS
- CLIMBING VINES

## (4) EXOTIC CACTUS + SUCCULENTS

- Frost HARDY outdoor varieties FOR St. Geo.
- INDOOR varieties

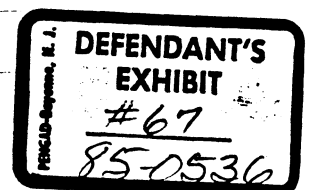
## (5) DECORATORS TO WORK w/ FLOWERS + PLANTS FOR INDOOR WATERING CONTAINERS

## (6) CONTACT ALL SOURCES FOR TREES (EXOTIC)

## (7) Order Pictures of Euc. From AUSTRALIA

- ② YUCCAS in front display
- ② EFFICIENT use of space

## (8) Call on Yucca Palms



APR 27 1988

## 2) THINGS TO DO FOR \$-

= PICK UP TERRA DRAWS CHECK FOR \$6.500<sup>00</sup>

= meet w/ SHOPPING CENTER <sup>owner</sup> from Calif

= " " " " owner from St. Geo.

= meet w/ EUG

= Landscaper who WANTED Yucca Palms.

= Meet w/ ALL R.V. PARKS UNDER CONSTRUCTION

= Call m. Hilton

- Swans on water

- Euc. + Yucca Palms:

⇒ Get order ready for Willow Run

⇒ Get Agreement drawn w/ Ehad.

⇒ Have Darrell get LOAD to cover new materials

⇒ TRAIN People at West-Side in Sales:

⇒ Sell Books to Attorney

= Sell EXERCISE EG.

## 1) Call People Rec'd by Oregon Contact (Euc. People)

4 Call Calif FOR Euc Growers w/ Cold + Hardy Species now  
Size of 10 + 12' high

1 Call

## 1) Decorate Basement

HAUQUIUQ ARTIFICIAL PLANTS + CONTAINERS.

## ADDENDUM I

'00 AUG 8 PM 1 05

HANS Q. CHAMBERLAIN [0607]  
CHAMBERLAIN & HIGBEE  
Attorneys for Defendants  
250 South Main  
P. O. Box 726  
Telephone: (801) 586-4404

CLERK  
DEPUTY *[Signature]*

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

GEORGE RONALD WRIGHT,	)	
	)	
Plaintiff,	)	JUDGMENT ON THE VERDICT
	)	
vs.	)	
	)	
WESTSIDE NURSERY, a Utah	)	
limited partnership and	)	
DARREL HUMPHRIES, an	)	
individual,	)	Civil No. 85-0536
	)	
Defendants.	)	

The above-entitled matter came on for jury trial pursuant to notice duly given on April 25th, 1988, in the Washington County Courthouse before the Honorable J. Philip Eves, District Court Judge presiding. Present were Plaintiff George Ronald Wright, and his counsel, Gary Pendleton. Also present was Defendant Darrel Humphries, general partner in Westside Nursery, a Utah limited partnership and Darrel Humphries, an individual, and their counsel, Hans Q. Chamberlain.

This matter has been the subject of prior orders which are affirmed in this Judgment. These orders include:

1. Temporary Restraining Order and Order to Show Cause dated December 23rd, 1985.
2. Temporary Restraining Order; Order Appointing Receiver;

*Entered by  
244-257*

Judgment; and Denial of Motion for Summary Judgment  
25th, 1986.

3. Findings of Fact and Temporary Order dated  
1986.

4. Findings and Order dated November 10th, 1986

The jury was empaneled and the parties proceeded  
opening statements. Plaintiff proceeded with the pre  
his case. Plaintiff rested. Defendants thereafter  
their case.

After the Defendants rested their case pursuant  
counterclaim, Plaintiff moved for a dismissal or dire  
against Defendants' counterclaim alleging fraud. Af  
said argument, the same was denied by the Court.

Following the order of the Court entered denying  
motion to dismiss, the jury was called in and ins  
Arguments were made, and the matter was duly submit  
jury. The jury returned a verdict as follows:

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND  
WASHINGTON COUNTY, STATE OF UTAH

---

GEORGE RONALD WRIGHT,	)	
	)	
Plaintiff,	)	SPECIAL VERDICT
	)	
vs.	)	
	)	
WESTSIDE NURSERY, a Utah	)	
limited partnership and	)	
DARREL HUMPHRIES, an	)	
individual,	)	Civil No. 85-053
	)	
Defendants.	)	

---

1 We the jury, duly empaneled in the above-entitled matter,  
2 find, by the agreement of at least six of our number:

3 1. Did Defendant Darrel Humphries breach the agreements  
4 between the parties by actions inconsistent with the terms of the  
5 agreements?

6 YES  X  NO

7 2. If your answer to No. 1 is Yes, what damages should be  
8 awarded to Plaintiff George Ronald Wright as a result of the  
9 breach?

10 \$  6,805.00

11 3. Did Plaintiff George Ronald Wright breach the agreements  
12 between the parties by terminating Defendant Darrel Humphries as  
13 an employee under the Management Agreement?

14 YES  X  NO

15 4. If your answer to No. 3 is Yes, what damages should be  
16 awarded to Defendant Darrel Humphries as a result of the breach?

17 \$  15,000.00

18 5. Did Plaintiff George Ronald Wright breach the agreements  
19 in any other respect?

20 YES  X  NO

21 6. If your answer to No. 5 is Yes, what should be the  
22 amount of damages awarded to Defendant Darrel Humphries as a  
23 result of that breach?

24 \$  0

25 7. Under the agreements, who was to pay the first \$5,000 of  
the accounts payable as of October 4, 1985?

PLAINTIFF  X  DEFENDANT



8. Under the agreements, who was to pay the  
payable in excess of \$5,000 as of October 4, 1985?

PLAINTIFF \_\_\_\_\_ DEF

9. Under the agreements, who was to receive the  
receivable owed to Westside Nursery as of October 4,

PLAINTIFF X DEF

10. Under the terms of the agreements, between P  
Defendant Darrel Humphries, who is obligated to pay  
Promissory Note in favor of Zions First National Bank  
of \$15,000, plus accrued interest dated January 3, 19

PLAINTIFF \_\_\_\_\_ DEF

11. As between Plaintiff and Defendant Darrel Hu  
is obligated to pay the Promissory Note in favor of  
National Bank in the sum of \$30,000, plus accrued int  
December 1985?

PLAINTIFF X DEF

12. Did Plaintiff George Ronald Wright make f  
misrepresentations concerning the value of the Weber  
property to Defendants? YES X

13. If your answer to question No. 12 is Yes, wh  
damages should be awarded to Defendants Westside Nu  
Darrel Humphries for the difference in the actual f  
value of the land in Weber County and the misrepresen  
that land? \$ 38,582.00

14. What is the amount of attorney's fee, if  
should be awarded to:

1  
2  
3  
4  
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25

PLAINTIFF GEORGE RONALD WRIGHT \$ \_\_\_\_\_

DEFENDANTS WESTSIDE NURSERY and

DARREL HUMPHRIES \$ 10,000.00

THE ABOVE STATES THE OPINION OF THIS JURY.

DATED this 30th day of April, 1988.

/s/ Clayton Prince  
Foreperson

DISSENTING JURORS

By each answer number, list the names, if any, of the jurors  
dissenting from that answer:

ANSWER NUMBER	NAMES OF JURORS DISSENTING
------------------	----------------------------

- |     |       |
|-----|-------|
| 1.  | _____ |
| 2.  | _____ |
| 3.  | _____ |
| 4.  | _____ |
| 5.  | _____ |
| 6.  | _____ |
| 7.  | _____ |
| 8.  | _____ |
| 9.  | _____ |
| 10. | _____ |

11.

12. Vondell L. Barrick, Evon R. Seely

13.

14.

The Court made some inquiry of the jury concerning findings. Neither counsel requested that the jury after returning the verdict and the jury was then excused.

NOW, THEREFORE, based upon the findings of the jury and applicable principles of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Humphries shall have and recover Plaintiff Judgment in the amount of \$20,198.21 computed as follows:

A. Plaintiff is entitled to Judgment in the amount of \$37,305.21 as reimbursement for funds borrowed from First National Bank and deposited directly into Westside Nursery checking account. Against this sum, Plaintiff is entitled to setoffs in the amount of \$6,805.00 as reimbursement for monies misappropriated by Defendant Humphries from the Westside Nursery account for the purpose of personal obligations and \$6,772.00 as reimbursement for funds withdrawn from the Westside Nursery account on October 4th, 1985, for the purpose of paying accounts payable which should have been assumed and discharged by Defendant Humphries. The amounts specified herein constituting Plaintiff Judgment are as follows:

1           setoff also includes interest which has been calculated at  
2           the legal rate on the above-mentioned items from the date of  
3           the misappropriation or expenditure.

4           2. Defendants Westside Nursery and Humphries are awarded  
5           Judgment against Plaintiff for the difference in the actual fair  
6           market value of the land in Weber County and the misrepresented  
7           value of said land in the sum of \$38,582.00. The damages awarded  
8           by the jury were calculated by the jury based on a fraudulent  
9           misrepresentation concerning the value of the Weber property to  
10          be \$90,000.00, less the sum of \$54,700.00 and less the real  
11          estate commission Westside Nursery and Humphries had to pay in  
12          selling the property of \$3,282.00, thus totaling a difference of  
13          \$38,582.00. Said Judgment shall bear interest at the rate of  
14          twelve percent (12%) per annum until paid in full. The Court  
15          will not award interest to Defendants on the sum of \$38,582.00  
16          from and after October 4th, 1985 until time of Judgment, even  
17          though requested to do so by Defendants.

18          3. Plaintiff is not contractually bound to assume or  
19          indemnify Defendant Humphries against any obligation in favor of  
20          Zions First National Bank arising out of the execution of a  
21          certain Promissory Note dated January 3rd, 1985.

22          4. Defendants are obligated to pay and discharge all  
23          accounts payable as of October 4th, 1985, to the extent that said  
24          accounts exceeded the sum of \$5,000.00 and are further obligated  
25          to pay all outstanding tax obligations, federal, state or local,  
            accruing on or before October 4th, 1985.

1 5. Even though the jury found that Plaintiff brought  
2 agreements between the parties by terminating Defendant  
3 as an employee under the Management Agreement and  
4 Humphries damages in the sum of \$15,000.00 by reason of  
5 the Court concludes and orders that Defendant Humphries  
6 for wrongful termination of the Management Agreement is  
7 with prejudice, the jury's findings regarding specific  
8 fact establishing the defense of justification as a matter of  
9 law.

10 6. Defendants Westside Nursery and Humphries are awarded  
11 Judgment against Plaintiff in the sum of \$10,000.00 and  
12 attorney's fees incurred in the prosecution of this action.

13 7. Defendants Humphries and Westside Nursery are  
14 awarded a total Judgment against Plaintiff in the sum of  
15 \$68,780.21, said Judgment to bear interest at the rate of  
16 percent (12%) per annum until paid in full.

17 DATED this 4<sup>th</sup> day of August

18 J. Philip Eves  
19 J. PHILIP EVES  
20 District Court Judge

21 APPROVED AS TO FORM:

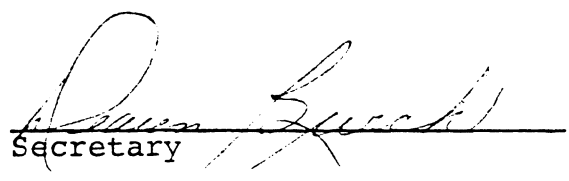
22 Gary W. Pendleton  
23 GARY W. PENDLETON  
24 Attorney for Plaintiff

25 Hans Q. Chamberlain  
HANS Q. CHAMBERLAIN  
Attorney for Defendants

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the within and foregoing JUDGMENT ON THE VERDICT to Mr. Gary W. Pendleton, Attorney at Law, 150 North Second East, Suite 202, St. George, Utah 84770, first-class postage prepaid, on this 5th day of August, 1988.

  
Secretary

## ADDENDUM J

March 19, 1985  
St. Geo, Utah.

To Darrell Humphreys

As a result of your continuing  
subterfuge, embezzlement, greediness of  
ownership unlawfully, and failure to  
disclose confidential suppliers pursuant to  
the Oct 4, 1985 agreement as well as failure  
to follow my supervision in practically all  
respects you are terminated as manager  
of the West-Side nursery.

George L. Hughes