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DeBry and Hilton Travel Services Inc. v. Capitol International Airways, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DeBRY AND HILTON TRAVEL SERVICES, INC.,

Plaintiff and Appellant,

v.

CAPITOL INTERNATIONAL AIRWAYS, INC.,

Defendant and Respondent.

Case No. 14335

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE JAMES S. SAWAYA, DISTRICT JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

DeBRY AND HILTON TRAVEL SERVICES, INC., *Plaintiff and Appellant,* v. CAPITOL INTERNATIONAL AIRWAYS, INC., *Defendant and Respondent.*	Case No. 14335

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Appellant DeBry and Hilton Travel Services, Inc. (hereinafter termed "Appellant") is a travel agent - broker. Defendant-Respondent Capitol International Airways, Inc., (hereinafter termed "Respondent") is a charter airline. Appellant claims a five per cent (5%) brokerage commission pursuant to an oral brokerage contract between Appellant and Respondent in connection with the sale of over $1,500,000 of charter flights procured and sold by Appellant for Respondent, which brokerage commission Respondent has refused to pay.

DISPOSITION OF THE CASE IN THE LOWER COURT

Following a non-jury trial based primarily upon a stipulation of the parties, the trial court entered judgment in favor of Respondent and against Appellant, no cause of action, and awarded Respondent its costs.

Respondent filed a Counterclaim which was withdrawn during the trial.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and entry of a judgment in its favor and against Respondent for the sum of $78,401.48, and Appellant's costs.

STATEMENT OF FACTS

Appellant is a corporation generally engaged in the sale and promotion of travel. Such activities involve the negotiation and sale of charter flights and the marketing of vacation tours generally, including the sale of airplane tickets, hotel reservations and the like. From time to time, Appellant sells air transportation to large groups. Instead of buying individual airplane tickets, such large groups (or group tour operators) often charter an entire airplane. (R. 813; Tr. 15)

Respondent is a charter airline. This means that Respondent does not sell individual tickets. Respondent only sells charter flights to qualified or charterworthy groups. (R. 808)

In order to solicit such charter business, Respondent advertises extensively to travel agents. From 1967-1974 Respondent spent approximately $2,793,600 for advertisements in travel agent trade journals and in direct mailings to travel agents. (R. 809) In addition to these published advertisements, Respondent has a staff of approximately 50-60 full time sales personnel. (R. 809)

The purpose of the advertising and sales effort of Respondent is to get travel agents to utilize Respondent's services or to go to customers and try to get them to form charter groups to be transported on Respondent's airplanes. (R. 809) The travel agent is not the purchaser of the charter flight. Customarily, the travel agent negotiates the contract between the airline and the travel group. The travel agent acts in the capacity of a broker or middleman. (R. 813; Tr. 15, 16)

The travel agent's only compensation for selling such charter flights is a commission of 5% of the charter paid directly by the airline to the travel agent. This 5% commission is standard and customary throughout the air charter industry. (R. 809, 810; Tr. 21)

The negotiation of a charter flight takes place in various stages. The travel agent first screens the potential charter user to determine whether the user is charterworthy and whether the needs and requirements of the charter user such as destination, number of people, etc., can be met(R. 808; Tr. 17) The travel agent next tries to match the needs of the charter user with

a particular charter airline, i.e., size of the airplane, authority of the airline to fly to a particular destination and otherwise plans and schedules the ground packages, including hotels, transportation and the like. The travel agent next circulates the charter user's requirements to those air carriers which are qualified and interested in the tour. The circulation of the charter user's requirements to various airlines is frequently done orally. (Tr. 18) A charter airline on occasion receives requests from several travel agents for the same flights. (R. 810) From the time of the initial contact by the charter user until bids on the particular flights are received by the travel agent, a substantial period of up to four months may elapse. The actual charter departure date may be as much as a year following the initial contact between the travel agent and charter user. (Tr. 21)

One of the most critical negotiations undertaken by the travel agent concerns deposits that are required by the airline to charter the airplanes. These deposits may equal 10% of the charter price and part of the travel agent's function is to negotiate the amount of such deposits to comply with the requirements of the particular airline and the ability of the charter user to pay such deposits. (Tr. 20)

In February of 1973, Appellant became acquainted with Prestige Vacations, a group tour operator (charter user) (hereinafter termed "Prestige"). Prestige requested Appellant to find and arrange a series of charter flights. (R. 816, 819, 825) According to the instructions of Prestige and according to the custom of the industry, Appellant sought bids from several different airlines, including Respondent. (R. 810) At the time Appellant introduced Prestige to Respondent, Respondent had never even heard of Prestige. (Ex. P-2, P-3)

Following this introduction, Appellant and Respondent had a conversation about the Prestige account. The substance of that conversation was a request by Appellant for Respondent to bid on the Prestige flights.(R. 816; Tr. 34)Respondent agreed to quote on the Prestige flights and to pay a 5% commission to Appellant if the flights were sold and if Prestige would sign a document termed a "Charter Agency Agreement" (Ex. D-51), making Appellant the agent of record. (R. 819, 825)

Sometime thereafter Appellant had other conversations with Respondent. Appellant expressed concern about what would happen if Prestige went behind Appellant's back to negotiate directly with Respondent. Respondent assured Appellant that Respondent always

protects the agent. Respondent further stated that if a customer should ever come directly to the airline, Respondent would "always quote the full gross price"; and that, " we (Respondent) would never give them (customer) the 5% commission or we (Respondent) would never quote to them (customer) the price minus the 5% commission." (Tr. 42-43, 216-217)

After these preliminary discussions, Appellant negotiated a series of charter flight contracts between Respondent and Prestige. These negotiations took place more or less concurrently. For convenience, each series of flights is referred to separately as a "flight chain". A synopsis of relevant negotiations follows:

1. *Chain "A" Transaction*

Following the request of Prestige for charter flights, Appellant made various requests for quotations to Respondent on or about April 20, 1973 and to other charter airlines. Thereafter, Respondent quoted prices for the Chain "A" flights to Appellant, including the requirement that a $2,000.00 deposit would be required for each flight. (R. 818) Prestige paid the required deposit directly to Respondent and eventually five of the six contracted flights were flown. (R. 818)

The charter for the Chain "A" flights was arranged by Appellant with Respondent even though negotiations with another charter airline which quoted prices for the charter flights slightly lower than Respondent's prices were presented to Prestige. On April 27, 1973, Respondent called Prestige directly and urged Prestige to use Respondent's services even at the higher prices, which Prestige agreed to do. (R. 817; Tr. 34) After the charter had been arranged and agreed to by the parties, Respondent sent its standard form which is termed a "Charter Agency Agreement" to Appellant with instructions to "[p]lease sign this so we can *process* your (Appellant's) five per cent commission." (Tr. 34) These instructions were complied with and the charter agency agreement was signed by the parties. (Ex. D-51)

Notwithstanding the execution of the charter agency agreement on October 9, 1973, during the negotiations of the Chain "C" and Chain "D" flights, Prestige wrote to Respondent instructing Respondent to "freeze" the commissions for the Chain "A" flights. (R. 818; Ex. D-43) That action was initiated by Prestige as the result of a suit commenced by Appellant against Prestige which suit was subsequently settled on February 27, 1974 prior to the trial of the instant case. The consideration for such settlement was the delivery of Respondent's check to Appellant, which check represented the agent's commission of five per cent of the charter

price of the Chain "A" flights. (R. 818; Ex. D-53) Appellant asserts no claim in connection with commissions from the Chain "A" flights against Respondent. (R. 818)

2. *Chain "B" Transaction*

Appellant makes no claim against Respondent in connection with the single Chain "B" flight.

3. *Chain "C" Transaction*

In April and May of 1973 Prestige requested Appellant to negotiate charter contracts for a series of charter flights to be flown to Jamaica during the winter/spring of 1974. (R. 819)

Appellant sent the Prestige request to a number of airlines including Respondent. (R. 819) Prior to receiving the requests from Appellant, Respondent had not at any time received any independent or direct request from Prestige for the same flights. (R. 819) Thereafter, there followed a series of "routine" phone calls between Appellant, Prestige and Respondent to coordinate the Prestige request. (R. 821) During all of these negotiations Prestige made it clear to Respondent that they (Prestige) intended to use Appellant as "agent" for their (Prestige's) future flights. (R. 820)

Appellant spent a substantial amount of time in negotiations concerning the Chain "C" flights. (Tr. 45) Included among the items of negotiation conducted by Appellant was the matter of the deposit that might be required in connection with the Chain "C" charter with Respondent and other airlines. (Tr. 45) Appellant negotiated the deposit amount from $2,000 per flight to $750 per flight which resulted in the securing of the Chain "C" charter business for Respondent. (R. 822; Tr. 45, 46)

After the charter negotiations had begun, Appellant and Prestige entered into separate negotiations on the possibility of a merger of the two organizations. (R. 820) One term of the proposed merger was that Appellant would advance the deposits to cover Prestige's airplane charters. (R. 822)

Respondent brought the charter quotation to Salt Lake City to present to Appellant. (R. 821) Respondent prepared certain working documents for the Salt Lake City meeting which designated Appellant as "agent" in connection with such flights. (Ex. P-47, P-52)

At the meeting in Salt Lake City, Utah, there was complete agreement on the price and terms for the charter flights. The primary topic of discussion was who could pay the required deposit of $13,500, Appellant or Prestige. (R. 822)

Historically, Prestige had always paid its own deposits. (R. 818) However, Prestige expected Appellant to pay the deposits for the Chain "C" flights as part of the merger. Nevertheless, the merger negotiations broke down and as a result, Appellant refused to advance to Respondent the deposits for Prestige. (R. 822) Prestige even attempted to borrow the amount of the deposit from Appellant, which Appellant likewise refused because the proposed merger was not completed. (Tr. 92) Although the merger negotiations had broken down, the relationship between Appellant and Prestige was still fairly viable. Prestige continued to use Appellant as its agent. (Ex. P-24) Notwithstanding Appellant's refusal to pay the deposits for Prestige, Appellant had successfully completed all of its obligations as a broker by successfully negotiating the terms of the charter agreement between Respondent and Prestige. (R. 822)

On June 16, 1973, Respondent (Mansfield) left Salt Lake City and went to Chicago, Illinois to meet directly with Prestige. (R. 822, 823) Prestige executed the charter contract and five days thereafter mailed a check in the amount of $13,500.00 representing the deposits directly to Respondent. (R. 823) After some routine modifications with respect to departure points, 14 of the 18 flights originally contracted as Chain "C" were operated and flown at a total charter price of $432,912.32. (R. 823; Ex. P-50)

Respondent paid Appellant no commission for negotiating and selling the Chain "C" flights. Rather, Respondent entered into an arrangement with Prestige whereby the 5% commission went directly to Prestige. (R. 824; Tr. 318)

4. *Chain "D" Transaction*

In April and May of 1973, Prestige requested Appellant to negotiate charter contracts for a series of charter flights to be flown to Munich, Germany during the summer/fall of 1974. (R. 825)

Appellant forwarded the Prestige request to a number of airlines, including Respondent. (R. 825) Pursuant to Appellant's request, Respondent mailed price quotations to Appellant on July 10, 1973 for the Prestige flights to Munich. (R. 825; Ex. P-23)

On July 18, 1973, Prestige telephoned Appellant to request certain modifications in the series of Munich flights. Prestige confirmed the telephone call in a letter. (R. 826; Ex. P-24) On July 20, 1973, Appellant telephoned Respondent to double check the bids for the modified Munich dates. However, Respondent responded that it would not give Appellant quotes for

the modified series of flights to Munich. (R. 826) Respondent then wrote to Appellant stating in part:

> Per my telcon with Sharon, I did not quote the Prestige trips because they have also requested them from several other agents, and I don't want to be a shill at the auction.

(Ex. P-27)

Only ten days after the above-described letter, Respondent (Mansfield) went directly to Prestige to bid on the same charter flights to Munich. (R. 827) During those negotiations with Prestige, Respondent told Prestige that Respondent would not even transmit the quotes to Appellant. (R. 827; Ex. D-40)

Respondent completed its private negotiations with Prestige without the knowledge or consent or participation of Appellant. (R. 828) Those negotiations resulted in a contract for ten charter flights to Munich. (Ex. P-49) Nine of these ten flights were actually operated. (Ex. P-50) However, the sales program of Prestige went better than expected and nine additional flights to Munich were added and flown as a part of the same program, for a total charter price of $1,135,117.20. (Ex. P-50) It is not unusual to have a program sell so well that extra flights are added. (R. 824)

At the time the Chain "D" flights were consummated, Respondent already held $25,500 of money paid by Prestige as deposits for Chain "A" and Chain "C" flights negotiated by Appellant. (Tr. 277, 278) Prestige utilized those same deposits as deposits for the Chain "D" flights. (Ex. P-30) This amount represented a "floating deposit" negotiated between Prestige and Respondent and was assigned to airplanes that Prestige would contract with Respondent from August 16, 1973 forward. (Tr. 275, 276; Ex. P-30)

Respondent paid Appellant no commission for negotiating and selling the Chain "D" flights. Rather, Respondent entered into an arrangement with Prestige whereby the 5% commission went directly to Prestige. (R. 828; Tr. 318)

Prestige has continued to be a major customer of Respondent and has purchased several million dollars of charter flights in addition to Chains "A", "B", "C", and "D". (Tr. 125) Appellant makes no claim for any commissions on any subsequent charter flights or contracts.

ARGUMENT

POINT I

APPELLANT WAS THE PROCURING CAUSE OF THE SALE OF CHAIN "C" AND CHAIN "D" FLIGHTS FROM RESPONDENT TO PRESTIGE UNDER ORAL BROKERAGE AGREEMENTS AND A UNILATERAL CONTRACT WITH RESPONDENT AND IS ENTITLED TO JUDGMENT PURSUANT THERETO AS A MATTER OF LAW

The Statement of Facts clearly shows that Appellant's function as a travel agent within the air transportation industry is essentially that of a broker. The brokerage relationship has been generally described as follows:

> [*A*] *broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business* relative to the acquisition of contractual rights, or to the sale or purchase of any form of property....[Brokers] act as negotiators in bringing other persons together to bargain; generally, they ought not to sell or bargain in their own name, have no implied authority to receive payment, are not entrusted with possession of goods bought or sold, and have no special property or lien thereon....
>
> . . . .
>
> Although a broker is broadly speaking an agent, the word "agent" is a broader term than "broker", more comprehensive in its legal scope, for while every broker is in a sense an agent, not every agent is a broker. A broker is distinguishable from an agent generally by reason of the fact that his authority is of a special and limited character in most respects. He derives his power and authority to bind his principal from the instructions given to him by the principal. A broker is also distinguished from an agent in that a broker sustains no fixed or permanent employment by, or relation to, any principal, but holds himself out for employment by the public, generally, his employment in each instance being that of special agent for a single object, whereas an agent sustains a fixed and permanent relation to the principal he represents and owes a permanent and continued allegiance. *A broker does not cease to be a broker because he may also in some transactions act as agent of either or both of the parties thereto.* [Emphasis added.]

12 *Am Jur. 2d, Brokers* §§ 1 and 3, pp. 772-774.

When these general concepts of brokerage are compared with the facts of this case, it becomes clear that the travel agent, Appellant, was a broker or middleman for the purpose of negotiating charter flight contracts between the airline, Respondent *and the charter customer*, Prestige.[1] There is an abundance of authority in support of the proposition that a travel agent

1. In excess of 90% of defendant's charter flights are sold through travel agents.

> From 1967-1974 defendant spent approximately $2,793,000 in advertising. [Citation omitted.] Practically all of this advertising has been spent in cultivating travel agents. [Citation omitted.]
>
> In addition to the advertising program described above, defendant has a staff of approximately 50-60 full time personnel in the sales department including salesmen. The major effort of these salesmen is to visit travel agents and cultivate travel agents. [Citation omitted.]
>
> When salesmen visit travel agents, their purpose is to try to get the travel agent to utilize Capitol's services or go to clients and try to get them to form charter groups to be transported on Capitol. [Citation omitted.] The travel agent usually understands that there is a five percent agent's commission on charters; if not, the agent discusses the five percent commission program. [Citation omitted.]
>
> According to the practice followed by Capitol, the travel agent would locate a customer and participate in the negotiations of securing the prices and availability. (R. 809-810)

is essentially a broker and that the brokerage function may involve acting as agent for both the seller and the buyer in a business transaction if the parties are aware of and have consented to such a relationship. *See, Capitol International Airways, Inc., Enforcement Proceeding* (Docket 16370), 46 CAB Reports 385 (1967); *Levine v. British Overseas Airways Corp.,* 322 N.Y.S. 2d 119, 122, 66 Misc. 2d 820 (1971).

The Utah law with respect to brokerage generally is in acord. In *Foster v. Blake Heights Corp.,* 530 P.2d 815 (Utah 1974), the Supreme Court of Utah said:

> It is not always true that a broker who is negotiating a transaction must be exclusively the agent of one or the other. He may well be a "go-between" acting for both.

530 P.2d at 817.

An excellent law review article has also noted that the brokerage function of a travel agent may involve acting as agent for both the buyer and the seller. Wohlmuth, *The Liability of Travel Agents: A Study in the Selection of Appropriate Legal Principles, 40 Temple L.Q.* 29, 45, 52 (1966).

In the instant case, Respondent was clearly aware that Appellant was acting in this dual capacity at the time Respondent entered into the oral contract with Appellant. (R. 816, 819, 820, 825; Tr. 122; Ex. P-2, P-3) Therefore, the fact that Appellant may have been, in some respects, the agent for Prestige as well as the agent for Respondent does not detract from the contractual relationship between Appellant and Respondent.

The law is clear that a broker is entitled to a commission on a sale made directly between a buyer and a seller if the broker operated under an agency or brokerage contract with one of the parties and was the procuring cause of the sale. The leading Utah case on this point is *Frederick May & Company v. Dunn,* 13 U.2d 40, 368 P.2d 266 (1962). In that case, the plaintiff claimed a commission on the sale of certain corporate stock on which he had an oral contract to act as a broker. The defendant had sold the stock to a third party who had had prior dealings with both parties and who had been involved in negotiations for the sale of the stock with the plaintiff only as a potential financial backer for prospective purchasers. Negotiations with the plaintiff had always been initiated by the third party through the defendant. The plaintiff never offered the sale to the third party, but the defendant did. Based on these facts, the trial court granted summary judgment in favor of the defendant. On appeal, the Supreme Court of Utah said:

> [*A*] *broker must be the procuring cause in order to be entitled to a commission for such* [*a*] *sale.* The cases use many different words in conjunction with, or in place of the words, "procuring cause" to indicate the necessary extent the broker must induce the sale in order to be entitled to a commission, such as "proximate cause", "actuating cause", "moving cause", and the like; all meaning about the same thing. Usually, *whether the broker first approaches, or brings to the attention of the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in determining whether the buyer* [*sic*] [broker] *is the procuring cause of the sale.* The fact that the sale was consummated without participation by the broker in the final negotiation does not preclude him from recovering his commission if the sale was otherwise procured by him. [Emphasis added.]

13 U.2d at 43-44, 368 P.2d at 269.

The court then noted that the broker in *Frederick May* had not introduced the buyer and seller, had not offered to sell the stock to the buyer, never considered the buyer to be a potential buyer and that negotiations with the buyer as a financial backer were always initiated by the buyer through the seller rather than through the broker. Based on the unusual facts presented, the court held that the broker was not the procuring cause, and, therefore, affirmed the lower court's decision.

In the instant case, it is undisputed that Appellant introduced the seller, Respondent, to the buyer, Prestige.(Tr. 122; Ex. P-2, P-3) It is further undisputed that Respondent spent nearly $2.8 million between 1967 and 1974 on advertising to travel agents such as Appellant and maintained a staff of 50-60 full-time personnel to solicit travel agents such as Appellant to buy Respondent's services or to act as broker for those services to clients for a five per cent commission (R. 809-810); and further that Respondent made continuing offers to travel agents to act as buyers and brokers for its charter flights which were communicated to Appellant's principals. (R. 813) Such advertising has been characterized by Professor Wohlmuth in his article on the subject as a standing offer of a unilateral brokerage contract which is accepted when the travel agent brings the customer to the carrier. Wohlmuth, *The Liability of Travel Agents: A Study in the Selection of Appropriate Legal Principles, 40 Temple L.Q.* 29, 46 (1966).

With respect to the initial dealings between Respondent and Prestige, it is undisputed that Prestige, as a new and inexperienced tour operator, contacted Appellant in February and March of 1973 requesting that Appellant assist it in arranging charter flights to Jamaica *(R. 815-816; Tr. 288);* that pursuant to such request, Appellant obtained quotes from Respondent for such flights, known as Chain "A" flights, and negotiated flight dates, points of departure, prices and deposits required in connection with the flights between Respondent and

Prestige (R. 816-817); and that Respondent entered into a contract with Prestige for such Chain "A" flights which was later modified as to schedule, such modifications being common in the charter business. *(R. 818, 823-824)*

With respect to the Chain "C" flights, it is undisputed that in April and May of 1973 Prestige requested Appellant to assist it in arranging the Chain "C" flights (R. 819); that Appellant was assured on at least one occasion by Respondent that Respondent would quote prices of Chain "C" flights and that Respondent would pay Appellant a five percent commission on such flights if the flights were sold and an agency agreement was executed (R. 819); that Respondent promised Appellant during the Chain "C" negotiations that Appellant would get the five per cent commission on any requests which Appellant initiated with Respondent which were later sold and that Respondent would not sidestep Appellant to deal directly with Appellant's clients or quote those clients prices net of commissions. (Tr. 42-43, 216-217)

The undisputed facts further show that Appellant, in reliance on the promises of Respondent, obtained quotes on Chain "C" flights and negotiated flight dates, points of departure, prices and deposits required in connection therewith between Respondent and Prestige (R. 819, 821-822); that particularly with respect to the negotiation of required deposits, Appellant was able to negotiate rates discounted 62% from the normal deposit required by Respondent to the benefit of Prestige (R. 822; Tr. 45, 275); that Respondent had not received any request from Prestige on the Chain "C" flights prior to receiving requests from Appellant (R. 819); that in processing the final paperwork for the Chain "C" flights Respondent twice formally acknowledged that Appellant was the agent for the transaction (Ex. P-47, P-52); that historically Prestige had always paid its own deposits (R. 818; Tr. 59); that as part of the merger negotiations between Appellant and Prestige, Prestige requested that Appellant pay the deposit on the Chain "C" flights or loan the money to Prestige to pay the same (Tr. 92); *that the merger negotiations between Appellant and Prestige broke down after all negotiations were completed on flight dates, points of departure, prices and deposits required for the Chain "C" flights* (R. 822); that after Appellant refused to pay Prestige's deposit, Respondent went directly to Prestige and executed the contract on the Chain "C" flights without concurrent payment by Prestige of the required deposits (R. 822-823); that Prestige thereafter paid the deposits which had been negotiated by Appellant on the Chain "C" flights (R. 822-823); that

the Chain "C" flights were later flown by Respondent on the terms negotiated by Appellant with routine modifications in schedules *except that Respondent sold the Chain "C" flights to Prestige on a net basis, i.e., gross charter price less the amount of the five per cent brokerage commission* (R. 823-824; Tr. 179-180); that Respondent did not require gross price payment from Prestige although it had earlier promised Appellant that it would do so and that Appellant had asserted a right to the commissions on Chain "C" flights. (R. 824; Tr. 43) It is further noted that notwithstanding a claim that Mr. Mansfield, the Regional Vice President for Sales of Respondent, was confused during his testimony, it is clear from his testimony that where there is a dispute between the parties claiming entitlement to commissions it is Respondent's practice to not pay anyone until the dispute is settled. (Tr. 177) Obviously, the withholding of the commissions by Prestige with the consent of Respondent is a clear breach of Respondent's practice.

With respect to the original Chain "D" flights, it is undisputed that in April and May of 1973 Prestige requested that Appellant assist it in arranging charter flights to Munich, Germany which became known as Chain "D" flights (R. 825); that Respondent agreed to quote prices on such flights to Appellant and to pay Appellant a five per cent commission if the flights sold and an agency agreement was executed by Prestige (R. 825); that Respondent promised Appellant on more than one occasion during the Chain "D" negotiations that Appellant would receive the five percent commission on any requests which Appellant initiated with Respondent which later sold and that Respondent would not sidestep Appellant to deal directly with Appellant's clients or quote those clients prices net of commission. (Tr. 42-43, 216-217)

The facts are further undisputed that Appellant in reliance on the promise of Respondent that it would receive a five percent commission did obtain quotes from Respondent on Chain "D" flights which it communicated and negotiated with Prestige (R. 825; Tr. 42);that Prestige later requested that Appellant assist it in negotiating a modified schedule of flights under Chain "D" (R. 826); that Respondent refused to quote such flights to Appellant at a point in time immediately following Respondent's sidestepping of Appellant to close the Chain "C" flights' contract directly with Prestige (R. 826-827); that Respondent subsequently negotiated Chain "D" flights directly with Prestige (R. 827); and that Respondent modified its proposal

on Chain "D" flights so that it could meet lower bids which had been negotiated for Prestige by Appellant. (R. 827-828)

Finally, the evidence is undisputed that Respondent created a unique deposit system for Prestige which allowed Prestige to utilize the deposits negotiated by Appellant on the Chain "A" and Chain "C" flights as a floating deposit for the Chain "D" flights and any future business between Prestige and Respondent (R. 822; Tr. 168-169; Ex. P-30); that the Chain "D" flights were later flown by Respondent on the terms which had originally been negotiated by Appellant with routine modifications in schedules and the addition of certain flights, *except that Prestige was allowed to use the floating deposit and the flights were sold to Prestige at an amount less the 5% brokerage commission* (R. 828; Tr. 179-180); and that Respondent did not require from Prestige the payment of the gross charter price although it had earlier promised Appellant that it would and Appellant had asserted a right to the commissions on the Chain "D" flights. (R. 828; Tr. 43)

In the wake of such an enormous wave of undisputed facts, it is abundantly clear that Appellant was, in fact, the procuring cause of the sale of the Chain "C" and Chain "D" flights under the requirements of *Frederick May.* In fact, Respondent has never contended that Appellant was not the procuring cause of the sales of the Chain "C" and Chain "D" flights. There simply are no facts to support such a position and Respondent knows that that is the case. Yet, the trial court refused to make a finding on this material issue.

The undisputed facts also clearly establish that Appellant was operating under a brokerage or agency agreement with Respondent. This agreement was established both as the result of Appellant's performance by bringing Prestige to Respondent under the unilateral offer made by Respondent through its advertising, offering Appellant and numerous other travel agents a five per cent commission for acting as its agent in negotiating for the sale of its charter flights to clients of the agents (*see,* Wohlmuth, *supra),* and the direct oral agreements made with Appellant as a result of Appellant's contacts with Respondent concerning the flights for Prestige.

Under *Frederick May,* Appellant is entitled to a five per cent commission on the Chain "C" and Chain "D" flights sold by Respondent to Prestige because Appellant was operating under an agency or brokerage agreement and because Appellant was the procuring cause of the sales to Prestige. In *Frederick May,* the court specifically determined that it is not necessary

that the broker participate in final negotiations or consummation of the sale to be entitled to his commission if the sale was otherwise procured by the broker. In the instant case, the signing of the charter agency agreement is obviously a mere formality of closing and the modified schedules are clearly foreseeable and simply matters of final negotiation.

The Utah rule is generally recognized and accepted. In *Abels v. Iceland Products, Inc.,* 274 F.2d 213 (7th Cir. 1960), the plaintiff had served as a broker for the defendant under an oral contract for a five per cent commission through various business entities over the course of approximately four years. The defendant terminated the brokerage agreement and commenced selling directly to the plaintiff's customers. The trial court awarded commissions to the plaintiff on the ground that the plaintiff had been, prior to his termination, the procuring cause on certain of the sales made subsequent to such termination. There was undisputed evidence that prior to termination the buyers had been brought to the seller and the broker had conducted negotiations on the sales in question. The court held that, even though the total amounts of sales to be made had not been finally determined prior to termination and that with respect to one of the customers the prices were renegotiated after termination, plaintiff was entitled to commission on the sales made pursuant to the dealings in which he had engaged prior to termination.

There is an abundance of case law on the subject of the right of an agent or broker who is the procuring cause of the sale in real estate transactions to a commission on such sale after the agent or broker has been circumvented by the buyer and seller. Unfortunately, it is not unusual for a buyer and seller introduced by a real estate agent or broker to attempt to "save the commission" by either feigning disinterest for a period of time and later consumating the sale or by going directly behind the broker's back to consummate a sale at a price less the broker's commission or conclude such sale on slightly different terms. *See, Tucker v. Green,* 96 Ariz. 371, 396 P.2d 1 (1964); *Hiller v. Moore Realty Co.,* 483 P.2d 415 (Colo. App. 1971); *Hanson v. Schletzbaum,* 192 Kan. 265, 387 P.2d 176 (1963); *Lindsey v. Cranfill,* 61 N.M. 228, 297 P.2d 1055 (1956).

The principle that a broker who is the procuring cause of a sale is entitled to a commission has been upheld in a recent case in the Arizona Court of Appeals under facts strikingly similar to those in the instant case. In *Mohamed v. Robbins,* 23 Ariz. App. 195, 531 P.2d 928 (1975), the plaintiff had entered into a 90 day brokerage contract with the defendant under which the

defendant promised that if a sale was made after the 90 day period to a buyer with whom the plaintiff was negotiating at the expiration of the agreement the plaintiff would still receive his commission. The plaintiff commenced negotiations with the highway department on the sale of the property. However, because of bureaucratic and procedural delays, negotiations could not be commenced in earnest until after the listing agreement had expired. *The highway department informed the plaintiff that it could not negotiate through him as the broker unless he obtained a written authorization from the defendant. The defendant refused to give such an authorization.* Nearly a year after the brokerage agreement had expired and following a series of negotiations between the buyer and seller, a deal was consummated without participation by the broker. The Court said:

> The dispositive question before us is whether plaintiff was the procuring cause of the sale...
>
> ....
>
> It is well settled real estate law that generally a broker who is the "procuring cause" of a sale under a listing agreement is entitled to a commission. [Citation omitted.] In the absence of a specific agreement to the contrary, if it can be shown that acts constituting the procuring cause occurred during the life of the listing contract, the commission has been earned even though the time provisions thereof may have expired prior to the consummation of the sale. [Citation omitted.]
>
> In Clark v Ellsworth, [citation], the term "procuring cause" was defined as follows:
>
> > "[A] cause *originating* a series of events which, without break in their continuity result in accomplishment of the prime objective of employment of the broker—producing a purchaser ready, willing and able to buy real estate on the owner's terms." (Emphasis in original)
>
> . . . .
>
> The fact that plaintiff took no part in the concluding negotiations is immaterial as long as the procuring cause is gleaned in his favor from the evidence. [Citations omitted.]

531 P.2d at 929-931.

The court went on to point out that it was immaterial that the plaintiff was not present in the concluding negotiations and the consummation of the sale and that the defendant had rejected an offer of the buyer during that period. Under the facts of that case, the court concluded that plaintiff was the procuring cause of the sale.

Without belaboring the point, the facts in the instant case indicate clearly that Appellant was the procuring cause of the sale of Chain "C" and Chain "D" charter flights to Prestige. Yet Respondent seeks to defeat Appellant's entitlement to commissions for those sales simply by asserting that Prestige refused to sign charter agency agreements after Appellant had

already initiated, and, in the case of the Chain "C" flights, completed negotiations. Chain "D" negotiations would no doubt have been completed had Respondent not refused to quote prices on the modified series to Appellant. Such a claim rings familiar to the seller's refusal in *Mohamed* to sign an authorization after the fact. Under the holding of *Frederick May, Abels, Mohamed* and a vast majority of the cases on point, it is clear that Appellant is entitled to its commission whether or not the charter agency agreement was signed by Prestige, whether or not Appellant participated in final negotiations or the consummation of the sale, and whether or not Appellant was terminated as the broker or agent prior to the consummation of the sale because Appellant operating under a brokerage agreement was the procuring cause of the sales which were eventually consummated. Any other holding would be inconsistent with precedent and manifestly unjust to Appellant.

POINT II

THE CONDUCT OF RESPONDENT IN DEALING DIRECTLY WITH THE CUSTOMER (PRESTIGE) PROCURED BY APPELLANT CONSTITUTED A WAIVER OF THE REQUIREMENT THAT THE CHARTER AGENCY AGREEMENT BE EXECUTED BY PRESTIGE AND FURTHER CONSTITUTED A BREACH OF THE BROKERAGE AGREEMENT AND AGENCY RELATIONSHIP BETWEEN THE PARTIES

Respondent contends that Appellant is not entitled to commissions on the Chain "C" and Chain "D" flights solely because Prestige refused to sign a document entitled "Charter Agency Agreement" in connection with such flights. The brokerage arrangement between Appellant and Respondent contemplated that the three parties (Appellant, Respondent and Prestige) would each sign Respondent's standard form brokerage agreement. (R. 819, 825) The apparent intent was that a separate charter agency agreement would be signed for each "chain" of

flights. The three parties did sign such an agreement in connection with the Chain "A" flights. (Ex. D-51)

The refusal of Prestige to sign the charter agency agreement should not defeat Appellant's claim for a five percent commission on the Chain "C" and Chain "D" flights because:

1. *Respondent's Own Conduct in Dealing Directly with Prestige Prevented Execution of the Charter Agency Agreements.*

The undisputed facts in the instant case, as more fully set forth in the statement of facts and Point I *supra,* clearly demonstrate that Respondent hindered and prevented the performance of the condition by dealing directly with Prestige at prices net of broker's commission and refusing to quote prices on Chain "D" flights as modified to Appellant.

It is undisputed that negotiations on Chain "C" flights were completed during or prior to Respondent's meetings with Appellant in Salt Lake City, Utah in June of 1973 and that prior to such meetings Respondent had agreed to quote prices on Chain "D" flights to Appellant. It is further undisputed that after such meetings and in the middle of negotiations on Chain "D" flights Respondent immediately proceeded to deal directly with Prestige to consummate the sale of Chain "C" flights, refused to quote prices on the modified Chain "D" flights to Appellant and thereafter negotiated Chain "D" flights as modified directly with Prestige and consummated their sale. It is likewise undisputed that the prices paid by Prestige for Chain "C" and Chain "D" flights were net of the five percent brokerage commissions and finally that the five percent was withheld by Prestige without the authorization or consent of Appellant and that such withholding was in direct conflict with Respondent's practice of holding disputed commissions until the entitlement thereto had been determined.

There is only one reasonable inference from these facts, i.e., *that Respondent gave Prestige the opportunity to bypass Appellant and to "save" the five percent commission on its dealings with Respondent.* Thus Respondent by its actions and in violation of its promise to Appellant hindered and prevented Appellant from getting the charter agency agreements signed by Prestige. Respondent, in fact, gave Prestige an "incentive" *not* to sign the charter agency agreements. This "incentive" was the five percent brokerage commission which equalled an amount in excess of $75,000.00. (Ex. P-50) The "incentive" also included a unique deposit arrangement which would serve to reduce the "up front" flight deposit amounts cementing

a long term relationship between Respondent and Prestige. There is no question but that the deal was highly successful (Tr. 125) and that Appellant was effectively excised therefrom.

Under such clear evidence of interference, hindrance and bad faith Respondent waived and excused the condition of signing the charter agency agreement and is estopped from raising the condition as a defense as a matter of law.

It is by now a "hornbook" rule of settled law that a party to a contract cannot escape his obligations under a contract by claiming failure of a condition when it was his conduct which prevented the fulfillment of the condition. *See, Concrete Specialties v. H. C. Smith Construction Co.,* 423 F.2d 670, 672 (10th Cir. 1970); *Gridiron Steel Co. v. Jones & Laughlin Steel Corp.,* 361 F.2d 791, 794 (6th Cir. 1966); *Travelers Indemnity Co. v. West Georgia National Bank,* 387 F. Supp. 1090, 1095 (D. Ga. 1974); *Security National Life Insurance Co. v. Pre-Need Camelback Plan, Inc.,* 19 Ariz. App. 580, 509 P.2d 652, 654 (1973); *Restatement of Contracts* § 295 (1932). The party taking such a position is regarded as having waived or excused the condition or as being estopped from raising it in his defense. *See, Fowler v. Dana,* 7 Ariz. App. 72, 436 P.2d 166, 168 (1968); *Weather-Guard Industries, Inc. v. Fairfield Savings & Loan Assn.,* 248 N.E. 2d 794 (Ill. 1969); *Cladianos v. Friedhoff,* 69 Nev. 41, 240 P.2d 208, 210 (1952); *Rogers v. Goodwin,* 208 Okl. 110, 253 P.2d 844, 846 (1953).

It is interesting to note that in *Capitol International Airways, Inc., Enforcement Proceeding* (Docket 16370), 46 CAB Reports 385 (1967), Respondent contended that it should be excused from its contractual obligations because the travel agent's conduct prevented it from performance. 46 CAB Reports at 387.

"Broker cases" such as the instant case often present a situation in which a broker has presented to a seller a buyer who is ready, willing and able to purchase. However, the broker is prevented from consummating the sale because the seller either refuses to sell or deals directly with the buyer in an effort to "save" the broker's commission. *See, Abels v. Iceland Products, Inc.,* 274 F.2d 213 (7th Cir. 1960); *Weniger v. Union Center Plaza Associates,* 387 F. Supp. 849 (S. D. N. Y. 1974); *Mohamed v. Robbins,* 23 Ariz. App. 195, 531 P.2d 928 (1975); *Manzo v. Park,* 220 Ark. 216, 247 S.W.2d 12 (1952); *Hiller v. Moore Realty Co.,* 483 P.2d 415 (Colo. App. 1971); *Winkelman v. Allen,* 519 P.2d 1377 (Kan. 1974); *Lindsey v. Cranfill,* 61

N.M. 228, 297 P.2d 1055 (1956); *Bonn v. Summers,* 249 N.C. 357, 106 S.E.2d 470 (1959).

In *Weniger,* the U.S. District Court for the Southern District of New York stated and cited the applicable principle of law very clearly:

> *It should be observed, however, that even where the broker and seller expressly provide that there shall be no right to a commission unless some condition is fulfilled, and the condition is not performed, the seller will nevertheless be liable if he is responsible for the failure to perform the condition.* [Citing cases.] [Emphasis in original.]
>
> . . . .
>
> In the instant case, the Court finds as a fact that the events specified in the payment provision of the brokerage agreement failed to occur solely as the result of defendants' conduct...*Such being the case, defendants cannot now invoke the conditions precedent recited in the August 1967 agreement as a bar to Plantiff's claim.*
>
> *If a promisor himself is the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of the failure* [Citations omitted.] "It is a well settled and salutary rule that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself." [Citing a case.] "*It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it.*" [Citations omitted.] [Emphasis added.]

387 F. Supp. at 863-864.

In *Lindsey v. Cranfill,* the New Mexico Supreme Court summarized the rule as it applies to the instant case when it said:

> We find the law to be that if the agent is employed for the purpose of procuring a buyer and actually puts forth effort about his agency, and procures a buyer to whom the owner later sells, and because of the fraud, wrongful act or bad faith of the owner it is made impossible for the agent to further pursue his efforts to bring about a sale, the agent is nevertheless entitled to the reasonable value of his services. [Citations omitted.]

297 P.2d at 1059.

It is clear that Utah follows these well established rules of law. *See, Fischer v. Johnson,* 525 P.2d 45 (Utah 1974); *Haymore v. Levinson,* 8 U.2d 66, 328 P.2d 307 (1958); *Curtis v. Mortenson,* 1 U.2d 354, 267 P.2d 237 (1954).

Whatever excuses or windowdressing Respondent may offer, the net legal effect is that Respondent fired Appellant in the middle of the negotiations. Respondent spent substantial sums in advertising to promote travel agents to sell Respondent's Charter flights. Nowhere did Respondent say in its advertising that it would quote on some flights and not on others. Nowhere did Respondent say in its advertising that it would deal directly with certain select

customers after the travel agent had made the introductions and commenced negotiations. Moreover, Respondent specifically agreed to give Appellant the price quotations for the Prestige account. (R. 819, 825)

The law is well settled that a broker whose employment is wrongfully terminated may sue for damages and is entitled to recover such prospective profits as would have been his but for the wrongful termination. *Abels v. Iceland Products, Inc.,* 274 F. 2d 213 (7th Cir. 1960); *Manzo v. Park,* 220 Ark. 216, 247 S.W.2d 12 (1952); *Bonn v. Summers,* 249 N.C. 357, 106 S.E.2d 470 (1959); *Restatement (Second) of Agency* § 455 (1958). In the instant case, Appellant is clearly entitled to commissions on the Chain "C" and Chain "D" flights.

2. *The Execution of the Charter Agency Agreement Was Not a Condition But Was Rather a Mere Formality.*

If the execution of the charter agency agreement was as important as Respondent now contends, Respondent would have circulated the same to be executed at the beginning of the parties' relationship (i.e., before the charter contract negotiations began). However, the record shows that Capitol *never* produces the document for signatures *before* the charter contract negotiations. Capitol *always* circulates the document for signatures after all the negotiations for the sale of the charters are completed. (R. 811) The fact that the charter agency agreement is always signed after the broker finishes his work clearly shows that its execution is a mere formality.

The parties did execute a charter agency agreement for Chain "A" flights. (Ex. D-51) However, Respondent did not request Appellant's signature on the charter agency agreement until eighteen days after the Chain "A" flights had been negotiated by Appellant and finalized between Prestige and Respondent. (R. 817) In fact, in transmitting the charter agency agreement for Appellant's signature, Respondent stated, "[E]nclosed please find our agency agreement covering the six Prestige Vacation charters to Montego Bay.... We must have these forms in order to *process* your 5% commission." [Emphasis added.] (Ex. D-11) Respondent's conduct

with respect to the Chain "A" flights further demonstrated that it considered the execution of the charter agency agreement as a mere formality rather than as the essential condition and "binding event" which Respondent now urges the court to find it. The charter agency agreement was executed on Chain "A" flights prior to the time when Respondent and Prestige decided to cut Appellant out of the arrangements in late June or early July of 1973. However, in the Fall of 1973 after Respondent and Prestige had developed a close relationship, the Chain "A" flights had been flown and paid for and Appellant's commission was due and notwithstanding the fact that all parties had signed the agreement (Ex. D-51), Prestige instructed Respondent to "freeze" the payment of Appellant's commission. (R. 818; Ex. D-43) Respondent promptly complied and continued to comply, notwithstanding Appellant's demand for payment of the commissions, until suit was filed and settlement was reached with Prestige. (R. 818; Ex. D-53) Surely, if Respondent considered the execution of the charter agency agreement to be such a "binding" factor in the relationship with Appellant, it would not have obeyed Prestige's conflicting instruction.

3. *Enforcement of the Condition Would Result in an Unconscionable Forfeiture After Substantial Performance.*

It is well established that forfeitures are not favored by the courts *Green v. Palfreymen,* 109 U. 291, 300, 166 P.2d 215, 219 (1946), opinion amended and rehearing denied, 109 U. 303, 175 P.2d 213 (1946); and that a court is loathe to enforce a forfeiture. *Swain v. Salt Lake Real Estate & Investment Co.,* 3 U.2d 121, 123, 279 P.2d 709, 711 (1955). This is especially true where the party that would forfeit all rights as a result of enforcement has substantially performed his obligations under the contract. *See, Mackey v. Eva,* 80 Ida. 260, 328 P.2d 66, 70 (1958); 5 *Williston on Contracts* § 805, p. 838 (3d ed. 1961).

Thus, the condition of having the charter agency agreements executed its rendered unenforceable because it unconscionably required substantial performance by the Appellant *prior* to its fulfillment and left its fulfillment at the discretion of a third party (Prestige) whose interests might then be, and in the instant case were then, in fact, adverse to those of Appellant. Thus enforcement of the condition would operate as a total forfeiture of Appellant's rights after substantial performance.

As more fully set forth in the Statement of Facts, *supra,* Respondent entered into an oral brokerage agreement with Appellant under which Appellant was to find a customer (Prestige),

to transmit bids to Prestige for charter flights and through negotiation of charter prices, schedules and deposits required on the Chain "C" and Chain "D" flights to secure the business for Respondent. Appellant was to perform these services, to bring Respondent and Prestige together in an arrangement that both could live with.

It is undisputed that in fact Appellant did perform each and every term of the agreement. The flights were secured from Respondent and were flown as negotiated, contracted and agreed upon. (R. 823-824, 828; Ex. P-50) Then after the parties reached complete agreement on the terms of the sale and as an adjunct to consummate the sale. Appellant was to secure the execution by Prestige of a charter agency agreement as a final requirement prior to receipt of Appellant's brokerage commission.

However, by reason of Respondent's direct dealing with Prestige, the agreement was not executed by Prestige *because Prestige obviously had received what it wanted and no longer needed the services of Appellant and Respondent had received what it sought, i.e., charter contracts representing in excess of $1.5 million of charter flights.* Even more importantly through the manipulation of deposit arrangements and payment of commissions to Prestige, Respondent would and did cement an on-going business relationship with Prestige.

Appellant therefore submits that as heretofore argued in Point I, *supra,* Appellant is entitled to the commissions irrespective of the execution of the charter agency agreements because under the undisputed facts Appellant was the procuring cause of the sale of the Chain "C" and Chain "D" flights under oral brokerage contracts with Respondent and as such is entitled to the commissions as a matter of law.

However, even assuming *arguendo* that the execution of the charter agency agreement was a condition precedent to Appellant's right to commissions under such brokerage contracts (which assumption ignores the unilateral contract and the oral contracts with Respondent which required no execution and further ignores Appellant's performance thereunder), Respondent waived that condition and is estopped from raising it as a defense because its unfair conduct in negotiating directly with Prestige during the middle of Appellant's negotiations and allowing Prestige to purchase the Chain "C" and Chain "D" flights at an amount net of commission, prevented the condition from being fulfilled. Furthermore, the execution of the agreement must have been a formality or the condition itself is rendered unenforceable because it requires forfeiture after substantial performance.

POINT III

RESPONDENT CANNOT AVOID LIABILITY TO APPELLANT FOR COMMISSIONS DUE APPELLANT UNDER THE REGULATIONS OF THE CIVIL AERONAUTICS BOARD

That the judgment rendered by the court on September 22, 1975 (R. 846-847), was based in part upon a consideration by the court of Rules and Regulations of the Civil Aeronautics Board is clear upon a reading of the judgment itself and the Findings of Fact and Conclusions of Law made and entered by the court on September 11, 1975. (R. 797-804)

Indeed, the Court found that under the regulations of the Civil Aeronautics Board, Appellant may not recover from Respondent because there is no written agreement between them (Conclusion of Law VI [R. 803]), and that notwithstanding the testimony of Mr. DeBry, an officer of Appellant, that Appellant is not directly regulated by the Civil Aeronautics Board (Tr. 16), the Court found that the regulations promulgated by the Civil Aeronautics Board "...are binding on Plaintiff (Appellant) and Defendant (Respondent)". (Conclusion of Law IV [R. 803])

It is ironic that Capitol should rely on Part 208 of the Civil Aeronautics Board, Economic Regulations, effective June 21, 1973 *(see, Federal Register,* Vol. 38, No. 104, pp. 14274, *et seq.,)* to shield itself from liability for the payment of commissions to Appellant when the clear purpose of the Regulations is to place limitations on the *operating authority of supplemental air carriers such as Respondent* for the obvious purpose of protecting the public from unrestricted authority of the supplemental air carrier. Furthermore, in a previous case involving a charter flight dispute brought before the Civil Aeronautics Board, Respondent had contended that where the issues involved were of contract and agency, the issue should be left to the courts and decided, presumably, on principles of contract and agency law. *Capitol International Airways, Inc., Enforcement Proceeding* (Docket 16370), 46 CAB Reports 385, 395 (1967).

Section 208.31a of the Civil Aeronautics Board Regulations, *supra,* provides with respect to written agreements with *ticket agents* the following:

> Each agreement between a supplemental air carrier and any ticket or cargo agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects.
>
> . . . .
>
> (d) The charter or lease of aircraft.

Federal Register, Vol. 38, No. 104 – Thursday, May 31, 1973, at 14277.

While it may be seriously questioned that said Regulation even applies to a broker such as Appellant under the facts of the instant case, assuming *arguendo* that it may apply, it is clear from the statute under which the regulations are promulgated that said Regulation does not apply in the instant case.

While there is no question as to the right of the Civil Aeronautics Board to promulgate regulations to govern air carriers, the *Federal Aviation Program,* 49 U.S.C.A. Sec. 1301, et seq. contains a specific statutory provision with respect to available remedies and provides:

> Sec. 1506. Remedies Not Exclusive.
>
> Nothing contained in this Chapter shall in any way abridge or alter the remedies *now existing* at common law or by statute, *but the provisions of this chapter are in addition to such remedies.* (Public Law citation omitted) [Emphasis added]

49 U.S.C.A., Sec. 1506

The plain language of the Statute clearly indicates that *the Regulation cannot abridge or abrogate any common law remedy.*

There can be no serious question raised to the proposition that an oral brokerage contract is enforceable at common law and this is especially true where there has been full or partial performance of the same by a contracting party.

The general rule with respect to oral brokerage contracts is stated at *12 Am Jur 2d, Brokers* § 41, p. 803 as follows:

> Statutes requiring contracts for the employment of brokers to be in writing *are in derogation of the common law* and should be strictly construed and interpreted in the light of the legislative intent promoting their enactment. *The Courts will not permit such a statute to be used as an instrument of fraud.* (Emphasis added)

Undoubtedly relying on the language of § 208.302 of said Regulation the trial court found that as a result of the settlement of a suit between Appellant and Prestige, Appellant received from Prestige a sum of money which constituted at least in part commissions on the Chain "C" and Chain "D" flights. (Finding of Fact XV [R. 802]) The Court made and entered its conclusion of law based thereon that the Appellant may not recover from Respondent "because Plaintiff (Appellant) has already received commissions for the same flights." (Conclusion of Law VII [R. 803])

Section 208.302 of the Civil Aeronautics Board Regulations, *supra,* provides with respect to commissions paid by direct air carriers to travel agents, the following:

> No direct air carriers shall pay a travel agent any commission in excess of 5 per cent of the total charter price or more than the commission related to charter flights paid to an agent by a carrier certificated to fly the same route, whichever is greater.

Federal Register, Vol. 38, No. 104 - Thursday, May 31, 1973, at 14281.

The trial court found that as a result of the settlement of a suit between Appellant and Prestige, Appellant received from Prestige a sum of money which constituted at least in part commissions on the Chain "C" and Chain "D" flights. (Finding of Fact XV [R. 802]) The Court made and entered its conclusion of law based thereon that the Appellant may not recover from Respondent "because Plaintiff (Appellant) has already received commissions for the same flights." (Conclusion of Law VII [R. 803])

The Civil Aeronautics Board Regulations *do not direct the air carrier as to whom the applicable commissions should be paid in the event of an existing dispute between the travel agent and its customers as to the right to receive such commissions.*

Respondent is attempting to shield itself from liability to Appellant in reliance on such regulations where there was an admitted dispute as to Appellant's claim for commissions on the Chain "C" and Chain "D" flights. This position was argued by Respondent notwithstanding the testimony of Mr. Mansfield, Regional Vice President of Sales, that where a dispute has arisen between two parties as to their entitlement to commissions that Respondent doesn't "pay anyone until the dispute is settled". (Tr. 177) Rather than following Respondent's normal, usual business practice in that regard, Respondent permitted the deduction of the five per cent commission on the Chain "C" and Chain "D" flights by Prestige. (R. 823-824, 828; Tr. 179-180)

The Record in the instant case is absolutely devoid of any factual support for the conclusion of law made and entered by the trial court. In fact, the Stipulation of the parties filed with the court with respect to the Chain "C" flights and the Chain "D" flights provides that "Prestige deducted the five per cent commission from monies collected from charterers and nothing was paid by Capitol (Respondent) to Plaintiff (Appellant)." (R. 824, 828) Thus it is clear that Respondent did not pay commissions to Appellant and it is likewise clear that Prestige did not pay Appellant with respect to any of the flights in question, i.e., Chain "C" and Chain "D" flights. *(Tr. 318)*

Assuming *arguendo* that Appellant did receive as a part of its settlement with Prestige

certain amounts representing commissions on the Chain "C" and Chain "D" flights, *which assumption ignores the stipulation of the parties and the expressed language of the Release between Appellant and Prestige (Ex. D-53),* it necessarily follows, even after the application of the regulations adopted by the Court as a basis for its Findings of Fact and Conclusions of Law, that Appellant would not be precluded from receiving the balance of such commissions.

However, the facts with respect to the release of Prestige by Appellant as evidenced by the executed release between the parties (Ex. D-53), clearly reflects that such release was executed in connection with the commissions due on the Chain "A" flights (R. 818), for which Appellant makes no claim against Respondent in the instant litigation and the parties so stipulated. It is further evident that the release was executed by and between Appellant and Prestige and Respondent was in no way a party thereto.

To permit Respondent to shield itself from liability to Appellant based upon the regulations of the Civil Aeronautics Board would be to permit the Civil Aeronautics Board to usurp the function of the judicial system *in determining the entitlement to brokerage commissions where a dispute exists between parties.* Such a determination by this Court would likewise permit an airline to pay to or permit withholding of a brokerage commission by a customer without regard to such airlines contracts, legal obligations and without responsibility for such conduct. Certainly, the regulations of the Civil Aeronautics Board do not contemplate such a result.

POINT IV

THE CONCLUSIONS OF LAW ADOPTED BY THE COURT WERE NOT SUPPORTED BY THE FINDINGS OF FACT OR THE EVIDENCE AND APPELLANT'S MOTION TO SET THE SAME ASIDE AND THE JUDGMENT ENTERED THEREON OR IN THE ALTERNATIVE FOR NEW TRIAL SHOULD HAVE BEEN GRANTED

On motion timely made and filed, Appellant moved to set aside the Findings of Fact and Conclusions of Law and the Judgment entered thereon or in the alternative for a new trial. (R. 829-845)

Certain of the Findings of Fact which the court adopted as Conclusions of Law to the extent that any of the same were Conclusions of Law and vice versa (Finding of Fact XVI [R. 802], Conclusion of Law X [R. 804]) were wholly unsupported by any evidence at the trial.

With respect to Finding of Fact XV adopted by the Court (R. 802), as discussed in Point III, *supra,* there is a total lack of any evidence that Appellant received any sums as payment of commissions due on the Chain "C" and Chain "D" flights in connection with the settlement of the Prestige litigation or other wise. In point of fact, such a finding is directly contrary to the stipulation of the parties which stipulation states as follows:

> On 2/27/74 plaintiff and Prestige entered into a settlement agreement and a release was signed. A copy of that agreement is attached hereto and appears as exhibit D53 hereof. A copy of the release is attached hereto marked exhibit D53. On 2/27/74 the check of Capitol payable to Prestige and plaintiff in the sum of $7, 287.00 was delivered to plaintiff, which check represented the agent's commission of five per cent of the sales price of the five flights operated as Chain "A".

(R. 818)

Furthermore, the evidence (including the stipulation of the parties) is clear and undisputed that the commissions on the Chain "C" and Chain "D" flights were retained by Prestige. (R. 824, 828; Tr. 178, 179, 180) As such, the adoption by the court of such finding and Conclusion of Law VII (R. 803) based thereon was clearly error.

The court recognized the obvious problem in adopting this finding as indicated in the following discussion between the court and counsel during the argument of Appellant's motion:

> THE COURT: What do you want to do with finding fifteen then?
>
> MR. SESSIONS: I want to delete it.
>
> MR. CHILD: Oh, Your Honor, this is one of the legal theories upon which this case should be dismissed.

THE COURT: But not one upon which I base my findings.

(Tr. 345)

That the Court was uneasy with respect to *all the findings adopted* was further demonstrated during argument as follows:

> THE COURT: These are the facts that you stipulated to and I have no choice but to adopt them as the findings of the Court.
>
> MR. SESSIONS: We agree.
>
> MR. CHILD: Right.
>
> THE COURT: They are probably a little more extensive than we would normally make but can't we base our conclusions on these facts?
>
> MR. SESSIONS: We certainly can base our conclusions on those facts. We disagree with the conclusions.
>
> THE COURT: I understand you do. If you didn't we wouldn't be here. Why don't we do that?
>
> . . . .
>
> THE COURT: No. I mean as a substitute.
>
> MR. CHILD: Oh, I think we need the findings of fact as entered also, Your Honor. They have been well thought out and they support any theories that are required. You see, the stipulated findings of fact were calculated in such a way as to express both sides' theories of the case, the facts that both sides could live with and they were not conclusive on the factual findings that the Court had to make.
>
> THE COURT: Well, are there facts included in your findings that don't appear in the stipulation?
>
> MR. CHILD: Yes.
>
> MR. SESSIONS: Yes.
>
> THE COURT: I see.
>
> MR. CHILD: That's why we had the trial.
>
> THE COURT: Well, then I don't know how to reconcile it.

(Tr. 337, 338)

Furthermore, the court's indecision with respect to the entire matter was indicated in the court's letter to Counsel of September 11, 1975 (R. 795) and statement at the argument of Appellant's motion. (Tr. 327) In the end, and notwithstanding the complexity of the trial and the issues presented, and further notwithstanding the stipulation of the parties which clearly prohibits the introduction of evidence which contradicts the facts as stipulated (R. 806), the

court adopted the findings and conclusions (as modified and expanded by the stipulation of the parties) (R. 864-865), submitted by Respondent's counsel including Respondent's "associated California counsel" (R. 794, 805), who not only did not attend the trial but had not even read a transcript thereof as the same was only later prepared. (R. 869)

Appellant requested the Court to make separate and specific findings of material issues presented to and tried by the Court pursuant to Rule 52 (a) of the Utah Rules of Civil Procedure, as amended, which states in pertinent part as follows:

> (a) Effect. In all actions tried upon the facts without a jury...the court shall find the facts specially and shall state separately its conclusions of law thereon....

The first material issue concerning which the court declined to make and enter any specific finding as requested by Appellant was whether or not Appellant's activities in bringing the parties (Respondent and Prestige) together was the procuring cause for the Chain "C" and Chain "D" flights. (R. 834-835; Tr. 348) Appellant's complaint further alleges that because of Appellant's introduction and assistance Respondent has in fact sold many charter flights to Prestige. *(See,* Paragraph 21 of Plaintiff's Complaint, R. 360) These allegations, together with the testimony at the trial, raise the issue as to whether Appellant's activities and efforts were in fact the procuring cause of the charter contract and the flights flown pursuant thereto, which Respondent ultimately entered into with Prestige. The court, in denying Appellant's motion (R. 862-863), made and entered no finding on this material issue, notwithstanding the evidence adduced at trial and contained in the stipulation of the parties that the Respondent did not know of Prestige prior to the introduction thereof by Appellant to Respondent and further that Appellant conducted substantial negotiations, expended time and effort in negotiation for the securing of the Chain "C" and initial Chain "D" flights, including negotiations for deposit reductions, without compensation or commission of any kind, as hereinbefore set forth.

The court further declined to make and enter a finding of fact on the material issue of whether or not an agency relationship existed between Respondent and Appellant and whether or not Respondent in dealing directly with Prestige engaged in unfair dealings and

interference with the basic agency relationship. (R. 835-839; Tr. 348-349)

The finding urged by Appellant is consistent with the evidence as to the nature of Respondent's business. Respondent spent substantial sums on advertising and in addition employed salesmen, all for the purpose of trying "to get the travel agent to utilize Capitol's services or to go to client's and try to get them to form charter groups to be transported on Capitol." (R. 809) Such a finding is further material with respect to the modified series of flights to Munich, Germany, Chain "D", because the fact that the original four flights, dates and destinations in Chain "D" were modified, revised and expanded to match the success of sales programs, is typical and anticipated. (R. 823) Finally, such a finding clearly raises the issue as to whether or not Respondent can deal directly with Prestige which had been procured by Appellant without liability to Appellant therefor and in so doing, whether Respondent has waived the condition precedent to the payment of commissions which it claims, to wit: the execution of the charter agency agreement.

This court has considered the matter of the necessity of the trial court making and entering findings of fact on all material issues on a number of occasions. In *Gaddis Investment Company v Morrison,* 3 U.2d 43, 278 P.2d 284 (1954), this court, considering an issue raised in defendant's answer but with respect to which the trial court made no finding, stated as follows:

> It has been frequently held that the failure of the trial court to make findings of fact *on all material issues* is reversible error where it is prejudical. [Citations omitted.] [Emphasis added.]

3 U.2d at 45, 278 P.2d at 285. *(See also, LeGrand Johnson Corp., v. Peterson,* 18 U.2d 260, 262-263, 420 P.2d 615, 616-617 (1966).

Notwithstanding the materiality of these issues which the record indicates is the very heart of the instant case, the court denied Appellant's motion (R. 864) which Appellant respectfully submits was error.

CONCLUSION

Based upon the foregoing, Appellant respectfully submits that under the undisputed evidence Appellant was the procuring cause for the sale of the Chain "C" and Chain "D" flights between Respondent and Prestige.

The conduct of Respondent in dealing directly with Prestige during the conclusion of negotiations for the Chain "C" flights and during the middle of negotiations for the Chain "D" flights and Respondent's refusal to quote the Chain "D" flights as modified to Appellant, constituted a violation of the agreement between Appellant and Respondent and further constituted a waiver of the condition that a charter agency agreement be executed between the parties. Furthermore, the execution of the charter agency agreement was in actuality a mere formality. Otherwise, enforcement of the condition would constitute an unconscionable forfeiture after substantial performance by the Appellant.

The offering to Prestige by Respondent of not only the brokerage commissions on the Chain "C" and Chain "D" flights, the entitlement to which was in dispute but, in addition, the implementation by Respondent of a system of utilizing flight deposits negotiated by Appellant to cement the on-going business relationship between Respondent and Prestige constituted an unlawful hindrance to and interference with the brokerage and agency relationship between Appellant and Respondent and resulted in Appellant receiving no compensation for services rendered in the negotiation and sale of said flights.

It is respectfully submitted that the trial court, when faced with the various interpretations of the findings of fact entered in the instant case, should have made specific findings on the issues of procuring cause and interference with the brokerage and the agency relationship existing between Appellant and Respondent and made applicable conclusions of law based thereon; and that the failure of the court to do so constitutes error.

It is finally submitted that the findings of fact and conclusions of law concerning the payment of commissions on the Chain "C" and Chain "D" flights to Appellant and that the Respondent can avoid liability to Appellant for such commissions based upon regulations of the Civil Aeronautics Board are wholly unsupported by any evidence adduced at the trial and have no basis or foundation in law.

The Judgment of the District Court should be reversed and judgment in favor of the Appellant and against the Respondent in the sum of $21,645.62 representing the brokerage commission on the Chain "C" flights and $56,755.86 representing the brokerage commission on the Chain "D" flights should be entered and Appellant should be awarded its costs.

Respectfully submitted,

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