

1989

Gillham Advertising, Inc., a Utah Corporation v. Tim Williams and Scott Rockwood : Brief of Appellant

Utah Court of Appeals

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COURT OF APPEALS

STATE OF UTAH

GILLHAM ADVERTISING, INC.,)
a Utah Corporation,)
Plaintiff/Appellant,)
vs.)
TIM WILLIAMS and SCOTT)
ROCKWOOD,)
Defendants/Respondents.)

Case NO. 880398

District Court No. 87-07863

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, JUDGE JAMES S. SAWAYA

ARGUMENT PRIORITY CLASSIFICATION: 14b

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JURISDICTION STATEMENT

Jurisdiction to determine this appeal is conferred upon this Court by Section 78-2a-3(2)(h), Utah Code Annotated (1988).

NATURE OF THE PROCEEDINGS

This is an appeal from an award of summary judgment in favor of Defendants, Tim Williams and Scott Rockwood (hereinafter "Williams and Rockwood").

STATEMENT OF THE ISSUES

The issues on appeal are:

1. Whether the Trial Court erred in granting Williams and Rockwood Summary Judgment where material issues of fact existed with respect to their actions, as corporate officers and key employees, in regards to fiduciary duties of loyalty, good faith, and fair dealing owing Gillham Advertising, Inc. (hereinafter "Gillham").
2. Whether Williams and Rockwood breached those fiduciary duties.

3. Whether Williams and Rockwood interfered with Gillham's business relations.

4. Whether Gillham's Complaint raises material issues of fact such that summary judgment on the Complaint was improperly granted.

5. Whether Williams and Rockwood are entitled to all or a portion of their costs incurred for depositions in defending this action by Gillham.

DETERMINATIVE STATUTES

Rule 56 of the Utah Rules of Civil Procedure is determinative of the issues before this Court. Rule 56 is included as Addendum "D" to this Brief.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by an employer against two of its former employees and officers (hereinafter "Williams and Rockwood") for breach of fiduciary duty, breach of contract, and interference with business relations. Williams and Rockwood each counterclaim for breach of contract, promissory estoppel, and defamation.

B. Course of Proceedings

On December 3, 1987, Gillham commenced this action against Williams and Rockwood. [R. 002-008] On December 28, 1987, Williams and Rockwood filed an Answer and Counterclaim. [R. 015-029] Gillham replied on January 19, 1988. [R. 030-036]

On January 26, 1988, Gillham noticed up the depositions of Williams and Rockwood for February 10, 1988. [R. 037-038, 297, 296] On February 2, 1988, Williams and Rockwood served Gillham with Interrogatories and Requests for Production of Documents. [R. 039] Gillham responded on March 4, 1988. [R. 055-056] Gillham supplemented its Responses on March 21, 1988. [R. 040-041]

Williams and Rockwood were not satisfied with Gillham's responses and filed a Motion and Memorandum to compel on March 23, 1988. [R. 042-052] Gillham served a responsive Memorandum on Williams and Rockwood. [R. 057-063] After hearing held April 18, 1988 [R. 064], Gillham served Supplemental Answers on Williams and Rockwood on May 12, 1988 [R. 065-066], together with Plaintiff's request that Williams and Rockwood produce documents. [R. 067] On May 25, 1988, Williams and Rockwood noticed up the deposition of Lon R. Richardson for June 1, 1988 and then June 21, 1988. [R. 068-071, 295]

On August 4, 1988, Williams and Rockwood filed a Motion and Memorandum for Partial Summary Judgment, together with Affidavits of Williams and Rockwood. [R. 075-168]

On August 31, 1988, Gillham filed its Memorandum in Opposition [R. 176-197], together with Affidavits of Milo S. Marsden, Jr. [R. 198-206] and D. Keith Hill. [R. 209-216]

On September 9, 1988, Williams and Rockwood filed a Reply Memorandum. [R. 217-237] The Motion for Partial Summary Judgment was heard September 12, 1988. [R. 238, 242]

On September 29, 1988, Williams and Rockwood filed a Memorandum of Costs. [R. 250-252] Gillham objected to those costs. [R. 253-262] A hearing was held October 31, 1988. [R. 268-269]

On November 3, 1988, Williams and Rockwood obtained a Writ of Garnishment which was served the next day. [R. 271-272, 275-283] The Writ was released November 11, 1989. [R. 273-274]

On December 2, 1988, Defendants obtained a second Writ of Garnishment which was served December 7, 1988. [R. 284-290] That Writ was released December 14, 1988. [R. 291-292]

C. Disposition at the Trial Court

On September 15, 1988, the Trial Court awarded Rockwood partial summary judgment against Gillham for a bonus in the amount of \$4,000 [R. 243-245], which Gillham has paid.

On September 26, 1988, the Trial Court awarded Williams and Rockwood summary judgment, dismissing Gillham's claims for relief. [R. 248-249; Addendum "B"]

On October 24, 1988, the Trial Court awarded Williams and Rockwood costs in the amount of \$795.78. [R. 246-247; Addendum "C"]

Gillham filed its Notice of Appeal October 21, 1988. [R. 266-267]

D. Relevant Facts

Uncontroverted Facts

1. Gillham is a Utah corporation engaged in the advertising business, having its principal place of business in Salt Lake

City. [R. 002, ¶ 1; 079, ¶ 1]

2. Williams and Rockwood are residents of Salt Lake County.
[R. 002, ¶s 2-3; 080, ¶ 2]

3. While with Gillham, Williams and Rockwood worked on the KSL advertising account. [R. 080, ¶ 5]

4. KSL had been a client of Gillham's for 10 or 12 years and, after First Security Bank, was Gillham's largest account.
[R. 179, ¶s 10-11]

5. Keith Hill, a former Gillham employee, was the KSL employee in charge of KSL's advertising accounts. [R. 080, ¶ 6; 081, ¶ 9]

6. Hill was a friend of both Williams and Rockwood. [R. 081, ¶ 10]

7. While with Gillham, Williams and Rockwood discussed with Hill their plans to purchase Gillham or form their own business.
[R. 081, ¶ 11]

8. While with Gillham, Williams and Rockwood prepared a "To Do" checklist of things to be done to form their own business if their negotiations to purchase Gillham failed. [R. 082, ¶ 13]

9. In establishing their new business entity, Williams and Rockwood reviewed and incorporated certain forms from Gillham.
[R. 083, ¶ 20]

10. On March 27, 1987, after Gillham discovered the "To Do" checklist and discussed it with Williams and Rockwood, Gillham dismissed Williams and Rockwood. [R. 082, ¶ 14]

11. Soon thereafter, KSL transferred its advertising business from Gillham to Williams and Rockwood. [R. 083, ¶ 19]

12. In Count III of its Complaint, Gillham alleges Williams and Rockwood owed fiduciary duties to Gillham which they breached, thereby damaging Gillham. [R. 006, ¶s 18-21]

Controverted Fact No. 1

1. Whether Williams and Rockwood were key employees and officers of Gillham or whether they were ordinary employees.

Facts According to Gillham

1. Williams was Senior Vice-President, supervisor, and primary contact person at Gillham on the First Security account, Gillham's largest account, which it had serviced for 35 years. In 1986, Gillham's annual gross billings to First Security were about \$600,000 and amounted to about 40 percent of Gillham's income. First Security left Gillham in March, 1987. [R. 178-179, ¶s 3-9]

2. As Vice-President and creative art director, Rockwood was responsible for Gillham's entire creative department consisting of two full-time writers, four full-time artists, and regular freelancers. [Deposition of Scott Rockwood, p. 9, lines 5-18]

3. Williams and Rockwood did not punch a time clock at Gillham. They had tasks and deadlines and worked until they were done. Rockwood arrived at 8:00 a.m. or earlier and worked until 6:00 p.m. or 8:00 p.m. most nights, often working through lunch. [Deposition of Scott Rockwood, p. 61, line 15 to p. 62 line 9]

4. For several months prior to their termination, Williams and Rockwood discussed with Lon Richardson, Gillham's President

and principal shareholder, the purchase of Gillham for about \$500,00 plus good will. Williams and Rockwood wanted control of Gillham in one (1) year; Richardson wanted to retain control for five (5) years. [R. 179, ¶s 12-16]

5. Williams recognized that Richardson had discretion in paying bonuses, depending on Gillham's profits. In March, 1987, Richardson paid Williams and Rockwood each \$1,000 as a bonus for 1986. [R. 188-189, ¶s 80-83]

6. Because Williams and Rockwood felt their bonuses were too small, in mid-March, 1987, Williams prepared a "To Do" checklist of things to accomplish prior to their departure from Gillham. [R. 181, ¶s 28-31]

Facts According to Williams and Rockwood

1. Williams and Rockwood were employed by Gillham as employees at will. [R. 018, ¶ 4; 080, ¶ 4; 075, ¶s 2-3; 167, ¶s 2-3]

Controverted Fact No. 2

2. Whether Williams and Rockwood, while employees and officers of Gillham, determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves from the taking of the KSL account from Gillham in violation of fiduciary duties of good faith and fair dealing they owed Gillham.

Facts According to Gillham

In its Memorandum in Opposition Summary Judgment, Gillham asserted the following supplemental facts:

22. Defendants wanted the KSL business and directly solicited that business from Hill. (Deposition of Rockwood, p. 26, lines 13-15; p. 28, lines 23-25). [R. 180]

The citations to Rockwood's deposition provided:

Mr. Rockwood: We naturally told him that we wanted his business and directly solicited that business, told him why we thought he should come with us . . . I don't recall specifics of the conversation. I recall that we discussed why he should come with us. And we put our best foot forward . . .

23. Defendants eventually got the KSL advertising business away from Gillham. (Deposition of Rockwood, p. 30, lines 5-9). [R. 180]

Mr. Marsden: Did you eventually get the advertising business for KSL?

Mr. Rockwood: Well, currently we are handling virtually all of their business, but we have no contract per se with them.

24. Defendants, in leaving Gillham, knew they had to talk to Hill and present a plan to show their interest in handling the KSL business. (Deposition of Williams, p. 23, lines 1-6). [R. 180]

Mr. Williams: . . . And this is one of those items we knew we would have to do in the future. And that meant to talk to Keith Hill of KSL Television. If we did leave Gillham we knew we would have to talk to him and we knew that we would have to present a plan to show him our interest in handling his business.

25. Defendants met with Hill prior to their termination. (Deposition of Rockwood, p. 18, lines 23-25). They talked about starting their own business. (Deposition of Rockwood, p. 19, lines 22-24; Deposition of Williams, p. 24, lines 15-18). [R. 181]

The citations to Rockwood's deposition provided:

Mr. Marsden: Working back from March 27th to the most recent conversation with Keith Hill, prior to your termination, about business, where did that take place and when, if you can recall?

Mr. Rockwood: Well, I can't be certain because I don't recall it that clearly. I recall that we had breakfast

with him I think at the Market Street Grill . . . We talked about the fact that we might consider starting our own business if this sale did not work out.

The citation to Williams' deposition provided:

Mr. Marsden: Did you talk to Keith about your leaving prior to your termination?

Mr. Williams: We told Keith we were considering the option in the event the buy agreement did not work.

26. Defendants talked to Keith Hill and presented a plan. (Deposition of Rockwood, p. 17, lines 6-14). [R. 181].

Mr. Marsden: Talk to Keith--present plan. What did that mean?

Mr. Rockwood: Well, Keith Hill worked for KSL Television. And if we were to pursue that business when we started our own we would have to talk to Keith and we would have to present a plan to Keith.

Q. Did you do that?

A. No--well, yes, we did talk to Keith and we presented a plan.

27. Prior to Defendants' termination, they discussed with Keith Hill if he would be interested in joining their new agency and he responded yes. (Deposition of Hill, p. 38, lines 12-15). [R. 181]

Mr. Hill: Well, I remember them asking me should--if their agency were formed, would I be interested . . . And I told them yes.

28. In mid-March, 1987, Tim Williams prepared a "To Do" checklist of things to accomplish prior to Defendants departure from Gillham. (Deposition of Williams, p. 16, lines 18-20). [R. 181]

Mr. Marsden: And approximately when did you prepare that?

Mr. Williams: It was in the month of March, I don't know, probably mid-March.

29. The "To Do" checklist was prepared prior to Defendants' termination. (Deposition of Rockwood, p. 16, lines 1-4). [R. 181]

Mr. Marsden: Do you know when it was written?

Mr. Rockwood: It would have been during March of 1987.

Q. Was it before March 27th?

A. Yes.

30. The "To Do" checklist is in Tim Williams handwriting. (Deposition of Williams, p. 16, line 17). [R. 181]

Mr. Marsden: Is that your handwriting?

Mr. Williams: Yes, it is.

31. Defendants prepared the "To Do" checklist because they felt they were not fairly dealt with in the 1986 bonus money Gillham paid them in March, 1987. (Deposition of Williams, p. 20, lines 19-25). [R. 181]

Mr. Williams: I would say both Scott and I were disappointed and had felt that we were not fairly dealt with in the bonus money that he paid earlier that month. And that to us was a show of his attitude towards us. And I would say that that might have given us more motivation than we had before. But I wouldn't say that that was the event.

32. Some of the checklist items were performed prior to termination. (Deposition of Rockwood, p. 16, line 18). [R. 181]

Mr. Marsden: Did you actually start to implement some of the items?

Mr. Rockwood: It's possible that we've done some of these things, that we had done some of them, it's possible.

33. Defendants crossed off the "To Do" checklist items they had accomplished. (Deposition of Rockwood, p. 16, line 24). [R. 182]

Mr. Marsden: What's the significance of items that are crossed off?

Mr. Rockwood: . . . Some of them are probably things that had already been done.

34. Defendants crossed off items on the "To Do" checklist they in fact had accomplished. (Deposition of Williams, p. 26, line 18). [R. 182]

Mr. Williams: . . . well, there are a few instances in which it's crossed off because we did in fact do them.

35. Defendants were following a time table on the "To Do" checklist. (Deposition of Williams, p. 28, line 17). [R. 182]

Mr. Williams: I assume that was a timetable that we were following on some of these items . . .

36. Prior to their termination, Defendants talked with Gene Yates, a Gillham employee, about Defendants starting a new business and asked Gene Yates to come with them. (Deposition of Rockwood, p. 40, line 18; p. 41, line; p. 41, line 12). [R. 182]

Mr. Marsden: Did you talk to Gene prior to your termination about leaving and setting up a new business?

Mr. Rockwood: It came up in conversation. As I recall he had--when we asked him about his relationship with Larry Miller he kind of wondered what we were thinking and asked us if we were thinking of starting our own business or something like that. And we told him that we were considering the possibility.

Q. Did you ask Gene if he was interested in coming with you?

A. We talked about if he might be interested. We didn't make him an offer saying--if we do this will you come with us--or anything like that. We basically were exploring--if this were to happen would he have any interest?

37. Defendants had contacted an accountant for their new business prior to their Gillham termination. (Deposition of Rockwood, p. 36, line 6). [R. 182]

Mr. Marsden: I'm talking about prior to your termination at Gillham.

Mr. Rockwood: We had called another accountant to try to set up an appointment but had not actually met with him.

38. Defendants had obtained stationery for their new business and a logo prior to their Gillham termination. (Deposition of Rockwood, p. 38, lines 5, 15). [R. 182]

Mr. Marsden: Next item is--create stationery, forms (to Scott by Friday)--what does that mean?

Mr. Rockwood: I had designed the logo.

39. Defendants planned their expenses prior to their Gillham termination. (Deposition of Rockwood, p. 44, lines 2-14). [R. 182]

Mr. Marsden: Plan expenses.

Mr. Rockwood: Yeah, we were probably planning the kinds of expenses we thought we would incur if we started a new business.

Q. Did you make a list of them?

A. Probably did, I think we did.

Q. Do you have a copy of that list?

A. I don't have a copy of it.

Q. Do you know who does?

A. I don't know, but Tim may. I have not saved any of that material.

Q. Was this done before your termination?

A. Yeah, I believe so.

40. Defendants listed the Gillham employee, Dave Bodie, on the checklist as a potential employee for Defendants' new advertising agency. (Deposition of Rockwood, p. 46, lines 4-24). [R. 182-183]

Mr. Marsden: Talk to Dave B. Do you know who that is?

Mr. Rockwood: Dave Boede.

Q. Spell it?

A. Boede, I think.

Q. Was that done?

A. Well, I don't know. We talked to Dave Boede a lot because he was a member of our team as far as many of the accounts we worked on.

Q. Obviously I'm just talking in regards to this alternate plan, how he fits into that on this list.

A. I don't believe so. He was aware of our interest in buying the agency and some of the discussions we had had with Lon.

Q. But my question is why is he on this list, if you know?

A. I believe that the reason he's on this list is because we had many friends at Gillham.

Q. Sure.

A. People who if we were to leave and to start our own agency would probably want to come with us, would probably be hurt

41. Defendants looked at office space prior to their termination. (Deposition of Rockwood, p. 47, lines 10-15). [R. 183]

Mr. Marsden: The next item--look into other space--did you look at other space prior to your termination?

Mr. Rockwood: We looked into office space because we wanted to find out what the cost of office spaces were and availability and that sort of thing. So we had looked at office space but had not selected any.

42. Defendants gathered incorporation and bylaw materials for their new advertising agency prior to their termination. (Deposition of Rockwood, p. 48, lines 1-22). [R. 183]

Mr. Marsden: The next item is--incorporate bylaws--Monday--tell me about that.

Mr. Rockwood: Well, we didn't want to spend a lot of money incorporating. We had very little money. If we were to do this we knew we would have to try to do it as cheaply as possible. My mother has owned several businesses and so have other family members. And I wanted to gather some incorporation papers and bylaws. And I thought that perhaps we could by using some of their materials avoid having to pay for lawyers to draw them up for us. We could create our own.

Q. And do you have what Monday that's referring to?

A. I don't recall what Monday that's referring to.

Q. But it does refer to you having gathered examples by that date?

A. That was the intent, to gather those things.

Q. Did you do that?

A. I had gathered that material, yes.

Q. Prior to your termination?

A. Yes.

43. Defendants copied a radio reel and "Home Equity Loan Blues" work produced at Gillham prior to their termination. (Deposition of Rockwood, p. 49, lines 13-25). [R. 183]

Mr. Marsden: I guess under that is--copy of radio reel and Home Equity Loan Blues--what are they?

Mr. Rockwood: They're examples--the radio reel is a cassette of examples of work produced at Gillham. I was involved in all of the projects on that and I wanted to get a copy of that because that's the nature of this business. People are hired on the work that they've done and what the prospective employer thinks of the quality of that work. So it's standard practice in the industry to get a copy of all the projects that you worked on and you set those forth as being examples of what you're capable of doing. I wanted to get a copy of what I had worked on.

44. Defendants priced the cost of telephones before their Gillham termination. (Deposition of Rockwood, p. 55, line 20). [R. 182]

Mr. Marsden: Next is--phone installation--with your name. Can you tell me about that?

Mr. Rockwood: Yeah, I was going to price the cost of phones and see how much it would cost to get them installed, that kind of thing.

Q. Did you do that?

A. I called to get that information, yeah.

Q. Before your termination?

A. Yeah.

45. Lon Richardson showed Defendants the "To Do" checklist and it was obvious to Richardson that Defendants fully intended to leave Gillham and were in the process of doing so. (Deposition of Richardson, p. 134, lines 20-25; p. 135, lines 1-3). [R. 183]

Mr. Richardson: I showed them the checklist and asked them what it was and asked them what they were doing and why and tried to determine whether they were truly going to leave or whether this was just kind of a -- a preliminary kind of thing that one might do.

Ms. Wood: What did they say?

Mr. Richardson: Well, the longer the conversation went on the more it was obvious to me that they fully intended to do so and were in the process of doing so.

46. Tim Williams and Scott Rockwood held a number of closed-door meetings in Tim Williams' office prior to termination. (Deposition of Richardson, p. 128, lines 22-23; deposition of Rockwood, p. 60, lines 4-25). [R. 183]

The citation to Richardson's deposition provided:

Mr. Richardson: The only signs that might be interpreted were a number of closed-door meetings in Tim's office.

The citation to Rockwood's deposition provided:

Mr. Marsden: There is some reference by Gillham employees that during the last year of your employment you and Tim had quote "many closed door sessions with one another." First of all, is that an accurate statement?

Mr. Rockwood: Well, I don't know what "many" means exactly. Tim and I were interested in buying the agency and had talked about the situation. And we would naturally close the door if that were the case. So we had sessions where the doors were closed. I don't know if it was many. We certainly did.

Q. How would you describe it? Closed-door sessions where you're discussing either buying the business or the alternate plan?

A. I would say that where incidents came up in regard to the buying of the business either something that Lon had said to Tim or something that we thought maybe we should contact Lon about we often would meet and talk about it. The fact is until the last few weeks or the last month or so we really weren't thinking in terms of our own agency. We were thinking in terms of buying Gillham. It wasn't until we sensed that this was not going to work that we began to consider an alternate

plan.

48. Defendants prepared a written business plan and financial statement prior to their termination. (Deposition of Rockwood, p. 43, lines 19-23). [R. 184]

Mr. Marsden: Type business plan, financial statement?

Mr. Rockwood: I think that was done.

Q. When?

A. Probably within the last few weeks of working at Gillham.

49. Defendants prepared a budget to submit to KSL for their new advertising agency take over of the KSL account prior to their termination. (Deposition of Williams, p. 28, line 25; p. 29, lines 1-6). [R. 184]

Mr. Marsden: What about this KSL budget, the last item on page 1, what does that refer to?

Mr. Williams: I frankly don't know why that's on this list other than I knew that if we were to go into business that as part of the plan we presented to KSL that we would have to propose a budget. That's all I can think this would be.

55. Defendants began preparations for their business presentation materials known as "leave behind" materials prior to their termination. (Deposition of Rockwood, p. 44, lines 15-25). [R. 185]

Mr. Marsden: Prepare new business presentation materials, leave behind--I assume "Leave behind" is something that after you make a presentation you leave with the client, is that correct?

Mr. Rockwood: Correct.

Q. Was that done?

A. I don't recall. I probably had begun, whether it was complete or not I doubt. I don't think it was complete.

Q. Not complete but begun?

A. Yes.

56. Prior to terminating Defendants, Lon Richardson met with

Keith Hill's supervisor, William Murdock, at the KSL offices, and Keith Hill had already told William Murdock about the possibility of some of Gillham's employees not remaining with Gillham after the loss of the First Security Bank account. (Deposition of Richardson, p. 130, lines 16-20). [R. 185]

Ms. Wood: What was Mr. Murdock's response?

Mr. Richardson: He told me that he had had some conversations with Keith Hill about the possibility of some of the agency employees not remaining with Gillham after the loss of the First Security account.

57. Defendants told Lon Richardson they were in the process of doing the things that were on the checklist and had done some of them. (Deposition of Richardson, p. 135, lines 10-14). [R. 185]

Mr. Richardson: As I recall, they just said that they were in the process of doing the things that were on the checklist.

Ms. Wood: And thinking about it?

Mr. Richardson: No. They were more than thinking about it. Some of the things they had done.

58. Lon Richardson reviewed the "To Do" checklist and determined that Defendants were planning to start their own agency and had begun the process. (Deposition of Richardson, p. 127, lines 6-8). [R. 185]

Mr. Richardson: I reviewed the checklist, it appeared to me that they--that Tim and Scott were planning to start their own agency, had begun the process

59. Defendants told Lon Richardson that the items that were crossed off on the checklist for the most part had been done. (Deposition of Richardson, p. 136, lines 4-8). [R. 186]

Ms. Wood: What did they say?

Mr. Richardson: I would have to look at the checklist and identify--and identify item by item. But the ones that were crossed out, for the most part, they said they had done.

60. Tim Williams called Keith Hill the morning following Defendants' dismissal from Gillham. (Deposition of Hill, p. 21, lines 5-12). [R. 186]

Mr. Hill: I learned of their dismissal on March 25th

in the morning. Tim gave me a call.

Mr. Marsden: What did he say?

Mr. Hill: He said, I'm not going in to work today, and as best I recall he indicated that he had been dismissed.

Q. That was a telephone call to you at home?

A. Yes.

61. Defendants told Keith Hill they were alarmed that Lon Richardson had found the "To Do" checklist; they were amazed and it was a shocking situation for them. (Deposition of Hill, p. 24, lines 16-24). [R. 186]

Mr. Marsden: Now, you say that there were items on the list in preparation of Tim and Scott forming their own business?

Mr. Hill: Yes.

Q. What did they say about that?

A. They were alarmed that that had happened, you know, that they were amazed that the piece of paper was found and they were quite amazed that--it was a shocking situation for them.

62. Defendants told Keith Hill that Lon Richardson found the "To Do" checklist containing items Defendants were doing in preparation for starting their own advertising agency. (Deposition of Hill, p. 22, lines 2-6). [R. 186]

Mr. Hill: It was indicated that a paper had been discovered in the parking lot and given to Lon and that the paper contained items that they were doing in preparation for starting their own advertising agency.

63. Defendants asked Keith Hill if he would be interested in them providing service. (Deposition of Hill, p. 23, lines 13-21). [R. 186]

Mr. Hill: They asked me if I would be interested in having them provide services . . . and I said--I expressed that I was uncertain as to their ability to deliver these services, you know, in my role as marketing director for the station. I wasn't ready to really make any major steps at that time. I was concerned that they would be unable to handle the number of projects that I had.

64. Keith Hill's Day-Timer shows that on **Wednesday, March 25, 1987**, he met with Tim and Scott on an agency decision. Hill indicated a "go but without fuss of other agencies; OK on high-end creative and ala carte services." (Deposition of Hill, p. 39, line 23; p. 41, line 4; Affidavit of Milo S. Marsden, Jr.). [R. 186]

(Note: The correct citation should have been Affidavit of D. Keith Hill.)

The Hill Affidavit [R. 209-216, Addendum "E"] provided:

1. I am a former KSL employee.
2. I gave my deposition in the captioned matter on May 26, 1988 and referred to my Day-Timer.
3. Following my deposition, copies of my Day-Timer sheets for the days March 25, 1987 through March 31, 1987 were copied. Attached hereto are copies of said Day-Timer sheets.
4. I made the following Day-Timer entry for March 25, 1987: "Met w/Tim + Scott on agency decision. Bill indicated a go but w/o fuss of other agencies. O.K. on high end creative + ala carte services."

(Note: This March 25, 1987 meeting was two days prior to Gillham's discovery of the "To Do" checklist and the dismissal of Williams and Rockwood on March 27, 1987!)

65. Keith Hill's Day-Timer indicates that he met with the Defendants on Saturday, March 28, 1987. (Deposition of Hill, p. 40, lines 15-17). [R. 187]

Mr. Marsden: Does your daytimer show anything for Saturday the 28th?

Mr. Hill: Meeting with Tim and Scott and Dave.

66. Keith Hill decided to give the KSL advertising work to Defendants' new agency the Saturday after the Defendants' termination from Gillham. (Deposition of Hill, p. 28, lines 10-21). [R. 187]

Mr. Marsden: Okay. After this Saturday meeting at Marie Callendars, the Saturday after March 25th, 1987, you said sometime after that Marie Callendar meeting you became persuaded.

Mr. Hill: Yes.

Q. -- to go with Tim and Scott. Tell me about that persuasion.

A. Well, I suppose that--well, I really can't recall any specifics in terms of how we would work together and what would happen. I don't have any real specific feelings about what they did to, you know, finally persuade me.

70. Keith Hill's Day-Timer indicates, "Lon fires Tim and Scott" Thursday, March 26, 1987. (Deposition of Hill, p. 40, lines 4-11). [R. 187]

Mr. Marsden: What do you have on Thursday the 26th?

Mr. Hill: I have, "Lon fires Tim and Scott."

Q. Do you have any memory of what triggered that entry?

A. I believe this was the day that I got the call from Tim.

Q. Thursday the 26th?

A. Yes.

71. William Murdock of KSL called Lon Richardson in less than a week after Defendants' termination at Gillham and told Lon Richardson that he had decided to give the business to Defendants. (Deposition of Richardson, p. 153, lines 11-23). [R. 187]

Mr. Richardson: I discussed with Keith Hill at KSL the--our continuing to handle the business or not.

Ms. Wood. When did that happen?

A. The week following.

Q. What happened in that conversation? Did you call him up?

A. He called me.

Q. What did he say?

A. He said that he had decided to give the business to Tim and Scott.

Q. This was approximately a week after their termination?

A. It was less than a week.

76. Defendants employ six full-time employees; five of the six full-time employees were former Gillham employees. (Deposition of Rockwood, page 12, line 11.) [R. 188]

Mr. Marsden: Approximately how many employees do you have?

Mr. Rockwood: We have six full-time people and one part-time person.

Q. How many of these used to work for Gillham? I know that you did and Tim Williams did. Did David Cole?

A. He worked for them for awhile.

Q. And did Bonnie Caldwell?

A. Yes.

Q. Did Gail Frankovski?

A. Yes.

Q. Did Todd Skurr?

A. No.

Q. Did John Caldwell?

A. No.

77. Gillham received approximately \$200,000 in fees from KSL during 1986. (Deposition of Rockwood, p. 69, line 22; p. 70, line 3). [R. 188]

Mr. Rockwood: Something in the neighborhood of \$200,000.

Mr. Marsden: What's the \$200,000 plus or minus figure that you're referring to?

A. That would have been something in 1986 where Gillham had done many projects over the course of a year and approximately what a full year's worth of that would have been.

78. Defendants' new agency received approximately \$120,000 from

KSL in 1987 for the months April through December, 1987. (Deposition of Rockwood, p. 70, line 15). [R. 188]

Mr. Marsden: Maybe I misstated the question or maybe you didn't catch it. We could go back, but my question is, I'm talking about your agency, not Gillham.

Mr. Rockwood: Excuse me, our frames of reference get confused here. It would be something in the neighborhood, as I recall, of \$120,000 or something in that ball park.

Facts According to Williams and Rockwood

In their Memorandum in Support of Motion for Summary Judgment, Williams and Rockwood assert as a material fact:

11. Williams and Rockwood discussed their plans to purchase Gillham or form their own business with Hill on their own time. (Deposition of Rockwood, p. 22 at line 21; p. 23 at line 1; Deposition of Williams, p. 23 at line 10-22; Deposition of Hill, p. 20 at lines 3-12). [R. 081]

The citation to Rockwood's deposition provided:

Mr. Marsden: Working backwards from that in time, from the breakfast meeting to a meeting with Keith about business matters, other than Gillham-KSL matters, was there any other conversation that you had with Keith?

Mr. Rockwood: Probably, yes, we had many conversations. We met weekly or often more than that.

The citation to Williams' deposition provided:

Mr. Williams: As Scott said, we had numerous conversations with Keith where he was actively interested in the status of the buy, of our interest in buying Gillham. Keith, as a former employee of Gillham, I might also say, was aware of this regardless of the fact that he was also a client. He was aware of it without us having to tell him. So he would often ask us how that situation was progressing because he was naturally interested as both a client and a friend. And in this same conversation Scott referred to he asked us how we thought it was going and if we thought we were going to be able to make the transition of ownership happen. And we told him we thought it was doubtful.

The citation to Hill's deposition provided:

Mr. Marsden: What was said by Tim or Scott or both to you the first time that you mention in your testimony during the fourth quarter of 1986 when they told you about their ownership transition activities?

Mr. Hill: The only recollection I have of that is that they had met with Lon and that they--it didn't go as well as they had hoped, but they were not totally dissatisfied with the progress. I had the impression that they would continue the talks.

In their respective Affidavits, Williams and Rockwood identically stated:

4. While employed at Gillham, I did not personally, nor did I participate with anyone else, in **presenting** a plan to perform advertising business for KSL, Utah County Journal, Digital Technology or any other client of Gillham Advertising. [R. 168, ¶ 4; 076, ¶ 4]

SUMMARY OF THE ARGUMENT

Genuine issues of material fact existed before the trial court which precluded summary judgment in favor of Williams and Rockwood. The first genuine issue of material fact concerned whether, as Senior Vice-Presidents with substantial managerial responsibility, Williams and Rockwood were key employees and officers of Gillham, or whether they were ordinary employees.

The second genuine issue of material fact concerned whether Williams and Rockwood breached the fiduciary duty of loyalty, good faith, and fair dealing they owed Gillham when they set about organizing their own ad agency to compete with Gillham while they were senior officers with Gillham.

The third genuine issue concerned whether Williams and Rockwood interfered with Gillham's business relations, particu-

larly KSL.

Finally, Williams and Rockwood were not entitled to an award of \$666 for the cost of taking the deposition of Gillham's President, Lon Richardson. They offered no evidence demonstrating they were entitled to recover that cost. The deposition was never used at trial. The information necessary to support their motion for summary judgment could have been discovered in a less costly manner, such as interrogatories or requests for production of documents.

ARGUMENT

POINT I. GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT IN FAVOR OF WILLIAMS AND ROCKWOOD

In Lach vs. Deseret Bank, 746 P.2d 802 (Utah App. 1987), Judge Billings reversed the trial court's award of summary judgment and wrote:

Summary judgment should be granted only when it is clear from the undisputed facts that the opposing party cannot prevail. Frisbee v. K & K Const. Co., 676 P.2d 287, 389 (Utah 1984); see Utah R.Civ.P. 56(c). In considering a summary judgment motion, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. Frisbee, 676 P.2d at 389.

746 P.2d at 804.

Similarly, in Durham v. Margetts, 571 P.2d 1332 (Utah 1977), Justice Crockett vacated the trial court's award of summary judgment, pointing out the standard for appellate review:

The summary judgment procedure has the desirable and salutary purpose of eliminating the time, trouble and expense of a trial when there are no issues of fact in dispute and the controversy can be resolved as a matter

of law. Nevertheless, that should not be done on conjecture, but only when the matter is clear; and in case of doubt, the doubt should be resolved in allowing the challenged party the opportunity of at least attempting to prove his right to recover. For that reason the 'submissions' should be looked at in the light favorable to her position, and unless the court is able to conclude that there is no dispute on material facts, which if resolved in her favor would entitle her to recover, the court should not summarily reject her claim and render judgment against her as a matter of law. Upon review we apply the same standard as that applied by the trial court.

571 P.2d at 1334. (Footnotes omitted.) See also, Mountain States, Etc. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984).

This Case:

In this case, there existed genuine issues of material fact properly before the trial court which precluded granting Williams' and Rockwood's Motion for Summary Judgment. Those issues were:

1. Whether Williams or Rockwood, or both, were key employees and officers of Gillham or whether they were ordinary employees.

2. If key employees and officers, whether their conduct breached the fiduciary duty of loyalty, good faith, and fair dealing they owed to Gillham.

The evidence before the trial court raised questions of fact regarding these genuine issues. This Court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to Appellant Gillham. After so doing, this Court should reverse the trial court's award of

summary judgment in favor of Williams and Rockwood and should remand the matter for further discovery and trial.

POINT II. A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER WILLIAMS AND ROCKWOOD WERE KEY EMPLOYEES AND OFFICERS OF GILLHAM OR WHETHER THEY WERE ORDINARY EMPLOYEES.

Generally, the relationship of a person to a corporation, whether as officer or as agent, is not determined by the nature of the services performed, but by the incidents of the relationship as they actually exist. The term "executive officer" implies some sort of managerial responsibility for the affairs of the corporation generally, and imports a close connection with the board of directors and high officers of the company. 18B Am. Jur. 2d, Corporations, § 1342, pp. 253-254. Ordinarily, an officer must devote to the performance of his duty such time and effort as is reasonably required, while an employee is usually required to work a specified schedule of hours. Ibid., § 1343, p. 254. See also, Flight Equipment & Engineering Corp. v. Shelton, 103 So.2d 615, 623 (Fla. 1958).

In Guillory v. Aetna Insurance Company, 415 F.2d 650 (5th Cir. 1969), the Fifth Court of Appeals held that the issue of whether an employee was an executive officer of the corporation raised questions of fact which precluded summary judgment. That case involved liability insurance coverage for an employee having "considerable managerial responsibility and a close connection with the president and secretary/treasurer" of a small corporation. The pertinent facts were:

Herring was employed to supervise performance of Beca's single contract, the construction of Chauteau Lafitte Apartments in Lake Charles, Louisiana. Herring was never formally elected, appointed or designated as an 'officer' of Beca by action of the board of directors or stockholders. Herring did, however, help negotiate the contract to build the apartments.

Brummel executed a written document stating that Herring had general authorization to represent the corporation in matters concerning negotiations, contracts and completion of such contracts. Herring had authority to hire and fire employees and to handle union matters. Herring was authorized to write checks for Beca and he was to receive a portion of any profits from the construction contract.

415 F.2d at 651.

In Guillory, the Fifth Circuit Court of Appeals cited language from Bruce v. Travelers' Insurance Company, 266 F.2d 781 (5th Cir. 1959)

As Judge Wisdom states, "The distinction between an agent or employee and an officer is not determined by the nature of the work performed, but by the nature of the relationship of the particular individual to the corporation." 266 F.2d at 784.

415 F.2d at 652. Regarding the issue of whether the employee was an "executive officer," that court concluded:

Given the relatively small number of persons associated with Beca, the lack of formal corporate procedure and the expanded managerial functions of Herring, we believe that the facts are sufficiently different from Bruce that it cannot be said as a matter of law that Herring was not an 'executive officer'. Under these circumstances, the **issue of whether Herring was an executive officer properly went to the jury.** Planter's Manufacturing Company v. Protection Mutual Insurance Company, 380 F.2d 869 (5th Cir. 1967), cert. denied 389 U.S. 930, 88 S.Ct. 293, 19 L.Ed.2d 282; Boeing Company v. Shipman, 411 F.2d 365 (5th Cir., April 7, 1969).

415 F.2d at 653. See also, DiTullio v. Hawaiian Insurance & Guaranty Company, Limited, 616 P.2d 221 (Haw. App. 1980).

Likewise, in Transport Indem. Co. v. Liberty Mut. Ins. Co., 620 F.2d 1368 (9th Cir. 1980), the Ninth Circuit Court of Appeals affirmed the trial court's conclusion that both an executive vice-president and a general manager of production in charge of supervising plant managers were executive officers entitled to coverage under corporate liability insurance policies. The Ninth Circuit Court pointed out minority and majority case law determining who is or is not a corporate officer:

Moreover, in contrast to Transport's reliance on a single case generally distinguishing 'officers' and 'agents,' Vardeman v. Penn Mut. Life Ins. Co., 125 Ga. 117, 54 S.E. 66, 67 (1906), Liberty cites several other cases liberally construing 'executive officer' as used in this type of insurance contract. Vega v. Southern Scrap Material Co., 517 F.2d 254, 257-58 (5th Cir. 1975); Strickland v. Transamerica Ins. Co., 481 F.2d 138, 148 (5th Cir. 1973); Galloway v. Employers Mut. of Wausau, 386 So.2d 676, 679 (La. App. 1973); Berry v. Aetna Cas. & Surety Co., 256 La. 914, 240 So.2d 374 (1970), cert. denied, 401 U.S. 1005, 91 S.Ct. 1225, 28 L.Ed.2d 541 (1971).

620 F.2d at 1374.

In Berry v. Aetna Casualty & Surety Company, 240 So.2d 243 (La. App. 1970), the Louisiana Court of Appeals emphasized: "It is clear the term 'executive officer' covers something more than, and is not restricted to, 'corporate officers'." 240 So.2d at 246. That court concluded that a plant manager and a personnel director were executive officers, even though neither were corporate officers:

We conclude that since Mambourg was directly under a corporate officer, Davis, and participated in the formulation and execution of company policy with respect to all areas of production at the Shreveport plant, he was an executive officer of the corporation within the terms and provisions of the insurance

policy.

Kuhlman's testimony shows he is personnel director of Hourly Employees, his duties encompassing safety, first-aid, employment and recreation for all eleven plants of the corporation. Kuhlman's immediate supervisor is Melvin Burwell, vice-president in charge of Employee Relations. His duties involve responsibility for the safety of all the hourly employees of the corporation generally, and his position is one closely connected with the officers of the corporation at the home office in Toledo, Ohio. Although not a corporate officer, he is an executive officer and an insured under the policy.

240 So.2d at 246.

In Diamond International Corporation v. Allstate Insurance Company, 712 F.2d 1498 (1st Cir. 1983), the First Circuit Court of Appeals applied factors developed in Young v. New Hampshire Indemnity Co., 120 N.H. 882, 424 A.2d 205 (1980) to conclude that a vice-president in charge of manufacturing was an "executive officer."

First, the plant involved many large, complex machines. Second, the plant manager was responsible for **supervising** three foremen and forty **employees** and for compliance with federal environmental and occupational health and safety regulations. Third, the plant manager was involved in the purchase and construction of other plants. Fourth, he had in the past **bound the corporation to contracts** with machinery contractors and other tradesmen on his own signature. In addition, the company treasurer, who purchased the policy, had given his opinion that an executive officer was an officer with authority to hire, fire, get things done in his department. Finally, both the treasurer and president had testified that they thought the plant manager was covered by the policy.

712 F.2d at 1503. The court remanded the issue of whether an assistant paper machine superintendent was an executive officer.

In Hadrick v. Diaz, 302 So.2d 345 (La. App. 1974), the Louisiana Court of Appeals summarized the numerous factors

Louisiana courts have considered in determining whether an employee is also an officer.

In determining the issue before us, our own courts have considered the following circumstances relevant: (1) Whether the employee's position was created by corporate charter, Thibodeaux v. Parks Equipment Co., 185 So.2d 232, 39 A.L.R.2d 1391, (La. App. 1965); (2) Whether the employee was formally elected or designated to his office or position by the Board of Directors, the officers or stockholders, Thibodeaux, above; (3) Did the employee have **authority, discretion and managerial responsibility** covering the divergent affairs of the corporation, Thibodeaux, above; (4) Did the employee have duties or authority outside his particular department, Thibodeaux, above; (5) Was the employee involved in **shaping company policy**, Thibodeaux, above; Berry v. Aetna Casualty & Surety Company, 240 So.2d 243 (La. App. 1970); (6) Did the employee possess **authority to alter contract terms or conditions** or to change specified company procedures, Employers' Liability Assurance Corporation, Ltd. v. Upham, 150 So.2d 595 (La. App. 1963); (7) Whether the employee had several department heads under his supervision, Berry, above; (8) Whether the employee had a large number of employees under his direction and control, and (9) Did the employee have authority to hire and fire other employees, Berry, above? In Guillory v. Aetna Insurance Company, 415 F.2d 650 (Fifth Circuit), the court also considered whether the employee maintained a **close connection with the corporate officers and board of directors** and whether the employee was empowered to write company checks.

In Industrial Indemnity Company v. Duwe, 707 P.2d 96 (Or. App.1985), the Oregon Court of Appeals found that a distributorship's branch manager possessed "adequate indicia of managerial responsibility for the affairs of Coast Distributors to permit the conclusion that he was an 'executive officer'."

He had primary control and responsibility over the operation of one branch office of the company. As a branch manager, he met regularly with the general manager and with other branch managers to participate in the **formulation and execution of corporate policy**. He supervised all other employees in the branch and in specified situations had hiring and firing authority.

He was empowered to enter into a variety of contracts on behalf of the corporation, and he could write company checks, albeit for limited, sales-related expenses. Although Duwe did not report directly to a corporate officer, his supervisor--the general manager--did, and we consider that a sufficiently close connection. We find adequate indicia of managerial responsibility for the affairs of Coast Distributors to permit the conclusion that he was an 'executive officer' under the Industrial Indemnity policy; the trial court correctly so concluded.

707 P.2d at 100-101.

Key employees and officers entitled to corporate liability coverage possesses considerable authority over the affairs of a corporation. It is not unreasonable to hold that such key employees and officers, who exercise authority on behalf of the corporation and through whom the corporation functions, occupy a fiduciary relation to the corporation and owe the corporation a duty of loyalty, good faith, and fair dealing. Breach of that duty should render the key employees and officers personally liable for losses suffered by the corporation, even as the corporation insures them against loss incurred in the performance of their duties.

Williams' and Rockwood's Managerial Responsibilities as Key Employees and Officers

Williams and Rockwood were intimately involved with managerial responsibilities at Gillham. Williams was Senior Vice-President and account supervisor over all accounts at Gillham. [R. 177, ¶ 1] As such, it is reasonable to infer that he participated in the formulation and execution of company policy and had authority to purchase materials and services for all of Gillham's accounts. Rockwood was Creative Director and Vice-

President, with responsibility for supervision of six full-time writers and artists and regular freelancers. [Deposition of Scott Rockwood, p. 9, lines 5-18] Williams and Rockwood devoted such time and effort to their duties as required, often putting in 10 to 12-hour days to get done the work for which they had responsibility. [Deposition of Scott Rockwood, p. 61, line 15 to p. 62, line 9]

Williams and Rockwood expected a portion of Gillham's profits, and counterclaimed to enforce their right to bonuses to which they believed they were entitled. [R. 018-023] As senior management officers, it is reasonable to infer they had a close and immediate connection with Lon Richardson, Gillham's President and primary shareholder. They had access to Gillham business forms and reviewed and incorporated those forms in establishing their new business entity. [R. 083, ¶ 20] They knew Gillham's small staff of personnel; five of six full-time employees of Williams and Rockwood once worked for Gillham. [R. 188]

Williams and Rockwood had a close relationship with Keith Hill, KSL's advertising accounts executive. [R. 081, ¶ 10] They knew all of KSL's advertising needs and how to provide for those needs. [R. 080, ¶5] They now handle all of KSL's advertising business. [R. 083, ¶19; 180]

The evidence overwhelmingly supports the fact that Williams and Rockwood were key employees and officers of Gillham. As such, they owed Gillham a fiduciary duty of loyalty, good faith, and fair dealing. The trial court erred in granting Defendants'

motion for summary judgment. This Court should reverse the summary judgment and remand this matter for further discovery and trial.

POINT III. AS KEY EMPLOYEES AND OFFICERS, WILLIAMS AND ROCKWOOD OWED GILLHAM A FIDUCIARY DUTY OF LOYALTY, GOOD FAITH, AND FAIR DEALING; AND THERE ARE MATERIAL FACTS IN DISPUTE SURROUNDING THEIR CONDUCT RELATIVE TO THESE FIDUCIARY DUTIES.

The management of corporate affairs is committed to directors and officers. Directors and officers are required to act with the utmost good faith, and in accepting office, they impliedly undertake to give to the enterprise the benefit of their care and best judgment and to exercise the powers conferred solely in the interest of the corporation or the stockholders as a body or corporate entity, and not for their own personal interests. 18 Am. Jur.2d, Corporations, § 1689, p. 543. As part of his fiduciary role, a director or officer must remain loyal to the corporation, acting at all times in the best interests of the corporation and its shareholders and unhampered by any personal pecuniary gain. Ibid., § 1711, p. 564.

The right of an officer or director to engage in enterprises of the same nature do not entitle him to enter into transactions of such a nature as to cripple or injure the company's business, or hinder or defeat it. He may not organize another corporation to engage in a competing business. Neither may a director or officer divert to himself business opportunities in which the corporation has an interest or expectancy. Ibid., § 1712, p.

586.

In Hoggan & Hall & Higgins, Inc. v. Hall, 414 P.2d 89 (Utah 1966), Justice Henriod upheld the trial court's finding that defendants tortiously violated their duty as officers, directors, and stockholders of an advertising agency. That finding was supported by evidence that defendants solicited business for their planned advertising agency from the plaintiff advertising agency's customers while they were still officers and stockholders of the plaintiff's corporation. One of the plaintiff's former accounts testified:

Mr. Hall said that Mr. Hoggan had lost his big account, and was drawing on the agency. That he and Mr. Higgins were carrying the load, in essence, and that he was breaking away from Mr. Hoggan and the agency that was set up, and wanted to know if we'd go along with the proposition. At the same time he also stated that most of the accounts he had contacted were going along with him.

414 P.2d at 90.

Justice Henriod cited the precedent upon which he relied:

We note with approval and cite the case of Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954). It would be difficult factually to find a case more nearly like the one here, and as difficult to find one more nearly espousing the principles we state here. The paucity of authority with respect to likeness seems to be shared only by it and this. We cite it as authority here and commend it to the reader rather than to repeat its context.

Ibid., p. 92.

In Duane Jones, supra, the departing account executives attempted first to buy the ad agency from its major shareholder. The account executives were variously directors, officers, and key employees of the agency. The account executives left, taking

several major accounts with them and started a new ad agency.

The Court of Appeals of New York held:

The inferences reasonable to be drawn from the record justify the conclusion--reached by the jury and by a majority of the Appellate Division--that the individual defendants-appellants, while employees of plaintiff corporation, **determined upon a course of conduct** which, when subsequently carried out, resulted in benefit to themselves through destruction of plaintiff's business, in violation of the fiduciary duties of good faith and fair dealing imposed on defendants by their **close relationship with plaintiff corporation.**

117 N.E.2d at 245.

The account executives there, key employees who were not under formal contract to the agency, maintained they did not divert Duane Jones accounts and employees until **after** their employment with Duane Jones terminated. The New York court found this immaterial:

Nor is it a defense to say that the defendants-appellants did not avail themselves of the benefit of the customers and personnel diverted from plaintiff until after defendants had received notice of discharge or had informed plaintiff of their intention to leave Duane Jones Company. Upon this record the jury might have found that the conspiracy originated in June or July while a fiduciary duty existed, and that the benefits realized when defendant Scheideler, Beck & Werner, Inc., commenced operation in September were merely the **results of a predetermined course of action.** In view of that circumstance, the individual defendants would not be relieved of liability for advantages secured by them, after termination of their employment, as a result of opportunities gained by reason of their employment relationship. Byrne v. Barrett, 268 N.Y. 199, 206-207, 197 N.E. 217, 218, 100 A.L.R. 680; and see Volk Co. v. Fleschner Bros., 298 N.Y. 717, 83 N.E.2d 15.

. . . .

Moreover, there is evidence of record from which the jury might have inferred that the **loss of customers** suffered by Plaintiff in August and September, 1951, was the **direct result of defendants-appellants'**

activities immediately prior thereto.

117 N.E.2d, pp. 245-246. See also Microbiological Research Corp. v. Muna, 625 P.2d 690, (Utah 1981), in which the Utah Supreme Court stated:

. . . (W)here a transaction has its inception while the fiduciary relationship is in existence, an employee cannot by resigning and not disclosing all he knows about the negotiations, subsequently continue and consummate the transaction in a manner in violation of his fiduciary duties. This exception is well illustrated in Glenn Allen Mining v. Park Galena Mining Company, (*supra*), wherein the defendants while officers of the company developed and put into motion the plans that ultimately resulted in certain contracts disadvantageous to the corporation. This court rules that under such conditions, an officer cannot avoid responsibility for violating his fiduciary duties by delaying the final execution of a contract until the expiration of his relation.

625 P.2d at 695. (Footnotes omitted.)

The officers in Duane Jones also argued that none of the accounts they soon diverted to their new agency was under contract to Duane Jones. The New York court responded:

Plaintiff was not required to show interference by defendants with existing contractual relationships in order to impose liability in the present action. Union Car. Adv. Co. v. Collier, 263 N.Y. 386, 401, 189 N.E. 463, 470.

117 N.E.2d at 246.

Duane Jones continues to be controlling precedent regarding the fiduciary duty of key advertising agency employees. On April 5, 1988, Judge Herman Cahn of the Supreme Court of New York (the trial level court in that state), relied on Duane Jones, *supra*, in enjoining advertising s Lord, Geller, Federico, Einstein ("LGFE") former Chairman-CEO Richard Lord, and five other former

top managers, who formed a new advertising agency, Lord Einstein, from soliciting LGFE accounts and employees for Lord Einstein's new business. (Excerpts, ADVERTISING AGE, April 4 and 11, 1988; Addendum "F" hereto.)

In Nicholsen v. Evans, 642 P.2d 727 (Utah 1982), a corporate officer/employee personally acquired the stock of a subsidiary which became quite profitable. The Utah Supreme Court held that such individuals owe their corporate employer a duty of loyalty. Justice Oaks overturned the lower court's decision and required the corporate officer to disgorge. The Utah Supreme Court stated:

Directors and officers have a fiduciary duty of loyalty to their corporation and its stockholders. Branch v. Western Factors, Inc., 28 Utah 2d 631, 502 P.2d 570 (1972); Elggren v. Woolley, 64 Utah 183, 228 p. 906 (1924); Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948); Guth v. Loft, 23 Del.Ch. 255, 5A.2d 503 (1939). They are obligated to use their ingenuity, influence, and energy, and to employ all the resources of the corporation, to preserve and enhance the property and earning power of the corporation, even if the interests of the corporation are in conflict with their own personal interests. This duty extends to all of the corporation's assets, including its subsidiary corporations.

As this Court held in Glenn Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 387, 296 p. 231 (1931):

The duty of the directors of a corporation is to further the interests and business of the association and to conserve its property. Any action on the part of directors looking to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and more especially the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors therein. 2 Thompson on Corporations, 1327.

As this Court said in another leading case:

[In an effort to assure that corporate directors' acts are] fair, just, and equitable to all of the stockholders . . . courts have adopted and are strictly and rigidly enforcing a policy which minimizes the temptation of officers of corporations to prefer their own interests rather than those of the corporation and the stockholders.

Elggren v. Woolley, 64 Utah at 194, 228 p. at 910.

The fiduciary duties owed to a corporation are especially vital when the corporation is in financial difficulty. Then, of all times, those responsible for the management of the corporation must realize 'that their personal interests are subordinate to that of their corporation in case of conflict.' Hoggan & Hall & Higgins, Inc. v. Hall, 18 Utah 2d 3, 6, 414 P.2d 89, 91 (1966); Glen Allen Mining Co. v. Park Galena Mining Co., supra.

642 P.2d at 730. (Emphasis added.)

Williams and Rockwood Breached Their Fiduciary Duty of Loyalty, Good Faith, and Fair Dealing to Gillham.

While key employees and officers of Gillham, Williams and Rockwood determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves through destruction of Gillham's business. While with Gillham, they organized their own advertising agency to compete with Gillham. They diverted KSL, ten (10) years with Gillham and its second largest account, to themselves as the result of the predetermined course of conduct they commenced while holding highly responsible positions with Gillham. [R. 180-189]

In mid-March, 1967, Gillham was reeling financially from the loss of its largest account, First Security Bank. [R. 178-179,

¶s 3-9] Gillham was naturally curious in the 1986 bonuses it paid to key employees and officers. [R. 188-189, ¶s 80-83] Williams and Rockwood prepared the "To Do" checklist because they felt they were not fairly dealt with in the 1986 bonus money. [R. 181, ¶s 28-31]

The "To Do" checklist was a list of things they had done, were doing, and a time table for establishing their own business before Williams and Rockwood left Gillham. Prior to their termination on March 27, 1987, they contacted an accountant for their new business. They designed the logo for new stationery. They planned their expenses. They looked at office space. They gathered incorporation and bylaw materials. They copied work they had produced at Gillham. They priced telephones. They held a number of closed-door meetings in Williams' office at Gillham. They prepared a written business plan and financial statement. They prepared "leave behind" materials. They talked with Gene Yates, a Gillham employee, about coming with them. They listed Dave Bodie, also a Gillham employee, as a potential employee for their new agency.

Williams and Rockwood knew they had to talk to Keith Hill about handling the KSL business. Prior to their termination, they prepared a budget to submit to KSL for their new agency; they met with Hill and talked about starting their own business; and they discussed with Hill if he would be interested in joining their new agency, and he responded yes. [R. 181-187]

Hill's Day-Timer shows that on Wednesday, March 25, 1987, he

met with Williams and Rockwood on an agency decision and that he indicated a "go but without fuss of other agencies; OK on high-end creative and ala (sic) carte services." [R. 209-216, Addendum "E"] Hill's Day-Timer also indicates he met with them on Saturday, March 28, 1987, and decided then to give KSL's advertising work to their new agency. In less than a week, William Murdock of KSL called and told Richardson he had decided to give KSL's business to Williams and Rockwood. [R. 187]

Williams and Rockwood wanted the KSL business. They talked to Hill and presented a plan. They asked Hill if he would be interested in them providing services. They got the KSL business away from Gillham. [R. 180]

In 1986, Gillham received about \$200,000 in fees from KSL. From April through December, 1987, Williams and Rockwood received about \$120,000 from KSL. Five of six Williams and Rockwood employees were former Gillham employees. [R. 188]

Gillham's loss of KSL incepted through Williams' and Rockwood's breach of fiduciary duties while key employees and officers of Gillham. It is no defense that KSL formally left Gillham and went with Williams and Rockwood the week after they were fired. It can easily be inferred that KSL's action was the direct result of the course of action Williams and Rockwood undertook while key employees and officers of Gillham.

As key employees and officers of Gillham, Williams' and Rockwood's fiduciary duty of loyalty, good faith, and fair

dealing to Gillham was like unto the duty owed by a director. Williams and Rockwood were not ordinary employees who owed Gillham no obligation except to give loyal and conscientious service during regularly scheduled hours. Crane Co. v. Dahle, 576 P.2d 870 (Utah 1978).

When viewed in the light most favorable to Gillham, the evidence and inferences reasonably drawn from it more than demonstrate that Williams and Rockwood were key employees and officers of Gillham who owed Gillham a fiduciary duty of loyalty, good faith, and fair dealing. This Court should reverse the trial court's award of summary judgment in favor of Williams and Rockwood and remand this matter for further discovery and trial.

POINT IV. GENUINE ISSUES OF MATERIAL FACT SHOULD HAVE PRECLUDED THE TRIAL COURT FROM SUMMARILY DISMISSING GILLHAM'S CLAIM FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS.

In Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982), the Utah Supreme Court recognized a common-law cause of action for intentional interference with prospective economic relations. In his scholarly opinion, Justice Oaks reviewed the law regarding interference with contract and the law regarding interference with prospective economic relations. He analyzed the middle ground outlined in Oregon and held, inter alia:

We recognize a common-law cause of action for intentional interference with prospective economic relations, and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the

plaintiff. Privilege is an affirmative defense, Searle v. Johnson, Utah, 646 P.2d 682 (1982), which does not become an issue unless 'the acts charged would be tortious on the part of an unprivileged defendant.' Top Service Body Shop, Inc., 283 Or. at 210, 582 P.2d at 1371.

657 P.2d at 305.

In Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979), the Oregon Supreme Court equated improper purpose with a duty of non-interference.

In Top Service we decided that the defendant's improper intent, motive or purpose to interfere was a necessary element of the plaintiff's case, rather than a lack thereof being a matter of justification or privilege to be asserted as a defense by defendant. Thus, to be entitled to go to a jury, plaintiff must not only prove that defendant intentionally interfered with his **business relationship** but also that defendant had a duty of non-interference; i.e. that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff.

600 P.2d at 374.

This Case

the uncontroverted facts establish that Williams and Rockwood intentionally interfered with Gillham's existing economic relations with KSL. The loss of KSL, its second largest account, with 1986 billings of \$200,000, caused injury to Gillham.

As key employees and officers of Gillham, Williams and Rockwood owed a fiduciary duty of loyalty, good faith, and fair dealing to Gillham. Implicit in that duty is a duty not to interfere with Gillham's business relationships. Williams' and Rockwood's breach of their fiduciary duty to Gillham clearly

establishes the element of improper purpose and establishes a prima facie case of intentional interference with economic relations.

The trial court's summary dismissal of Gillham's claims, including its claim for intentional interference with economic relations, should be reversed. Genuine issues of material fact existed which should have precluded summary judgment. This Court should remand the matter for trial.

POINT V. THE TRIAL COURT ERRED IN AWARDING WILLIAMS
AND ROCKWOOD DEPOSITION COSTS.

Williams and Rockwood have the burden of demonstrating that they are entitled to recover deposition costs. First Security Bank of Utah, NA v. Winget, 521 P.2d 563 (Utah 1971); John Price Associates, Inc. v. Davis, 588 P.2d 713 (Utah 1978). Williams and Rockwood offered no evidence sustaining their burden of proof. Absent such proof, costs were not appropriately awarded.

The standard for determining if deposition costs are recoverable is whether the expense of the deposition was necessary or "essential" and whether the depositions were used at trial. Nelson v. Newman, 583 P.2d 601 (Utah 1978).

The courts also consider whether a less costly form of discovery would have sufficed. Highland Const. Co. v. Union Pacific Railroad Co., 683 P.2d 1042 (Utah 1984).

In the present case, Williams and Rockwood prevailed on a motion for partial summary judgment without trial. Further, the

information necessary to support their motion for partial summary judgment could have been discovered through interrogatories and production requests, like was done in the counterclaim for bonus money.

Finally, the only deposition that Williams and Rockwood noticed up was that of Gillham's president.

Williams and Rockwood, therefore, should not have been entitled to recover deposition costs. That award should be reversed.

CONCLUSION

Key Employees and officers of a corporation owe that corporation a duty of loyalty, good faith, and fair dealing, which is greater than the duty of an ordinary employee to render loyal and conscientious service. As Senior Vice-)President and Vice-President/Creative Director of Gillham, respectively, Williams and Rockwood exercised substantial authority and managerial responsibility over Gillham's affairs. Their relationship to Gillham was significant, valuable, and critical.

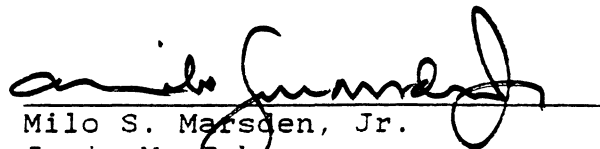
The evidence was overwhelming that they were not ordinary employees. Nevertheless, in its award of summary judgment to Williams and Rockwood, the trial court implicitly found them to be ordinary employees. In the fact of this genuine issue of material fact, the trial court erred in awarding Williams and Rockwood summary judgment. This Court should reverse that award.

The evidence was also overwhelming that Williams and Rockwood breached the fiduciary duty of loyalty, good faith, and

fair dealing they owed Gillham as key employees and officers. Given that genuine issue of material fact, the trial court erred in awarding Rockwood the \$4,000 bonus money and in awarding Williams and Rockwood deposition costs, as well as summary judgment.

The September 15, September 26, and October 24, 1988 Orders should be reversed and this matter remanded for trial.

DATED: April 26, 1989


Milo S. Marsden, Jr.
Jamis M. Johnson
MARSDEN, ORTON & CAHOON

Virginia C. Lee

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

Mailed a copy of the foregoing BRIEF OF APPELLANT to Mary Anne Q. Wood, HOLME, ROBERTS & OWEN, 50 South Main, Suite 900, Salt Lake City, Utah 84101, this 26th day of April, 1989.



ADDENDUM

- A. September 15, 1988 Bonus Order.
- B. September 26, 1988 Final Summary Judgment Order.
- C. October 24, 1988 Cost Order.
- D. Rule 56 of the Utah Rules of Civil Procedure.
- E. Affidavit of D. Keith Hill.
- F. ADVERTISING AGE, April 11, 1988 and April 4, 1988.

HOLME ROBERTS & OWEN
Mary Anne Q. Wood #3539
50 South Main, Suite 900
Salt Lake City, Utah 84144
Telephone: (801) 521-5800

Attorneys for Defendants

JUDGMENT

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

SEP 15 4 55 PM '88

HONORABLE CLERK
SALT LAKE COUNTY
BY *[Signature]*
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

GILLHAM ADVERTISING, INC.,
a Utah corporation,

Plaintiff,

vs.

TIM WILLIAMS and SCOTT
ROCKWOOD,

Defendants.

ORDER

Civil No. C87-07863

Judge James S. Sawaya

2143656
11-4-88 8:00

Defendants' Motion for Partial Summary Judgment came on for hearing on September 12, 1988 before the Honorable James S. Sawaya, Judge of the Third Judicial District. Defendants Tim Williams and Scott Rockwood were represented by Mary Anne Q. Wood. Plaintiff Gillham Advertising, Inc. was represented by Milo S. Marsden. The Court having considered the statements and arguments of counsel and good cause appearing

IT IS ORDERED that the relief requested in Defendants' First Counterclaim be granted. It is further ordered that Plaintiff Gillham Advertising, Inc. pay to Defendant Scott Rockwood the sum of \$4,000.

DATED this 15 day of September, 1988.

BY THE COURT:

The Honorable James S. Sawaya

ATTEST
H. DIXON HINDLEY
Clerk

By Nancy A. [Signature] Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered,
a true and correct copy of the foregoing proposed Order this
14th day of September, 1988, to the following:

Milo S. Marsden, Jr., Esq.
Marsden, Orton & Cahoon
Attorneys for Plaintiff
68 South Main
Salt Lake City, Utah 84101



MAWP/BA2

HOLME ROBERTS & OWEN
Mary Anne Q. Wood #3539
50 South Main, Suite 900
Salt Lake City, Utah 84144
Telephone: (801) 521-5800

SEP 25 12 57 PM '88

CLERK
DEPUTY CLERK

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

GILLHAM ADVERTISING, INC.,)	
a Utah corporation,)	ORDER
)	
Plaintiff,)	
)	
vs.)	
)	Civil No. C87-07863
TIM WILLIAMS and SCOTT)	
ROCKWOOD,)	Judge James S. Sawaya
)	
Defendants.)	

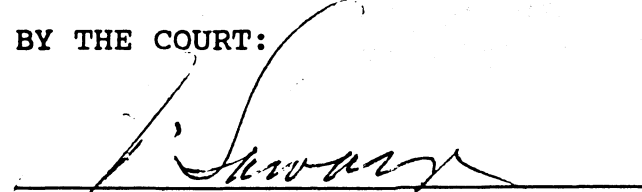
Defendants' Motion for Partial Summary Judgment came on for hearing on September 12, 1988 before the Honorable James S. Sawaya, Judge of the Third Judicial District. Defendants Tim Williams and Scott Rockwood were represented by Mary Anne Q. Wood. Plaintiff Gillham Advertising, Inc. was represented by Milo S. Marsden. The Court having considered the statements and arguments of counsel and good cause appearing,

IT IS ORDERED that summary judgment is granted dismissing Plaintiff's claims for relief. Summary judgment has previously been ordered on Defendants' First Counterclaim. In accordance with Rule 54 of the Utah Rules of Civil

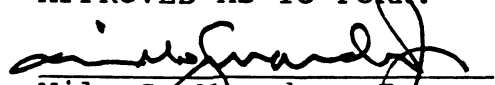
Procedure, the court has determined that there is no just reason for delay and expressly directs the entry of judgment in favor of Defendants on Plaintiff's claims and the Defendants' First Counterclaim.

DATED this 26 day of September, 1988.

BY THE COURT:


The Honorable James S. Sawaya

APPROVED AS TO FORM:


Milo S. Marsden, Jr.
Attorney for Plaintiff

MAWP/BB3

HOLME ROBERTS & OWEN
Mary Anne Q. Wood #3539
50 South Main, Suite 900
Salt Lake City, Utah 84144
Telephone: (801) 521-5800

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

OCT 24 4 44 PM '88

M. DIXON HINDLEY CLERK
3rd DIST. COURT

BY [Signature]
DEPUTY CLERK

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

GILLHAM ADVERTISING, INC.,
a Utah corporation,

Plaintiff,

vs.

TIM WILLIAMS and SCOTT
ROCKWOOD,

Defendants.

ORDER

Civil No. C87-07863

Judge James S. Sawaya

2143656

Based upon the Memorandum of Costs submitted by the
defendants and good cause shown,

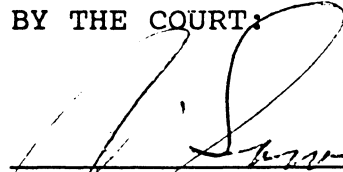
IT IS ORDERED that the following costs and
disbursements necessarily incurred by defendants in this
action be taxed to the plaintiff.

- | | | |
|----|--|-------------|
| a. | Filing fee of answer and
counterclaim and jury demand | \$ 80.00 |
| b. | Deposition transcripts and
court reporter fees | 666.60 |
| c. | Court copies | 3.30 |
| d. | Photocopies | 36.85 |
| e. | Tape duplication | <u>9.03</u> |

TOTAL: \$795.78

DATED this 20 day of Oct, 1988.

BY THE COURT:


The Honorable James S. Sawaya

ATTEST

F. W. HINDLEY

Clerk

By 

Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered,
a true and correct copy of the foregoing proposed Order this
11th day of October, 1988, to the following:

Milo S. Marsden, Jr., Esq.
Marsden, Orton & Cahoon
Attorneys for Plaintiff
68 South Main
Salt Lake City, Utah 84101



MAWP/BC3

UTAH RULES OF CIVIL PROCEDURE

Rule 56

and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a

trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.

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SALT LAKE COUNTY, UTAH

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3RD DIST. COURT

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MILO S. MARSDEN, JR. A2086
MARSDEN, ORTON & CAHOON
ATTORNEYS FOR PLAINTIFF
68 SOUTH MAIN, FIFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 521-3800

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

GILLHAM ADVERTISING, INC.,)
a Utah Corporation,)

Plaintiff,)

vs.)

TIM WILLIAMS and SCOTT)
ROCKWOOD,)

Defendants.)

AFFIDAVIT

Civil No. C87-07863
(Judge James S. Sawaya)

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

D. KEITH HILL, on oath deposes and says:

1. I am a former KSL employee.

2. I gave my deposition in the captioned matter on May 2
1988 and referred to my Day-Timer.

3. Following my deposition, copies of my Day-Timer shee
for the days March 25, 1987 through March 31, 1987 were copie
Attached hereto are copies of said Day-Timer sheets.

1
2 4. I made the following Day-Timer entry for March 25, 1987:

3 Met w/Tim + Scott on agency decision. Bill indicated a
4 go but w/o fuss of other agencies. O.K. on high end
creative + ala carte services.

5 DATED this 10 day of September, 1988.

6 D. Keith Hill
7 D. Keith Hill

8 SUBSCRIBED AND SWORN to before me this 10th day of
9 September, 1988.

10 Dail B. Guerin
Notary Public

11 Residing at Davis County, Utah

12 My Commission Expires:

13 1-8-90

14 DELIVERY CERTIFICATE

15 I certify that I hand delivered a copy of the forgoing
16 AFFIDAVIT to Mary Anne Q. Wood, 50 South Main, Suite 900, Salt
17 Lake City, Utah 84144, this 12th day of September, 1988.

18 Dail Guerin
19
20
21
22
23
24

WEDNESDAY 13th Week

MARCH 25 1987 • 281 Days Left

APPOINTMENTS & SCHEDULED EVENTS

TIME	NAME	PLACE	THURSDAY
9:30	Mangan		
4:00 PM	Com to		
7:15	Geo Guiner		
2	Eugene		
NOTE Item No	TO BE DONE TODAY (NUMBER EACH ITEM)		
1	Ind goals when Jim		
	Budget		
	Tom memo		
	His schedule		
P	Call Melva / signage set		
	Murder record days		
	4/6 Hollywood Square 100,000 pr		
	large slide		
	4/18-21 research		

EXPENSE & REIMBURSEMENT RECORD:

Item What?	Where? Duration?	Purpose Who What involved?	To whom Paid?	Reimbursed? By whom?	Amount

WEDNESDAY

84th Day • MARCH 25 1987

TIME RECORD, SERVICES PERFORMED, DIARY

TIME	TH	THURSDAY	TIME
8:12			
8:30			
9:00 AM			
9:12			
9:30			
1:00 PM			
1:12			
1:30			
1:48			
2:00			
2:12			
2:30			
2:48			
3:00			
3:12			
3:30			
3:48			
4:00			
4:12			
4:30			
4:48			
5:00			
5:12			
5:30			
5:48			
6:00			

① Tablet West
② Great Am. Ins. Shoot out
③ Tom Peters

2074 100 000
John Garfalo 213-203-163

Met w/ Tim + Scott on agency
decision. Bill indicated we
go but w/o fuse of other
agencies. O.K. on high end
creative + also carte services.

FRIDAY 13th Week

MARCH 27 1987 • 279 Days Left

APPOINTMENTS & SCHEDULED EVENTS

NAME PLACE SUBJECT

Don Mikelson
Dove + Jon

TO BE DONE TODAY (NUMBER EACH ITEM)

Write Post 583-7082

EXPENSE & REIMBURSEMENT RECORD:

Item: Where? Purpose: Who To whom Reimbursed? Amount
What? Duration? What Involved? Paid? By whom?

FRIDAY

30

86th Day • MARCH 27 1987

TIME RECORD, SERVICES PERFORMED, DIARY

FOR OF DESCRIPTION

6TH NORTH TRID 6'15"

Target: 18-34 Women
People oriented
Female presence
Family oriented
Punk Teases / Porn
10 Review Tests
Operah
Video I.D.

BILL SAYS GO FOR IT.

How Judge Cahn views the issues

Here's how Judge Herman Cahn, in his decision last week in the Martin Sorrell-Richard Lord legal fight, sorted out the issues. The excerpts below are from his April 5 New York state Supreme Court decision.

[Lord, Geller, Federico, Einstein] seeks, among other things, to enjoin said former employees [former Chairman-CEO Richard Lord and five other former top managers] from attempting to obtain the business of [LGFE]. It argues persuasively that it will be irreparably harmed if Lord Einstein is permitted to solicit LGFE's most talented employees, thus denuding the organization of the talent and ability that had made it successful.

Further, the accounts should not be solicited since they are extremely valuable and hard to replace.

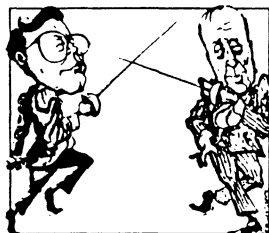
Employees' obligations

Defendants argue that both employees and accounts have the right to move from and to whatever agencies they wish and that indeed it is not unusual that they do so. But this argument does not address the obligations of employees and directors to their employer, and their contractual obligations.

The law is well-settled that a preliminary injunction will not issue un-

less a clear right to relief is shown. Plaintiffs must demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury in the absence of an injunction and (3) a balance of the equities in their favor.

The common law implies a duty of loyalty between employer and employee which prohibits employees from conspiring to set up a competing business while they are still work-



ing for their employer. Furthermore, this common law duty of loyalty survives the termination of employment. The solicitation of employees to leave their former employer constitutes a breach of this duty.

Defendants' own papers indicate that of 360 LGFE employees on March 18, 1988, 40 have since left the employ of LGFE. The bulk of these employees have been hired by Lord Einstein.

Stemming the exodus

Whether, in fact, defendants have induced or solicited the employees to leave is a question of fact; however, the mass exodus of employees, on no notice (with the exception of one employee), within days of each other, and their concomitant employment at Lord Einstein point strongly towards a solicitation which must be enjoined pending determination of this action.

Accordingly, defendants (with the exception of Young & Rubicam) are preliminarily enjoined from solic-

iting the employees of LGFE to leave. However, to the extent that employees leave LGFE of their own accord, and seek employment at Lord Einstein, Lord Einstein is free to hire those employees.

That irreparable harm to LGFE is likely [is] without question. LGFE has lost, within one week, all of its former top management and over 10% of its employees. LGFE will be irreparably harmed by further massive resignations.

No-compete clause stands

Defendants Lord and Einstein must be preliminarily enjoined from soliciting accounts of LGFE which were accounts as of March 18, 1988.

As previously discussed herein, Lord and Einstein entered into an agreement in 1974 which contained an anti-competitive provision prohibiting the solicitation or acceptance of any of the advertising business being handled by LGFE during the 12 months immediately preceding their termination.

Although the agreement provided for a term of five years, the non-competition provision explicitly provides that it shall go into effect "whether during, at the end of or after the term of employment provided for by Section 2 hereof (five years)." [Emphasis added by Judge Cahn.]

Defendants Lord and Einstein argue that the non-solicitation provision in their employment agreements are not enforceable because they had expired. Defendants cite *Hubbell vs. Hubbell Highway Signs Inc.* for this proposition. However, the court in *Hubbell* expressly upheld the provisions involved therein. In that case the employees continued in the employ of their employer for many years after the expiration of an agreement containing a three-year non-competition clause. The court held that the clause expired three years from the expiration of the contract.

Here the contract provision provides for it to go into effect at the termination of employment even if after the five-year period covered by the agreement.

WPP didn't breach contract

Defendants allege breach of the management agreement as a defense to the action. Such a breach would prevent operation of this provision under the terms thereof. However, that agreement itself provided JWT the right to accept or resign any accounts. Accordingly, the court believes such a defense to have little likelihood of success; to the contrary, plaintiffs have shown a likelihood of success.

The Court of Appeals has specifically enumerated the preservation of goodwill of an employer's business a reason to enforce an anti-competitive provision. The court notes that

Judge Cahn: Man of reason amid turmoil

By JUDANN DAGNOLI

Herman Cahn, the man hearing the legal dispute between WPP Group and Lord, Einstein, O'Neill & Partners, says he is not "tough," but "reasonable."

Then the acting New York state Supreme Court judge adds, "But I guess everyone says they are reasonable."

If "reasonable" means all parties walk away thinking they've won, Judge Cahn is that. Attorneys for WPP Group, Lord Einstein and the agency's minority backer, Young & Rubicam, all were claiming victory after the judge's preliminary rulings. Last week, the judge issued a temporary order that two former executives of WPP's Lord, Geller, Federico, Einstein can't try to attract LGFE clients to Lord Einstein, but others at the new agency can. He also said the new agency can't recruit LGFE staffers for now.

The judge is no stranger to controversy, even though he's an unknown quantity to many lawyers in this case because he has spent most of the past six years on the criminal court bench.

Judge Cahn is now presiding over Irving Bank Corp.'s fight against a takeover attempt by the Bank of New York.

Largely, however, Judge Cahn is known for his Criminal Supreme Court decisions. Judge Cahn, a civil court judge for the city of New York, has presided over some locally high-profile trials. One involved five men convicted of attacking two allegedly gay men in Greenwich Village. In another, he barred the Life Science Church from selling minister's credentials in an alleged pyramid scheme.

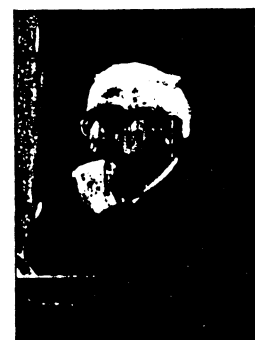
It was only this year that he again began hearing civil cases, making it unlikely many of the corporate attorneys at Skadden, Arps, Slate, Meagher & Flom—representing Lord Einstein—and at Davis & Gilbert—representing WPP—would have had much occasion until now to stand before him.

Small, thin and bespectacled, the 56-year-old Judge Cahn is a soft-spoken family man. Born in Bonn, Germany, to Samuel and Julia Cahn, he moved to the U.S. in 1918 when he was 6.

After getting his bachelor's degree from City College of New York in 1953 and his law degree from Harvard University in 1956, Judge Cahn went into private practice, first with Grossman & Grossman in Manhattan. He later formed his own firm, Cahn & Ryb, in 1963. He was at an offshoot of that firm, Cahn & Levenson, when he was elected a civil court judge in 1976, taking office in 1977. He became an acting supreme court judge in April 1980.

An interview about his personal life yielded few clues about Judge Cahn's legal thinking. He describes himself as religious, belonging to the Jewish Orthodox faith, and being active in community work, including the Jewish Relations Community Council of New York and the Jewish Community Council in Inwood, N.Y.

Judge Cahn and his wife, Abby, have four children, three in their early to mid 20s: Avrom, Eva and Milton. His youngest, Samuel, is 10 years old and "keeps me really busy," he said. His two eldest sons are both attorneys.



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the issue is not whether defendants had the right to leave the employ of LGFE nor whether they have the right to open a competing business, both of which they have the right to do. However, they may not violate the terms of their express agreement not to accept or solicit LGFE clients for one year.

The court notes that non-competitive agreements are not favored by

the courts. Here, the court will grant enforcements of the provision for several reasons.

First, because the provision itself is clearly limited both as to time and as to what is prohibited. The time of the prohibition is only one year. Secondly, the activities prohibited only related directly to the accounts of LGFE for a further limited time. The provision does not prevent Lord and Einstein from carrying on their trade—it merely prevents them from soliciting certain limited accounts. Lord and Einstein may compete with [LGFE] in every market, for every account—excepting only the accounts serviced by [LGFE] for the year prior to their leaving [LGFE] employ. The provision is not unreasonable.

Insofar as Lord Einstein is concerned, it has no obligation to LGFE. A careful reading of the non-competition clause shows that it specifically binds individuals and not the new agency. Therefore, the

(Continued on Page 69)

AGENCY BREAKAWAY

Tallying up Sorrell's score in court battle

Martin Sorrell's "won-loss" record in last week's decision by New York state Supreme Court acting Judge Herman Cahn, ending Round 1 in his legal battle with Richard Lord:

WIN: Judge temporarily bars Lord, Einstein, O'Neill & Partners from soliciting employees of Mr. Sorrell's Lord, Geller, Federico, Einstein to join the new agency.

WIN: Judge temporarily bars Mr. Lord, former LGFE chairman-ceo, and Arthur W. Einstein Jr., former LGFE president, from soliciting or accepting clients that were LGFE

accounts on March 18, the day the two men quit Lord Geller with four other senior managers.

LOSS: Judge refuses a companion Sorrell request that the Lord Einstein agency and its other executives be barred from soliciting or accepting business from clients now at Lord Geller. That could permit current LGFE clients to shift business to the new Lord Einstein agency provided Messrs. Lord and Einstein aren't directly or indirectly involved.

LOSS: Judge denies Mr. Sorrell's request for an order bar-

ring Mr. Lord's new agency from using "Lord" as the first name in its agency identity.

LOSS: Judge refuses "at this stage of the proceeding" to grant Mr. Sorrell's requests for action against Young & Rubicam for its role in financing the Lord Einstein breakaway.

Last week's order dealt with Mr. Sorrell's requests for preliminary injunctions to prevent "irreparable damage" from being done to Lord Geller. Final decisions on the Sorrell charges will come later. #

Court text

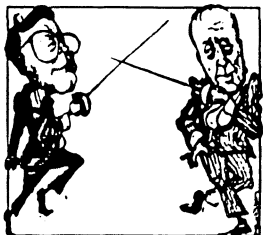
(Continued from Page 68)
motion for temporary injunction is denied as to Lord Einstein.

The courts are all but anxious to enjoin the use by a man of his own surname in business. However, an injunction is "more tolerable" where the infringer has sold his business with its goodwill.

Let Lord be Lord

This is not a case where a newcomer wishes to start his own business under his own surname, which, by coincidence, happens to be a known surname in the industry; nor has plaintiff been in business a short time.

When the use of a name will tend to confuse the public, its use may be enjoined, whether specific instances of confusion are shown or not. The central concern is that it is wrong to



sell a business and the[n] try to get that very asset back.

Recognizing the reluctance to prohibit the use of a surname, plaintiff's motion as to use of the name is denied.

Plaintiffs seek inclusion of defendant Y&R in all phases of any injunctive relief given.

However, no injunctive relief is warranted at this stage of the proceeding. Substantial proof has not been advanced to show knowing participation by Y&R of a breach of a fiduciary duty by the other defendants herein.

The injunction

In conclusion, plaintiffs' motion is granted to the following extent:

1) The individual defendants herein are preliminarily enjoined from soliciting the employees of LGFE to leave their employ and work for Lord Einstein.

2) Defendants Lord and Einstein are preliminarily enjoined from soliciting or accepting, directly or indirectly, any accounts of LGFE which were accounts of LGFE for the 12 months preceding their resignation, in accordance with Clause 7 of the employment agreements.

The court will fix the amount of the [bond] to be posted by Mr. Sorrell in the order to be settled. Letter suggestions from the parties regarding the appropriate amount to be fixed will be accepted by the court.

The motion for a preliminary injunction is denied as to defendant

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Advertising Age

Crain's International Newspaper of Marketing. In Two Sections. Section 1.

Philip Morris force behind new council

By STEVEN W. COLFORD

The spark behind the controversy over two similar industry "councils" set up to fight ad taxes and other issues is tobacco giant Philip Morris Cos.

Phil Smith, chairman-CEO of General Foods Corp., last week said his company's parent "took the initiative" in organizing a new Leadership Council on Advertising Issues, so far made up of GF, Mars Inc., Ogilvy Group, Procter & Gamble Co. and Time Inc.

The ad hoc group is being formed despite the startup of a similar organization, the Council for Commercial Freedom, an advisory panel to the three advertising associations an-

"I don't feel there is a need for two organizations working to the same purpose. . . . The existing structures . . . are doing the job."

—AAF Chairman James Blocki

nounced last week.

The purpose of both groups is to fight government infringement on advertiser rights (AA, March 28).

PM took action because of the threat of higher tobacco taxes in lieu of the advertising tax that Florida unsuccessfully tried to implement last year.

Although it has yet to meet, the Leadership Council has been under consideration at least since mid-1987. That's about the same time the associations began hammering out plans for their Council for Commercial Freedom.

Already industry association leaders and their board members are questioning the need for two groups with similar goals, and leave no question as to which they'd like to see continue.

Dewitt Helm Jr., president of the Association of National (Continued on Page 73)

Last Minute News

Diamandis seeks investors

NEW YORK—Diamandis Communications Inc. is negotiating to sell part of the company to interested investors, including Hachette Publications, sources say. Recent industry rumors had speculated that DCI was for sale. The company was created last year in a \$650 million management-led buyout of CBS Magazines. But sources within DCI say CEO Peter Diamandis is only looking for an investor to help reduce the company's debt while he keeps management control.

Baseball, MasterCard team up

NEW YORK—Major League Baseball is close to finalizing a deal with MasterCard International to create affinity card programs for its 26 teams, sources say. The cards, which will be issued by local banks, will carry individual team logos. Lintas Worldwide is agency of record for MasterCard.

Gallo talks to Noble

MODESTO, CALIF.—E&J Gallo Winery last week met with John Noble Advertising, San Francisco, fueling speculation (Continued on Page 8)

Agency of the Year finalists—P. 48



Kevin O'Neill (l.) leads Ray Freeman, Dick Lord and Bruce Albert to New York Supreme Court last Monday for the first round in their breakaway battle with Martin Sorrell.

Photo by Doug Goodman

'Conspiracy'

Sorrell claims breakaway is a plot to force LGFE sale

By JON LAFAYETTE and GARY LEVIN

NEW YORK—In a surprising courtroom tactic, WPP Group may try to prove that the walkout of six key Lord, Geller, Federico, Einstein executives was designed to force WPP to sell the agency at a devalued price.

WPP may claim that a circle of conspiracy had been formed by former LGFE Chairman-CEO Richard Lord, his associates and Young & Rubicam, and that Dean Witter Reynolds may be a part of it.

Under this scenario, Dean Witter, both LGFE's client and a contact of Mr. Lord in the breakaway, would try to arrange a purchase of the agency after the executive departure.

WPP Chief Executive Martin Sorrell refused to say whether he had been contacted about a possible sale of LGFE since the walkout on March 18, but he restated his position that the agency is not for sale. Prior to the breakaway, (Continued on Page 70)

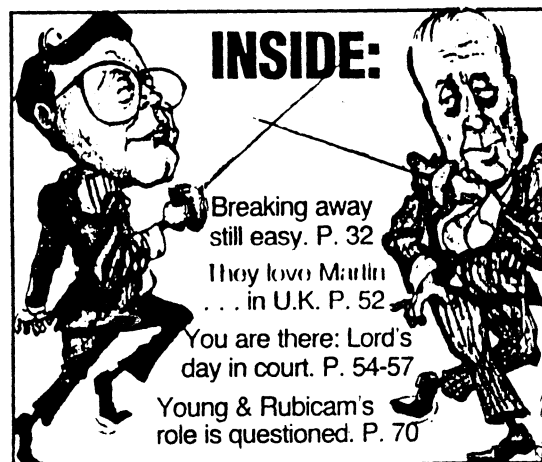


Illustration by Roger Schuler

Admen raise ethics issue

By GARY LEVIN

NEW YORK—Agency executives believe the dispute between WPP Group and Lord, Einstein, O'Neill & Partners presents ethical issues that threaten to tarnish the ad industry's image.

Despite uncertainty about the legal implications of the affair, many executives questioned the propriety of Young & Rubicam's financial interest in the breakaway shop.

"The whole thing's kind of shabby; it's just another hit on the head for the agency ethics issue," said the head of one West Coast agency, who asked not to be identified.

"I don't have any problem with the issue of breakaways, but I think it's highly unusual to have [another agency] finance it," said Kenneth Roman, chairman-CEO of Ogilvy & Mather Worldwide. "The whole issue and the suggestion that this was done to win an account—that strikes me as making the whole business seem less than I would like it to seem."

Executives at Lord Einstein re-

Y&R's interest sparks questions

peatedly denied they had approached clients of their former agency before or since their walk-out. Y&R refused comment on the matter.

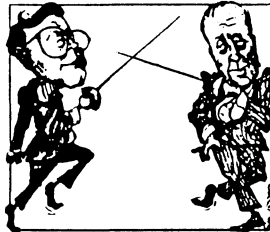
But the issue was surrounded with questions of ethics.

"Did people really anticipate taking the business?" asked Charles Peebler, CEO of Bozell, Jacobs, Kenyon & Eckhardt. "If they did, that's probably not a good thing. If they didn't intend to take any business, would they have taken as many people as they did?"

(Twenty-eight LGFE staffers have joined the new agency.)

Most agency people discounted a theory that Y&R became involved simply to damage the reputation of competitor WPP as "too personal" and as having uncertain concrete advantages.

And few subscribed to the "U.S. vs. British" hypothesis that has pa-



triotic Y&R rushing to rescue a U.S. agency against the British invasion.

But many thought potential business gains—pending the outcome of the lawsuit filed against Lord Einstein by WPP—may have lured Y&R to participate financially.

"I have a hard time believing Y&R does anything that isn't monetarily beneficial to them," said Jerry Siano, vice-chairman of N W Ayer

and chairman of its Ayer USA unit. "Y&R's motivation, unlike what others might think, is to get bigger and to get their hands into anything they can get their hands into," Mr. Siano said. "It's an opportunity to grow in other areas with guys who may have a hold on other businesses and maybe get some of that."

Others seemed equally convinced of that motive, despite the lack of evidence that specific LGFE business was courted by its departing executives.

"They had every right not to continue to work after the business was sold [to WPP], but they did not have the right to tamper with the business," said Robert Bloom, chairman-CEO of the Bloom Cos., New York and Dallas. "Nor does an outside firm have the right to tamper with the business."

"The basic message is that if you don't want to give up rights of own-

ership, don't sell," he said, referring to the agency's 1974 sale to J. Walter Thompson Co.

Mr. Peebler said the defectors appeared to have ignored the "real values of ownership" in their quest for independence from WPP under Y&R's wing.

"Somebody might say, 'Well, look, nobody did anything illegal.' I don't know if legal is the answer," he said. "Right or wrong isn't always determined by, 'If I do it, will I go to jail?'"

But another agency executive said the ethical question is equally muddled.

"It's not an issue of standard ethics," said Dennis Coe, president of Eisaman, Johns & Laws, Los Angeles. "Depending on how it was written, Y&R could be stepping into a deep hole, or they could have every moral and legal right to assist the breakaway." #

Jennifer Lawrence in Houston and Marcy Magiera in Los Angeles contributed to this story.

LGFE name now tarnished, Lord says

(Continued from Page 1)

Mr. Lord and five of his associates had made several unsuccessful attempts to buy LGFE. After failing, they walked out and formed a new agency, Lord, Einstein, O'Neill & Partners, with financial backing from Y&R (AA, March 21, et seq.).

Mr. Lord said he hasn't seriously considered, or approached, WPP about any continuing interest in buying LGFE. But he didn't rule out such a move.

"The name is so tarnished, I think it's been irreparably damaged" by the publicity and lawsuits, he said. "It's not worth the money Martin would want for it. Would I like to do it? I don't know. I'd have to ask the guys. Would I want to buy it back? I haven't even thought about it."

Mr. Lord and his associates have not yet signed a definitive agreement with Y&R setting out complete terms for the new agency. But Y&R sources say this is only a technicality.

Much of WPP's legal strategy centers on a memo found in the office vacated by C. Ray Freeman, the former LGFE exec VP who was part of the breakaway team.

The handwritten memo reads: "#1—Leave and sell for \$25-30 million with backing from Y&R—Dean Witter to handle."

"#2—Top 25 walkaway."

Map for breakaway

WPP's lawyers contend this represents a map for the breakaway group's actions so far. The theory is that the six executives would leave LGFE and eventually be able to buy the agency back for \$25 million to \$30 million. Y&R would help with the financing and Dean Witter would handle the transaction.

Dean Witter representatives could not be reached for comment.

But sources say Dean Witter Chairman-CEO Philip Purcell and Mr. Sorrell hold no great love for each other.

In a candid and rare interview with ADVERTISING AGE earlier in the week, Mr. Sorrell said that he had turned down about 25 inquiries about the sale of LGFE before the breakaway.

Mr. Sorrell said he was particularly irritated by inquiries initiated by Dean Witter's mergers and ac-

quisition unit. Mr. Sorrell said those inquiries disturbed him not only because the investment company is an LGFE client but because WPP itself is a Dean Witter client, having recently paid fees to the company for its help in closing two WPP deals.

In the interview, Mr. Sorrell said he would still like to see the LGFE defectors, termed "co-conspirators" in his lawsuit, return to their former jobs.

"The best solution would be for them to come back to work and discharge their obligation," Mr. Sorrell said. "We'd like them to come back."

Mr. Lord said he wouldn't work for Mr. Sorrell again under any circumstances. "I couldn't go back to someone like that," he said.

Mr. Sorrell acknowledged that his refusal to sell LGFE has created a great deal of trouble for him.

"We've had more than enough of it," he said, adding that he can't change his mind on selling the agency. "We won't accede to blackmail," he declared.

He added that selling LGFE would set a bad precedent and send out the wrong signals for the other companies owned by WPP.

In the weeks and months before the breakaway, Mr. Sorrell said, Mr. Lord and his associates, in discussions on new-employment agreements, continually asked for the autonomy they said they had enjoyed before the agency was bought by WPP.

But Mr. Sorrell pointed out that even before the sale, LGFE's parent, JWT Group, reserved the right to approve all potential LGFE clients.

Mr. Sorrell also claimed the financial terms of proposed employment arrangements with Mr. Lord and his associates were favorable.

Recognizing their leverage, "We treated them as owners," he said. The agency's 1988 plan called for a bonus of \$825,000 if the agency made its target of \$5 million in pre-tax profits, he said.

The bonus pool was to be distributed entirely at Mr. Lord's discretion. Any profits above \$5.6 million were to be split 50-50 between WPP and LGFE.

In addition, LGFE had a "phantom stock plan" that Mr. Sorrell said was put into effect by JWT to

compensate the agency for forgoing an opportunity to handle the Jaguar car account.

The phantom stock enabled agency principals to participate in the agency's growth and could have earned them "millions and millions," Mr. Sorrell said.

He added that whenever an agreement seemed to be imminent, but not nailed down, the LGFE executives backed off.

Mr. Lord disputed Mr. Sorrell's assertion that the principals were

"We don't make a distinction between a 10% interest or a 100% interest" for purposes of conflict policy.

—Doug McClure
Ford Motor Co.

offered favorable contracts, calling them "punitive and restrictive. We didn't feel any trust."

Bonuses withheld

And he contends that Mr. Sorrell tried to force them into accepting his terms by withholding year-end bonuses from all LGFE employees, not just those with whom he was negotiating. "Holding the kids' bonuses up until we signed contracts was outrageous," Mr. Lord said.

Even as the legal battle brewed, several of LGFE's clients took action last week to reaffirm or cut ties to the troubled agency.

Sony Corp. of America pulled its \$2.6 million-to-\$3 million professional account from the agency but blamed the move on long-running compensation issues and not the current controversy.

Jeff Brooks, VP-advertising, said he was pleased with the agency's creative work; he added that the split was mutual.

Sony will not begin an agency review until next week at the earliest.

The New Yorker was expected to join Lord Einstein's short client roster, following in the footsteps of WNBC-TV, but by press time had

taken no official action.

No client showed more concern about LGFE's status than IBM Corp., by far LGFE's largest client (see related story and chart on Page 72).

In a letter to Mr. Sorrell dated March 23, IBM VP-Communications M.B. Puckett wrote, "We frankly are very concerned over your ability to perform work which is vital to our business. We cannot accept any delays, especially in this critical time period ahead. We would, therefore, ask that you provide within the next 48 hours a plan detailing how your agency will accomplish this work."

The letter was released as an exhibit in WPP's lawsuit. Another document containing a projection of revenues shows that LGFE expected revenues from the IBM account to drop 28% to \$19.1 million this year.

The projected figures account for a 10% IBM billings increase and a reduction in commission rate to 12%. At those levels, IBM's account would have had billings of \$133 million of the agency's total of slightly more than \$200 million.

Mr. Sorrell declined to discuss the business of any client, including his response to the IBM letter.

He acknowledged that he was calling on the full resources of WPP to help LGFE and its clients. Those resources reportedly include staffers at J. Walter Thompson Co., but Mr. Sorrell wouldn't elaborate, and the reports couldn't be confirmed.

Sources said regularly scheduled meetings with IBM were held last week and that the computer marketer approved new LGFE ads.

IBM is unlikely to move precipitously in making a move to change agencies, sources said.

Two individuals emerged as possible keys to IBM's decision. One was Michael Dann, a former senior VP-programs at CBS Entertainment and a well-known figure in network TV circles, who has been the TV consultant to IBM since 1973.

Mr. Lord and Mr. Dann are said to be friends, and the latter, according to sources, advised Mr. Lord and former JWT Group Chairman-CEO Don Johnston on how to service IBM.

Mr. Dann's recommendation when the account moved to Lord

Geller was to hire John Curran, the second key individual.

Mr. Curran had serviced IBM's buying at Doyle Dane Bernbach for nearly a decade, was a very respected buyer with a special bent toward creating "standout" buys (which IBM likes); and he knew the IBM business intimately.

This was critical, because top IBM executives were often circulated throughout the corporation and were media experts.

Sources indicated that Mr. Dann's recommendations to IBM could be critical to any decision and that Mr. Curran would likely work at whichever agency won the account.

Lord Einstein sources said Mr. Curran would move to their new agency, but last week he was still at LGFE, reportedly working on IBM's third-quarter TV buys.

Freeman statement noted

In court papers, WPP's legal team made an issue of a statement by Mr. Freeman that he had told an IBM representative he was considering leaving LGFE.

"On Wednesday evening, March 16, 1988, while returning home from work, I told Darby Coker, an IBM representative who was commuting with me, that I might resign and establish a new agency," Mr. Freeman said in a deposition. "I did not solicit business from Mr. Coker on behalf of Lord Einstein, nor did I disparage Lord Geller."

"Moreover, Mr. Coker is not employed by IBM in a position that would enable him to award advertising business to Lord Einstein. He is simply a longtime friend."

WPP claimed in legal papers that this "was tantamount to advising IBM of the plan for an impending walkout..."

A spokesman for another LGFE client, Schieffelin & Somerset, said the agency and client "had a very good creative session" on March 31, with presentations of new ads for Hennessy cognac and Domain Chandon sparkling wines.

"I'd say everything right now is status quo," said Schieffelin Senior VP-Marketing Clint Rodenberg. "It's up to Lord Geller to see how everything shakes out."

Mr. Rodenberg said the agency

(Continued on Page 71)

AGENCY BREAKAWAY

Sorrell depends on outside shop for PR assistance

By JACK BERNSTEIN

NEW YORK—Isn't it curious? WPP Group owns Hill & Knowlton, one of the world's largest public relations agencies and certainly proud of its skills in crisis communications situations.

So who's WPP using in its media confrontation with Richard Lord and fellow defectors from Lord, Geller, Federico, Einstein? Kekst & Co.

Why? The folks at H&K wouldn't comment, but sources assert that they're perplexed and bitter.

Martin Sorrell, chief executive at WPP, used Kekst in his campaign to take over JWT Group last year. JWT Group acquired H&K in 1980. With the WPP takeover completed in July, the expectation was that WPP communications requirements would be handled by H&K. That hasn't happened.

Mr. Sorrell finds nothing curious about working with Kekst, describing it as "a continuation of the relationship initiated last year."

His preference for independent service extends to London, where he retains the services of Binns-Cornwall, a financial PR agency. WPP is headquartered in London, where H&K has a full-service operation.

What has also raised some eyebrows is the fact that Kekst is closely wired to Skadden, Arps, Slate, Meagher & Flom, the takeover law firm that's representing the Lord breakaway contingent. #

Jack Bernstein is ADVERTISING AGE's PR columnist.

WPP Group buys Brit consultancy

By LAUREL WENTZ

LONDON—In the midst of upheavals in the U.S., WPP Group last week made its first acquisition in strategic marketing consulting, buying the prestigious U.K. economic forecaster Henley Centre.

Henley will continue to operate independently, but is expected to complement the existing range of marketing services WPP offers by adding a strategic approach to the analysis of marketing problems.

Henley is strong in product development and brand positioning, strategic options, policy analysis, communication tactics and market forecasts.

British Airways, British Petroleum, RJR Nabisco, Reckitt & Colman and Unilever are clients.

WPP is making an initial payment of \$3.8 million and \$1.8 million in WPP stock, with profit-linked payments over five years to a total price of up to \$15.4 million paid in a combination of cash and

WPP stock. A bonus payment of up to \$18 million will be made if Henley can produce 50% compound increases in after-tax profits over the next five years.

WPP has signed the company's three principals—Bob Tyrrell, man-

heart of the group, discussing the development of the whole [WPP] animal," Mr. Staniford said. "Martin [Sorrell] has built a fantastic company with a vast range of marketing services and sees us as being at the hub."

"Henley is keen to expand into the U.S. market," said Anita Frew, WPP's corporate development director. "It will be natural if they expand geographically and begin working for clients like Unilever on a worldwide basis."

WPP is delegating Stephen King, research and development director at J. Walter Thompson Co.'s London office; Jeremy Bullmore, former chairman of JWT, London; and John Quelch, WPP board director and Harvard Business School professor, to work closely with Henley.

"With Henley playing a pivotal, independent role in the group, we shall significantly strengthen our ability to serve clients strategically," said WPP Group Chief Executive Martin Sorrell. #

Sorrell "has built a fantastic company with a vast range of marketing services and sees us as being at the hub."

—Barrie Staniford
Henley Centre

aging director; Paul Ormerod, director of economics; and Barrie Staniford, director of planning and marketing—to seven-year management contracts.

"We will be working right at the

Lord

(Continued from Page 70)

has "more than" maintained its level of service to Schieffelin and "has met extraordinary demands" from the client, but he didn't rule out the possibility of a review.

Messrs. Rodenberg and Sorrell are scheduled to meet this week.

As for the new Lord Einstein agency, it was unclear how much freedom from conflict it would have because of its association with Y&R.

Ford Motor Co. said it wouldn't allow Lord Einstein to pursue a major automotive account, such as General Motors Corp.'s Saturn business, because of its connection to Young & Rubicam, which handles about \$200 million in Ford billings, including its Lincoln-Mercury Division, said Doug McClure, director-corporate advertising and marketing strategy.

"We don't make a distinction between a 10% interest or a 100% interest" for purposes of the policy, Mr. McClure said. He said Y&R has been told that the policy applies to Lord Einstein.

But Mr. McClure said a new Ford policy on conflicts leaves room for an affiliate of its own agencies to take on a small-volume marketer.

What about autonomy?

There were also questions about how much autonomy was promised to LGFE by JWT Group.

The autonomy agreement presented in court by the Lord group specifies that JWT had the power to cause LGFE "to decline or resign an account." It adds that LGFE would get a pretax net income credit for the computation of management incentives.

Relying on memos later found in vacated LGFE offices, WPP and its advisers concluded that the executives' only goal was to force a sale of the agency.

"No one was willing to give us a chance," Mr. Sorrell said.

Mr. Sorrell recalled that Y&R came up in one conversation with Mr. Lord a few months ago: "I mentioned in conversation that I thought Y&R was pursuing one of our accounts. He said, 'Let them.'"

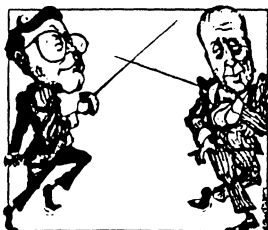
Mr. Sorrell originally interpreted

this reply as an expression of confidence, but now considers it evidence of a conspiracy.

On April 1, Y&R Chairman Alexander Kroll sent a memo to the agency's worldwide management group to explain its role in the dispute in which he characterized Mr. Sorrell as "a hostile overlord."

In the memo, Mr. Kroll maintained that "we put money behind them because we admire their principals and their principles. . . . They are not a Y&R company. They are a Y&R investment. We are a minority partner and have no hand in operations."

"After all, they fled the incursions of a hostile overlord. Why would they flee to another overlord; albeit friendly? There is some smoky speculation about our intentions."



They are simple as well. We hope they succeed, do brilliant work, grow and expand. That will make us happy and make us money."

Mr. Lord confirmed as "fairly accurate" Mr. Sorrell's report that Y&R initially holds a 40%-to-45% stake in Lord Einstein but said the "handshake" agreement provides for a sliding-scale formula.

The formula could eventually transfer some equity held by Y&R and the principals to new employees or partners.

But the details behind the Lord Einstein-Y&R link aren't settled yet, including the terms and duration of Y&R's financial involvement.

Ironically, these are similar issues to those that caused a conflict between Lord Geller and WPP.

One outside source said: "I'm sure they're discussing what Y&R's options are when the new agency is up and going and worth something."

Leaving Sorrell in the lurch

Despite Y&R's involvement, Mr.

Sorrell seemed most outraged over the manner in which the LGFE executives left on March 18.

"The issue is not freedom or independence," he said. "What the issue is was the chaos they caused to the major companies that need work done."

He also said that by departing so suddenly, the executives jeopardized the jobs of the agency's other 300 employees. "This wasn't a divorce, where papers are drawn and provisions are made. It was abandonment," he said.

Mr. Sorrell said that if Mr. Lord and his associates had reached the end of their rope, they should have "come in and said, 'I don't like you. I don't like what you stand for. You're killing the agency. But we don't want to cause chaos, and propose a way to leave over a three-month, six-month or nine-month period.'"

Early last week, WPP Group went to court seeking a temporary restraining order or injunction against Lord Einstein to prevent the breakaway executives from taking clients or employees from LGFE or from using "Lord" as the lead name in their agency.

New York Supreme Court Judge Herman Cahn heard arguments from both sides but didn't rule on WPP's requests. A ruling is expected this week.

Smoking memo, Part II

Documents supplied by both sides underscored the quiet warfare that went on between WPP and LGFE since last July when JWT Group was acquired by the British company (see transcript and other documents on Page 54).

The Lord group's unhappiness is made clear in several memos left behind in LGFE's offices.

WPP further contends that these memos serve as a blueprint for the walkout, for which the breakaway group had been preparing for some time.

Mr. Lord said he sold the agency to JWT in 1974 for an "embarrassing" amount of unregistered JWT stock, then worth "well under \$400,000."

That amount was split among five principals, he said.

The notion of making considerably more money was alluded to in a memo allegedly written by Edward

Yaconetti, former exec VP-chief operating officer of LGFE.

The memo, found in LGFE files after the breakaway, draws up a 1987-89 business plan for "an agency without the IBM business . . . but also without JWT Group."

It offers a conclusion in which owners of such an agency should "grow it for several years—sell it at a multiple of the profit it generates . . . perhaps for real money!"

Last week, Mr. Sorrell was personally lobbying such agency heavyweights as Phil Geier, Interpublic Group of Cos. chairman-CEO; Ken Roman, Ogilvy Group vice chairman; and Allen Rosenshine, Omnicom Group president-CEO, to publicly support the WPP chief in his battle with Y&R and Dick Lord, sources said.

They all turned him down, though Mr. Roman expressed some moral

support. #

Contributing to this story were Patricia Winters and Judith Graham in New York; Raymond Serafin in Detroit; and Ira Teinowitz in Chicago.

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The following excerpts are from a March 28 hearing for a preliminary injunction requested by Martin Sorrell's Owl Group.

JUDGE HERMAN CAHN: Do you have any reason or do you have any indication as to why these men left (Lord, Geller, Federico, Einstein)?

PATRICIA HATRY (attorney from Davis & Gilbert for Owl Group): Yes, your Honor. I think the exhibits, documentary evidence we have been able to compile and have just left with you this morning . . . show a very clear conspiracy, action that started as long ago as October, almost six months ago. . . . The affidavit of Mr. Sorrell points out they met . . . in October of 1987 with the chairman of Young & Rubicam and with its general counsel. They started mapping out this scheme.

There is documentary evidence we were able to put together out of pieces of paper left in their office; of those left we were able to show a scheme and you have all the exhibits that show they were working on it.

JUDGE CAHN: Let me cut you short. What specific relief are you looking for this afternoon?

MS. HATRY: The specific relief we're looking for is something that will enable us to keep those 300 people (at Lord Geller) employed, to keep the business going.

JUDGE CAHN: One of the things you want is some sort of injunctive or temporary restraining order?

MS. HATRY: To stop the drain of our key employees and also in order to maintain our operation . . . we need assurance that the clients will not disappear.

JUDGE CAHN: What you're asking is you want me to enjoin them or their new agency, Lord Einstein, from going after your clients?

MS. HATRY: In this very interim period, yes, your Honor. They are totally free to seduce and induce the rest of the world.

JUDGE CAHN: Counsel?

A long history

THOMAS SCHWARZ (attorney from Skadden, Arps, Slate, Meagher & Flom for Lord Einstein): This action is not what plaintiff represents.

. . . This has a long history and it starts in 1974 at a time when the predecessor company had been in business for some years, was a very small agency, \$5 million worth of billings and sold to J. Walter Thompson.

The key fact is . . . (the) principle upon which the acquisition took place was an issue of autonomy; that is, the Lord Geller agency would be run totally autonomous from the J. Walter Thompson agency. . . .

Obviously if the conflict from J. Walter Thompson would bar Lord Geller from taking business, then Lord Geller would never get bigger than a \$5 million agency.

At the time of the (WPP) acquisition in 1987, the (Lord Geller) defendants requested some assurances that the agency will be operated in an autonomous fashion and there were various discussions between Mr. Sorrell and representatives of Lord Geller. . . . At some point in late 1987, it was beginning to be clear that Mr. Sorrell did not want to pay any attention.

So there were various ruminations that your Honor has before you in certain documents. They have, by the way, released them to



Standing before Judge Herman Cahn in New York Supreme Court for the injunction hearing are (from l.) attorneys Stephen Oxman (representing Young & Rubicam), Thomas Schwarz (representing the former Lord Geller executives at Lord, Einstein, O'Neill & Partners) and Patricia

the press and, as any good advertising agency would do, is fighting their case in the press more so than in the court. They released these documents. The documents are basic ruminations. . . . They show various potentials for trying to hit the donkey over the head, which is Mr. Sorrell, to get his attention to talk to them.

None of them, by the way, did they ever do and the record in this case as opposed to the claims in this case is absolutely clear that they did not do anything . . . to cause personal dissatisfaction to their client(s) by sabotaging the business of Lord Geller.

Ultimately it became clear that Mr. Sorrell cared about the bottom line. Then there were two principal events that took place. . . .

One is that Mr. Sorrell wants to get Alfa Romeo business in Europe. He is concerned that would present a conflict if J. Walter Thompson does it. He talks to Mr. Lord . . . and Mr. Lord says he doesn't think it's a good idea, No. 1.

No. 2, the people who were going to be operating this Lord Geller European facility were going to operate out of (a) J. Walter Thompson facility without Lord Geller's control, notwithstanding that J. Walter Thompson announces it will have European facilities and it's going to be a Lord Geller facility; then, sort of aside, General Motors, as you know, is developing a new line of cars called Saturn. It is, in fact, the biggest piece of new advertising business to come down the road in a long while.

Lord Geller was one of the top finalists in bidding for that new business.

Lo and behold, what happens is Mr. Sorrell says no. You may not bid for that business. Why? Because it's a conflict with J. Walter Thompson's representation (of Ford), and he says how much is the business? Answer, maybe \$100 million a year.

Well, J. Walter Thompson has Ford.

It's \$300 million. He can't do it.

JUDGE CAHN: Tell me, between 1974 and 1987 they never had these problems?

MR. SCHWARZ: They worked out these problems in a way that they were able to live with. . . .

In late 1986, 1987, there began to be discussions . . . with J. Walter Thompson about buying the agency.

. . . The predecessor management (JWT Group) appeared receptive, but then the tender was gone and Mr. Sorrell was there.

JUDGE CAHN: They (Owl Group) quote in the complaint (a) non-competition agreement, certainly as to Lord.

MR. SCHWARZ: The agreement, your Honor, states actually what solicitation means. It says that it does not prohibit Lord or Mr. Einstein from going to work for another advertising agency. . . . If your Honor compares in the record the (employee agreement) that they wanted, that Mr. Sorrell wanted them to sign and they refused, you will see that [it] is a real non-competitive agreement. This one was very limited in effect and we also believe . . . that it is clearly expired. . . .

What we have here, as compared to the Duane Jones case which they rely on, is a case of no solicitation of clients before they left. There is no evidence in the record that Messrs. Einstein or Lord solicited clients. There is nothing in the record. There is nothing with respect to Mr. Lord and Mr. Einstein. There is no evidence in the record that they took documents.

Mr. Yaconetti removed a duffel bag. In it were his underwear, jock-strap and all the stuff he needs for playing squash and to work out.

There is no indication anywhere in the record here that they did any of the things that would give the defendant, the plaintiffs, a right to any relief and then . . . you look at the harm. . . . What is there?

There is an agency functioning with over 300 employees. They reconstructed management. Most of

Hatry (representing Martin Sorrell's Owl Group). Seated (from l.) members of the breakaway agency: C. Ray Freeman, Kevin O'Neil, Richard Lord, Arthur W. Einstein Jr., Edward Yaconetti and Lew Chenholtz. (Courtroom sketch by Marilyn Church.)

those people . . . who they held out as management are still right there. One of them who may have been management left, but did not come to us. He decided to go into the computer business. . . .

There is evidence in the public record that Mr. Sorrell and others have said that the agency is still functioning.

In the record there is evidence that [what] they gave today does not indicate that IBM, their biggest client, has not made a determination.

The record is clear that it [IBM] has gone back to Lord Geller and said, "Tell us how you're going to function our account."

Mr. Federico, Mr. Geller are still there. . . . the agency is bigger now than it was in 1985 and 1986, even without the people who left.

Where is the irreparable harm?

JUDGE CAHN: Let's see if we can narrow it down.

Are you ready to say that Lord Einstein . . . will not solicit or, in fact, during the pendency of the lawsuit, hire any Lord Geller employees?

No promises

MR. SCHWARZ: No, sir. No, I am not, and, in fact, have no obligation . . . to do so prior to a final judgment because there is no irreparable harm. . . . The record is clear that Mr. Einstein and Mr. Lord have to be separated from the issues. They cannot involve themselves with arranging meetings or soliciting clients, with contacting clients.

The record is clear that under the '74 agreement that would be the case, and we acted to ensure the minimum.

We believe, your Honor, that agreement is terminated.

JUDGE CAHN: Let me throw another question at you. . . . Don't they have an obligation as Directors?

MR. SCHWARZ: The case as we set forth in our memoranda clearly states that the breach of fiduciary law concept does not prohibit directors from discussing among them-

selves their leaving the business and establishing a competing business as long as they don't take secrets—they don't solicit clients while still at the old agency—they don't steal corporate assets, and none of that happened.

. . . These are not Directors anymore of a company in the same way that you have Directors of a public company to its shareholders. These people are essentially, as they said—the paid management. They have a right to leave. What they can do while they're there is circumscribed. When they left, they left documents there. They left all their personal documents. All of the documents that Mr. Sorrell has been releasing to the press were in the file. They left their personal credit cards, utility bills. They left everything.

What did they do? They sent a memorandum to the employees saying—and this is in the record, too—encouraging the employees to work hard for Lord Geller, to continue operating on the business and the only calls that were made to clients is where they had contact with clients. They called the clients and said the man or woman at Lord Geller who is now dealing with your account is X or Y. Don't worry. They're going to take care of your account.

This is who they are. That is what they did. They did it out of the ultimate conclusion that they could not operate a creative agency under a foreign financial wizard who was restraining their ability to grow.

. . . I would like to go back to the merits, but I would like to make one more point with respect to the irreparable harm.

. . . If your Honor enters any Order here, you will never be able to undo the harm that will befall this company and the individuals. They will be branded as having breached their fiduciary duty and we can have a trial till kingdom come. In the minds of the public, you will have set their reputation as viola-

(Continued on Page 56)

AGENCY BREAKAWAY

Sorrell: Consider clients

How Martin Sorrell sees the Lord Geller blowup (excerpted from an affidavit filed in New York state Supreme Court):

I first met Dick Lord, the chairman of Lord, Geller, Federico, Einstein . . . on June 17, 1987. I had requested the meeting so that I could explain our plans for Lord Geller, which basically were to provide it with international capability in order to service major agency clients on a worldwide basis. At that meeting and in a subsequent meeting, Mr. Lord was receptive to our concept, as witnessed by a July 23, 1987, memo from [then LGFE Exec VP] Ray Freeman to [LGFE President] Arthur W. Einstein, which in part stated:

"There's a natural fit. First WPP can align us internationally. It can also give us new capabilities with its 15 below-the-line companies."

Lord Geller's demands

In the summer of 1987, the Executive Committee of Lord Geller presented me with a number of demands. They requested, among other things, a written contract for each of them, with various additional financial benefits. Proposed contracts were drafted to meet their demands, but our proposal was rejected summarily as containing language which was not acceptable to the Lord Geller executives. Rather than negotiate further with respect to the contracts, Arthur Einstein on their behalf suggested that we simply forget about written contracts. I did not understand that at the time since I had agreed to virtually all of their demands.

On or about Feb. 5, I met with Messrs. Lord, Einstein, Freeman and [Senior VP-Chief Financial Officer Lewis] Eichenholtz to attempt once again to work out a financial arrangement that would be satisfactory to them. I instructed company counsel to work it out with them by the end of the month.

By March 5, 1988, their renewed financial demands had been agreed to and a financial compensation package worked out. Then the next day I received a telephone call from Lewis Eichenholtz who said that the financial arrangements were fine, but much had to be done on the professional side of things.

His reference was to their insistence that Lord Geller have absolute autonomy, including the unfettered right to accept any client whether or not this would cause a conflict

and regardless of the consequences.

I had from the start entrusted Mr. Lord and the others that made up the Lord Geller management group with all client relationships. Not once did I ask to be involved with or even be introduced to any agency clients nor did I or anyone at WPP have any involvement with the advertising created by Lord Geller.

Nor did I even request that Lord Geller add to its Board any WPP appointee. Thus, the entire Lord Geller Board was selected by the Lord Geller management. In retrospect, this

"When I arrived at the Lord Geller office . . . employees were crying, others were talking in hushed and small groups."

—Martin Sorrell

allowed them to use the Board and the Executive Committee of the Board as vehicles to serve their own interests, clandestinely, rather than the interests of their owner.

I had also trusted the Lord Geller management to handle their business exclusively on their own provided only that they not accept business that would be in conflict with certain JWT clients, which had also been the case prior to WPP's involvement, and that the financial affairs of their business be kept entirely confidential since it was owned by my company. Nevertheless, Mr. Lord asked me in October or November if he could release financial information on Lord Geller to an outside party. I refused and reminded him that the only person other than myself who could release such information was Robert Lerwill, the chief financial officer of WPP.

On a number of occasions Lord Geller Executive Committee members asked me to sell Lord Geller to them. My response consistently was Lord Geller is not for sale.

On another occasion Dick Lord asked me to talk to Tom Wilson at Dean Witter about a management buyout. I told

him that I had no intention to do so, and repeated that I was not prepared to sell Lord Geller.

Tom Wilson then called me. I asked Mr. Lerwill to return the call and ask its purpose. I instructed Mr. Lerwill to tell Mr. Wilson that if he (Wilson) was calling about a Lord Geller management buyout that we considered Dean Witter's involvement totally inappropriate in that Dean Witter was a client of Lord Geller (its second-largest client) and WPP is a Dean Witter client (Dean Witter was working on several business matters for WPP and in fact had just earned a substantial fee for acting on an acquisition for us). Mr. Lerwill was further instructed to tell Mr. Wilson that the company was not for sale.

On March 11, 1988, I received a visit from Bruce Wasserstein and Jeff Rosen who, while at First Boston Corp., had been our financial adviser in connection with the WPP offer to acquire JWT in June/July 1987. In the course of our conversation, Mr. Wasserstein said that he had received a phone call from Mike Goldberg, a lawyer at Skadden Arps, who said he was representing principals of Lord Geller. Mr. Goldberg had asked Mr. Wasserstein to get me to talk to him (Mr. Goldberg) about a buyout of Lord Geller. I said I was not prepared to sell (as I had told Dick Lord and Arthur Einstein, and everyone else who inquired about the purchase of Lord Geller) and had nothing further to discuss on the subject. I told Mr. Wasserstein that he should tell Mr. Goldberg that the message had been delivered.

Dealing with Dick Lord

I arranged for Dick Lord to come to England to review the [LGFE] Executive Committee's insistence that I permit them the absolute right to accept any client they chose. But Mr. Lord called me (Wednesday, March 16) and left a message that (1) there is a strike next week of television actors and (2) there was nothing more to talk about.

On March 17, I called Dick Lord. He was not at home, but his wife said he was expected shortly. I asked her to have him call me back, whatever the time. When I did not hear from him, I called back twice, but only reached his answering machine. I then called again and his wife said he was still not home.

Lord Geller corporate counsel had separate conversations. (Continued on Page 57)

Lord: Quest for freedom

How Richard Lord sees the Lord Geller blowup (excerpted from an affidavit filed in New York state Supreme Court):

Plaintiffs are unjustifiably seeking to prevent me and other individuals named as defendants herein from earning a living in the business in which some of us have been engaged for in excess of 30 years. As set forth below, Messrs. [Arthur] Einstein, [Kevin] O'Neill, [Edward] Yaconetti, [C. Ray] Freeman, [Lewis] Eichenholtz and I never "conspired" to steal Lord Geller's business. On the contrary, until our resignations from Lord Geller on March 18, 1988, we continued faithfully to perform our duties as employees, officers and directors of Lord Geller.

Both prior to and since leaving Lord Geller, I personally have not solicited or accepted business from, or arranged a meeting with, a single Lord Geller customer, nor have I personally contacted a single Lord Geller employee to leave and join Lord Einstein.

Under the eye of a giant

The decision to leave Lord Geller was the product of my inability to continue working under the control and domination of Martin Sorrell. . . . As set forth more fully below, despite repeated entreaties Sorrell refused to honor his commitment to me that Lord Geller's autonomy as an independent advertising agency would be maintained following the WPP hostile takeover.

Instead, Sorrell acted in a manner singularly designed to further his own interests and the interests of the British masters whom he served, at the expense of Lord Geller. When it became clear that WPP and Sorrell would not ameliorate this problem and also refused to consider selling Lord Geller to myself and certain others, we were left with no alternative but to express our creativity on our own. However, we have done nothing improper. We have only tried to pursue our livelihood.

Nor . . . will plaintiffs suffer irreparable injury if their request to prevent me and the other individual defendants from earning a living is denied. By public accounts, less than 15% of the approximately 320 employees at Lord Geller as of March 18, 1988, have left. Moreover, by public accounts, Lord Geller has reorganized its management and continues to conduct business. Indeed, Sorrell was reported to have issued a statement reaffirming the continuing vitality of

Lord Geller following March 18. . . .

In 1987, after more than 10 years in the advertising business, I and certain other individuals established the predecessor to Lord Geller. Seven years later, on April 26, 1974, Lord Geller was sold to and became a wholly owned subsidiary of the J. Walter Thompson Co., another, larger advertising agency.

At that time, Lord Geller had billings of approximately \$5 million. Lord Geller has only three clients who have continued since the acquisition by JWT in 1974, Napier, S.K.I. Ltd. (Killington) and Schieffelin. A fourth, *The New Yorker*, left Lord Geller in 1986 and returned this year.

An integral part of that transaction was the commitment

"We have done nothing improper. We have only tried to pursue our livelihood."

—Richard Lord

by JWT that Lord Geller would retain its autonomy as a separate advertising agency despite its acquisition by a larger competitor. Accordingly, JWT, Norman Geller, Arthur Einstein, Gene Federico and I entered into a "Management Agreement" dated April 28, 1974, which specifically provided as a basic principle for us to have the right "to conduct the business of (Lord Geller) on an autonomous basis."

This autonomy principle was limited in only certain ways for a five-year period which ended in 1979. Among other things, the Management Agreement committed JWT for a period of five years to cause the directors of Lord Geller to consist of whichever of Geller, Einstein, Federico and/or me remained in Lord Geller's employ.

Subject to certain limitations, we were thereby vested with the full authority of a board of directors to conduct the affairs of Lord Geller.

However, while certain of the commitments by JWT under the Management Agreement were for a specified period of five years only, the recognized right of Lord Geller personnel

to autonomy was unlimited in time.

The issue of employment pacts

I also executed an employment agreement dated April 26, 1974—the first time, both prior to and since then, that I had ever been a party to such an agreement. The term of the Employment Agreement was stated to be for five years commencing on the effective date of the merger between a subsidiary of JWT and Lord Geller—April 30, 1974. Upon its expiration on April 30, 1979, that written agreement has not been renewed and at no time until this litigation has either JWT or WPP taken the position that it is still a viable agreement.

Paragraph 7 of the Employment Agreement provides that "for a period of one year from the termination for any reason of (my) employment with (Lord Geller) . . . (I) shall not, directly or indirectly, solicit or accept any of the advertising business being handled by (Lord Geller) at the time (my) employment with (Lord Geller) terminates, or handled by (Lord Geller) during the twelve months immediately preceding said time, provided, however, that (I) shall be entitled to solicit or accept the business of any former client after the first anniversary of the termination of the client's relationship with the Company."

The Employment Agreement further specifies that I shall be "conclusively deemed" to have "indirectly solicited or accepted" such advertising business . . . only where "(I) have contact with or arrange for a meeting with any representative of a client or former client of Lord Geller or if (I) have any contact or attend any meetings with any representative of such a client after the acquisition of the account by such agency."

I have not directly or indirectly solicited or accepted any advertising business being handled by Lord Geller from March 18, 1987, through March 18, 1988, as defined in the Employment Agreement, subsequent to March 18 of this year. Significantly, the Employment Agreement does not preclude me from working with or forming another advertising agency which competes with Lord Geller. I understand that for that reason, the 1974 agreement was much narrower than the usual non-competition agreement.

The Employment Agreement, which was drafted by JWT, is clear that these restrictions do not apply, "in the event (Continued on Page 56)

... of the law in one respect or another.

Y&R denies impropriety

STEPHEN OXMAN: [attorney from Shearman & Sterling for Young & Rubicam]... all of the claims against Young & Rubicam are derivative from the [allegations against] Lord Einstein. For the reasons Mr. Schwarz has given, we feel there is no merit to those claims and, therefore, not to the claim [against] Young & Rubicam. ... Let me just say that if you look at the papers that you have, you will see very few facts about Young & Rubicam from what the plaintiff just said.

There is a lot of conclusion and speculation.

As to the facts, those are set forth in the affidavit we have given you. They show that there was no impropriety whatsoever in what Young & Rubicam did.

They were approached after Mr. Sorrell had taken over the J. Walter Thompson agency. They were asked if they would be interested in a possible leveraged buyout, participating as a possible investor.

They met with Mr. Lord and his colleagues to consider this possibility very thoroughly and those discussions went on for a number of months until March, earlier this

that Mr. Sorrell would not even negotiate concerning the sale of Lord, Geller.

At that time, Mr. Lord and his colleagues indicated they were contemplating resigning because of this impasse.

JUDGE CAHN: Who did they state that to?

MR. OXMAN: They stated that to, among others, Young & Rubicam.

JUDGE CAHN: Not to Mr. Sorrell?

MR. OXMAN: I am sure in due course they stated it to Mr. Sorrell.

... Your Honor, they asked then what the proposal was to consider the alternate possibility of establishing a new advertising agency with Young & Rubicam as investors with minority interest and not participating in the day-to-day management.

This, in fact, happened.

Whether or not, Young & Rubicam's motivation throughout this was not to injure Lord Geller but to make a profitable investment and it was.

JUDGE CAHN: Let me stop you for a moment.

Is there any way from your point of view, is there any ground for injunctive relief?

MS. HATRY: They [Y&R and

the documents show it.

JUDGE CAHN: Even under your view, whatever they did, they [Y&R] did not owe you the same duties under your view that the other defendants did.

MS. HATRY: They did not owe us a duty directly. They knew those duties to us were being violated.

MR. OXMAN: ... Young & Rubicam went to great length to do this properly and in a professional way. They made it clear, and Mr. Lord and his colleagues agreed, that no confidential information would be provided to Young & Rubicam at all. None was.

They were assured by Mr. Lord and his colleagues [that] no solicitation of employees or of clients had taken place.

They were determined to do this in a professional way.

Resignations "no surprise"

MR. SCHWARZ: ... Yes, in response to your question, there were discussions with Mr. Sorrell all along here that ... disclosed to him ... their unhappiness, their difficulty in dealing with restraint he was placing on them, and there were efforts made to actually buy the agency from Mr. Sorrell.

So it came as no surprise to him that ultimately these people left,

and, one thing I meant to mention, I happened to see coming down here in the car that in today's ADVERTISING AGE, which has a front-page article, there is a column called Last Minute News and it talks about loose accounts. These are advertising accounts in general and obviously, your Honor, that is what happened in this business. There is a \$10 million account moving to somebody else.

That is what goes on in this business. It is not irreparable harm.

MS. HATRY: Yes, on this so-called autonomy agreement to which there is no writing, your Honor asked, among excellent questions, how it [was] before, with J. Walter Thompson.

If you look at some exhibits ... you will see even in the papers written by some of the six men who left, they acknowledge that same ... issue existed before.

It goes with the nature of the business when you sell a company. We have been put on notice by everybody, by every one of our clients, and they're concerned about our ability to service their accounts.

The people who had the main contacts left, unfortunately.

Serving the clients

JUDGE CAHN: Let me take it

from a different angle for a moment. Let's assume for the moment that you win this lawsuit or lose it. For my purpose to this question, it makes no difference. ... These people are obviously gone.

MS. HATRY: They're welcome back. We will welcome them back.

JUDGE CAHN: I am sure you will. In the real world, they're gone. They're not coming back.

MS. HATRY: We never know.

JUDGE CAHN: In the real world, it looks like they're not coming back. You still have to service ... accounts.

Isn't that really a question in the lawsuit, that is a question that your clients are asking you? Can you service our accounts? Can you give us the quality of service or whatever else is the way you were serviced in the past.

MS. HATRY: It's sort of a Catch-22. The employees have to be there in place. They disappear every day. ... We have to have them in place to assure the client so we can service them. The client has its own pressing needs and they have to be assured that things get done. They want to make sure we have people in place to handle it.

Every day they're going, disappearing. We have a situation where we need stability. ... #

Lord recounts his quest for freedom

(Continued from Page 55)

of the breach by JWT of the Management Agreement," thereby recognizing the importance of the autonomy to which JWT agreed to provide Lord Geller. During the ensuing years, JWT and Lord Geller generally observed such autonomy.

For example, Eastman Kodak Co. was an account of JWT while, at the same time, Fuji, a competitor of Kodak's, was an account at Lord Geller for Fuji tapes. As explained below, Sorrell and WPP did not share this respect for Lord Geller's autonomy.

In July 1987, WPP, a British marketing services concern headed by Sorrell, acquired the JWT Group, the parent of JWT and Lord Geller, in a highly publicized hostile takeover. According to published reports, Sorrell had previously served as finance director at Saatchi & Saatchi PLC, another large advertising agency based in London.

In that capacity, Sorrell was reported to have forced major changes which were disruptive to its business, including forcing Saatchi & Saatchi to discontinue certain accounts and causing widespread discontentment among Saatchi & Saatchi personnel.

The reaction to Sorrell's hostile offer to acquire JWT Group and, thereby, Lord Geller, in the advertising community was swift and negative. For example, immediately upon the announcement of the hostile tender offer, Goodyear Tire & Rubber Co. announced that a takeover of JWT by WPP would prompt it to rethink its \$30 million relationship with JWT.

As reported in the Dec. 28 edition of ADVERTISING AGE, accounts worth more than \$450 million have left JWT since the acquisition by Sorrell.

The deleterious effect of Sorrell's acquisition of JWT was not limited to defections in the existing client base. Following the WPP takeover, JWT personnel also left. For example, the Nov. 23 ADVERTISING AGE reported that the Chicago office of JWT had lost at least four key senior vice presidents, including the head of the media department and the group creative director.

Cries for freedom

Shortly after the takeover, I met with Sorrell and discussed the possibility of a management-led leveraged buyout of Lord Geller. Just months prior to the WPP takeover, Don Johnston, JWT's former Chairman of the Board, and I had discussed a Lord Geller buyout and he seemed receptive to it. Sorrell indicated, however, that he was not interested in selling the agency.

Several weeks later, Sorrell visited Lord Geller's offices to meet with management. At that meeting, management presented a list of concerns to him that we believed he should consider to ensure continued good relations between Lord Geller and WPP.

Foremost among these was the question of Lord Geller's autonomy. It was my belief that because Lord Geller was no

longer owned by JWT, a competitor advertising agency, it would enjoy even greater autonomy than in the past. When I raised this issue with Sorrell, he assured me that WPP would seek to remove Lord Geller even further from the JWT shadow by, among other things, shifting the entity to which Lord Geller reported for financial purposes to one of Sorrell's companies in London. I soon discovered, however, that Sorrell had other ideas.

Late last year, Burt Manning, the new Chairman and Chief Executive Officer of JWT, approached me and indicated that Sorrell was interested in establishing Lord Geller offices in Europe to service Alfa Romeo, a potential new client. Because JWT handled advertising for Ford Motor Co., it was explained that the Alfa Romeo account, if obtained, would have to be serviced by a newly created group, one which Sorrell proposed to use the Lord Geller name.

Upon reflection, I informed Mr. Manning that Lord Geller objected to the use of its name in connection with Sorrell's proposed European offices. Notwithstanding this fact, WPP announced two weeks later that it planned to establish offices in Europe under the name "Conquest Europe"—affiliated with Lord Geller. As if to add further insult to injury, these offices were to be staffed by JWT personnel in Europe and managed out of the JWT office in Milan, Italy. It did so without any authority from me and in direct contravention of Sorrell's representations concerning the autonomy Lord Geller would continue to enjoy.

Thereafter, Sorrell dealt what remained of Lord Geller's autonomy another crushing blow when he forced the agency to withdraw from competition for the account of General Motors' new Saturn division, the largest and most significant new piece of advertising business available in years, and which was reported to generate \$100 million in annual billings. However, because Sorrell was solely interested in the bottom line to WPP and because Ford Motor Co. was a \$300 million account for JWT, he refused to permit Lord Geller to pursue bidding on the Saturn project. At the time Sorrell demanded we withdraw, Lord Geller was one of just five agencies still being considered for the business.

As noted above, Lord Geller had done work for Fuji tapes. In the fall of last year, we became aware that Fuji was thinking of consolidating all of its products into one agency, including Fuji film, and were asked whether Lord Geller would be interested in bidding for the business. Because of the relationship between JWT and Kodak, Sorrell discouraged Lord Geller from pursuing this, notwithstanding that Lord Geller risked losing all of the Fuji tape business to another agency as a result.

The perception in the advertising world was becoming such that if a potential client was in a field in which JWT already did advertising work, the client would not even attempt to talk to us. In light of Sorrell's attitude that WPP's interests came ahead of Lord Geller's, autonomy for Lord Geller was an impossible dream under his reign.

Another issue ... was raised by me and other Lord

Geller officers was our desire to execute written employment agreements to obtain protection from the uncertainties at Lord Geller created by Sorrell and his business practices. At first, Sorrell and others acting on his behalf ignored our requests.

After some months had passed, Sorrell proffered proposed agreements which contained extremely onerous terms. When efforts to negotiate these provisions failed, I and certain others concluded that it would be in our best interests to continue working without employment agreements. As Arthur Einstein explained to WPP in a Nov. 19 letter: "We've also decided, based on the contracts we received, that the baggage outweighs the benefits. Therefore, we've decided to go ahead and run our business without employment agreements."

At no time did Sorrell, WPP or plaintiffs herein ever respond to Mr. Einstein's letter and contend that I was, in any way, still bound by any of the terms of the Employment Agreement executed in 1974.

Sorrell, however, would not be deterred from attempting to convert us into indentured servants. Lord Geller had traditionally paid year-end bonuses to its staff. Sorrell, however, at first refused to pay any of the year-end bonuses. In early March 1988, Sorrell permitted year-end bonuses to be paid to all Lord Geller employees, except me, Einstein, O'Neill, Yaconetti, Freeman and Eichenholtz.

Sorrell steadfastly refused to permit Lord Geller to pay year-end bonuses to me and the others, unless we executed employment agreements—which we did not.

As it became evident to me that Sorrell did not intend to honor his commitments to preserving Lord Geller's autonomy, I began to consider and explore alternatives to continuing under Sorrell's auspices. The options I considered included a purchase of Lord Geller from WPP.

Enter Dean Witter

In December 1987 I requested Dean Witter Reynolds Inc., an investment banker, to present a proposal to WPP for a buyout of Lord Geller by Lord Geller's management. Although Dean Witter, which indicated at the time that they had previously been made aware of my interest in purchasing Lord Geller, put together such a proposal, Sorrell refused to talk with them.

When that option no longer was possible because of Sorrell's refusal to discuss the matter, I began to focus upon the possibility of establishing a new advertising agency. Alex Kroll, the Chairman of the Board of Young & Rubicam Inc., and I have been friends for 20 years; I had previously made him aware of my desire to buy Lord Geller back from JWT. When our intentions shifted toward creating a new agency, I again approached Mr. Kroll to determine his interest in assisting in such an undertaking.

Contrary to plaintiffs' speculative assertions, however, I never disclosed any non-public information concerning Lord (Continued on Page 66)

AGENCY BREAKAWAY

Sorrell: Lord Geller was in chaos

(Continued from Page 55)

tions with Mr. Eichenholtz to try to reach a resolution of the autonomy issue. Mr. Eichenholtz said he would speak to Mr. Einstein first thing in the morning and get back to us.

The next day, March 18, I arrived early in New York and immediately called Dick Lord who explained that he had trouble getting home due to St. Patrick's Day. I told him that I was here to meet with him and the other members of the Executive Committee, at any time convenient to them. I explained that I had some proposals that might interest them. Mr. Lord replied, "Maybe the house has burned down." I pleaded with him to set up a meeting with the Executive Committee. I said that even if they did not want to speak to me, I had things I wanted to say to them. I told him that I had put together a presentation that I believed would be a fair and reasonable solution. He promised to talk to his colleagues and get back to me.

The next and last thing I heard from the management I had entrusted to run Lord Geller was an envelope containing the simultaneous resignations of all six, effective immediately.

The exodus begins

Not until I read it in the newspapers did I learn of Y&R's involvement. Y&R, within an hour of the mass exodus, announced to the world (and thus to all Lord Geller clients) that it was sponsoring Lord, Einstein, O'Neill & Partners, who were set up at Y&R's office space and with Y&R telephone service.

Indeed, the Certificate of Limited Partnership filed on behalf of "Lord, Einstein, O'Neill & Partners L.P." on March 23, 1988, with the Secretary of State of Delaware, disclosed that there are two general partners of Lord Geller. The first stated partner is a corporation called "RJC Inc." The signature of the President of RJC Inc. seems to be that of R. John Cooper. Mr. Cooper is Executive Vice President and general counsel of Y&R. And he is the Y&R employee who, in addition to its chairman, Alex Krill, held meetings with Lord Geller senior management, as early as October 1987.

... When I arrived at the Lord Geller office they had already exited in unison, leaving a memo to other employees ... and total chaos. Employees were crying, others were talking in hushed and small groups. All were stunned by what had happened. It was clear that not only I, but none of the "rank and file" at Lord Geller had any idea that the Lord Geller leaders were going to quit—in unison or otherwise.

I spent that night and all of Saturday and Sunday planning a reorganization of the company. The remaining department heads worked with me. Thus, on Monday, March 21, Lord Geller was able to announce the formation of a new management committee which consisted of 10 people. ...

Clients were called both by me and others on the Committee such as [Senior VP] Bruce Albert, to advise them of the creation of the New Management Committee and to attempt to reassure them that Lord Geller could continue to function and to take care of their immediate and long-term needs.

Thus, for example, a client was called twice Monday by Bruce Albert, to assure the client that he was staying and that the business would continue in good hands. The same client was called on Tuesday by Bruce Albert to say he was leaving to join the new Lord Einstein agency.

The evening of March 21 I had a series of meetings, first with [VP] Greg Faust, who told me he was resigning. I tried to persuade him to stay or, at the least, to remain for a short time so that we could take care of immediate client responsibilities, but he refused. Then Bruce Albert and [VP] Barry Hoffman told me that they had to leave immediately. They, too, refused to stay to help effect some transition. I pointed out that the positions of over 300 people who had not left the agency depended on Lord Geller's ability to continue in business. They insisted they had to leave immediately, despite the fact that they had been calling clients and saying to them as well as to the Lord Geller employees that they would be the new management.

A memorandum relating to the realignment of the creative department was to have been prepared and circulated that same day. I called [VP-Creative] Chuck Griffith that

evening to ask him what had happened with respect to that memorandum. He said that there was a last-minute hitch and added that he and [Senior VP] Dick Thomas wanted to see me at 10 the next morning. I asked why they wanted to see me. He said they wanted to resign. I asked him how he could do that after he had agreed to act as an integral part of the New Management Committee. The only explanation I could get from him was that it would not work, that without the leadership of the six who had left, they could not manage. He told me that Dick Thomas felt the same way and was also resigning. I pleaded with him to reconsider his decision carefully because it would have an impact on Lord Geller's ability to remain viable.

The resignation of the four newly appointed Management Committee members, on the heels of the resignations of the six former senior managers, left me with a management void that will further irreparably damage Lord Geller and its ability to service clients properly. This is particularly true since the four new members of the management group had been presented to clients as the people who would work on their business going forward. Every day since then has seen the exit of other Lord Geller employees to join the new Lord Einstein/Y&R partnership. ...

Lord Geller left "bereft"

While Lord Geller has been left bereft of management and of vital members of its operating departments, the new agency was established immediately, the instant Lord Geller leadership left. It would thus appear, to clients and to our remaining employees, that the new agency could handle the client business better since the people who managed their business were with the new Lord Einstein/Y&R agency.

Clients have advised that they are reviewing the situation or leaving Lord Geller for Lord Einstein. ... Unless this Court grants immediate relief, the defendants may succeed in taking what they could not buy, by actions carried out in concert, after careful planning, by the very people who were charged with the responsibility for the company whose assets they have plundered. #

LGFE memos, client files missing, investigator says

Private detectives scoured Lord Geller executive offices after the blowup. Their report is excerpted from a court affidavit of private investigator Bruce Dollar, managing director of Krill Associates:

On March 22, 1988, my firm was retained by Davis & Gilbert, attorneys for plaintiffs, to assist them in this litigation. ...

[We] examined the former office of defendant Arthur Einstein (former LGFE president). We examined a file cabinet across the room from Mr. Einstein's desk. ... We reviewed these files and found memos, newspaper clippings and other documents from 1986 and earlier. No documents were found from either 1987 or the first quarter of 1988.

My staff and I also inspected what had been Mr. Einstein's desk. ... All the files except five were completely empty.

In the top desk drawer of Mr. Einstein's desk, we located a handwritten memorandum on Lord Geller memo paper which reads as follows:

"Cooper 210-4812
"David Blinken 916-8335"
The number 210-4812 is a telephone number at Young & Rubicam.

My staff and I also examined the files in the office previously occupied by Mr. Lord [former LGFE Chairman-CEO Richard Lord]. In a cabinet on a wall parallel to his desk, we located a file drawer with client files. ... We found no documents dated after 1986. We searched all the other drawers and cartons in his former office without finding any other set of client files.

The former office of Mr. Freeman [former LGFE Exec VP C. Ray Freeman] was also inspected. In a file drawer in his office, we located

an undated seven-page computer-generated memorandum to Arthur (Einstein) and Ray (Freeman) from Ed (Yaconetti) [former LGFE vice chairman]. Page 5 of this document is entitled "An agency without the IBM Business and without JWT."

The document proceeds to list a selection of "those clients we would probably want to take ... or hope to take with us" and the names of 10 clients follow. This list of the "desirable clients" named: "Schieffelin," "Contel," "Metromedia," "Chemical," "Partners," "Fuji," "Sony," "WNBC," "AK II" and "New DP Client."

Also located in Mr. Freeman's former office were six copies of a memorandum to Dick Lord from the Executive Committee, dated Oct. 19, 1987, summarizing discussions at a meeting that day relating to the "Future Relationship of LGFE and WPP."

The memo advises Lord that the [LGFE] Executive Committee "would like (Martin Sorrell's) permission to disclose our finances to other interested parties with the goal of a LGFE buyout from WPP."

At counsel's direction, we also retained Hugh L. Sang (handwriting expert) to determine if handwriting from particular documents could be positively attributed to any of the defendants. The first such document was a handwritten notation which reads as follows:

"John Cooper/Michael Goldstein
"1-Leave and sell for \$25-30 million with backing from Y&R—Dean Witter to handle."
"2-Top 25 walkaway."

Mr. Sang ... confirmed the writing to be Mr. Freeman's.

Our handwriting identification expert also sought to identify the handwriting and signature on a six-

page memorandum from Mr. Yaconetti to the Executive Committee, summarizing the options described at "yesterday's meeting" with "the legal." [He] made a positive identification that this was Mr. Yaconetti's handwriting.

We have also examined some of the office phone records of Messrs. Lord, Einstein, [former LGFE Exec VP-Creative Director Kevin] O'Neill, Yaconetti, Freeman and [former LGFE Senior VP Lewis] Eichenholtz, beginning on March 14, 1988, when Lord Geller installed a new computer system that has the capability of providing computer printouts of both local and long-distance calls made at each office extension.

The printout from Mr. Lord's former extension shows that on March 14 at 11:32 a.m. and again on March 16 at 9:57 a.m., the number 210-4812 was dialed.

These calls lasted between 1.3 and 5.2 minutes. This same telephone number was listed on another document we reviewed as the telephone number of John Cooper, who I understand to be the General Counsel of Young & Rubicam. The same phone number (210-4812) was called five times from Mr. Eichenholtz's former extensions (347 and 647). These calls to Mr. Cooper's extension lasted between 1.7 and 7.3 minutes.

In addition to the calls from Mr. Lord's extension to 210-4812, there were at least two other calls from that extension to another phone number within Young & Rubicam—to 210-3060, the number of George Schweitzer, Vice President-Director of Corporate Relations. Both of these calls were made on March 17 and lasted between 1.3 and 3.2 minutes. ... #

Sky-high dreams: Secret sessions at the Sky Club

The Sky Club in New York's Pan Am Building was the location for secret meetings that involved executives from Lord, Geller, Federico, Einstein and Young & Rubicam, as is related in excerpts from an affidavit that was submitted to the court by LGFE Senior VP William Wardell:

Commencing on or about October 1987, (the Lord Geller board of directors) as a group and individually had a series of meetings with Young & Rubicam. The primary contact with Y&R was Dick Lord, who used to work there and remained in touch with his former employer.

Dick Lord reported that he had spoken with Alex Krill of Y&R, that Y&R knew of our problems with the WPP Group and that he had a lot of respect for Lord Geller.

The meetings were not at the Lord Geller premises but rather at the Sky Club in the Pan Am Building.

An early meeting held after September 1987, attended by me and all the other senior Lord Geller management, took place at the Sky Club with Alex Krill and another Y&R employee whose name was, I believe, John Cooper.

Mr. Krill reviewed for us his philosophy of advertising, then told us that he thought very highly of us (Lord Geller) and that he wanted to help us as a group to do our own thing.

The help that I understood Mr. Krill was speaking about included financial help for the group to buy Lord Geller from WPP. The Y&R lawyer cautioned us that in any further discussions we must be very careful not to compromise our responsibility to WPP Group or Lord Geller and I believe I followed that instruction at all times.

To my knowledge, none of the group told anyone from WPP or Lord Geller about these Y&R contacts.

We also discussed the problem of potential conflicts, in the recognition that if Lord Geller were to join in a relationship with Y&R, there seemed to be conflicts such as between IBM and AT&T as well as others. It was acknowledged that this would have to be checked out down the road.

Over the course of the next months these contacts continued mostly between Dick Lord and Alex Krill, with Dick Lord keeping the rest of us advised on an informal basis.

At some point, I heard from one or more of the other members of the group that a plan to buy Lord Geller was being developed for presentation to Martin Sorrell with the assistance of Dean Witter, the investment bankers. Dean Witter was at the time a Lord Geller client.

Some time in December, after Martin Sorrell was asked if he would agree to the buyout and refused, I was no longer included in the discussions that continued between Y&R and the other Lord Geller senior management. #