

1987

Little America Hotel Corporation, Utah Hotel Company v. Salt Lake City : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 870286

LITTLE AMERICA HOTEL	:	
CORPORATION, a Utah	:	
corporation, and UTAH HOTEL	:	
COMPANY, a Utah corporation,	:	Case Nos. 870259
	:	870286
Plaintiffs and	:	
Appellants,	:	
vs.	:	Category No. 14(b)
SALT LAKE CITY, a municipal	:	
corporation within the State	:	
of Utah, et al.,	:	
Defendants and	:	
Respondents.	:	

CONSOLIDATED REPLY BRIEF OF APPELLANTS LITTLE AMERICA
HOTEL CORPORATION AND UTAH HOTEL COMPANY

Appeal of Judgment of Third Judicial District Court
in and for Salt Lake County, State of Utah
Honorable Timothy R. Hanson, District Judge.

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APR 23

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LIST OF ALL PARTIES

Plaintiffs in the various actions which were consolidated for hearing in the case appealed from were Little America Hotel Corporation, Utah Hotel Company, Pearson Enterprises Partnership Company, a Utah limited partnership, Boyer-Gardner Hotel Properties Partnership, Tri-Arc Hotel Associates, and Holiday Inns, Inc. The defendants were Salt Lake City and Ted Wilson, Salt Lake City Mayor.

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FACTS

In this brief, Salt Lake City's Innkeeper's License Tax will be referred to as "Innkeeper Tax", Salt Lake City will be referred to as "SLC", Little America Hotel Corporation will be referred to as "LAHCO", Utah Hotel Company will be referred to as "Hotel Utah", and Appellants will jointly be referred to as "Hotels". The class subject to the Innkeeper Tax will be referred to as "Innkeepers".

SLC recognizes that all disputed facts on this appeal from a summary judgment should be viewed in a light most favorable to Hotels. Hotels believe SLC has not applied that rule in paragraphs 6 and 7 of its Statement of the Case and Facts. (Brief of SLC at 6 & 7). The Affidavit of Merrill Norman establishes that the SLC International Airport is operated under an enterprise fund of SLC, which is separate from SLC's general fund. He also disputed SLC's statement that the airport expansion uniquely benefits Innkeepers. (Affidavit of Merrill Norman, ¶4-8, R. 812-813).

Hotels find no evidence in the record that any increase in the cost of city government is due to expanded commercial and visitor service demands. Also, it may have been the intent of the SLC City Council to ease the tax burden on the resident population and more equitably share the cost of providing municipal services to include Innkeepers and their guests who the council

assumed increase the cost of city government. However, there is evidence to contradict that assumption. The Affidavit of Merrill Norman, paragraph 21, establishes that LAHCO guests pay \$317.00 per year of taxes per resident-equivalent, compared to \$130.00 per resident of SLC, without considering the effect of the Innkeeper Tax. The Innkeeper Tax would add an additional \$139.00 per year to the tax burden of LAHCO guests per resident-equivalent, bringing the tax burden on LAHCO guests to 3-1/2 times that of residents. Also, LAHCO guests and employees have a lower per capita rate of calls to police and to the fire department than SLC in general. (R. 814-817).

SUMMARY OF ARGUMENT

In its brief, SLC has failed to address the appropriate test for the legality of a city's license tax classification. As argued in the Hotel's earlier brief, and as recently reaffirmed by this Court in Mountain Fuel Supply v. Salt Lake City, ___ P.2d ___, 77 Utah Adv. Rep. 6 (1988), that test is whether there exists a reasonable relationship between the choice to tax innkeepers and the achievement of some legitimate legislative purpose. As applied by this Court in cases regarding city license taxes, including Mountain Fuel Supply v. Salt Lake City, that question of reasonableness is a question of fact to be determined by examining the circumstances in which the tax will operate. In this case,

there are issues of fact regarding whether there exist facts which would justify a tax directed exclusively at Innkeepers as being reasonably related to SLC's stated objective of more equitably spreading the tax burden. In view of LAHCO's evidence that its guests pay more in taxes to SLC than average residents of the city, while drawing on city services less than average residents of the city, it was error for the trial court to grant summary judgment to SLC on this classification issue.

SLC also lacks the power to enact a gross receipts tax on Innkeepers. The legislature has given that power only to counties under the Transient Room Tax statute and to resort cities, by allowing such cities to impose an additional 1% sales tax. By specifically delegating such power to counties and granting to only certain cities a specific limited power to impose such a tax, the legislature has pre-empted the field, and SLC should not be able to infer a power to enact the Innkeeper Tax by virtue of its general license taxing powers under Utah Code Ann. § 10-8-80. Also, the tax is a sales tax which the city cannot enact.

ARGUMENT

I. THE TEST OF THE LEGALITY OF THE INNKEEPER TAX IS WHETHER THE CLASSIFICATION TAXING ONLY INNKEEPERS IS A REASONABLE ONE AND BEARS A REASONABLE RELATIONSHIP TO THE ACHIEVEMENT OF A LEGITIMATE LEGISLATIVE PURPOSE.

The Hotels' brief, Section I.A. argues that the appropriate test for the legality of the Innkeeper Tax, as regards the discrimination issues raised under Utah Code Ann. § 10-8-80, and Utah Constitution, Article I, Section 7 is whether the classification of Innkeepers as the only taxpayers includes all persons similarly situated, and bears a reasonable relation to the general revenue-raising purposes to be accomplished by the act. SLC uses much of its brief, in points I, II, and III.C. to set forth a litany of tests formulated and stated by various courts, primarily under the Fourteenth Amendment. These include statements that the party challenging a tax must negate every conceivable basis which might support the classification (SLC brief at 17), that the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination (SLC brief at 18), that a successful challenge must show that the classification is wholly without any rational basis and is essentially arbitrary (SLC brief at 18), or that a tax is so unreasonable or oppressive as to amount to a confiscation or destruction of the business being taxed (SLC brief at 36).

Since the Hotels' brief was filed, this Court has again addressed the legality of a tax classification in a city's license tax. That case is Mountain Fuel Supply Company v. Salt Lake City Corporation, _____ P.2d _____, 77 Utah Adv. Rep. 6 (Utah

S. Ct. March 9, 1988) (hereinafter "Mountain Fuel"). In Mountain Fuel, this Court stated that the test for compliance with Utah Code Ann. § 10-8-80 and with Article I, Section 24 of the Utah Constitution are the same. That does not mean that every tax statute or ordinance must comply with the test stated in Mountain Fuel. In Continental Bank & Trust v. Farmington City, 599 P.2d 1242, 1244-45 (Utah 1979), this Court held that taxes based on income, occupation, licenses or franchises "are not subject to the requirements of Article I, Section 24, of the Utah Constitution," and grounded its decision on Article I, Section 7 of the Utah Constitution and on Utah Code Ann. § 10-8-80. In the case of a city's license taxes, it is not Article I, Section 24 which is operative, but the legislature's determination in Utah Code Ann. § 10-8-80 to extend the uniformity requirement to license taxes in order to limit discretion in municipal license taxation to prevent inequitable distributions of the tax burden among a few businesses. It is not clear from prior cases the extent to which Article I, Section 7 of the Utah Constitution, which seems the right to due process, has been relied on as the source of the reasonableness standard.

The test to be applied under Utah Code Ann. § 10-8-80, as stated in Mountain Fuel, supra is:

Whether the classification of those subject to the legislation is a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose. Id. at 8.

That test was applied by first determining the reasonableness of the classification in the abstract, and then by determining whether the classification bears a reasonable relationship to the achievement of a legitimate legislative purpose.

The Hotels' view the test as stated in Mountain Fuel as a restatement of the test argued in their earlier brief in this case. It is the most recent in a line of case including Continental Bank & Trust v. Farmington City, supra and Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971)¹, both of which were cited with approval in Mountain Fuel.

At any rate, the appropriate test to be applied in this case has been set forth by this Court in Mountain Fuel.

II. THE ISSUE WHETHER A TAX ON INNKEEPERS BEARS A REASONABLE RELATIONSHIP TO THE ACHIEVEMENT OF A LEGITIMATE LEGISLATIVE PURPOSE IS A FACTUAL ISSUE WHICH REQUIRES A TRIAL.

The Hotels argued in Section I.B. of their brief that the issue of reasonableness of classification involves controverted

¹SLC improperly characterizes Weber Basin Home Builders Association v. Roy City as a regulatory case, and therefore dismisses that case as not being applicable to a revenue-raising tax such as is at issue here. But that case was a case involving a pure revenue-raising tax, and this court noted that "it is conceded that the purpose was to obtain additional money for the city's general fund." Id. at 216.

questions of fact. Reasonableness has been treated as a factual question in Continental Bank & Trust v. Farmington City, supra, and in Weber Basin Home Builders Ass'n v. Roy City, supra.² This Court treated reasonableness as a question of fact again in Mountain Fuel. The opinion in Mountain Fuel refers to the undisputed evidence that (1) the Utility Franchise Taxes account for 20% of SLC's revenues; (2) the Public Service Commission sets Mountain Fuel's rate of return; (3) the tax is passed directly through to consumers, who have not switched to competing energy sources; and (4) it would be economically inefficient to track down and tax every supplier of coal, firewood, or bottled gas. The other important factual determination relied on by this Court was that

by imposing the licensing tax indirectly on all users of telephone, electric, and gas service, the City is able to reach those not otherwise subject to City taxes and thereby spread more broadly the financial burden of providing city services. Mountain Fuel, supra, at 9.

In Mountain Fuel, this Court noted that the standard of scrutiny under the Utah Constitution and Utah Code Ann. § 10-8-80

²The Hotels also argued by analogy that the test of reasonableness of a regulatory measure being a factual one, the test of reasonableness of a revenue measure should also be a factual one. (Hotels' brief at 20-21). SLC argued in its brief that Hotels wrongly base their whole argument on regulatory or impact fee cases (SLC's brief at 27, note 7). That is not the case. The regulatory cases were cited in addition to the cases noted above as analagous, but not identical, regarding the question of reasonableness.

"will always meet or exceed that mandated by the fourteenth amendment of the U.S. Constitution." Id., at 8. The Hotels submit that the scrutiny of license tax classifications under the Utah statute is one of whether there is in fact a reasonable relationship between the class taxed and the achievement of a legitimate legislative purpose.

In Mountain Fuel, the legitimate legislative objectives were to raise revenue, and to do so in such a fashion as to spread the taxpaying burden in a more fair and uniform manner than had previously been the case. Because the utility franchise tax is passed through to all users of telephone, electric and gas service, the effect of the tax was to spread the burden of that tax very broadly, and to provide a means of taxing those institutions which are exempt from property taxes. So, under the undisputed facts in Mountain Fuel, there was a reasonable relationship between the tax on utilities, passed through to all consumers, and the objective to spread the taxpaying burden in a more fair and uniform manner.

The tax involved in this case is very much different. The Innkeeper Tax is very narrowly targeted to affect only Innkeepers and their guests, without having any effect on any others in SLC. However, SLC's justifications for the Innkeeper Tax are nearly identical to those claimed for the utility franchise tax:

(1) The desire to equitably spread tax burdens to include others than property taxpayers living in the City;

(2) the benefits uniquely provided to these businesses by the City;

(3) additional service costs generated by the transient visitor patrons of the Innkeepers; and

(4) the unique clientele and methods of doing business of Innkeepers. (Brief of SLC at 12).

The fourth justification merely relates to whether Innkeepers can reasonably be described as a class, but not to whether a tax on that class only is reasonably related to a legitimate purpose. Of the remaining justifications claimed by SLC, only the first could be called a legislative objective--the desire to equitably spread tax burdens to include others than property taxpayers living in the city. The second and third justifications are really factual assumptions which SLC contends exist in order to justify its conclusion that the Innkeeper Tax will more equitably spread the tax burden. In other words, in order for the Innkeeper Tax to be reasonably related to the legitimate objective of equitably spreading tax burdens, it must be true that Innkeepers receive unique benefits from the city or generate additional service costs for the city. SLC apparently believes that the mere incantation of these statements is sufficient to show the legality of the tax classification, because SLC also takes the position that

taxes paid by Innkeepers compared to others and the services received by Innkeepers compared to others are irrelevant. (SLC's brief at 13).

The Hotels believe that in order for the Innkeeper Tax to be upheld, there must be a reasonable relationship in fact between a tax directed only at Innkeepers and the objective of more equitably spreading the tax burden. SLC repeatedly and incorrectly states that the Hotels seek to compare taxes they pay to benefits they receive (SLC's brief at 29, 33). What the Hotels do contend is that, in order to justify a tax directed only at the limited class of Innkeepers as being reasonably related to the objective of more equitably spreading the tax burden, there must in fact be some inequity in the tax burden on Innkeepers without the tax. That inequity could only be one of two things: either the taxes paid to SLC by Innkeepers and their guests are less than the taxes paid to SLC by others, or the services provided by SLC to Innkeepers and their guests are greater than the services provided to others. To justify an increase of LAHCO's license tax by 2,300%, and an increase of the total taxes paid by LAHCO to SLC by 42%, while holding the line on all other business license taxes, there must be some existing inequity in the tax structure in need of being remedied. The Hotels don't argue for parity between taxes paid and benefits received. The Hotels believe that to determine whether the choice to tax Innkeepers is reasonably

related to the objective of equitably spreading the tax burden, it is appropriate to compare the taxes paid by Innkeepers and their guests to the taxes paid by all other taxpayers, and to compare the benefits received by Innkeepers and their guests to the benefits received by all other taxpayers.

There is at least a factual question regarding the existence of such an inequity as would justify the Innkeeper tax. LAHCO presented affidavits showing that LAHCO guests paid \$317.00 per resident-equivalent to SLC without the Innkeeper Tax, compared with \$130.00 per SLC resident. LAHCO also presented affidavits showing it provides its own security force, and that calls to police from LAHCO were lower than those from SLC residents in general, per capita, and that the same is true of calls to the fire department. Further, the costs of being ready to respond to fires in high rise buildings cannot be placed only on Innkeepers, since 59% of the hotel and motel units in SLC are in structures of six floors or less, and hotels account for only 11.5 % of the total floor space in high-rise buildings in SLC.

The need for a factual test of the existence of a reasonable relationship between the class taxed and a legitimate governmental objective can be shown by a hypothetical example, since the test which will be applied regarding the classification of Innkeepers will also be applied to a tax classification of any other business in the future. Suppose the city passed a special business license

tax on the gross receipts of movie theaters. To justify the tax, the city claims that movie theaters require more police protection than other businesses, create a bigger fire danger than other businesses, attract people from outside the city who don't pay property tax to the city and uniquely benefit from the redevelopment efforts of the city which have revitalized the downtown area at night. Those factors made the city decide that, to more equitably spread the tax burden, movie theaters should pay a business license tax 25 times as large as that paid by any other businesses. If the factual assumptions made by the City in passing that tax could not be challenged for correctness, then there is a reasonable relationship between specially taxing movie theaters and the objective of more equitably spreading the tax burden, even if there is no basis in fact for those assumptions.

If the uniformity provisions of the Utah Constitution and Utah Code Ann. § 10-8-80 are to provide any means for preventing unfair discrimination against a particular class of business, in this case or any future case, there must be an available avenue of judicial scrutiny regarding the factual assumptions made by a city to justify a tax on that class. This is just the higher standard of reasonableness which can and should be required under the Utah Constitution and under Utah Code Ann. § 10-8-80 to protect businesses against unfair discrimination in business license taxation.

In this case, unlike in Mountain Fuel, there is a dispute about whether there exists any basis in fact for singling out one particular kind of business, Innkeepers, for a special tax far greater than the tax on any other non-utility businesses in SLC.

III. CLASSIFICATION CASES RELIED ON BY SLC FROM OTHER JURISDICTIONS ARE DISTINGUISHABLE.

At pages 22-24 of SLC's brief, four cases are referred to by SLC as involving the precise issue before this Court. That is not the case. Edwards v. City of Los Angeles, 119 P.2d 370 (Cal. App. 1941), involved a tax imposed on hotels and apartments. The appellant argued that the rental of bungalows and cottages weren't included under the ordinance, denying equal protection. The Court simply held that bungalows and cottages would be included, thus avoiding the equal protection argument. The argument made and result reached in that case were entirely distinguishable from the present case.

City of Inglewood v. Right, 364 P.2d 569 (Colo. 1961), also did not involve the classification of hotels and motels. The tax involved there taxed those in the business of renting residential or commercial property. The case contains no analysis of any equal protection issues, just a reference to other cases.

508 Chestnut, Inc. v. City of St. Louis, 389 S.W.2d 823 (Mo. 1965), did involve a tax on Innkeepers. The plaintiff

hotel made a claim of discrimination by taxing rentals to transient and not non-transient guests. That issue is not involved in this case. Also, the test applied by the Court in that case is not compatible with the one announced by this Court as discussed above. And, unlike the present case, the Court specifically mentioned that no extrinsic evidence of unreasonableness had been introduced.

Finally, City of Portsmouth v. Citizens Trust Company, 22 S.E.2d 532 (Va. 1976), involved a tax of 2% of gross income of those engaged in the business of renting residential property. The tax at issue specifically excluded hotels and motels, which were covered by another license tax. The Court held that it was proper to omit hotels and motels from that tax, and to cover them by a different tax. The Court said that the burden to establish the unreasonableness of the tax had not been carried by the plaintiff.

This Court should not be guided by decisions or ordinances in other jurisdictions, which revolved around different circumstances and varying statutory and constitutional provisions, and in which many of the arguments made were materially different from the arguments made in this case. This court should apply Utah law as previously elaborated by this Court, and apply that law to the specific facts of this case.

IV. THE UTAH LEGISLATURE HAS NOT GRANTED TO CITIES
THE POWER TO LEVY A TRANSIENT ROOM TAX.

The city's argument that the Innkeeper Tax is not pre-empted by other legislation appears to misapprehend the Hotel's challenge to this ordinance. The Hotels' argument is simpler and more basic. As explained in the Hotels' original brief, at 47-49, no statute expressly vests the power to collect a transient room tax in Utah cities. Any inference that SLC has been granted the power to impose the Innkeeper Tax under general statutes such as Utah Code Ann. § 10-8-80 runs afoul of the deliberate, specific treatment given transient room taxes by the Utah Legislature. The legislature's crafting of legislation authorizing transient room-related taxation reflects important public policy considerations that bear upon the collection and spending of such revenues.

Utah Code Ann. § 59-12-301 expressly empowers counties to collect a transient room tax. In similar fashion, the Utah Legislature has addressed the potential impact of tourism on resort communities through Utah Code Ann. § 59-12-204(8), which empowers "a city or town in which the transient room capacity equals or exceeds the permanent census population," i.e., a small resort city, to "impose a sales tax of up to 1%."

Where the Utah Legislature has intended to provide for local transient room-related taxation, it has done so in express terms. Nothing in these statutes grants SLC the power

to levy its own transient room tax. Where the Legislature has so carefully delineated the delegation of power to impose transient room-related taxes, the omission of SLC from that grant should be understood as an exclusion. See 2A N. Singer & C. Sands, Sutherland on Statutory Construction § 47.23 (4th ed. 1984). Implying such taxing authority on the part of the city is inconsistent with the overall legislative scheme. It is not so much that SLC's power to tax has been pre-empted by the state legislation; rather, it is that the legislation has made no grant to cities of the power to impose such a tax in the first place.

V. THE INNKEEPER TAX MAY OPERATE AS AN IMPERMISSIBLE SALES TAX: THE MOUNTAIN FUEL RULING CAN BE DISTINGUISHED.

In Mountain Fuel, supra, a case decided by this Court subsequent to the filing of the Hotels' original brief in this appeal, the appellants challenged the validity of SLC's utility licensing tax ordinances. In part, they alleged "that the tax, although labelled an annual license tax, should more properly be characterized as a sales or income tax, which the city was not statutorily authorized to levy." Id. Treating the utilities' equal protection and uniformity challenges at considerable length, see discussion supra, this Court gave short shrift to the argument that the tax in question in Mountain Fuel was an invalid sales or income tax:

Mountain Fuel makes another argument: that the tax should be characterized as an income or sales tax. There is no reason to give extended treatment to this claim; it is without merit. Id., 77 Utah Adv. Rep. at 9.

This Court did not elaborate upon the basis for rejecting the challenge, other than to reiterate the city's defense that "the tax cannot be viewed as an unauthorized sales or income tax . . . simply because the amount of the tax is determined by the vendor's gross billings." Id., 77 Utah Adv. Rep. at 6.

Because the license tax ordinance challenged in Mountain Fuel is similar in language and effect to the Innkeeper Tax now before this Court, it may well be argued that the result in Mountain Fuel should control here. However, as discussed supra, this tax does not reach beneficiaries of "all municipal services, including police and fire protection" who are "not otherwise subject to other City taxes and thereby spread more broadly the financial burden of providing City services." Id., 77 Utah Adv. Rep. at 9. Taxes like the Innkeeper Tax have routinely been distinguished from other business or license taxes by the nomenclature used to identify them.

A tax imposed on the amount charged a transient guest for room occupancy at a hotel, motel, inn, or like establishment has been referred to by the courts as a bed tax, a hotel or motel room tax, an accommodation tax, a transient room tax, a room occupancy tax, a tourist room tax, a tourist development tax, or an occupancy tax.

Annot., Tax on Hotel-Motel Room Occupancy, 58 A.L.R. 4th 274, 281-82 (1987). As the Annotation explains, the nomenclature reflects the "diverse judicial view of the tax, which has been held under various circumstances to be a sales tax. . . , privilege tax . . . , a license tax . . . , an income tax . . . , or an excise tax" Id. at 282 (emphasis added & citations omitted). See also Montana Innkeeper Association v. Billings, 671 P.2d 21 (Mont. 1983) (\$1 per day transient room tax held to be impermissible sales tax).

That the Innkeeper Tax may be considered a sales tax finds support in the fact that the Utah Legislature has granted express authority to county governments to levy a "Transient Room Tax" as part of the "Uniform Local Sales and Use Tax Act," Utah Code Ann. § 59-12-201, et seq. This reflects a legislative view that transient room taxes similar in substance to the Innkeeper Tax are properly classified with other local sales and use taxes, rather than under separate business licensing powers.

CONCLUSION

SLC has not addressed the appropriate standard by which the validity of the Innkeeper Tax is to be determined. That test, as recently reiterated by this Court in the Mountain Fuel case, is whether there exists a reasonable relationship between the class taxed and a legitimate governmental purpose; in this case, a revenue-raising purpose. The Hotels submit that the

test to be applied under the Utah Constitution and statutes is whether there is in fact such a reasonable relationship, and a trial is necessary to determine that factual issue. In view of the factual issues raised, the trial court's award of summary judgment to SLC was in error. Appellant Hotels respectfully request that the summary judgment granted by the trial court on the issue of the legality of the classification of Innkeepers as the only class subject to the Innkeeper Tax be vacated and that this case be remanded to the trial court for a trial on those issues. For the reasons stated in the previous brief of appellants, it is requested that the Court rule that the trial court's protective order prohibiting discovery of taxes paid by Innkeepers to SLC was an abuse of discretion. That order should be vacated and the trial court should be instructed upon remand to allow discovery of that relevant factual information.

In addition, this Court is asked to determine that the legislature has not empowered SLC to impose this tax, because such power cannot be implied from general license tax power in view of the specific grant of authority by the legislature to counties to impose transient room taxes and to small resort cities to impose an additional 1% sales tax where transient room capacity exceeds permanent population. Finally, SLC lacks power to impose the Innkeeper Tax because it is in fact a sales tax beyond the city's power to impose. If SLC has no power to impose the Innkeeper

Tax, the summary judgment for the City should be reversed and the summary judgment sought by the Hotels should be entered.


Respectfully submitted this 22 day of April, 1988.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS LITTLE AMERICA HOTEL CORPORATION AND UTAH HOTEL COMPANY were mailed, postage fully prepaid, this 22 day of April, 1988 to the following:

Roger F. Cutler, Esq.
SALT LAKE CITY ATTORNEY
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Lon R. King Kp