

1987

Kathy's Food Stores, Inc., dba Time Out Food Stores, a Utah corporation and Jay Slaughter, and Vaughn Nelson, individuals v. Equitable Life and Casualty Insurance Company, a Utah corporation :  
Petition for Rehearing

Utah Supreme Court

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Daniel W. Anderson; Gary E. Jubber; Patrick L. Anderson; Fabian and Clendenin;  
Attorneys for Defendant/Respondent.

Michael A. Neider; Richard L. Halliday; Neider and Hutchison; Attorneys for Appellants.

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### Recommended Citation

Petition for Rehearing, *Kathy's Food Stores, Inc., Time Out Food Stores, Jay Slaughter, Vaughn Nelson v. Equitable Life and Casualty Insurance Company*, No. 870394.00 (Utah Supreme Court, 1987).  
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UTAH SUPREME COURT  
BRIEF

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SO  
DOCKET NO. 870394

MAR 12

Clerk Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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KATHY'S FOOD STORES, INC.	)	
d/b/a TIME OUT FOOD STORES, a	)	
Utah corporation and JAY	)	
SLAUGHTER, and VAUGHN	)	
NELSON, individuals,	)	
Plaintiffs/Appellants	)	
vs.	)	Supreme Court
	)	<del>Consolidation</del> No. 870394
EQUITABLE LIFE AND CASUALTY	)	
INSURANCE COMPANY, a Utah	)	
corporation,	)	
Defendant/Respondent.	)	

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PETITION FOR REHEARING  
OF A PORTION OF PER CURIAM DECISION

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Appeal from Interlocutory Order of the  
Third Judicial District Court  
for the Salt Lake County, State of Utah,  
Honorable Homer Wilkinson, District Judge.

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Attorneys for  
Plaintiffs/Appellants

---

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

KATHY'S FOOD STORES, INC.	)	
d/b/a TIME OUT FOOD STORES, a	)	
Utah corporation and JAY	)	
SLAUGHTER, and VAUGHN	)	
NELSON, individuals,	)	
Plaintiffs/Appellants	)	
vs.	)	
	)	Case No. 870394
EQUITABLE LIFE AND CASUALTY	)	
INSURANCE COMPANY, a Utah	)	
corporation,	)	
Defendant/Respondent.	)	

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PETITION FOR REHEARING

Appellants hereby petition the Supreme Court of the State of Utah to rehear and redetermine that portion of the Per Curiam decision granting sanctions entered in the above-entitled appeal on March 3, 1988. The basis of the grant of sanctions was that this appeal is frivolous and brought for delay. This Petition for Rehearing does not request this Court reconsider that portion of the decision dismissing the appeal.

FACTS

1. In January, 1987, Appellant Time Out Foods tendered rent to the Defendant who refused the same.
2. In September, 1987, the lower court, Judge Homer Wilkinson presiding, entered an Order requiring Plaintiffs to

pay rent into Court under Rule 67 of Utah Rules of Civil Procedure, including over \$30,000.00 of back rent. This Order ignored Appellants financial claims.

3. This appeal was then sought by the Appellants on the ground that the September Order was unlawful and not authorized by Rule 67 of the Utah Rules of Civil Procedure, was a final order because at least one and probably two of the Appellants had no obligation to pay rent to anyone, and for the other reasons cited in Appellants' Amended Docketing Statement. See cases cited in Amended Docketing Statement.

4. Appellants sought no stay pending appeal either in the Court below or this Court, filed no supersedeas bond, and the proceedings below continued. See Affidavit of Michael A. Neider attached hereto.

5. Appellants have now been evicted from the property by order of the lower Court entered in December, 1987 after this appeal was instituted by Appellants. See Order attached to Affidavit of Michael A. Neider.

6. The lower Court Order granting the Defendant its writ of restitution stated by its own terms that it is based on the ground specified in the Motion. See paragraph 5, page 2 of the Order. The only ground specified in the Motion for Summary Judgment was Plaintiffs' failure to pay rent. Appellants' fears of losing their meritorious claims were then realized by entry of such Order. See Affidavit of Michael A. Neider and Order and Motion attached thereto.

7. In early 1987, the Respondent received an offer to sell the property which it desired to accept in early 1987 in the sum of \$350,000.00, and one year later sold the property to the same buyer for the sum of \$400,000.00 while real estate prices in the market generally have gone down. See Affidavit of Michael A. Neider and Affidavit of Earl Ross attached thereto.

#### ARGUMENT

##### POINT I

#### APPELLANTS' APPEAL WAS NOT FOR THE PURPOSE OF DELAY BUT TO CORRECT AN ONEROUS AND BURDENSOME ORDER.

Appellants did not delay the proceedings in the Court below or in this Court by their appeal. Appellant Time Out has now been evicted from the premises and has lost its possession, valuable goodwill on the property, and right of first refusal to purchase the subject property. This goodwill has been turned into a windfall to the Defendant who has sold the property for \$400,000.00, \$50,000.00 more than was offered to the Defendant a year previously by the same buyer. See Affidavit of Earl Ross attached to Affidavit of Michael A. Neider.

Appellants did not seek a stay pending appeal, did not file a supersedeas bond and did not ask this Court to stay the proceedings pending a determination on appeal.

Because the case moved forward in the Court below and because the Appellants only sought legitimate legal rights

without seeking a stay of any proceedings, it cannot now be said nor can it be found by any court that the purpose of the appeal was for delay.

## POINT II

### THE APPEAL WAS NOT FRIVOLOUS.

As set forth on page 2 of the Amended Docketing Statement and as cited in Appellants' Response to the Motion to Dismiss Appeal, there is sufficient case law to justify Appellants' position (if viewed in a light most favorable to Appellants) that the Order appealed from was final and appealable.

1. The Order required two of the Appellants to pay money into Court, at least one of which had no obligation to do so. As such, it essentially fixed the obligations of the parties.

2. The Order was final and appealable because of the irreparable injury it caused to Appellants. This injury resulted from the Order being unlawful and not authorized by Rule 67. Appellants believed the Order had the effect of destroying Appellants' opportunity to have a fair determination of the matter on the merits. In fact, Appellants were deprived of a meritorious determination of their claims because the lower Court granted Respondent's Motion for Summary Judgment to obtain possession of the property based only on Appellants failure to comply with the Order when they did not pay over \$30,000.00 of back "rent"

into Court. Appellants believe the unlawful order resulted when the Court misunderstood that Appellants had tendered rent which Defendant refused, because the Defendant sensationalized the fact that no rent had been paid inspite of its refusal to receive it, and then improperly obtained an Order to pay rent from the Court below.

3. The Order affected the substantial rights of the Appellants which rights they asserted they would lose and which they in fact did lose. Appellants asserted substantial rights under a lease (which the Respondent denied): (1) the right to the beneficial use and enjoyment of the property, (2) the right of first refusal to purchase the property and (3) valuable goodwill. The Order requiring a substantial payment of money into Court (over \$30,000.00) was financially and legally oppressive to the Appellants. Because Appellants were in jeopardy and then did lose their rights under the effect of such Order, the Order was final and appealable under the cited case law.

For the above reasons, Appellants in good faith and with the expectation of prevailing on appeal filed the instant appeal for relief from this Court. See Affidavit of Michael A. Neider attached hereto. Appellants have cited case law and factual situations in such case law which when viewed in a light most favorable to Appellants, can be used to justify a determination that the Order was final and appealable under exceptional circumstances.

CONCLUSION

The appeal was neither sought for delay nor frivolous. To now penalize the Appellants for seeking their constitutional and lawful right of appeal from an onerous and burdensome Order of the Court is to further throw a shadowy light on a system which Appellants already believe have deprived them of their substantial rights without due process or a proper hearing on the merits. Sanctions should not to be granted under Rule 33 of the Rules of the Utah Supreme Court.

Respectfully Submitted this 17<sup>th</sup> day of March, 1988.

NEIDER & HUTCHISON

  
\_\_\_\_\_  
Michael A. Neider

CERTIFICATION

Michael A. Neider, of the firm of Neider & Hutchison, attorneys for Appellants, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay. The Petition is based upon the ground that the Court has overlooked or misapprehended certain facts and the intent and purpose of the Appellants in filing this Appeal.

  
\_\_\_\_\_  
Michael A. Neider



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

On the 17<sup>th</sup> day of March, 1988, personally appeared before me MICHAEL A. NEIDER, who duly acknowledged to me that he signed the foregoing Certification, has read the same and knows the contents thereof to be true and correct.

Laurie S. Deaton  
Notary Public

My Commission Expires:

Residing at Salt Lake County

6-16-90

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Rehearing and Certification to Daniel W. Anderson, Gary E. Jubber and Patrick L. Anderson, Fabian & Clendenin, Twelfth Floor, 215 South State Street, Salt Lake City, Utah 84111, postage prepaid, this 17<sup>th</sup> day of March, 1988.

Laurie S. Deaton

AFFIDAVIT OF MICHAEL A. NEIDER

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

MICHAEL A. NEIDER, being first duly sworn, states as follows:

1. I am one of the attorneys for the Appellants in this case, am familiar with the pleadings, papers and records of this case before this Court and the Third Judicial District Court, am a resident of Salt Lake County, and competent to testify, and personally know the facts stated herein are true.

2. I certify that this Petition for Rehearing is presented in good faith and not for delay.

3. I also certify that the appeal of the September Order of the Court below was not sought for delay. As evidence of Appellant's good faith, no supersedeas bond was obtained, no stay pending appeal was sought in either this Court or the lower Court, and in fact the proceedings below continued during this appeal.

4. The Order attached hereto as Exhibit "A" is the December Order of the Court which granted Defendant's Motion for a Writ of Restitution on the grounds set forth in the Motion. See also Motion for Partial Summary Judgment attached hereto as Exhibit "B".

5. As the Motion recites, the only basis sought for

the Writ of Restitution and Partial Summary Judgment was for Plaintiffs' failure to pay rent and this despite the fact that Plaintiff Time Out had tendered the rent and it had been refused by Defendant.

6. During discovery it was learned that Defendant had received an offer to purchase property in early 1987 in the sum of \$350,000.00. On information and belief, deponent asserts that the offer was from Rainbow Oil Company. See offer attached as Exhibit "C".

7. The Affidavit of Earl Ross, which is attached hereto as Exhibit "D", states that in late 1987, the Defendant received an offer for the purchase of the property for \$400,000.00, which on information and belief deponent asserts was also from Rainbow Oil.

8. One of the causes of action of the Plaintiffs against the Defendant in the case below is for unjust enrichment for the value of the good will, right of first refusal to purchase and the value of the leasehold interest all of which Defendant has attempted and has now taken from Plaintiff Time Out. The continued increase in the value of the property, while other real property in Salt Lake County is stagnant or falling, lends credibility to Plaintiffs' claims.

9. As counsel for Appellants, I sincerely believed and advised Appellants that the Order requiring a payment of a large sum of money into Court (which Appellants could not make) reduced their ability to pay for and prosecute their

lawsuit and would ultimately result in their losing on the merits of the case simply because they were unable to comply with the Order of the Court. This advise has proven to be true.

10. As counsel for the Plaintiffs/Appellants, my research indicated case law which, though small, supported the proposition that an Interlocutory Order, though not final in the traditional sense, could be deemed a final Order and appealable if such Order caused irreparable injury to the Appellant, affected the substantial rights of the parties, or had the effect of fixing or determining the liabilities of the parties.

11. As counsel for the Appellants/Plaintiffs, it was my belief that the September, 1987 Order, though on its face "a house keeping Order" injured the Appellants immediately and irreparably because it would ultimately have the effect of determining the case on the merits if Appellants failed to comply with the Order. The Order immediately reduced Appellants ability to prosecute the litigation because of their inability to meet the financial requirements of carrying the case and complying with the Order. Failure to comply with the Order was later used to deprive Appellants of possession of the subject property.

12. I believed the Order affected the substantial rights of the parties because it severely restricted

Appellants' right to have their claims heard on the merits. Counsel for Defendant so sensationalized the issue of rent and their security that the lower Court was distracted from the merits of the case.

13. I sincerely believed that the Order had the effect of determining the liabilities of the parties because at least one of the Appellants and probably two had no obligation at all to pay rent or the fair rental value for the property because one Appellant neither signed the lease nor possessed the property and the other Appellant did not possess the property. Possession of the property is an essential element to Defendant's Counterclaim for the fair rental value of the property in circumstances where Defendant denied the legal existence of the lease.

DATED this 17<sup>th</sup> day of March, 1988.

NEIDER & HUTCHISON

  
Michael A. Neider

On the 17<sup>th</sup> day of March, 1988, personally appeared before me MICHAEL A. NEIDER, who duly acknowledged to me that he signed the foregoing Affidavit, has read the same and knows the contents thereof to be true and correct.

My Commission Expires:

\_\_\_\_\_  
Notary Public  
Residing at Salt Lake County

\_\_\_\_\_  
ld kathequi.af2

EXHIBIT "A"

Daniel W. Anderson, A0800  
Gary E. Jubber, A1758  
Patrick L. Anderson, A4787  
FABIAN & CLENDENIN,  
a Professional Corporation  
Twelfth Floor  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 531-8900

Attorneys for Equitable Life and  
Casualty Insurance Company

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER, and VAUGHN NELSON,	:	ORDER GRANTING MOTION
Individuals,	:	FOR PARTIAL SUMMARY
	:	JUDGMENT
Plaintiffs,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	Civil No. C87-2981
corporation,	:	(Judge Homer F. Wilkinson)
	:	
Defendant.	:	
	:	

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This matter came before this Court for hearing on November 25, 1987, pursuant to Equitable Life and Casualty Insurance Company's ("Equitable") Motion for Partial Summary Judgment and Plaintiffs' Motion to Revise Order, or in the Alternative, for an Order Certifying Final Order, and Motion to Amend Amended Complaint. Judge Wilkinson ruled on the above motions on December 4, 1987. This matter again came before this Court for hearing on November 18, 1987, pursuant to plaintiffs'

objection to order, motion to certify order as final, and motion to set supersedeas bond amount. At the hearings, Equitable was represented by Gary E. Jubber and Patrick L. Anderson, plaintiffs Kathy's Food Stores, Inc. d/b/a Time Out Food Stores, Jay Slaughter and Vaughn Nelson were represented by Michael A. Neider, and plaintiff Kathy's Food Stores, Inc. d/b/a Time Out Food Stores was also represented by David Ward. The Court having considered the various motions, supporting memoranda and arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion to Revise the September 29, 1987 Order is denied.

2. Plaintiffs' Alternate Motion for An Order Certifying the September 29, 1987 Order as a final order is denied.

3. Plaintiffs' Motion to Amend Their Amended Complaint, is denied; however, plaintiffs' Motion to Amend may be noticed for hearing if the proposed amendment has not been disposed of by the other rulings contained herein.

4. Those claims for relief set forth in plaintiffs' Amended Complaint which deal with the possession of the property located at 502 East 2100 South, Salt Lake City, Utah are disposed of by this Order and dismissed with prejudice.

5. Equitable's Motion for Partial Summary Judgment is granted based upon the grounds specified therein.

6. That a writ of restitution shall issue entitling Equitable to immediate possession of the property located at 502 East 2100 South, Salt Lake City, Utah.

7. Plaintiffs' Motion to Certify this Order as a final order is granted.

8. This order shall be stayed pending appeal only upon the posting by the plaintiffs of a supersedeas bond in the amount of \$144,000.00.

JUDGMENT

Based on the foregoing Order granting Equitable's Motion for Partial Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered entitling Equitable to immediate restitution of the property located at 502 East 2100 South, Salt Lake City, Utah.

IT IS FURTHER ORDERED that this Judgment shall be enforced by the issuance of a Writ of Restitution upon entry of this Order and Judgment.

DATED this \_\_\_\_\_ day of December, 1987.

BY THE COURT:

\_\_\_\_\_  
Homer F. Wilkinson  
District Court Judge

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael A. Neider, Esq.  
Neider & Hutchison  
Attorneys for Plaintiffs



CERTIFICATE OF HAND-DELIVERY

This is to certify that on this 22nd day of December, 1987, I caused to be hand-delivered a true and correct copy of the foregoing Order Granting Motion for Partial Summary Judgment to Michael A. Neider, Esq., Neider & Hutchison, 7050 South Union Park Avenue, #570, Salt Lake City, Utah 84107.

Carol Riddle

PLA:122187A

DATE April 4, 1987

The undersigned Buyer COMPANY hereby deposits with Broker as EARNEST MONEY the amount of ONE THOUSAND AND NO/100 Dollars (\$ 1,000.00) in the form of check which shall be deposited in accordance with applicable State

Brokerage

Phone Number

Received by

## OFFER TO PURCHASE

1 PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 2100 South 502 East in the City of Salt Lake City County of Salt Lake subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by I in accordance with Section G. Said property is more particularly described as Legal to follow - See Exhibit "A"

## CHECK APPLICABLE BOXES

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_

☒ IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Condo ☐ Other \_\_\_\_\_

(a) Included items Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the prop

The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title \_\_\_\_\_

None

(b) Excluded items. The following items are specifically excluded from this sale None

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase

<input checked="" type="checkbox"/> public sewer <input checked="" type="checkbox"/> connected	<input type="checkbox"/> well <input type="checkbox"/> connected <input type="checkbox"/> other	<input checked="" type="checkbox"/> electricity <input checked="" type="checkbox"/> connected
<input type="checkbox"/> septic tank <input type="checkbox"/> connected	<input type="checkbox"/> irrigation water / secondary system	<input type="checkbox"/> ingress & egress by private easement
<input type="checkbox"/> other sanitary system _____	= of shares <u>N/A</u> Company <u>N/A</u>	<input checked="" type="checkbox"/> dedicated road <input checked="" type="checkbox"/> paved
<input checked="" type="checkbox"/> public water <input checked="" type="checkbox"/> connected	<input type="checkbox"/> TV antenna <input type="checkbox"/> master antenna <input type="checkbox"/> prewired	<input checked="" type="checkbox"/> curb and gutter
<input type="checkbox"/> private water <input type="checkbox"/> connected	<input checked="" type="checkbox"/> natural gas <input checked="" type="checkbox"/> connected	<input type="checkbox"/> other rights _____

(d) Survey. A certified survey ☐ shall be furnished at the expense of \_\_\_\_\_ prior to closing ☒ shall not be furnished

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical condition except \_\_\_\_\_

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Three Hundred Fifty Thousand and No/100 Dollars (\$ 350,000.00) which shall be paid as follows

1,000.00 which represents the aforesaid EARNEST MONEY DEPOSIT  
99,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing.  
 -- representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_ which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other \_\_\_\_\_  
 -- representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_ which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other \_\_\_\_\_  
 -- 1 representing balance, if any, including proceeds from a new \_\_\_\_\_ loan, to be paid as follows \_\_\_\_\_

250,000.00 Other Trust Deed and Note at 10% - 15 years - PI = \$2,686.51

250,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same and is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within \_\_\_\_\_ days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed \_\_\_\_\_ Buyer does not qualify for the assumption and/or financing within \_\_\_\_\_ days after Seller's acceptance of this Agreement, this Agreement shall be void by the option of the Buyer or Seller upon written notice.

Seller agrees to pay \$ \_\_\_\_\_ towards Buyer's total financing and closing costs, including but not limited to loan discount points. If this Agreement involves the assumption of an existing loan or obligation on the property, Section F shall apply.

INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any condominium CC & R's prior to signing this Agreement.

VESTING OF TITLE. Title shall vest in Buyer as follows: Company

SELLER WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: None

ons to the above and Section C shall be limited to the following: \_\_\_\_\_

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing. Offer subject to obtaining adequate zoning. Offer also subject to final approval from \_\_\_\_\_ Company's \_\_\_\_\_ office. Upon execution of this agreement, Buyer has the right to enter the property for the purpose of conducting soil and ground water tests.

CLOSING OF SALE. This Agreement shall be closed on or before April 30, 19 87 at a reasonable location to be designated by subject to Section Q. Upon demand, Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R, shall be made as of ☐ date of possession ☐ date of closing ☐ other In the event closing does not occur before or on 4/30/87, there shall be an automatic 30 day extension.

POSSESSION. Seller shall deliver possession to Buyer on closing unless extended by written agreement of parties.

GENERAL PROVISIONS. Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated into this Agreement by reference.

AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall accept until 5:00 (AM-PM) XXX, 19 87 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the BEST MONEY to the Buyer.

Signature of Buyer \_\_\_\_\_ Date \_\_\_\_\_ Signature of Buyer \_\_\_\_\_ Date 4/3/87

ONE

ACCEPTANCE OF OFFER TO PURCHASE. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

REJECTION. Seller hereby REJECTS the foregoing offer. \_\_\_\_\_ (Seller's Initials)

COUNTER OFFER. Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (A.M. / P.M.) \_\_\_\_\_, 19 \_\_\_\_\_ to accept the terms specified below.

\_\_\_\_\_  
(AM-PM)

Signature of Seller

Signature of Seller

ONE

Buyer accepts the counter offer

Buyer accepts with modifications on attached addendum

\_\_\_\_\_  
(AM-PM)

Signature of Buyer

Signature of Buyer

COMMISSION. The undersigned hereby agrees to pay to: \_\_\_\_\_ (Brokerage) a commission of 6% as consideration for the efforts in procuring a buyer.

Signature of Seller

Date

Signature of Seller

Date

#### DOCUMENT RECEIPT

The Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed):

☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures

SIGNATURE OF SELLER

SIGNATURE OF BUYER

\_\_\_\_\_  
Date \_\_\_\_\_  
Date \_\_\_\_\_

\_\_\_\_\_  
Date \_\_\_\_\_  
Date \_\_\_\_\_

☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_, 19 \_\_\_\_\_ by \_\_\_\_\_ and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by \_\_\_\_\_

Three of a four page form. Seller's Initials ( ) ( ) Date \_\_\_\_\_ Buyer's Initials ( ) ( ) Date \_\_\_\_\_

EXHIBIT C

Daniel W. Anderson, A0800  
Gary E. Jubber, A1758  
Patrick L. Anderson, A4787  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Equitable Life and  
Casualty Insurance Company  
Twelfth Floor  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 531-8900

*Homer F. Wilkinson*

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

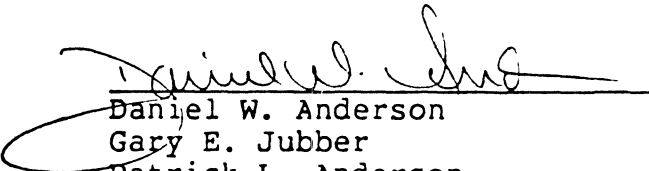
STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER, and VAUGHN NELSON,	:	DEFENDANT'S MOTION FOR
Individuals,	:	PARTIAL SUMMARY JUDGMENT
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	Civil No. C87-2981
corporation,	:	(Judge Homer F. Wilkinson)
	:	
Defendant.	:	
	:	

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, defendant Equitable Life and Casualty Insurance Company ("Equitable"), by and through its counsel, hereby moves this Court for partial summary judgment against plaintiffs herein for an order determining that Equitable is entitled to immediate restitution of the property located at 502 East 2100 South in Salt Lake City, Utah.

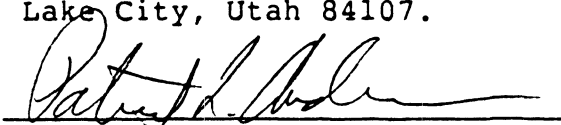
The grounds for this motion, as set forth in the memorandum of points and authorities filed in support hereof, are that plaintiffs have occupied the said property since Equitable purchased it at a trustee's sale on December 17, 1986, without paying any rent therefor, no issues of material fact exist, and Equitable is entitled to the relief requested as a matter of law.

DATED this 12<sup>th</sup> day of November, 1987.

  
Daniel W. Anderson  
Gary E. Jubber  
Patrick L. Anderson  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Equitable Life and  
Casualty Insurance Company

#### CERTIFICATE OF SERVICE

This is to certify that on this 12<sup>th</sup> day of November, 1987, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Defendant's Motion for Partial Summary Judgment to Michael A. Neider, Esq., Neider & Hutchison, 7050 South Union Park Avenue, #570, Salt Lake City, Utah 84107.



102687A:PLA

Daniel W. Anderson, A0800  
Gary E. Jubber, A1758  
Patrick L. Anderson, A4787  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Equitable Life and  
Casualty Insurance Company  
Twelfth Floor  
215 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

KATHY'S FOOD STORES, INC.	:	
d/b/a TIME OUT FOOD STORES,	:	
a Utah corporation, and JAY	:	
SLAUGHTER, and VAUGHN NELSON,	:	AFFIDAVIT OF EARL ROSS
Individuals,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
INSURANCE COMPANY, a Utah	:	Civil No. C87-2981
corporation,	:	(Judge Homer F. Wilkinson)
	:	
Defendant.	:	

---

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

Earl Ross, being duly sworn, states as follows:

1. I am the Chief Executive Officer and Chairman of Equitable Life and Casualty Insurance Company ("Equitable") and have been assigned responsibility for the property located at 502 East 2100 South, Salt Lake City, Utah (the "Property") which is the subject of the above-referenced matter.

2. Equitable has received an offer to purchase the Property for \$400,000. Under the terms of the offer, Equitable must be able to deliver possession and quiet enjoyment of the Property to the purchaser. If plaintiffs are allowed to remain in possession through the imposition of a stay pending appeal, Equitable will lose the offer to purchase the Property and will be damaged thereby.

3. The Purchaser of the Property has agreed to make a cash down payment of \$125,000 on or before December 29, 1987 with closing to be within ninety (90) days from that date. If Equitable is prevented from selling the Property within that time frame, it will forfeit the \$125,000 down payment and the Agreement between Equitable and the purchaser will be deemed void and unenforceable.

4. The purchaser of the Property has agreed to pay the balance of the purchase price in equal monthly installments over fifteen (15) years with interest at ten percent (10%) per annum. Equitable will lose \$27,500 per year during the pendency of the appeal in interest alone. Moreover, Equitable would not be receiving monthly installments during the pendency of an appeal.

5. Equitable will be irreparably harmed if it is not allowed to sell the Property. Any supersedeas bond required by this Court should be an amount sufficient to protect Equitable's ownership interest in the Property and must consider damages caused by any lost sale thereof.

DATED this 16<sup>th</sup> day of December, 1987.

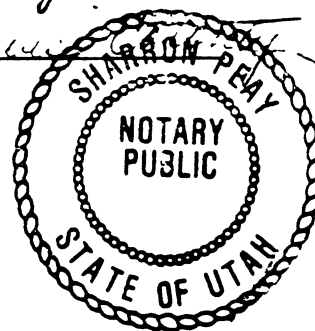
Earl Ross  
Earl Ross

SUBSCRIBED AND SWORN TO before me this 16<sup>th</sup> day of  
December, 1987.

Sharon Peay  
NOTARY PUBLIC  
Residing At: New York

My Commission Expires:

10 - 7 - 91



CERTIFICATE OF SERVICE

This is to certify that on this 16<sup>th</sup> day of December,  
1987, I caused to be hand-delivered, a true and correct copy of  
the Affidavit of Earl Ross, to Michael A. Neider, Esq., Neider &  
Hutchison, 7050 South Union Park Avenue, #570, P.O. Box 7005,  
Salt Lake City, Utah 84107.

Robert L. Adams

121687A:PLA



Daniel W. Anderson, A0800  
 Gary E. Jubber, A1758  
 Patrick L. Anderson, A4787  
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Individuals,	:	
	:	
Plaintiffs,	:	
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vs.	:	
	:	
EQUITABLE LIFE AND CASUALTY	:	
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	:	
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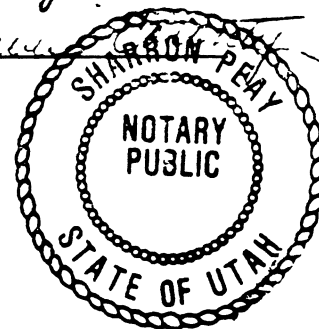
Earl Ross  
Earl Ross

SUBSCRIBED AND SWORN TO before me this 16<sup>th</sup> day of  
December, 1987.

Sharon Peay  
NOTARY PUBLIC  
Residing At: New

My Commission Expires:

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