

1988

Marion H. Webb and Jill W. Brown v. Vantage Income Properties, Bruce Honey, and Steve Holcomb : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Webb v. Vantage Income Properties*, No. 880137.00 (Utah Supreme Court, 1988).
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BRIEF

880137

IN THE SUPREME COURT OF THE STATE OF UTAH

MARION H. WEBB and JILL W.
BROWN,

Plaintiffs/Respondents,

vs.

VANTAGE INCOME PROPERTIES,
BRUCE HONEY, and STEVE
HOLCOMB,

Defendants/Appellants.

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Case No 880137

Priority Classification
No. 14(b)

APPELLANTS' BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
JUDGE TIMOTHY HANSEN

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APPELLANTS' BRIEF

JURISDICTION

The Court's Jurisdiction over this appeal arises from Utah Constitution Article VIII, § 3, Utah Code Annotated § 78-2-2(3)(j) (1953, as amended) and Rule 3, Rules of the Utah Supreme Court.

NATURE OF PROCEEDINGS

This appeal is from an order granting default judgment in favor of Respondents Marian H. Webb and Jill W. Brown and against Appellants Vantage Income Properties, Bruce Honey and Steve Holcomb under Respondents' First Cause of Action alleging violations of the Utah Racketeering Influences and Criminal Enterprise Act ("RICE"), under §§ 76-10-1602(p), (q), and (s) of the act as was in effect at the time of the complaint. Default judgment was entered in favor of Respondents upon Defendants' refusal to produce

certain documents, claiming privilege against self-incrimination under the Constitution of Utah and the United States Constitution.

ISSUES PRESENTED ON APPEAL

1. Did Appellants properly assert their privilege against self-incrimination by refusing to provide sales records and customer lists to Respondents who sought such information for the expressed purpose of establishing a pattern of racketeering activity on the part of Appellants?

2. Did Appellant Holcomb waive his right to claim privilege against self-incrimination by making certain non-incriminating statements?

3. May a Plaintiff sustain an action for civil remedies under the criminal RICE statute without first alleging specific actions of a Defendant in the Complaint that would warrant an indictment if presented to a grand jury?

4. Should the Appellants be awarded costs and attorney's fees for this appeal which has been brought to protect their constitutional right against self-incrimination?

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions relevant to the determination of this case, copies of which are attached hereunder as Exhibit "A" to the Addendum, are as follows:

1. Constitution of Utah, Article I, § 12.
2. Constitution of the United States, Amendment V.

3. Utah Code Annotated, §§ 76-10-1602(p), (q), and (s)
(1953, as amended) as in effect at the time of the Complaint.
4. Utah Code Annotated, §76-10-1801 et seq. (1953, as amended)
5. Utah Code Annotated, § 77-11-5 (1953, as amended).

STATEMENT OF THE CASE

1. Nature of the Case. This is an appeal from an order granting default judgment in favor of Respondents against Appellants by reason of Appellants refusal to produce documents in a civil action brought under the Utah Racketeering Influences and Criminal Enterprise Act ("RICE") as it was in effect at the time the alleged violations occurred. Although the action was civil, the statute is a criminal statute that provides civil remedies if the Plaintiff is successful in proving that Defendant violated the criminal provisions of the statute.

2. Course of Proceedings. During the discover phase of the case in early 1987, Appellants in this action refused to provide certain documents requested by Respondents for the expressed purpose of proving that Appellants had committed crimes under the statute. Appellants claimed privilege against self-incrimination under the Constitution of Utah and the Constitution of the United States. In October 1987, Respondents brought a motion to compel and for sanctions against Appellants. Appellants restated their claim of privilege against self-incrimination, and in December 1987 the matter was again brought before the Trial Court, which ordered that if the documents were not produced, default judgment would be entered against the Appellants. In late December 1987,

Appellants attempted to obtain permission to appeal the interlocutory order of Trial Court. Permission was refused, and Appellants informed the Trial Court that they would not waive their right to claim privilege against self-incrimination and refused to produce the documents sought by Respondent.

3. Disposition at Trial Court. The Trial Court below ruled against Appellants' assertion of privilege against self-incrimination and entered default judgment against Appellants Honey and Vantage Income Properties on March 28, 1988, and against Appellant Holcomb on September 27, 1988 in the amount of \$141,232.65.

RELEVANT FACTS

Respondents commenced an action against Appellants on February 21, 1986 for fraud and racketeering based on a real estate transaction that had taken place the previous summer wherein Respondents had purchased an apartment complex located at 576-604 Vine Street in Murray, Utah (Record, Pages 2-10). Appellants had represented Respondents as their real estate broker in the transaction. As a basis for racketeering, Respondents alleged actions and omissions of Appellants that constituted communications fraud, as set forth in § 76-10-1801 et seq. of the Utah Code Annotated, and the consummation of an alleged fraudulent real estate sale in violation of the Utah Racketeering Influences and Criminal Enterprise Act ("RICE") under §§ 76-10-1602(p), (q), and (s) of the act as was in effect at the time of the complaint (Record, Pages 8-10). A statutory prerequisite for a racketeering cause of action under

RICE was the establishment of a pattern of racketeering activity, defined under § 76-10-1602(4) as:

. . . at least two episodes of racketeering conduct which have the same or similar objectives, results, participants, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events, provided at least one of the episodes occurred after the effective date of this part and the last of which occurred within five years after the commission of a prior episode of racketeering conduct.

On April 8, 1987, after a motion to compel had been granted to Respondents (Record, Page 89), Appellants responded to specific requests by Respondents for the production of documents, which included customer sales records of Vantage Income Properties and customer lists of Defendant Steve Holcomb, by refusing to produce such documents, claiming privilege against self-incrimination (Record, Pages 135-138).

On October 5, 1987, Respondents brought a motion to strike Appellants answers and enter default by reason of Appellants' failure to produce the documents (Record, Pages 101-115). Appellants argued at the hearing that the only fact that could be proven from such documents was a pattern of racketeering based on previous real estate transactions (Record, Page 122). Accordingly, they argued, such testimony would be incriminating because it would establish that Appellants had indeed committed a crime.

Respondents asserted on page 5 of their memorandum in support of the October 5th motion that the information was needed to assist in the preparation of Respondents' case of fraud and racketeering (Record, Page 107). At the hearing, Mr. Newton, counsel for Respondents, argued that Respondents were seeking others who

might have similar claims against the Appellants to support their allegations of a pattern of racketeering and thus assist Respondents efforts to get Mr. Holcomb "off of the streets" (Record, Page 180).

the Court ruled that the answers provided in the responses to Respondents' request for production of documents that were delivered to Respondents on April 8, 1987 were inadequate under the Rules of Civil Procedure, and further, did not state sufficiently the grounds upon which Appellants claimed a privilege against self-incrimination (Record, Pages 134, 139-141). The Court ordered Appellants to file supplementary responses within 10 days. Supplemental responses were filed by Appellants on October 14, 1987 that conformed with the Rules of Civil Procedure and provided a more detailed basis of Appellants' claims for 5th amendment protection (Addendum, Exhibit "B"). Responding therein to the specific request for sales records and customer lists, Appellants stated the following:

Defendants object to producing such information and/or documents, and invoke their 5th amendment privilege against self-incrimination for the following reasons. Plaintiffs have stated repeatedly, in their oral arguments before this Court on April 8, 1987, in their Memorandum in Support of Striking Defendants' Answer on file herein, and in their oral argument before this Court on October 5, 1987, that the expressed purpose of obtaining information under this request is to discover information that will support their claims under the First Cause of Action in the Complaint herein against Defendants for alleged violations of the Utah Racketeering Influences and Criminal Enterprise Act ("RICE") specifically enumerated in §§ 76-10-1602(p),(q) and (s).

The specific provisions allegedly violated by Defendants, as set forth in the First Cause of Action in the Complaint herein, constitute a second degree

felony in the State of Utah. §§ 76-10-1602 and 76-10-1603 state that a "pattern of racketeering activity" must be proved to establish liability. Plaintiffs further assert in their First, Second and Fourth Causes of Action that Defendants have committed acts or omissions that would constitute criminal violations of the Communications Fraud statute found at § 76-10-1801 of the Criminal Code which would also constitute a second degree felony.

Plaintiffs seek to support their allegations of racketeering in the Complaint herein by "fishing" through the sales records and customers of Steve Holcomb in an attempt to find anyone who might join in Plaintiffs' criminal allegations and thus establish a "pattern of racketeering activity." This was expressly represented by Paul Newton, counsel for Plaintiffs at the hearing on October 5, 1987, who stated substantially, or words to the effect, that Plaintiffs wanted to find other customers who were no longer "loyal" to Mr. Holcomb, and assist Plaintiffs in their efforts to "get him off the streets."

If Defendants are required to produce such documents, and, if Plaintiffs are successful in establishing sufficient evidence from such records that Defendants have indeed violated provisions of RICE and thus committed a second degree felony, then such violations shall have been established through their own testimony, in direct conflict with their expressed desire and constitutional privilege not to provide any testimony that would tend to incriminate themselves. It is well established that Plaintiffs have a burden of establishing such criminal liability on the face of their complaint in order to obtain the treble damages they seek as civil relief under §76-10-1605. If Plaintiffs have carried their burden, there is no need for further supportive discovery. If they have not plead violations of RICE sufficient to establish liability under RICE, which in this case is clear they have not, then they cannot force Defendants, in violation of their 5th amendment rights, to provide information that could be used in any way to establish such liability and prove that Defendants had indeed committed a second degree felony.

Plaintiffs assert that Defendant Holcomb has previously waived his 5th amendment rights in testimony found on pages 48, 54, 59, 60, and 84-88 of Mr. Holcomb's deposition of December 4, 1986, which deposition remains unpublished in this action. Defendants assert that Defendant Holcomb has made no representation whatsoever on those pages, or at any other part of said deposition

that he has committed any act that can be construed as a criminal violation of RICE or any other criminal statute that would constitute a waiver of his 5th amendment rights, nor has he testified to any matter therein that can only be verified or established by a review of the sales records of Vantage Income Properties or customer lists of Steve Holcomb.

Mr. Newton argued before the Court on October 5, 1987 that Mr. Holcomb had testified that there were numerous times that he had to take property back, implying to the Court that Mr. Holcomb had committed alleged criminal acts. As clearly stated on the pages referred to by Plaintiffs' counsel in the deposition, each decision by Mr. Holcomb to take property back was based on a business judgment that served the interests of all parties concerned, and in no instance were the Defendants ever compelled to take back such properties.

In summary, Defendants object to providing information in the sales records or from Mr. Holcomb's list of customers on the basis that any information found by Plaintiffs in such records and lists that could support their expressed goal of proving their allegations of criminal violations by Defendants, and establish a pattern of racketeering, or any other provision of the RICE or Communications Fraud statutes, would accordingly be incriminating, and consequently Defendants invoke their 5th amendment right not to testify in any manner against themselves. This objection is supported by Defendants' Memorandum in Opposition to Plaintiffs' Motion to Strike Defendants' Answer which was previously filed in this matter and argued before the Court on October 5, 1987, which memorandum is incorporated herein by reference.

On October 29, 1987, Respondents filed another motion for sanctions against Appellants on the basis that the Appellants had filed a response that did nothing more than "reiterate their prior arguments concerning their privilege against self incrimination. They have provided this court with no more information than they previously have provided concerning how this information might incriminate them" (Record, Page 142-154).

The matter was argued on December 7, 1987. The Court ruled

that (1) Defendant Steve Holcomb had made a waiver of his 5th amendment privilege in a deposition by stating, "Our company was very proud of the fact that in the hundreds of apartment houses that we sold, we had very few people that were dissatisfied with the service we had performed," and (2) that the Appellants could not assert the Fifth Amendment as an objection and privilege to Respondents' request for production of documents when Appellants had "failed to show and would not represent that there is anything contained within such documents that is incriminating" (Record, Page 196-198).

On December 24, 1987, Appellants filed a Petition for Permission to Appeal Interlocutory Order with the Utah Supreme Court in an attempt to have the matter of privilege against self-incrimination reviewed before Appellants would have to choose between incurring the sanctions of the court by refusing to comply with its order, or irrevocably waiving their rights by providing the information. In early January, 1988 the Utah Supreme Court denied Appellants' petition, and pursuant to an order made by the District Court on January 4, 1988, Appellants gave notice to Respondents of their intent not to produce the documents requested by Respondents and thereby waive Appellants' claim of privilege against self-incrimination (Record, Page 212). On February 1, 1988, upon motion by Respondents, the Court struck Appellants' answers to Respondents' First Cause of Action, entered Default Judgment against Appellants in favor of Respondents, certified his order for appeal under Rule 54(b) of the Utah Rules of Civil Procedure, and stayed

proceedings on the remaining causes of action pending the outcome of the appeal (Record, Page 217 and 251).

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of Utah provide that no person shall be compelled to be a witness against himself. The privilege may be invoked if an answer **might** incriminate and there is some possibility that a criminal action **might** be filed; [Rogers v. United States, 340 U.S. 367, 374-75 (1951)], even though no criminal charges are pending [Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)]. The privilege against self-incrimination was extended to the production of documents in the landmark case of Boyd v. United States, 116 U.S. 616 (1886), and has since been held to require the elements of (1) compulsion (2) of a testimonial communication, and that (3) the communication could be incriminating, such that it could furnish "a link in the chain of evidence" that could be used to prosecute the individual invoking the privilege, [United States v. Hoffman, 341 U.S. 479, 486-87 (1951)]

The order of trial court required Appellants to produce documents that may have incriminated them, in spite of their continuous, and good faith efforts to inform the Trial Court of the danger of self-incrimination. The order to produce the sales records and customer lists over Appellants privilege against self-incrimination was patently unconstitutional.

Trial Court also erred in its ruling that Appellant Holcomb

waived his right to claim privilege against self-incrimination by making statements that are obviously not incriminating in and of themselves.

Finally, Respondents should not be allowed to recover, even by a default judgment, under complaint allegations that on their face do not sufficiently state a cause of action under the statutory requirements for racketeering; nor should Appellants incur the cost of judgment and this appeal as a price to pay for their constitutional privilege against self-incrimination.

ARGUMENT

POINT NO. 1: APPELLANTS HAVE PROPERLY ASSERTED THEIR CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION IN REFUSING TO PRODUCE CERTAIN DOCUMENTS AND THE TRIAL COURT ERRED IN ENTERING DEFAULT JUDGMENT AGAINST APPELLANTS.

The basis for privilege against self-incrimination is found in Article I Section 12 of the Utah Constitution and in the Fifth Amendment to the United States Constitution. The United States Supreme Court has interpreted the privilege against self-incrimination in numerous cases, many of which apply directly to the issues raised in this appeal.

To sustain the privilege, it need only be evident from the implications of the question, [emphasis added] in the setting in which it is asked, that a responsive answer to the question, or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. [Hoffman, at 486-87]

The Court further stated in Hoffman that an individual claiming such privilege need not give a detailed explanation of why the privilege is invoked, because such disclosure in and of itself could be incriminating.

. . . if the witness, upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. [Id. at 486]

In the case at bar, the implications of the question are simple, and have been restated by Respondents on numerous occasions; they want to find information to support a pattern of racketeering on the part of Appellants by perusing the customer lists of Appellant Steve Holcomb and the business records of Vantage Income Properties, **even though such information bears no relevance whatsoever to the specific, expressed allegations set forth in Plaintiffs' Complaint** [emphasis added]. The only value of such information, is to provide collateral proof that Appellants have engaged in a "pattern of racketeering" and in doing so, have violated the criminal provisions of RICE.

IF Appellants had produced such documents, and IF Respondents had successfully found information sufficient to support their allegations of a "pattern of racketeering", then the establishment of that fact would have come from Appellants own testimony by providing Respondents with incriminating evidence to show that indeed, they had committed crimes and were liable to Respondents.

Both parties to this appeal have relied on a Utah case, First Federal Savings and Loan Association of Salt Lake City v. Schamanek, 684 P.2d 1257, 1267 (Utah, 1984) which cited a federal case, Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981) stating that in order to assert a 5th amendment privilege, it requires at a minimum, a good faith effort to provide the trial

judge with sufficient information from which he can make an intelligent evaluation of the claim. This point of law was stated in Schamanek to contrast the conduct of the Defendant Gail Schamanek, who had been sued by First Federal Savings and Loan over a cashier's check that was allegedly cashed, and then retrieved by the defendant when the teller's attention was diverted. In that case, the defendant made no effort whatsoever to explain the basis of her 5th amendment claim of privilege, and refused to comply with an order of the Court demanding that she submit to discovery. The Utah Supreme Court provided a complete synopsis of all the 5th amendment holdings that could have protected Ms. Schamanek, had she only made a good faith effort to tell the Court why the information requested could have incriminated her. She made no effort, and consequently her answer was stricken.

In this case, Appellants had clearly, and repeatedly asserted that the specific information sought by Respondents for the expressed purpose of establishing a pattern of racketeering, if provided by Respondents, could incriminate themselves as having committed crimes under RICE. Appellants claims were not, as argued by Respondents, a simple rendition of legal arguments explaining a theoretical reason why they should not have to comply with Respondents' discovery requests. It was a clear and convincing fact that if Respondents were able to find information that established a pattern of racketeering from the customer lists of Appellant Steve Holcomb and the business records of Vantage Income Properties provided to Respondents by Appellants, then Appellants would have

in fact testified against themselves and established criminal liability, in direct conflict with their constitutional rights against self-incrimination.

Respondents argued repeatedly that in order for Appellants to claim privilege against self-incrimination, they had to follow some ill-defined process of an "explanation of what criminal conduct might be charged and how the documents sought would provide a link in the chain to establishing such criminal charges."

The U.S. Supreme Court stated in Hoffman:

. . . if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. [Id. at 486]

Even though the standard set in Hoffman did not require the criteria sought by Respondents, Appellants, in their response of October 14, 1987 set forth hereinabove, exceeded the requirements by providing a complete and detailed analysis of the threat of incrimination they were facing, far beyond what would have constituted good faith compliance with the Hoffman rule.

The basis for Appellants' objections to Respondents' discovery requests and their ensuing claim of privilege against self-incrimination as provided to the Trial Court on October 14, 1987 set forth hereinabove, go far beyond the standards set by this Court and the United States Supreme Court for a valid assertion of such privilege, and accordingly, the Trial Court erred in granting default judgment in favor of Respondents.

POINT NO. II: NONE OF THE TESTIMONY GIVEN BY APPELLANT HOLCOMB
IN HIS DEPOSITION, OR OTHERWISE, IN THE CASE BELOW CONSTITUTED
A WAIVER OF HIS PRIVILEGE AGAINST SELF INCRIMINATION.

Addressing the issue of statements that constitute a waiver of the privilege against self-incrimination, the U.S. Supreme Court has stated in order for the fact so disclosed to constitute a waiver, the disclosed fact itself must be incriminating.

[Rogers, at 373]. In a related case, In Re Corrugated Container Anti-Trust Litigation, 661 F.2d 1145, 1158 (7th Cir. 1981), the 7th Circuit Court of Appeals ruled that even testimony previously given under protection of immunity did not constitute a waiver in subsequent "unprotected" actions. More importantly, however, the Court clearly enunciated the crux of self-incrimination issues in civil cases:

Any inconvenience to the plaintiffs must pale in the face of denial of the fundamental right against self-incrimination.

In sum we are asked to rely on too many uncertainties. Plaintiffs assure us that Conboy will not be prosecuted. But Conboy **might** be prosecuted. Plaintiffs assure us that the deposition testimony could never be used against Conboy. But that testimony **might** be used against him. And when he does testify, he **might** face the possibility of perjury or waiver.

In the face of these uncertainties, we should not conclude that Conboy's Fifth Amendment protections do not apply. [Id. at 1159, emphasis added] [See also: Blau v. United States, 340 U.S. 159 (1950)]

In two related cases, Arndstein v. McCarthy, United States Marshall for the Southern District of New York, 254 U.S. 71 (1920) and McCarthy, United States Marshall for the Southern District of New York v. Arndstein, 262 U.S. 355 (1923), the U.S. Supreme Court stated:

. . . that since the evidence furnished "**did not amount to an admission of guilt or furnish clear proof of a crime**" . . . the privilege had not been abandoned and the witness was entitled to stop short when further testimony might tend to incriminate him. [emphasis added] [see also Brown v. United States, 356 U.S. 148 (1957)]

In the case at bar, no rational interpretation of any statement made by Appellant Holcomb during his deposition can be construed in the most liberal of interpretations to constitute "an admission of guilt or furnish clear proof of a crime." In order for the above referenced statement to be construed as a waiver of Appellant Holcomb's privilege against self-incrimination, It must be shown that the statement relied upon as the basis of such waiver constituted an incriminating statement in and of itself, and that such waiver was knowingly and intentionally waived. [See Johnson v. Zerbst, Warden, 304 U.S. 458 (1938). Accordingly the trial court's finding that Appellant Holcomb has waived his privilege against self-incrimination is in error, and his constitutionally protected privilege against self-incrimination must be preserved.

POINT NO. III: RESPONDENTS SHOULD NOT BE ALLOWED TO PREVAIL IN AN ACTION BY DEFAULT OR OTHERWISE WHERE THE COMPLAINT FAILED TO PROPERLY SET FORTH SUFFICIENT INFORMATION TO STATE A CAUSE OF ACTION FOR RACKETEERING AND WHERE THE PRIVILEGED INFORMATION SOUGHT FROM APPELLANTS WAS INTENDED TO CURE SUCH FLAW.

A recent holding in Federal District Court for the District of Utah written by Judge Jenkins focused on the burden to be met by plaintiffs bringing RICO and RICE actions in the state of Utah. Addressing the need for courts to control overenthusiastic use of RICO and RICE Judge Jenkins wrote:

A private civil action under RICO is grounded on the premise that a party has twice engaged in "racketeering activity". The Act defines "racketeering activity" as

behavior "**indictable**" [emphasis added] under specific provisions of the United States Code. . . possible only if the factual basis of those "acts of racketeering" is set out with particularity. [Bache Halsey Stuart Shields Incorporated v. Tracy Collins Bank & Trust Company, 558 F.Supp. 1042, 1045 (D. Utah, 1983)]

Judge Jenkins further pointed out that to properly plead a cause of action for RICO, an offense was not "**indictable**" [emphasis added] merely because it is alleged; it must be "well founded" and based on probable cause, [Id. citing Brazburg v. Hayes, 408 U.S. 665, 668, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972)] and must include a factual statement similar to a bill of particulars in a criminal action. [Id. at 1046].

Judge Jenkins contrasts the Utah RICE statute by stating:

Rather than requiring the acts be "indictable", the Utah definition requires that the act be "illegal under the laws of Utah". Like the Federal Act, however, the Utah Racketeering Act suggests that the predicate crimes must be alleged with particularity. The court can determine whether the pleadings state a violation of the Utah Act only if the facts are sufficient to show that the alleged activity would be illegal in Utah and would fall into one of the enumerated categories.

The statute is silent on the standard to be used in deciding if the alleged activity is illegal. However, even if the determination only requires a finding that the facts would be indictable, **the burden is greater than under the federal statute**. [Id. at 1047, emphasis added]

The basis for applying a stricter standard under RICE than is found under RICO is explained as follows:

In many states the grand jury is directed to indict if it finds "probable cause" to believe that the accused has committed a crime . . . In others, however, it is directed to indict "when all the evidence taken together, if unexplained or uncontradicted, would warrant the conviction of a defendant." . . . Since the trial jury would convict only if convinced of the accused's guilt **beyond a reasonable doubt** [emphasis added], it generally

is assumed that this "prima facie case" standard imposes a substantially more rigorous test than the traditional "probable cause" test. [Id. at 1048 citing Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure, 1025-26 n.9 (5th ed. 1980)]

Judge Jenkins concludes the analysis by pointing out that Utah has adopted the more demanding of these standards. As set forth in § 77-19-5 of the Utah Code Annotated at the time of the Complaint (now found at § 77-11-5):

It is the duty of a grand jury to find an indictment when all the evidence before them, taken as a whole, would in their judgment justify a conviction by jury trial.

In the case at bar, considering the racketeering allegations of Respondents, set forth in their Complaint, even in their best light, are insufficient to meet either a "prima facie case" standard, or a probable cause standard.

As stated repeatedly by Respondents, the purpose for obtaining the sales record and customer list information, claimed by Appellants to be privileged, was to establish the necessary pattern of racketeering activity that would prove Appellants had committed the crime as alleged and accordingly facilitate Respondents' civil damages recovery. In essence, by refusing to testify against themselves, Appellants incurred a default judgment under a Complaint that was fatally flawed at the outset in its failure to state a racketeering cause of action. Clearly, Respondents should not benefit both from the denial of Appellants constitutional rights against self-incrimination and a the award of a default under a complaint that patently fails to meet the statutory requirements for a violation that would allow recovery for civil

damages.

POINT IV: APPELLANTS SHOULD BE AWARDED COSTS AND ATTORNEY'S FEES
HEREIN BECAUSE THEIR CLAIM OF FIFTH AMENDMENT PRIVILEGE
HAS BEEN VALIDLY ASSERTED IN LIEU OF PRODUCTION OF DOCUMENTS.

It has been well established by the U.S. Supreme Court, that a witness cannot be penalized for asserting a fifth amendment privilege. In Spevac v. Klein, 385 U.S. 511 (1966) the Court reasserted its possession that:

The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement--the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence. [Id. at 514]

In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." [Id. at 515]

In the case at bar, Appellants have suffered substantial cost for the assertion of their privilege against self-incrimination, including both the judgment entered against them, and the costs incurred on this appeal. Accordingly, Appellants should be awarded attorney's fees based upon the affidavit of counsel attached hereunder as Exhibit "C" to the Addendum.

CONCLUSIONS

The basis for Appellants' objections to Respondents' discovery requests and their ensuing claim of privilege against self-incrimination as provided to the Trial Court on October 14, 1987 set forth hereinabove, go far beyond the standards set by this Court and the United States Supreme Court for a valid assertion of such privilege, and accordingly, the Trial Court erred in granting


default judgment in favor of Respondents. Further, the Trial Court erred in its finding that statements made by Appellant Steve Holcomb at a deposition in this matter constituted a waiver of privilege against self incrimination, because such statements were not, in and of themselves, incriminating,

Appellants have also argued herein that Respondents should not be allowed to take a default judgment against Appellants, even if their answers are stricken, because the complaint on its face fails to properly allege a valid pattern of unlawful activity as required for a racketeering cause of action. Respondents were well aware of the defect in their pleading, and were attempting to cure the problem by forcing Appellants to testify against themselves to establish such a pattern.

Finally, Appellants have incurred substantial cost and penalties against them during the course of their claiming constitutional rights against self-incrimination. By reason of well established rulings prohibiting such costs and penalties, Respondents' judgment should be vacated and Appellants should be awarded costs and attorney's fees incurred in this Appeal.

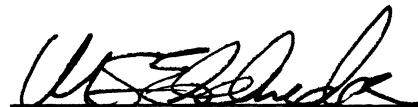
Appellants pray that the Trial Court below be reversed and the judgment herein vacated; and further, that Appellants be awarded costs and attorneys fees incurred in this appeal.

RESPECTFULLY SUBMITTED this 7th day of March, 1989.


MICHAEL S. ELDREDGE
Attorney for Appellants

Certificate of Delivery

I hereby certify that I caused to be delivered 4 true and correct copies of the foregoing Brief of Respondent to James L. Christensen, Esq. and Paul D. Newton, Esq. of CORBRIDGE, BAIRD & CHRISTENSEN, attorneys for Respondents, at 215 South State Street, Suite 800, Salt Lake City, Utah 84111 this 7th day of March, 1989.


MICHAEL S. ELDREDGE
Attorney for Appellants

ADDENDUM

Exhibit "A" - Statutory Provisions

The Constitution of the United States, Amendment V, reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of Utah, Article I, § 12, reads as follows:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Code Annotated, § 77-11-5 (1953, as amended), reads as follows:

77-11-5. Duty to find indictments on sufficient showing. It is the duty of the grand jury to find an indictment when all the evidence before them, taken as a whole, would in their judgment justify a conviction by a jury trial.

Utah Code Annotated, § 76-10-1601 et seq. (1953, as amended), and § 76-10-1801 et seq. (1953, as amended) as of the time of filing the Complaint in the action below, are attached hereto.

of the owner of the property or the bus company, or its duly authorized representative is guilty of theft and shall be punished pursuant to section 76-6-412.

History: L. 1979, ch. 72, § 8.

76-10-1509. Obstructing operation of bus. Any person who unlawfully obstructs or impedes by force or violence, or any means of intimidation, the regular operation of a bus is guilty of a class C misdemeanor.

History: L. 1979, ch. 72, § 9.

76-10-1510. Obstructing operation of bus — Conspiracy. Two or more persons who willfully or maliciously combine or conspire to violate section 76-10-1509 shall each be guilty of a class C misdemeanor.

History: L. 1979, ch. 72, § 10.

76-10-1511. Cumulative and supplemental nature of act. The provisions of this act shall be cumulative and supplemental to the provisions of any other law of the state.

History: L. 1979, ch. 72, § 11.

PART 16

RACKETEERING ENTERPRISES

Section

- 76-10-1601. Short title.
- 76-10-1602. Definitions.
- 76-10-1603. Unlawful acts — Felony — Forfeitures.
- 76-10-1604. Enforcement authority of peace officers.
- 76-10-1605. Remedies of person injured by pattern of racketeering activity — Authorized orders of district court.
- 76-10-1606. Payments to general fund of state.
- 76-10-1607. Evidentiary value of criminal judgment in civil proceeding.
- 76-10-1608. Separability clause.

76-10-1601. Short title. This act shall be known and may be cited as the "Utah Racketeering Influences and Criminal Enterprise Act."

History: C. 1953, 76-10-1601, enacted by L. 1981, ch. 94, § 1.

Title of Act.

An act relating to organized fraudulent and illegal enterprise crime; designating the following activities as unlawful: to use or invest proceeds from a pattern of racketeering conduct in an enterprise; to acquire or maintain an interest in, or to conduct an enterprise through a pattern of

racketeering conduct; or to conspire to engage in such conduct; providing criminal penalties; providing for enforcement; providing civil and equitable remedies; providing for the rights of innocent persons; and providing that any aggrieved person may institute civil proceedings to seek damages; and providing an effective date.

This act enacts part 16, chapter 10, Title 76, Utah Code Annotated 1953. — Laws 1981, ch. 94.

76-10-1602. Definitions. As used in this part:

(1) "Racketeering" means any act committed for financial gain which is illegal under the laws of Utah regardless of whether such act is in fact charged or indicted, involving:

(a) Criminal homicide.

- (c) Aggravated kidnapping or kidnapping;
 - (d) Forgery;
 - (e) Aggravated burglary or burglary;
 - (f) Asserting false claims including, but not limited to, false claims asserted through fraud, arson, unlawful public assistance, or Medicaid fraud;
 - (g) Theft, including theft by deception, theft by extortion, theft of lost, mislaid or mistakenly delivered property, receiving stolen property, theft of services and theft by any person having custody of property pursuant to repair or rental agreement;
 - (h) Bribery;
 - (i) Gambling;
 - (j) Illegal kickbacks, including bribery to influence official or political actions and receiving a bribe or bribery for endorsement of a person as a public servant;
 - (k) Extortionate extension, collection and financing of credit;
 - (l) Trafficking in controlled substances, explosives, weapons or stolen property;
 - (m) Aggravated arson or arson;
 - (n) Promoting prostitution;
 - (o) Obstructing or hindering criminal investigations or prosecutions;
 - (p) False statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands;
 - (q) Resale of realty with intent to defraud;
 - (r) Sale of unregistered securities or real property securities or transactions involving such securities by unregistered dealers or salesmen;
 - (s) A scheme or artifice to defraud;
 - (t) Perjury;
 - (u) Fraud in purchase or sale of securities;
 - (v) The soliciting, requesting, commanding, encouraging, or intentionally aiding another in commission of any of the above enumerated offenses;
 - (w) Conspiracy to commit any of the above enumerated offenses; or
 - (x) An attempt to commit any of the above enumerated offenses.
- (2) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property.
- (3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities.
- (4) "Pattern of racketeering activity" means engaging in at least two episodes of racketeering conduct which have the same or similar objectives, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events, provided at least one of such episodes occurred after the effective date of this part and the last of which occurred within five years after the commission of a prior episode of racketeering conduct.

History: C. 1953, 76-10-1602, enacted by
L. 1981, ch. 94, § 1.

76-10-1603. Unlawful acts — Felony — Forfeitures. (1) It shall be unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of racketeering activity in which such person has participated, as a principal, to use or invest, directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in, or the establishment or operation of, any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of such enterprise's functions through a pattern of racketeering activity.

(4) It shall be unlawful for any person to attempt or to conspire to violate any provision of subsections (1), (2), or (3) of this section, or to solicit, request, command, encourage, or intentionally aid another in the violation of any of the provisions of subsections (1), (2), or (3) of this section.

(5) Whoever violates any subsection of section 76-10-1603 shall be guilty of a second degree felony and in addition to the penalties prescribed by law shall forfeit to the state of Utah:

(a) any interest acquired or maintained in violation of section 76-10-1603; and

(b) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 76-10-1603 of this act.

(6) In any action brought by the state of Utah or, any county in the state under this part, the district court shall have jurisdiction to enter such restraining orders or prohibitions, and to take such other actions, including but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(7) Upon conviction of a person under this part, the court shall authorize the attorney general or the county attorney to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the convicted person it shall expire, and shall not revert to the convicted person.

History: C. 1953, 76-10-1603, enacted by
L. 1981, ch. 94, § 1.

76-10-1604. Enforcement authority of peace officers. Notwithstanding any law to the contrary, peace officers in the state of Utah shall have authority to enforce the criminal provisions of this act by initiating investigations, assisting grand juries, obtaining indictments, filing informations, and assisting in the prosecution of criminal cases through the attorney general or county attorneys' offices.

History: C. 1953, 76-10-1604, enacted by
L. 1981, ch. 94, § 1.

76-10-1605. Remedies of person injured by pattern of racketeering activity — Authorized orders of district court. (1) A person who sustains injury to his person, business, or property by a pattern of racketeering activity, in which he is not a participant, may file an action in the district court for the recovery of treble damages, the costs of the suit, including reasonable attorney's fees, and any punitive damages the court may deem reasonable. The state or any county may file an action on behalf of these persons injured or to prevent, restrain or remedy racketeering as defined by this part.

(2) The district court has jurisdiction to prevent, restrain and remedy racketeering as defined by this part after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. The court shall determine issues by a preponderance of the evidence, and proceedings under this section shall be independent of any other proceedings, whether civil or criminal, under the laws of this state.

(3) Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or such other actions, includ-

(4) Following a determination of liability such orders may include, but are not limited to:

(a) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

(b) Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of Utah, to the extent the constitutions of the United States and Utah permit.

(c) Ordering dissolution or reorganization of any enterprise.

(d) Ordering the payment of treble damages to those persons who are not found to be participants and are injured by the racketeering.

(e) Ordering the payment of all costs and expenses of the prosecution and investigation of any offenses included in the definition of racketeering, incurred by the state, to be paid to the general fund of the state.

History: C. 1953, 76-10-1605, enacted by
L. 1981, ch. 94, § 1.

76-10-1606. Payments to general fund of state. The court may order payment to the general fund of the state as appropriate, to the extent not already ordered to be paid in other damages, of:

(1) Any interest acquired or maintained by a person in violation of section 76-10-1603.

(2) Any interest in, security of, claims against or property or contractual rights of any kind affording a source of influence over any enterprise which a person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 76-10-1603.

(3) An amount equal to the gain a person has acquired or maintained through an offense included in the definition of racketeering.

History: C. 1953, 76-10-1606, enacted by
L. 1981, ch. 94, § 1.

76-10-1607. Evidentiary value of criminal judgment in civil proceeding. A final judgement or decree rendered in favor of the state or a county in any criminal proceeding brought by this state or a county shall preclude the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.

History: C. 1953, 76-10-1607, enacted by
L. 1981, ch. 94, § 1.

76-10-1608. Separability clause. If any part of application of the Utah Racketeering Influences and Criminal Enterprises Act is held invalid, the remainder of this part, or its application to other situations or persons, shall not be affected.

History: C. 1953, 76-10-1608, enacted by
L. 1981, ch. 94, § 1.

Effective Date.

Section 2 of Laws 1981, ch. 94 provided:
"This act shall take effect July 1, 1981."

PART 17

CABLE TELEVISION PROGRAMMING DECENCY ACT

Section

76-10-1701 to 76-10-1708. Repealed.

76-10-1701 to 76-10-1708. Repealed.

Repeals. — Laws 1988, ch. 5, § 1 repeals §§ 76-10-1701 to 76-10-1708, as enacted by Laws 1983, ch. 207, §§ 1 to 8, entitled the Cable Television Programming Decency Act, effective April 25, 1988.

PART 18

COMMUNICATIONS FRAUD

Section

76-10-1801. Communications fraud.

76-10-1801. Communications fraud.

(1) Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of:

(a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is \$100 or less;

(b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is more than \$100 but does not exceed \$1,000;

(c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is more than \$1,000 but does not exceed \$10,000;

(d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is more than \$10,000 but does not exceed \$100,000;

(e) a second degree felony when the object of the scheme or artifice to defraud is other than the obtaining of something of monetary value; and

(f) a first degree felony when the value of the property, money, or thing obtained or sought to be obtained is \$100,000 or more.

(2) The determination of the degree of any offense under Subsection (1) shall be measured by the total value of all property, money, or things obtained or sought to be obtained by the scheme or artifice described in Subsection (1) except as provided in Subsection (1)(e).

(3) Reliance on the part of any person is not a necessary element of the offense described in Subsection (1).

(5) Each separate communication made for the purpose of executing or concealing a scheme or artifice described in Subsection (1) is a separate act and offense of communication fraud.

(6) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information. Means of communication include, but are not limited to, use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

(7) It is an affirmative defense to prosecution under this section that the pretenses, representations, promises, or material omissions made or omitted by the defendant were not made or omitted knowingly or with a reckless disregard for the truth.

History: C. 1953, 76-10-1801, enacted by
L. 1985, ch. 157, § 2.

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Michael S. Eldredge (USB#0967)
Terry C. Turner (USB#3299)
Attorneys for Defendants
5295 South 320 West, Suite 540
Salt Lake City, Utah 84107
Telephone 263-1511

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

* * * * *

MARIAN H. WEBB and JILL W. BROWN,	:	
Plaintiffs,	:	
vs.	:	SUPPLEMENTAL RESPONSES TO PLAINTIFFS' REQUEST
VANTAGE INCOME PROPERTIES, BRUCE HONEY, and STEVE HOLCOMB,	:	FOR PRODUCTION OF DOCUMENTS
Defendants.	:	Civil No. C-86-1302 Judge Timothy Hansen

* * * * *

COME NOW Defendants Holcomb and Vantage Income Properties, and pursuant to the Order of the Court entered herein on October 5, 1987, supplement their responses to Plaintiffs' Request for Production of Documents as previously delivered to Plaintiffs on April 8, 1987. Request No. 1. A copy of the document dissolving Vantage Income Properties.

Response: Said document was produced on April 8, 1987.

Request No. 2. A copy of the Vantage Income Properties' Training Manual for appraisers and salesmen.

Response: Said document was erroneously indicated as having been produced on April 8, 1987, however, Defendants have been unable to locate such documents. Defendants have no objection to producing such documents and will continue their efforts to locate such documents and produce them if and when they are available.

Request No. 3. Names of all of Steve Holcomb's customers while he was at Vantage Income Properties.

Response: Such information does not exist on a single document, however can be derived from the sales records of Vantage Income Properties. Defendants object to producing such information and/or documents, and invoke their 5th amendment privilege against self-incrimination for the following reasons. Plaintiffs have stated repeatedly, in their oral arguments before this Court on April 8, 1987, in their Memorandum in Support of Striking Defendants' Answer on file herein, and in their oral argument before this Court on October 5, 1987, that the expressed purpose of obtaining information under this request is to discover information that will support their claims under the First Cause of Action in the Complaint herein against Defendants for alleged violations of the Utah Racketeering Influences and Criminal Enterprise Act ("RICE") specifically enumerated in §§ 76-10-1602(p),(q) and (s).

The specific provisions allegedly violated by Defendants, as set forth in the First Cause of Action in the Complaint herein, constitute a second degree felony in the State of Utah. §§ 76-10-1602 and 76-10-1603 state that a "pattern of racketeering activity" must be proved to establish liability. Plaintiffs further assert in their First, Second and Fourth Causes of Action that Defendants have committed acts or omissions that would constitute criminal violations of the Communications Fraud statute found at § 76-10-1801 of the Criminal Code which would also constitute a second degree felony.

Plaintiffs seek to support their allegations of racketeering in the Complaint herein by "fishing" through the sales records and customers of Steve Holcomb in an attempt to find anyone who might join in Plaintiffs' criminal allegations and thus establish a "pattern of racketeering activity." This was expressly represented by Paul Newton, counsel for Plaintiffs at the hearing on October 5, 1987, who stated substantially, or words to the effect, that Plaintiffs wanted to find other customers who were no longer "loyal" to Mr. Holcomb, and assist Plaintiffs in their efforts to "get him off the streets."

If Defendants are required to produce such documents, and, if Plaintiffs are successful in establishing sufficient evidence from such records that Defendants have indeed violated provisions of RICE and thus committed a second degree felony, then such violations shall have been established through their own testimony, in direct conflict with their expressed desire and constitutional privilege not to provide any testimony that would tend to incriminate themselves. It is well established that Plaintiffs have a burden of establishing such criminal liability on the face of their complaint in order to obtain the treble damages they seek as civil relief under §76-10-1605. If Plaintiffs have carried their burden, there is no need for further supportive discovery. If they have not pleaded violations of RICE sufficient to establish liability under RICE, which in this case is clear they have not, then they cannot force Defendants, in violation of their 5th amendment rights, to provide information that could be used in

any way to establish such liability and prove that Defendants had indeed committed a second degree felony.

Plaintiffs assert that Defendant Holcomb has previously waived his 5th amendment rights in testimony found on pages 48, 54, 59, 60, and 84-88 of Mr. Holcomb's deposition of December 4, 1986, which deposition remains unpublished in this action. Defendants assert that Defendant Holcomb has made no representation whatsoever on those pages, or at any other part of said deposition that he has committed any act that can be construed as a criminal violation of RICE or any other criminal statute that would constitute a waiver of his 5th amendment rights, nor has he testified to any matter therein that can only be verified or established by a review of the sales records of Vantage Income Properties or customer lists of Steve Holcomb.

Mr. Newton argued before the Court on October 5, 1987 that Mr. Holcomb had testified that there were numerous times that he had to take property back, implying to the Court that Mr. Holcomb had committed alleged criminal acts. As clearly stated on the pages referred to by Plaintiffs' counsel in the deposition, each decision by Mr. Holcomb to take property back was based on a business judgment that served the interests of all parties concerned, and in no instance were the Defendants ever compelled to take back such properties.

In summary, Defendants object to providing information in the sales records or from Mr. Holcomb's list of customers on the basis that any information found by Plaintiffs in such records and lists

that could support their expressed goal of proving their allegations of criminal violations by Defendants, and establish a pattern of racketeering, or any other provision of the RICE or Communications Fraud statutes, would accordingly be incriminating, and consequently Defendants invoke their 5th amendment right not to testify in any manner against themselves. This objection is supported by Defendants' Memorandum in Opposition to Plaintiffs' Motion to Strike Defendants' Answer which was previously filed in this matter and argued before the Court on October 5, 1987, which memorandum is incorporated herein by reference.

Request No. 4. The record for all sales at Vantage Income Properties.

Response: Defendants incorporate their response to Request No. 3 as if fully set forth herein.

Request No. 5. A market analysis form of Vantage Income Properties.

Response: Said document was produced on April 8, 1987.

Request No. 6. A work-up sheet of Vantage Income Properties.

Response: Said document was produced on April 8, 1987.

Request No. 7. A sales training information sheet of Vantage Income Properties.

Response: Said document was produced on April 8, 1987.

Request No. 8. A neighborhood survey prepared by Vantage Income Properties.

Response: Said document was produced on April 8, 1987.

Request No. 9. A copy of the listing agreement between Vantage Income Properties and Morris and Jo D'leen Nesmith.


Response: Upon review of the records and documents of the

transactions between Nesmiths and Plaintiffs, Defendants have been unable to locate a listing agreement between Nesmiths and Vantage Income Properties. Defendants believe that no such agreement was ever entered into, and that Nesmiths negotiated with Plaintiffs solely on the basis of the earnest money offer presented by Plaintiffs, after Vantage Income Properties had determined from Nesmiths that they were interested selling their property if a suitable offer were made. This practice is not uncommon in the industry.

Request No. 10. A copy of the 1986 tax return for Steve Holcomb.

Response: Said document is expected to be available on or about October 15, 1987 when Mr. Holcomb's extension for filing will expire. It will be forwarded to Plaintiffs immediately as it becomes available.

DATED this 14th day of October, 1987.


MICHAEL S. ELDREDGE
Co-counsel for Defendants

Certificate of Service

I hereby certify that I hand delivered a true and correct copy of the foregoing Supplemental Responses to Plaintiffs' Request For Production of Documents to James L. Christensen, Esq. and Paul D. Newton, Esq., counsel for Plaintiffs, at CORBRIDGE, BAIRD & CHRISTENSEN, 215 South State Street, Suite 800, Salt Lake City, Utah 84111, this 14th day of October, 1987.

Michael S. Elshof

Michael S. Eldredge (USB#0976)
SNOW & HALLIDAY
Attorney for Appellants
261 East 300 South, Suite 350
Salt Lake City, Utah 84111
Telephone: (801) 364-4940

IN THE SUPREME COURT OF THE STATE OF UTAH

MARION H. WEBB and JILL W. BROWN,	:	
	:	
Plaintiffs/Respondents,	:	Affidavit of Counsel
	:	
vs.	:	Case No 880137
	:	
VANTAGE INCOME PROPERTIES, BRUCE HONEY, and STEVE HOLCOMB,	:	Priority Classification
	:	No. 14(b)
	:	
Defendants/Appellants.	:	
	:	

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

MICHAEL S. ELDREDGE, first duly sworn upon his oath, deposes
and states as follows:

1. That he is counsel for Appellants in the above-captioned
matter;
2. That the matters testified to herein are based upon his
own personal knowledge;
3. That it was necessary to expend approximately 45 hours
to research issues, prepare motions, draft arguments and prepare
the Appellants' Brief in this appeal as of the time of filing
of said brief;
4. The affiant charges as legal fees for an appeal such as

this at \$100 per hour, which rates are commensurate with rates normally found for such legal services in Salt Lake City, Utah;

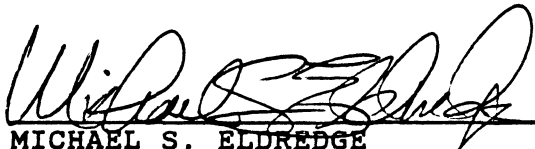
5. That Appellants have incurred approximately \$4,500 in fees in bringing this appeal;

6. That in the legal opinion of the Affiant, Appellants' incurring of such fees was necessary to preserve their constitutional rights to privilege against self-incrimination;

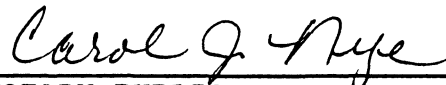
7. That Appellants are entitled to, and are in need of an order from this Court awarding costs and attorney's fees incurred as of the date of the decision in this appeal.

9. Further, the affiant sayeth naught.

DATED this 6th day of March, 1989


MICHAEL S. ELDREDGE
Attorney for Appellants

SUBSCRIBED AND SWORN TO before me this 6th day of March, 1989.


NOTARY PUBLIC
Residing at: Davis County, Utah
My Commission Expires: 6/17/89

Seal