

1988

# Marian H. Webb and Jill W. Brown v. Steve Holcomb and Bruce Honey, Vantage Income Properties : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

## BRIEF

**.S9**

DOCKET NO. 880137

MARIAN H. WEBB and JILL W.  
BROWN,

Case No. 880137

**v.**

Priority Classification No.

Defendants and  
Appellants.

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

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BROWN,

V.

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### JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a default judgment of the Third Judicial District. This court has jurisdiction pursuant to U.C.A., 1953, § 78-2-2 (3)(j).

### STATEMENT OF ISSUES

1. Did the trial court err in finding that defendants failed to show or represent that the contents of the requested documents might be incriminating?

2. Did the trial court err in determining that defendants failed to provide sufficient information from which the trial court could make an intelligent evaluation of defendants' claim of privilege against self-incrimination?

3. Did defendants waive their claim of privilege by asserting in deposition that they had very few dissatisfied customers and by identifying their sales records as the basis for this assertion?

4. Can defendants claim the privilege as to partnership records of which defendants are the custodians?

5. Were plaintiffs required to allege their claims under Utah's former RICE statute with the same particularity as required for a grand jury to indict a criminal defendant?

6. Are defendants entitled to attorney fees on appeal?

### DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are as follows:

1. United States Constitution, Amendment V: "No person ... shall be compelled in any criminal case to be a witness against himself ...."

2. U.C.A., 1953, § 76-10-1601 et seq (as enacted at time of plaintiff's complaint). See addendum at 1-4.

#### STATEMENT OF THE CASE

##### A. Nature of Case, Course of Proceedings, and Disposition Below

Plaintiffs sued defendants' partnership and partners for fraud in the sale of investment real estate. The defendants refused to produce certain partnership documents based on their privilege against self-incrimination under the Fifth Amendment to the federal constitution.

The trial court evaluated defendants' self-incrimination claims and found them to be groundless. The court ordered defendants to produce the documents, and defendants again refused to do so. The court held an evidentiary hearing, made findings of fact and conclusions of law, and ordered that defendants' answer be struck and default judgment entered. Defendants appeal this order.

##### B. Relevant Facts

Defendants Steve Holcomb and Bruce Honey were partners in and real estate agents/brokers for defendant Vantage Income Properties ("Vantage"), a real estate broker partnership. In 1985 defendants acted as the principal real estate brokers or agents of the owners of certain investment real estate located on

Vine Street in Murray, Utah. This real estate consisted of apartment complexes, a triplex, and a duplex. (Record 2-4 (hereinafter "R."); Addendum 5-7 (hereinafter "Add.")).

Defendants approached plaintiffs Marion Webb and Jill Brown about purchasing the investment real estate. Plaintiffs lacked experience and sophistication in the purchase and sale of investment real estate, and defendants knew this. Defendants also knew that plaintiffs did not have the economic means to service the debt on the property. Defendants represented to plaintiffs that debt service would not be a problem because plaintiffs could resell the property at a profit a few weeks after purchasing it. Defendants represented that the property had a positive cash flow and that it had been appraised at over \$1,000,000. (R. 3-8; Add. 6-11.)

Defendants knew that the foregoing representations were false. In fact, the property had a negative cash flow, had not been appraised at over \$1,000,000, and was actually worth only about \$550,000. (R. 4-7, 9; Add. 7-10, 12.) Defendants also made other false representations that will be discussed in the Argument, Point V, *infra*.

Relying upon defendants' false representations, plaintiffs purchased the property for \$780,000 and hired defendants as their brokers to resell the property. Defendants failed to locate a ready, willing, and able purchaser who would pay over \$1,000,000 for the property. Defendants eventually told plaintiffs that the property was worth less than what plaintiffs paid, and

recommended to plaintiffs that they sell it at a loss. (R. 7, 8-9, 11-12; Add. 10, 11-12, 14-15.)

Plaintiffs filed this lawsuit, alleging claims for civil violation of Utah's former Racketeer Influenced and Corrupt Enterprises Act<sup>1</sup> (RICE), fraud, constructive fraud, and negligent misrepresentation. Plaintiffs sought compensatory and punitive damages. (R. 2-17; Add. 5-22.)

At his deposition, Steve Holcomb asserted that Vantage had very few dissatisfied customers and identified Vantage's sales records as evidence of this. Holcomb stated:

A 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 that we had performed.

. . . .

A Most real estate agents sell one or two buildings in their career and that's it. People that worked for me did business with their customers over and over and over. Our business was about 70 percent repeat business.

. . . .

Q You have referred to the fact that about 70 percent of your business was repeat business. Did you have some sort of a customer list of the people who you were doing most of your business with? Again, I'm referring to VIP [Vantage Income Properties].

A I think I got that figure from a list of sales that we had made at one time during the year, and I could look back to see who the people were that bought the buildings and where we had met them and how many they bought from us, and it was about 70 percent.

---

<sup>1</sup>U.C.A., 1953, § 76-10-1601 et seq. This Act was subsequently revised and renamed the Pattern of Unlawful Activity Act (PUA). See § 76-10-1601 et seq. (as amended). References in this brief to RICE should, where the context requires, be interpreted to also refer to the PUA Act.

(Deposition of Steve Holcomb at 48, 54, 59; Add. 21-23.)

Holcomb also disclosed that in at least two instances Vantage had purchased properties back from customers. He testified that there might be other instances, but he could not remember them. (Deposition of Steve Holcomb at 84-88; Add. 24-28.)

To verify the truth of Holcomb's statement that very few of Vantage's customers were dissatisfied, and to check out why some customers had sold their properties back to Vantage, plaintiffs sought to obtain the sales records identified by Holcomb so that plaintiffs could contact those customers directly. In February 1987 plaintiffs served requests for production on Honey, Holcomb, and Vantage requesting, inter alia, the record for all sales at Vantage and the names of all of Steve Holcomb's customers while he was at Vantage. (R. 63; Add. 29-30.) At first, defendants simply failed to produce these documents. Such failure to respond was part of a continuing pattern of failure to respond to discovery requests. (See R. 32-33, 58-59, 103-104.) Later, defendants refused to produce the documents, claiming the Fifth Amendment privilege against self-incrimination.

Plaintiffs brought a series of motions to either compel production or to strike defendants' answer for refusal to produce. The trial court granting these motions in a series of five orders. (R. 89-90; 139-141; 196-98; 217; 258-63; Add. 31-



32, 40-46, 49-54.)<sup>2</sup> For purposes of this appeal, the trial court's orders and the defendants' responses to these orders can be simplified down to the following:

(A) Defendants failed to respond to the requests to produce, and the trial court ordered production. (R. 89-90; Add. 31-32.)

(B) Defendants refused to produce the documents based on their privilege against self-incrimination under the Fifth Amendment to the federal constitution;<sup>3</sup>

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<sup>2</sup>These five orders were as follows:

<u>Order No.</u>	<u>Date</u>	<u>Description of order</u>
1	4/9/87	Order compelling response to requests for production (R. 89-90; Add. 31-32.)
2	10/26/87	Order that defendants explain their assertion of privilege against self-incrimination (R. 139-141; Add. 40-42.)
3	12/15/87	Order granting plaintiffs' motion for sanctions conditioned on defendants' failure to produce documents within 10 days (R. 196-98; Add. 43-45.)
4	2/1/88	Minute entry granting judgment for plaintiffs on RICE claim (R. 217; Add. 46.)
5	3/28/88	Findings of Fact, Conclusions of Law, and Default Judgment on Plaintiffs' First Cause of Action (R. 258-63; Add. 49-54.)

<sup>3</sup>Defendants claim on appeal the privilege against self-incrimination under article I, section 12 of the Utah Constitution. Defendants did not make such a claim before the trial court. (R. 120, 178; Add. 34.)

(C) The trial court ordered defendants to provide sufficient information from which the court could make an intelligent evaluation of their claim of privilege (R. 139-41; Add. 40-42);

(D) In a written response to the requests to produce, defendants set forth the basis for their claim of privilege (Add. 33-39.);

(E) The trial court ruled defendants' written statement of their claim to be insufficient and ordered defendants to produce the documents (R. 196-98; Add. 43-45);

(F) Defendants refused to produce the documents; and

(G) The trial court struck defendants' pleadings and granted judgment for plaintiffs on their RICE claim. (R. 217, 258-63; Add. 46, 49-54.)

The trial court's third order contains the following pertinent findings of fact and conclusions of law (R. 197; Add. 44.):

1. Defendants had not validly claimed the privilege because they "had failed to show and would not represent that there is anything contained within [the] documents that is incriminating."

2. Plaintiffs had a right to verify Holcomb's deposition statements concerning repeat business by obtaining copies of the sales records identified in the deposition.

3. By making the statements at his deposition concerning Vantage's satisfied customers, Holcomb had waived his right to

assert the privilege against self-incrimination as to the sales records and customer lists substantiating his statement.

4. Defendants did not supply sufficient information from which the court could make an intelligent evaluation of their claim of privilege.

Prior to making its final order, the trial court held an evidentiary hearing on damages and took testimony from plaintiff Marion Webb. In its fifth and final order the trial court made the following findings of fact and conclusions of law, which support its third order (R. 259-61; Add. 50-52):

1. Defendants knew or had reason to know that plaintiffs lacked business experience, knowledge and sophistication concerning purchasing and operating rental income property or real estate generally, especially buying and holding real estate for the short term.

2. Plaintiffs bought the property because of the representations of defendants; without such representations, plaintiffs would not have purchased the property.

3. Defendants defrauded plaintiffs.

The court ordered that the answer of defendants Bruce Honey and Vantage be stricken as to plaintiffs' RICE claim.<sup>4</sup> It is from this fifth order that Honey and Vantage appeal.

---

<sup>4</sup>Judgment as to defendant Holcomb was reserved because of his pending bankruptcy. In August 1988 that bankruptcy was dismissed. In September 1988 the same judgment was entered against Holcomb.

### SUMMARY OF ARGUMENTS

To properly invoke the Fifth Amendment privilege against self-incrimination, a defendant must generally show (1) that a response might be incriminatory, and (2) a possibility of criminal prosecution. The trial court found that defendants failed to show the first element, and this finding is supported by the record. Also, the record shows that defendants failed to show the second element.

An additional requirement applicable to this case, since it deals with production of documents, is to show that such production would be a testimonial communication. Here production would not have been a testimonial communication, since the documents were already identified in prior testimony.

A defendant waives his privilege against self-incrimination by putting forth his own version of the facts. Defendants waived their privilege in this case as to Vantage's sales records by Holcomb's deposition statements based on those records.

An additional ground not considered by the trial but upon which the trial court's ruling can be sustained is that a custodian of partnership records may not claim the privilege as to partnership records in his possession. The disputed records in this case were the sales records of Vantage, and therefore this rule applies.

Plaintiffs' RICE allegations are sufficient under traditional pleading standards. This Court should decline to adopt the standard articulated in Bache Halsey-Stuart Shields

Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042 (D. Utah 1983), which has been rejected by numerous courts.

Under the American rule, defendants are not entitled to recover attorney fees on appeal. Defendants are not penalized by having to pay their own attorney fees.

### ARGUMENT

#### **POINT I: Standard of Review**

In reviewing a default judgment entered as a sanction for refusal to produce discovery, the appellate court takes the allegations of the complaint as true and conclusive as to the facts. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 316 (1980), appeal dismissed, 451 U.S. 901 (1981). See also Brown v. Kenron Aluminum and Gas Corp., 477 F.2d 526 (8th Cir. 1973); Olsen v. Kirkham, 720 P.2d 217 (Idaho App. 1986).

#### **POINT II: The Trial Court Did Not Err in Denying Defendants' Claim of Privilege under the Fifth Amendment**

The trial court did not err in denying defendants' claim of privilege against self-incrimination under the Fifth Amendment. The trial court's ruling is in accordance with federal law governing (A) the claim of privilege generally and (B) the claim of privilege in response to requests to produce documents.

##### **A. Claim of the Privilege Generally**

At the outset, it should be noted that defendants' claim of privilege before the trial court was based solely on the Fifth Amendment to the federal constitution, and not on article I,

section 12 of the Utah Constitution. (R. 120, 178; Add. 34.) The first time that defendants have claimed the privilege under the Utah Constitution is on appeal. Defendants are precluded from doing so under this Court's rule that appellants may not raise issues on appeal that were not argued before the trial court.

This Court has previously had occasion to grapple with the scope of the Fifth Amendment privilege. In First Federal Savings & Loan Association v. Schamanek, 684 P.2d 1257 (Utah 1984), this Court thoroughly analyzed the leading federal cases governing the assertion of the Fifth Amendment privilege. The general rule culled from those cases was stated as follows:

The privilege may be invoked if an answer might incriminate and there is some possibility that a criminal action might be filed.

684 P.2d at 1262 (emphasis in original omitted), citing, inter alia, Rogers v. United States, 340 U.S. 367, 374-75, 71 S. Ct. 438, 442-43 (1951). In other words, the two requirements for claiming the privilege are (1) that the response sought might incriminate and (2) that there is a possibility of criminal prosecution.

Regarding the first requirement, it need only be evident from the implications of the question asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result. 684 P.2d at 1263, quoting United States v. Hoffman, 341 U.S. 479, 486-87, 71 S. Ct. 814, 818-19 (1951). It is not

enough, however, to merely declare that an answer will incriminate:

To sustain an assertion of the privilege against self-incrimination, a party must show that the responses sought to be compelled might be incriminating. This requires . . . "at minimum, a good faith effort to provide the trial judge with sufficient information from which he can make an intelligent evaluation of the claim." [684 P.2d at 1266-67 (quoting Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)).]

It is the trial judge, and not the claimant, who is the final arbiter of the claim. Id.

Regarding the second requirement, the possibility of a criminal prosecution must be a "real danger," not a "mere imaginary possibility." Id., quoting Rogers v. United States, 340 U.S. 367, 374-75, 71 S. Ct. 438, 442-43 (1951). Again, this would also require a good faith effort to provide the trial judge with sufficient information to determine that the possibility of criminal prosecution is real and not merely imaginary.

In this case, defendants have failed to satisfy either of these requirements:

1. Showing that response might incriminate. The trial court found that defendants had failed to show and would not even represent that the contents of the documents might incriminate them. (R. 197; Add. 44) A review of defendant's response to plaintiffs' request for production shows this finding to be supported. At most, the defendants' response gives a theoretical explanation of how the documents could be used to incriminate defendants; nowhere does it show or affirmatively represent that

the contents might be incriminating. (See add. 33-37.) Accordingly, the trial court correctly concluded that defendants had failed to supply sufficient information from which the court could make an intelligent evaluation of their claim. (R. 197; Add. 44.)

2. Showing possibility of criminal prosecution. The defendants also failed to show or even represent that there existed any real danger of criminal prosecution. Nowhere in the record did they disclose the possibility of a pending criminal investigation or even that the police had talked to them. Their response shows that, at most, the possibility of such prosecution is an "imaginary possibility." Although defendants assert that Mr. Newton threatened to get Mr. Holcomb "off the streets," and imply by this assertion a threat of criminal prosecution, the trial court's ruling rejects such an implication. The trial court's finding on this point should be sustained.

In other words, the trial court's ruling is a determination that defendants' claim of privilege was not genuine but merely another attempt to frustrate the discovery process. Defendants could have shown their claim to be genuine in a number of ways, such as showing the documents to the trial court in camera, disclosing whether they were subject to a pending police investigation, or otherwise making some effort to explain how the contents of the documents might actually be incriminatory and how defendants were actually in danger of criminal prosecution. Defendants failed to make any such effort. Absent this, the



trial court was justified under the federal authorities reviewed in Schamanek in denying defendants' claim of privilege.

A case factually similar to this case is Davis v. Fendler, 650 F.2d 1154 (9th Cir. 1981), in which the defendant was served with interrogatories and at first objected to them without making a claim of privilege. Later the defendant claimed the privilege because he was involved in a simultaneous, overlapping criminal action. The trial judge ordered the defendant to set forth his claims of privilege more specifically so the judge could assess their merits. Defendant responded with "answers" that simply restated the same objections that the trial judge had found insufficient. The district court struck defendant's answer and entered default judgment against the defendant for \$37.9 million. The appellate court affirmed, stating:

[T]he district court did not abuse its discretion in entering default judgment against appellant. The sanction was imposed because of [defendant's] persistent unresponsiveness to both informal discovery requests and formal court orders. [650 F.2d at 1161.]

In this case, as in Davis v. Fendler, defendants did not at first claim the privilege, but simply failed to respond to the requests to produce. Furthermore, defendants engaged in "persistent unresponsiveness" to discovery requests. Over and over defendants failed to respond to discovery requests until motions to compel were filed against them. (See R. 32-33, 58-59, 89-90, 103-104.) Thus, the trial court did not abuse its discretion in granting default against defendants.

On appeal defendants again do not affirmatively assert that the contents of the documents might incriminate them. Instead, they reiterate their abstract argument that since plaintiffs could use the contents of the documents to prove their civil claims under RICE, which has a criminal counterpart, the documents could, in theory, be used to incriminate them.

If this argument were accepted, it would have far-reaching effects on discovery effort in civil claims under RICE or any other civil cause of action, such as fraud, that has a criminal counterpart. It is clear that every defendant of such a claim could assert the privilege on the same basis as the defendants in this case, i.e., they could assert that in theory their responses to discovery could be used to prove the elements of the criminal counterpart. If such a theoretical assertion of the privilege is sustainable, then all defendants of such civil claims could shut down discovery efforts against them even though a real threat of criminal prosecution does not actually exist. Plaintiffs ask the Court not to open up such a Pandora's box, which could end up undoing RICE and all other civil claims that have criminal counterparts.

Moreover, contrary to defendants' argument plaintiffs have not sought the documents solely to prove RICE. Plaintiffs have sought the documents to verify the statements of Holcomb that over 70% of his customers were repeat business. That issue is relevant not only to plaintiffs' RICE claims but also to plaintiffs' fraud claims and prayer for punitive damages.

**B. Claim of Privilege in the Context of Requests to Produce.**

When the privilege is claimed in response to requests to produce documents, an additional requirement exists. As this Court observed in Schamanek, "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." 684 P.2d at 1264, quoting Fisher v. United States, 425 U.S. 391, 408, 96 S. Ct. 1569, 1579 (emphasis in original).

In other words, since the Fifth Amendment only proscribes being compelled to be a witness against oneself, the production of documents falls within its scope only if such production has a testimonial aspect.<sup>5</sup> The documents themselves, since they are already in existence, cannot be considered as testimony.

Thus it has been held that to sustain the privilege in response to a request to produce documents, a court must both find the contents of the documents to be incriminating and find that the act of producing the documents is a testimonial communication. Whether the act of production is testimonial depends on the facts of the case. 684 P.2d at 1264; see Fisher v. United States, 425 U.S. 391, 410, 96 S. Ct. 1569, 1581 (1976).

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<sup>5</sup>The same requirement would apply under article I, section 22 of the Utah Constitution, which this Court has interpreted to be no broader than its federal counterpart. Sandy City v. Larson, 733 P.2d 137, 138 (Utah 1987); see First Federal Savings v. Schamanek, supra.

In this case, the trial court's ruling supports the view that production of the documents would not be a testimonial communication. In his deposition, Holcomb had already testified as to the existence and identity of the documents sought through the requests to produce. Given this prior testimony, production of the documents would not also be a testimonial communication as to the existence or identity of the documents.

Therefore, based on this additional requirement that production of a document be testimonial in nature, the trial court's ruling should also be sustained.

**POINT III: Defendants Waived their Right to Claim the Privilege Against Self-Incrimination**

The trial judge also ruled that defendants waived their right to claim the privilege against self-incrimination by virtue of Holcomb's deposition statements asserting that Vantage had very few dissatisfied customers and identifying the sales records as the source of such information. This ruling was justified under the law and facts of the case.

It has been held that the disclosure of a fact waives the privilege against self-incrimination as to the details of the fact. Rogers v. United States, 340 U.S. 367, 373, 71 S. Ct. 438 (1951); In Re Corrugated Container Anti Trust Litigation, 661 F.2d 1145, 1158 (7th Cir. 1981). A contrary rule would "open the way to distortion of the facts by permitting a witness to select any stopping place in the testimony." Rogers v. United States, supra, 340 U.S. at 371. Thus, a witness who voluntarily testifies on his own behalf waives the right to invoke the

privilege as to matters raised by his own testimony. In choosing to testify, a witness must weigh the advantage of raising the privilege against the advantage of putting forth his own version of the facts. Brown v. United States, 356 U.S. 148, 155-56 (1958); In Re Candor Diamond Corp., 42 B.R. 916 (Bankr. S.D.N.Y. 1984).

In this case, Holcomb chose to put forth his own version of the facts, i.e., that very few of Vantage's customers were dissatisfied. In addition, he revealed that certain customers had sold their properties back to Vantage. Therefore, it is only fair that plaintiffs be allowed verify Holcomb's version by obtaining copies of the sales records identified by Holcomb so that plaintiffs can contact those customers. As mentioned previously, these lists could provide information relevant not only to plaintiffs' RICE claim, but also to plaintiffs claim for fraud and prayer for punitive damages. If, contrary to Holcomb's statement, many of Vantage's customer were dissatisfied, and that is the reason Vantage repurchased their property, it is possible that Vantage engaged in the same fraudulent practices against these customers as against the plaintiffs. Such a pattern of fraud would justify an award of punitive damages and would substantiate plaintiffs' fraud claim as well as the RICE claim.

**POINT IV: Defendants Can Not Claim the Privilege for Partnership Documents**

This Court has often held that it will affirm a trial court's decision whenever it can do so on a proper ground, even though it was not a ground on which the trial court relied in its

ruling. E.g., Bill Nay & Sons Excavating v. Neeley Construction Co., 677 P.2d 1120, 1123 (Utah 1984); Rice, Melby Enterprises v. Salt Lake County, 646 P.2d 696, 698 n.3 (1982). Such a ground may be considered even though it is raised for the first time on appeal. Buehner Block Co. v. UWC Associates, 752 P.2d 892, 894-95 (Utah 1988).

In this case, such an additional, proper ground to sustain the trial court exists. The rule is well-accepted, known as the "collective entity" rule, that where production of corporate or partnership records is sought, an individual holding such records in a representative capacity cannot claim the privilege against self-incrimination to avoid producing the records, even though the records might incriminate him personally. Bellis v. United States, 417 U.S. 85, 88, 94 S. Ct. 2179, 2183 (1974); Braswell v. United States, 108 S. Ct. 2284 (1988); 81 Am. Jur. 2d Witnesses § 48 (1976).

In Bellis v. United States, supra, the United States Supreme Court ruled that a partner in a three-man partnership could not rely on the privilege against self-incrimination as grounds for refusing to produce partnership records. The Court applied the collective entity rule even though the partnership had been dissolved. The rationale for the rule was that the privilege against self-incrimination applies only to natural persons and not artificial organizations. It followed that

[s]ince no artificial organization may utilize the personal privilege against compulsory self-incrimination, . . . an individual acting in his official capacity on behalf of the organization may

likewise not take advantage of his personal privilege.  
[417 U.S. at 90, 94 S. Ct. at 2184.]

The Court further justified the rule by looking to the policy underlying the privilege, which is the protection of personal privacy. Artificial organizations, such as partnerships, are entitled to no such privacy. 417 U.S. at 91-92, 94 S. Ct. at 2184-85. Indeed, by statute they are often required to make their records available to inspection of their members or others. Accordingly, artificial organizations and their representatives should not be allowed to invoke the privilege.

In Braswell v. United States, supra, the Court reaffirmed the rule in Bellis. In Braswell the person claiming the privilege was the sole shareholder of a family corporation who had been subpoenaed to turn over corporate records to a grand jury. The Court held that, regardless of whether a subpoena is addressed to the organization or to the individual in his capacity as a custodian, a custodian of organizational records may not resist a subpoena for those records by asserting the privilege against self-incrimination.

In the instant case, the rule articulated in Bellis and Braswell directly applies. Plaintiffs' request for production sought partnership records, i.e., the record of Vantage's sales. Honey and Holcomb possessed such records as representatives of the partnership. Therefore, under Bellis and Braswell Honey and Holcomb are precluded from asserting the privilege against self-incrimination, even though they could be personally incriminated

by such production. On this additional ground, the trial court's ruling should also be upheld.

**POINT V: Plaintiffs Have Adequately Pleaded Civil RICE**

Defendants argue on appeal that this Court should reverse because plaintiffs have not properly alleged a "pattern of racketeering activity" under Utah's former Racketeer Influenced and Corrupt Enterprises Act (RICE), U.C.A., 1953, § 76-10-1601 et seq. Section 1602(4) of that act provided:

"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 . . . .

The statute defines "racketeering activity" as an act committed for financial gain which is illegal under the laws of Utah "regardless of whether such act is in fact charged or indicted," and which involves one of a laundry list of illegal acts. Included in this list are (1) a scheme or artifice to defraud, (2) resale of realty with intent to defraud, and (3) false statements concerning land for sale. § 76-10-1602(p), (q), (s).

Although the liability created by this statute was denominated as "racketeering," it would more accurately termed as liability for statutory fraud or other unlawful conduct. The successor to RICE has adopted this view by renaming the act as the "Pattern of Unlawful Activity Act." The trial court took this view of the statute, stating:



I prefer to call [this action] a . . . statutory fraud cause of action, because that's really what it is. . . . I prefer to use that term rather than racketeering. [Trial Judge's Ruling, February 9, 1988, at 4, 5; Add. 47-48.]

Plaintiffs alleged in their complaint eight episodes of "racketeering," or as the trial court viewed it, statutory fraud, as follows:

1. Defendants falsely represented that the roofs on the apartment buildings needed only "a couple buckets of tar" to repair them when in fact the cost to repair the roofs was over \$40,000. (R. 6, 10-11; Add. 9, 13-14.)

2. Defendants falsely represented that plaintiffs would not be required to pay real property taxes for five years when in fact real property taxes were due annually. (Id.)

3. Defendants falsely represented that the cost to re-meter each rental unit was \$150.00 when in fact such cost exceeded \$250.00. (Id.)

4. Defendants falsely represented that the property had been appraised in excess of \$1 million when in fact it had not. (Id.)

5. Defendants falsely represented that the income from the property exceeded the expenses thereon. (Id.)

6. Defendants falsely represented that if plaintiffs executed certain promissory notes, which notes plaintiffs did not have the present ability to pay, repayment would not be a problem because defendants guaranteed that the property would be sold within a couple of weeks. (R. 9-11; Add. 12-13.)

7. Defendants induced plaintiffs to execute other obligations that plaintiffs did not have the present ability to pay. (R. 8, 10-11; Add. 11, 13-14.)

8. Defendants stated that the property was worth less than what plaintiffs had paid and that now plaintiffs should sell it at a loss.

Defendants argue that in order for plaintiffs to properly allege RICE, the foregoing episodes must be alleged with sufficient particularity to satisfy a "probable cause" or "prima facie" standard necessary to obtain an indictment under Utah's grand jury statute, U.C.A., 1953, § 77-11-5. Defendants' argument relies entirely on a Utah federal district court case, Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045 (D. Utah 1983).

This Court should decline to adopt the pleading requirement articulated in Bache Halsey. Since Bache Halsey was decided in 1983, numerous other courts have considered its approach and expressly refused to follow it. Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd 473 U.S. 606 (1985); Meyer v. First National Bank & Trust Co., 698 F. Supp. 798, 806-807 (D.N.D. 1987); Rhoades v. Powell, 644 F. Supp. 645, 670 n. 20 (E.D. Cal. 1986); Cincinnati Gas & Electric Co. v. General Electric Co., 656 F. Supp. 49, 77 (S.D. Ohio 1986); Lewis v. Sporck, 612 F. Supp. 1316, 1324 (N.D. Cal. 1985); Tryco Trucking Co. v. Belk Store Services, Inc., 608 F. Supp. 812, 815-16 (W.D. N.C. 1985); Schnitzer v. Oppenheimer &

Co., 633 F. Supp. 92, 96 (D. Ore. 1985).

The reasons for not following Bache Halsey are strong. If a plaintiff were required to establish probable cause or a prima facie case at the pleading stage, he would essentially have to plead evidence and prove his case before filing the complaint. This is not possible for civil plaintiffs, who, unlike grand juries, do not have any discovery mechanism available to them prior to filing the complaint. This concept was well explicated by the court in Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 404 (7th Cir. 1984), wherein it stated:

With respect to Bache Halsey's discussion of grand juries, it should be recalled that a grand jury has significant investigative powers and resources, including a broad subpoena power. Before it decides whether to indict a person, it has extensive opportunities to discover and evaluate relevant facts. It should be obvious that a civil plaintiff has no similar discovery rights until it files the complaint. Yet the approach of the district court in Bache Halsey appears to require a plaintiff to establish a case before any discovery is permitted. . . . While the court's motives [in Bache Halsey] are admirable, its approach seems to us to be impractical. We see no grounds for demanding that a civil RICO plaintiff essentially plead evidence and prove the case in the complaint.

Under any other standard than Bache Halsey, the allegations of plaintiffs' complaint would be considered sufficient. This Court should not impose the additional, unreachable standard created by Bache Halsey.

**POINT VI: Defendants Are Not Entitled to Attorney Fees on Appeal**

Finally, defendants request that they be awarded attorneys fees on appeal. Plaintiffs strongly oppose this request.

Under the "American" rule, followed by this Court, attorneys

fees are awarded only when provided for by contract or by statute. E.g., Golden Key Realty v. Mantas, 699 P.2d 730 (Utah 1985); Utah Farm Production Credit Assoc. v. Cox, 627 P.2d 62 (Utah 1981). Defendants do not cite such a contractual or statutory provision, nor do they cite any authority to vary the American rule in this case.

Defendants rely on Spevack v. Klein, 385 U.S. 511 (1967), for the general proposition that a person claiming the privilege should not be subjected to a penalty. From this general proposition defendants argue that if they are forced to bear their own attorneys fees on appeal, that would amount to a penalty, and that therefore plaintiffs should pay defendants' fees.

Defendants' reliance on Spevack is entirely misplaced. In that case, a lawyer who claimed the privilege was ordered to be disbarred. The United States Supreme Court held that the threat of disbarment constituted a "penalty" tantamount to compulsion, and thus was impermissible. There is nothing in Spevack remotely supporting defendants' argument that they are somehow subject to a penalty by having to bear the costs of their own appeal.

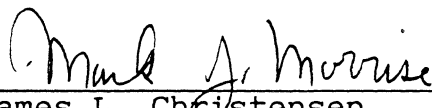
"[N]ot every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as a penalty." Flint v. Mullen, 499 F.2d 100, 104 (1st Cir. 1974). Certainly there can be no penalty where defendants are simply required to do what all litigants do, which is to pay for their own attorney fees.

### CONCLUSION

The trial court's ruling is sustainable on four grounds: (1) defendants failed to show they might be incriminated; (2) defendants failed to show the real possibility of criminal prosecution; (3) defendants waived their right to claim the privilege; and (4) defendants cannot claim the privilege as to partnership records in their possession.

Accordingly, the trial court's ruling should be affirmed.

DATED this 5<sup>th</sup> day of June, 1989.

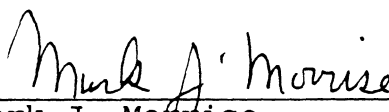
  
\_\_\_\_\_  
James L. Christensen  
Paul D. Newton  
Mark J. Morrise

### PROOF OF SERVICE BY MAILING

The undersigned, attorney for plaintiffs and respondents, hereby certifies that on June 5, 1989, he caused the foregoing "Brief of Respondent" to be served on all parties to this appeal, by mailing copies thereof by first-class mail, postage prepaid, on the following:

Attorney for Defendants  
Michael S. Eldredge  
SNOW & HALLIDAY  
Attorney for Appellants  
261 East 300 South, Suite 350  
Salt Lake City, Utah

June 5, 1989  
Dated

  
\_\_\_\_\_  
Mark J. Morrise

### ADDENDUM

[This addendum is consecutively numbered, with page numbers at the top center of each page. The record numbers appear in the lower right-hand corner of the page.]

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;
- (b) Aggravated robbery or robbery.

- (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 control 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, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as the court deems proper.

(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."

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

MARIAN H. WEBB and JILL W. BROWN,  
  
Plaintiffs,  
  
v.  
  
VANTAGE INCOME PROPERTIES,  
BRUCE HONEY, and STEVE HOLCOMB,  
  
Defendants.

COMPLAINT

Civil No. 55100

Plaintiffs complain of Defendants and allege as follows:

PARTIES

1. Upon information and belief, Defendant Vantage Income Properties ("Vantage") is believed to be a partnership composed of James W. Andrew, Bruce Honey and Steve Holcomb as partners, doing business in Salt Lake County, State of Utah and conducting business as a principal real estate broker as defined by Section 61-2-2, Utah Code Annotated (1953, as amended).

2. Upon information and belief, Defendant Bruce Honey ("Honey") is a resident of Salt Lake County, State of Utah and is the principal broker of Vantage Income Properties.

3. Upon information and belief, Defendant Steve

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Holcomb ("Holcomb") is a resident of Summit County, State of Utah and doing business as a real estate sales agent for Vantage in Salt Lake County, State of Utah.

4. Plaintiffs Marian H. Webb and Jill W. Brown are residents of Salt Lake County, State of Utah.

JURISDICTION

5. Jurisdiction rests in the above entitled Court pursuant to §78-3-4 Utah Code Annotated (1953, as amended).

VENUE

6. Venue is laid pursuant to §78-13-7, Utah Code Annotated (1953, as amended) in that the causes of action set forth herein all arose in Salt Lake County, State of Utah.

FACTS

7. All representations, non-disclosures and acts of Defendants described herein were performed by Steve Holcomb as a principal partner and agent for Vantage, Honey and the other partners of Vantage and were performed within the scope of Holcomb's authority from Vantage, Honey and other partners; and were performed on behalf of Vantage and Honey and the other individual partners of Vantage as if all the relevant acts were performed directly by Honey, Vantage and its individual partners.

8. At all times relevant herein Defendants were engaged in the business of selling real property for others and during the spring and summer of 1985 were acting as the principal real estate brokers or agents of Morris and Jo D'Leen Nesmith ("Nesmith") the owners of certain real property consisting of two apartment complexes, a triplex and a duplex, located at 576-580,

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588, 600, and 604 Vine Street, Murray, Salt Lake County, State of Utah (the "Property") for the purpose of selling the Property to Plaintiffs. The Property is more particularly described on Exhibit "A" attached hereto and by this reference made a part hereof.

9. Upon information and belief, Nesmith represented to Defendants the value of the Property, the condition of the Property, and the profitability or lack thereof, of the Property including income and expenses.

10. Defendants approached Plaintiffs about purchasing the Property and ultimately persuaded Plaintiffs to purchase the Property.

11. Upon information and belief, Defendants knew or had reason to know that Plaintiffs lacked business experience, knowledge and sophistication concerning purchasing and operating rental and income property; and that because of this lack of experience, knowledge and sophistication, Defendants knew or had reason to know that Plaintiffs would not properly analyze the condition and value of Property in determining whether to purchase it; and that Plaintiffs further lacked the economic means to purchase the Property and thereafter properly operate and maintain the Property and the debts thereon and expenses arising therefrom.

12. During the spring and summer of 1985 and prior to the purchase of the Property, Defendants or one or more of them represented to Plaintiffs that:

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a. The condition of the roofs on the two apartment complexes on the Property needed "a couple of buckets of tar" to repair them when in fact the cost to adequately repair these roofs exceeded the sum of \$40,000.00.

b. Plaintiffs would not be required to pay real property taxes for five years when in fact real property taxes are due annually and if not paid included on the rolls for tax sale as delinquent real property taxes.

c. The Property had been appraised in excess of one million dollars when in fact the Property had not been appraised by a certified and competent appraiser and its value was substantially less than one million dollars.

d. The cost to re-meter each unit was \$150.00 when in fact such cost was no less than \$250.00 per unit.

e. The income from the Property exceeded the expenses thereon when in fact the expenses substantially exceeded the income derived from the Property.

f. The Property could be resold within a few weeks after the purchase for a sales price exceeding one million dollars when in fact no offer has ever been tendered to Plaintiffs to purchase the Property for a sum in excess of one million dollars and no written offer has ever been presented to purchase the Property from Plaintiffs exceeding \$780,000.00, and the property is worth substantially less than one million dollars.

13. On several occasions during the late spring of 1985 and the early summer of 1985 and prior to the purchase of the Property, Defendants or one or more of them omitted to represent to Plaintiffs that:

a. Plaintiffs should include taxes, repairs and maintenance costs, legal fees, resident management costs, advertising costs, and accounting costs as expenses against the Property.

b. The cost to repair the roofs on the two apartment complexes was a sum not less than \$40,000.00.

c. Real property taxes are due every year on January 1, and payable on or before November 30 of that year and delinquent thereafter.

d. A vacancy rate factor should be included in the financial analysis of the Property.

e. All pertinent facts relative to the purchase of the Property by Nesmith in late 1984 including but not limited to the purchase price paid by Nesmith.

f. The appraisal referred to in connection with the Property prior to the purchase by Plaintiffs was not a certified appraisal prepared by a certified MAI appraiser.

g. The Property was not worth one million dollars or more.

h. The cost to remeter each unit for utility purposes exceeded \$150.00 per unit.

i. The expenses from the Property exceeded the income thereon.

j. The Property could not be resold within two weeks after the purchase from Nesmith for one million dollars or more.

14. Plaintiffs relied upon the representations and non-disclosures of Defendants or one or more of them in purchasing the Property.

15. On or about May 28, 1985, Plaintiffs in reliance upon the representations and non-disclosures of Defendants, agreed to purchase the Property for \$780,000.00. The terms presented to Plaintiffs by Defendants included \$80,000.00 as a down payment, (\$1,000.00 of which had been tendered as a earnest money deposit which was held by Defendants), a \$656,000.00 Note and all-inclusive trust deed in favor of Nesmith and a \$44,000.00 additional note in favor of Nesmith.

16. Prior to July 2, 1985, Plaintiffs told Defendants that they could not purchase the Property because they did not have the \$79,000.00 required to complete the downpayment. Defendants represented to Plaintiffs that if Plaintiffs could borrow approximately \$34,000.00 for the downpayment for the Nesmith's benefit, then Defendants would look to Plaintiffs for payment of the commission after closing by taking a note for \$46,800.00 secured by a Trust Deed.

17. Upon information and belief, prior to July 2, 1985 Defendants instructed Utah Title & Abstract Company ("Utah Title"), the closing agent and title insurance company, to prepare closing statements with terms directly contrary to those



earlier presented to Plaintiffs. The new terms included a sales price of \$733,200.00, with Plaintiffs paying the real estate sales commission directly to Defendants of \$46,800.00 (6% of \$780,000.00). Defendants further instructed Utah Title to apply \$29,000.00 of the cash payment to the real estate sales commission and to pay Nesmith the balance, if any, of said down payment.

18. Prior to July 2, 1985, Plaintiffs borrowed \$34,000.00 from Rocky Mountain State Bank at an interest rate of 2% above the prime rate to use as the down payment to purchase the Property.

19. On July 2, 1985, Defendants again represented to Plaintiffs that Plaintiffs should purchase the Property and execute notes of \$17,000.00 in favor of Nesmith and \$16,000.00 in favor of Defendant Vantage because Defendants could guarantee to Plaintiffs that the Property would be resold within a couple of weeks. Defendants made these representations knowing that Plaintiffs had no ability to repay the notes at the times when they were due unless Plaintiffs sold the Property. Plaintiffs are unable to pay the debts evidenced by said notes.

20. After Defendants failed to locate a purchaser ready, willing and able to purchase the Property from Plaintiff for a sum exceeding one million dollars, Defendants represented to Plaintiffs that Plaintiffs must sell the Property for less than what they purchased it for and that the Property was worth less than what they purchased it for and that Defendants were willing to help Plaintiffs sell the Property for the lesser

amount if Plaintiffs would pay Defendants another real estate commission.

21. Upon information and belief, the value of the Property is approximately \$550,000.00.

FIRST CAUSE OF ACTION

(Racketeering)

22. Plaintiffs reallege all the preceding paragraphs as though specifically set forth at length hereat.

23. Defendants are an enterprise, within the meaning of §76-10-1602(3), engaged in the business of buying and selling real property for others within the meaning of §61-2-1 et. seq. Utah Code Annotated.

24. Defendants, as persons within the meaning of §76-10-1602(2), Utah Code Ann., through a pattern of racketeering activity acquired directly or indirectly an interest in the Property in violation of §76-10-1603(2), Utah Code Ann. The racketeering activity includes acts committed for financial gain involving (a) a scheme or artifice to defraud, (b) false statements or publications concerning land for sale and the sale and mortgaging of unsubdivided lands and (c) resale of realty with intent to defraud. The numerous episodes of racketeering which constitute this pattern of racketeering are those acts representations and non-disclosures described in paragraphs 12, 13, 16, 19 and 20.

25. Vantage, Honey and Holcomb as persons within the meaning of §76-10-1602(2) and as persons employed by or associated with said enterprise, conducted and participated,

directly and indirectly, in the conduct of affairs of said enterprise through a pattern of racketeering activity and in violation of §76-10-1603(3), Utah Code Ann. The racketeering activity includes acts committed for financial gain involving (a) a scheme or artifice to defraud, (b) false statements or publications concerning land for sale and the sale and mortgaging of unsubdivided lands, or (c) resale of realty with intent to defraud or all of these above activities. The numerous episodes of racketeering which constitute this pattern of racketeering activity are those acts, representations and non-disclosures described in paragraphs 12, 13, 16, 19 and 20.

26. These numerous episodes of racketeering, occurring within five years of one another, constitute a pattern of racketeering within the meaning of Section 76-10-1602(4), Utah Code Ann.

27. Plaintiffs have sustained injuries to the persons, business and property by reason of these violations of Section 76-10-1601 et.seq. Utah Code Ann. in that as a direct and proximate result of the episodes committed by Defendants, Plaintiffs suffered damages including the following:

- a. Payment at the time of the purchase of the subject property in cash towards Defendants real estate commission and other closing costs in an amount not less than \$33,271.66.
- b. Expenses incurred in operating and maintaining the Property, including interest expense paid to Rocky Mountain State Bank in an amount not less than

\$30,000.00.

c. Execution of a \$16,000.00 Trust Deed in favor of Defendant Vantage Income Properties.

28. By reason of Defendants' violation of §76-10-1601 et. seq. Utah Code Ann., Plaintiffs are entitled, pursuant to §76-10-1605(1), Utah Code Ann., to treble damages of \$189,814.98, the costs of this suit, including a reasonable attorneys fees in an amount not less than \$30,000.00, and punitive damages in a sum not less than \$300,000.00 together with interest thereon at the legal rate of ten percent (10%) per annum.

SECOND CAUSE OF ACTION

(Fraud and Deceit)

29. Plaintiffs reallege paragraphs 1 through 21 inclusive as though specifically set forth at length hereat.

30. During the late spring and summer of 1985, Defendants or one or more of them, did knowingly or recklessly make representations and non-disclosures to Plaintiffs of presently existing material facts more fully described in paragraphs 12, 13, 16, 19 and 20 herein.

31. That these representations and non-disclosures were material to the Plaintiffs in connection with the subject transaction.

32. Defendants or one or more of them made these representations and non-disclosures for the purpose of inducing Plaintiffs to act upon them.

33. Plaintiffs reasonably believed these representations to be true and in ignorance of their falsity, did

justifiably rely upon them and entered into a contract for the purchase of the Property, purchased the Property, and attempted to resell the Property.

34. As a direct and proximate result of Defendants' actions Plaintiffs have been injured and damaged by the representations and non-disclosures of the Defendants.

35. Defendants committed the acts described herein wilfully and maliciously for the purpose of injuring Plaintiffs and benefitting themselves.

36. Plaintiffs are entitled to rescission of the Trust Deed Note and Trust Deed in favor of Vantage, and damages in an amount not less than \$33,271.66, consequential damages in an amount not less than \$30,000.00, costs including a reasonable attorneys fee, punitive damages in an amount not less than \$300,000.00 and whatever additional relief the Court deems proper.

#### THIRD CAUSE OF ACTION

(Negligent Misrepresentation)

37. Plaintiffs reallege paragraphs 1 through 21 inclusive, as though specifically set forth at length hereat.

38. Defendants, or one or more of them, at the time of the aforementioned misrepresentations and non-disclosures, owed Plaintiffs a duty to use reasonable care to discover and communicate truthful information regarding the condition of the Property, the relationship of income and expenses of the Property, and the value of the Property.

39. Defendants also owed Plaintiffs duties of honesty,

integrity, truthfulness, reputation, competency and fair dealing.

40. Defendants breached these duties in that they were in a superior position to know the material facts described in paragraphs 12, 13, 16, 19 and 20 above and carelessly and negligently made false representations and non-disclosures concerning these facts to Plaintiffs for the purpose of inducing Plaintiffs to rely and act thereon.

41. Plaintiffs reasonably believed these representations to be true and, in ignorance of their falsity, justifiably relied thereon in entering into a contract to purchase the Property, in purchasing the Property and in attempting to resell the Property and suffered injury and damage as a direct and proximate result of misrepresentations and non-disclosures of Defendants.

42. Plaintiffs are entitled to rescission of the trust deed note and trust deed in favor of Vantage, restitution of all payments in an amount not less than \$33,271.66, consequential damages in an amount not less than \$30,000.00, costs including a reasonable attorneys fee, punitive damages in an amount not less than \$300,000.00 and whatever additional relief the Court deems proper.

FOURTH CAUSE OF ACTION

(Constructive Fraud)

43. Plaintiffs reallege paragraphs 1 through 21 inclusive, as though specifically set forth at length hereat.

44. The agency relationship of Defendants with Nesmith and Plaintiffs and the other circumstances surrounding the

purchase of the Property by Plaintiffs from Nesmith imposed a special duty on Defendants to determine and know the truth of Defendants' representations regarding the Property.

45. Defendants made the representations set forth in paragraphs 12, 13, 16, 19 and 20 as facts based upon their own personal knowledge or under circumstances where they knew or should have known the truth or untruthfulness of the representations and non-disclosures.

46. Plaintiffs reasonably relied upon the representations of Defendants because they presumed that the position of Defendants as buyers and sellers for themselves of and as agents for buyers and sellers of income property provided Defendants with complete knowledge and that Defendants' statements fairly implied that they had complete knowledge of the representations made.

47. Defendants had expected payment of a sales commission from Plaintiffs upon Plaintiffs' purchase of the Property from Nesmith.

48. Plaintiffs reasonably believed the representations of Defendants to be true and in justifiable reliance thereon entered into a contract to purchase the Property from Nesmith, purchased the Property and attempted to resell the Property and suffered injury and damages as a proximate result of these misrepresentations and non-disclosures.

49. Plaintiffs are therefore entitled to a decree rescinding trust deed note and trust deed in favor of Vantage, restitution made of all payments in an amount not less than

\$33,271.66, for consequential damages in an amount not less than \$30,000.00, costs including a reasonable attorneys fee, punitive damages in an amount not less than \$300,000.00 and whatever additional relief the Court deems proper.

FIFTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

50. Plaintiffs reallege paragraphs 1 through 21 inclusive, as though specifically set forth at length hereat.

51. During the late spring and summer of 1985, Defendants or one or more of them represented to Plaintiffs the certain presently existing facts described in paragraphs 12, 13, 16, 19 and 20.

52. Plaintiffs reasonably believed these representations to be true and justifiably relied upon them in entering into the contract to purchase the Property purchasing the Property and attempting to resell the Property.

53. The acts of Defendants were done wilfully, maliciously, outrageously, deliberately and purposely with the intention to inflict emotional distress upon Plaintiffs and/or were done in reckless disregard of the probability of causing Plaintiffs' emotional distress and these acts did in fact result in severe and extreme emotional distress to Plaintiffs.

54. As a direct and proximate result of these acts and misrepresentations, Plaintiffs were caused to incur severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety. Plaintiffs continue to be fearful, anxious and nervous.



55. As a result of Defendants actions Plaintiffs request compensatory damages in the sum of not less than \$100,000.00 and punitive damages in the sum of not less than \$300,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. For their First Cause of Action, Plaintiffs are entitled to judgment against Defendants Vantage, Honey and Holcomb, jointly and severally, for treble damages in an amount not less than \$189,814.98, costs of this suit, including a reasonable attorney's fees in an amount of not less than \$30,000.00, and punitive damages in an amount of not less than \$300,000.00 together with interest on all damages and costs at the legal rate of ten percent (10%) per annum.
2. For their Second Cause of Action, for rescission of the trust deed note and trust deed in favor of Vantage, for a judgment of restitution against Vantage, Honey and Holcomb, jointly and severally, in an amount not less than \$33,271.66, for consequential damages in an amount not less than \$30,000.00, punitive damages in an amount not less than \$300,000.00, costs including a reasonable attorneys fee and whatever additional relief the Court deems proper.
3. For their Third Cause of Action, for rescission of the trust deed note and trust deed in favor of Vantage, for a judgment of restitution against Vantage, Honey and Holcomb, jointly and severally, in an amount not less than \$33,271.66, for

consequential damages in an amount not less than \$30,000.00, punitive damages in an amount not less than \$300,000.00, costs including a reasonable attorneys fee, and whatever additional relief the Court deems proper.


4. For their Fourth Cause of Action, for rescission of the trust deed note and trust deed in favor of Vantage, for a judgment of restitution against Vantage, Honey and Holcomb, jointly and severally, in an amount not less than \$33,271.66, for consequential damages in an amount not less than \$30,000.00, punitive damages in an amount not less than \$300,000.00, costs including a reasonable attorneys fee, and whatever additional relief the Court deems proper.

5. For their Fifth Cause of Action, for compensatory damages in the sum of \$100,000.00 and punitive damages in the sum of \$300,000.00.

6. For such other and further relief the Court deems proper in these circumstances.

DATED this 20 day of February, 1986.

CORBRIDGE, BAIRD & CHRISTENSEN

  
James L. Christensen  
Paul D. Newton  
Attorneys for Plaintiff

Address of Plaintiffs:  
2364 Evergreen Street  
Salt Lake City, Utah 84109

1     Wouldn't you say that's a reasonable thing to arrive at?

2           Q     I don't want to say anything. Go ahead.

3           A     You are not listening.

4           Q     I'm listening.

5           A     So basically, we had to take all of our market  
6 information and put it all together and try and determine what  
7 would be the best price in terms for this apartment house.

8                     Our company was very proud of the fact that in the  
9 hundreds of apartment houses that we sold, we had very few  
10 people that were dissatisfied with the service that we had  
11 performed.

12          Q     The service you are referring to is the appraisal  
13 service?

14          A     Both.

15          Q     The appraisal and sales?

16          A     We listed and sold all of our own apartment houses.  
17 We did all that work within the company, and it was very  
18 important to us that both parties won on the transaction.

19          Q     So you would not sell or VIP would not sell apartment  
20 houses that had been listed by other companies or brokers?

21          A     Not normally. Sometimes occasionally we would sell  
22 an apartment house listed by another company, very rarely.

23                     MR. SNUFFER: Could we take a recess? I want to talk  
24 to him off the record for just a moment.

25                                     (Short recess taken.)

1 Q Have you used them?

2 A I have used those words, yeah. I would be lying if I  
3 said I have never used those words.

4 Q What have you used those words in connection with?

5 A All sorts of things.

6 Q Give me some examples that you would use them in  
7 connection with.

8 A I have got to jam my shoe on because it's too tight.  
9 Are you talking about in conjunction with real estate?

10 Q Yes.

11 A Mostly I used those words because I said, "I don't  
12 like to see that sort of thing happening here. You can't be  
13 jamming someone into an apartment house and expect them to be a  
14 long-time customer." One of the things about our company was  
15 that we did business over and over and over with people. They  
16 bought an apartment house, fixed it up, and sold it and they  
17 bought another one and fixed it up and sold it. You don't just  
18 sell somebody a building and run and hide like most real estate  
19 agents. Most real estate agents sell one or two buildings in  
20 their career and that's it. People that worked for me did  
21 business with their customers over and over and over. Our  
22 business was about 70 percent repeat business.

23 Q Would it be fair to characterize another philosophy  
24 of VIP to not cram or jam buildings to people?

25 A That's right. It doesn't do you any good.

1 there.

2 Q (By Mr. Christensen) You have referred to the fact  
3 that about 70 percent of your business was repeat business.  
4 Did you have some sort of a customer list of the people who you  
5 were doing most of your business with? Again, I'm referring to  
6 VIP.

7 A I think I got that figure from a list of sales that  
8 we had made at one time during the year, and I could look back  
9 to see who the people were that bought the buildings and where  
10 we had met them and how many they bought from us, and it was  
11 about 70 percent.

12 Q Were they the same people?

13 A Yeah.

14 Q When you say 70 percent, 70 percent of all the sales  
15 were people who you had done business with before?

16 A Yeah. I carried on business from the start at Income  
17 Realty until I finished the business. And I took ad calls,  
18 which are when people call in about an apartment house listed  
19 in the newspaper the first couple of years, the first few  
20 months I was with Income Realty. After that, all my business--  
21 not all my business--90 percent of my business was with people  
22 that I had already done business with. They just continued to  
23 do business with me or referrals by people they knew. Very  
24 seldom did someone work with me that was new. I just was  
25 basically handling my old customers time and time again.

1 ownership?

2 A No.

3 Q What has happened to all the income properties you  
4 had owned?

5 A I have either sold them, disposed of them, traded  
6 them, gotten rid of them. I have got plenty to do at  
7 Commercial Interiors. I don't have time for apartment houses.

8 Q I want to go back for just a moment to the  
9 partnership with Honey and VIP. You stated that the reason  
10 that you dissolved the partnership was mutual. I would like to  
11 understand why you split up the partnership. What specific  
12 event caused the two of you to decide to split up the  
13 partnership?

14 A There was no specific event.

15 Q Any reason for splitting it up?

16 A Yeah, I just got tired of working with him.

17 Q Had VIP or you or Mr. Honey or the two of you ever  
18 purchased any properties back for people that you had worked  
19 for agents for in the sale of property?

20 A Yes.

21 Q How many times and how many properties?

22 A Two that I can think of.

23 Q Tell me about the first one, when it occurred, who  
24 the buyers were that you purchased it from.

25 A The first one I think was a duplex on Edmunds Avenue

1 that he had that actually we didn't sell this to the person,  
2 but we knew him and he bought it when he was at Income Realty &  
3 Mortgage and it had been sold two or three times and somewhere  
4 down the line some people weren't making the payments.

5 Q This person you are referring to, had he been the  
6 seller in the transaction?

7 A It wasn't on Edmunds Circle, I beg your pardon. He  
8 owned some property that was on Edmunds Circle.

9 Q Who is he?

10 A A fellow named Danny Burnette.

11 Q Had he been the owner of that property on Edmunds  
12 Circle?

13 A This is not the property on Edmunds Circle, this was  
14 on Second Avenue--Second West. It's 1171 South Second West, a  
15 dreadful place, and I'm not sure who he bought the property  
16 from. He bought the property from a lady and he did--it was  
17 through our company. It was like in 1980, real early on.

18 Q When you say "our company", referring to--

19 A Vantage Income Properties, and then he owned it for a  
20 while and then he sold it to another guy and that guy had it  
21 for a while and he sold it to somebody else and then it started  
22 getting run down and some people walked out of the deal here  
23 and there and it got down to this fellow, Danny Burnette, and  
24 he had since then bought a bunch of other property and he  
25 didn't really want this one and I can't remember what it was

1 now, but he asked us if we wanted to take it and we said yeah,  
2 we would. It was a small duplex, maybe worth--I don't know,  
3 50,000 bucks, 40,000 bucks.

4 Q So why did you buy it from him?

5 A The company needed--the company had made in profit,  
6 we needed a little depreciation. We had several agents there,  
7 a couple of them had expressed some interest in maybe wanting  
8 to go manage it for us. So I said, "We'll take it." He just  
9 signed a deed over to us. We didn't pay anything for it.

10 Q This was Danny Burnette?

11 A Yes.

12 Q You say there was another property you did something  
13 like that?

14 A There were some people that bought a piece of  
15 property from us on--boy, I don't remember--if I can remember  
16 the street, about 13th South.

17 Q You say they bought it from you?

18 A From the company--not from the company, they bought  
19 it through us.

20 Q You represented the seller?

21 A And buyers.

22 Q And the buyers?

23 A We were--we did all that in our company and they were  
24 kind of skiddish and they didn't want to buy it, then they did  
25 and they didn't. The people do that all the time. They get



1 buyer's remorse. They think, "Maybe we shouldn't have bought  
2 it," but they were ready to buy it and they had the money.

3 Q Do you recall these people's names, the buyers?

4 A I can't right now. I know he was a security guard or  
5 something at Hill Air Force Base and he said, "Okay, I'll buy  
6 it, but if I don't like it in 30 days you have to buy it from  
7 me." I said okay. I wasn't even the salesman on the  
8 transaction. It was one of our salesmen, and they came in and  
9 talked to me about it and asked me if I would do that and I  
10 said I imagined I would, so--

11 Q So what happened, he bought the property from the  
12 buyer?

13 A Then a month later he said, "I can't stand this.  
14 It's too much pressure." So I said, "I'll buy it from you." I  
15 think we paid him a thousand dollars or something and took over  
16 his position.

17 Q Can you remember who the sellers were in that  
18 transaction?

19 A No, but it's some guy in California. I never met the  
20 seller. I really wasn't directly involved in the thing until  
21 the final act of the guy saying, "Well, you know, I want to buy  
22 it back."

23 Q Can you recall who the sales agent was?

24 A A guy named Kit Paul.

25 Q Who was the listing agent?

1           A     Glen Stevens.

2           Q     Any other situations like that the entire time you  
3 were with VIP where you had purchased back a property from a  
4 buyer for one reason or another? When I say purchased back,  
5 that's probably not the right way to put it. Whenever you  
6 purchased a property from a buyer for one reason or another--

7           A     Those are the only ones that I can remember. There  
8 may be some others, but as far as I can remember, that's all.

9           Q     On the second one, can you recall approximately the  
10 date?

11          A     1982, I think.

12          Q     What I would like to do now is shift out of all of  
13 this general questioning and go straight to the Vine Street  
14 property that is the subject of the lawsuit. Are you aware of  
15 which property I'm referring to?

16          A     I think I am. What do you mean specifically?

17          Q     The Vine Street property that Marian Webb and Jill  
18 Brown, the Plaintiffs in this lawsuit, purchased from Nesmith.  
19 Are you aware of the property?

20          A     I think so.

21          Q     I will be referring to it as the Vine Street property  
22 from this point forward.

23          A     All right.

24          Q     Mr. and Mrs. Nesmith were the sellers of the  
25 property?

James L. Christensen, USB No. A0639  
 Paul D. Newton, USB No. 4382  
 CORBRIDGE, BAIRD & CHRISTENSEN  
 Attorneys for Plaintiffs  
 215 South State Street, Suite 800  
 Salt Lake City, Utah 84111  
 Telephone: (801) 534-0909

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MARIAN H. WEBB and JILL W.	)	
BROWN,	)	REQUEST FOR PRODUCTION
	)	OF DOCUMENTS
Plaintiff,	)	
	)	
v.	)	Civil No. C86-1302
	)	
VANTAGE INCOME PROPERTIES,	)	
BRUCE HONEY, and STEVE	)	Judge Timothy Hanson
HOLCOMB,	)	
	)	
Defendants.	)	

---

Plaintiffs, by and through their counsel of record, and pursuant to Rule 34 of the Utah Rules of Civil Procedure, hereby requests the Defendant Bruce Honey to produce the following-described documents for inspection and copying at the offices of James L. Christensen, attorney for Plaintiffs, 215 South State Street, Suite 800, Salt Lake City, Utah, or at such other reasonable location as Plaintiff or his attorney may designate within thirty (30) days from the date of this request.

Request No. 1. A copy of the document dissolving Vantage Income Properties.

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

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

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

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

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

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

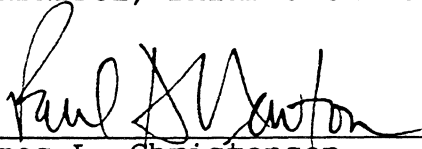
Request No. 8. A neighborhood survey prepared by Vantage Income Properties.

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

Request No. 10. A copy of Bruce Honey's 1985 and 1986 tax returns.

DATED this 23<sup>rd</sup> day of February, 1987.

CORBRIDGE, BAIRD & CHRISTENSEN

  
\_\_\_\_\_  
James L. Christensen  
Paul D. Newton  
Attorneys for Plaintiffs

000031

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

APR 10 1987

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H. Dixon Hindiey, Clerk 3rd Dist. Court  
By [Signature]  
Deputy Clerk

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

MARIAN H. WEBB and JILL W.  
BROWN,

Plaintiffs,

v.

VANTAGE INCOME PROPERTIES,  
BRUCE HONEY, and STEVE HOLCOMB,

Defendants.

ORDER COMPELLING  
RESPONSE TO DISCOVERY

Civil No. C86-1302

Judge Timothy Hanson

Plaintiffs' motion to compel came on for hearing before the above-entitled court on April 8, 1987 at 1:30 p.m.; plaintiffs were represented by Paul D. Newton, and defendants were presented by Terry C. Turner and Michael S. Eldredge; and the court having heard arguments of counsel including defendants' oral motion for a protective order prohibiting any discovery and having reviewed the file, pleadings, and other documents represented to the court for the purpose of these motions and good cause appearing therefor,

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

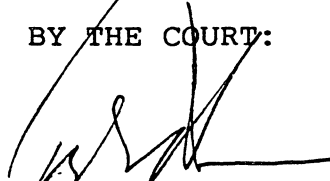
1. Defendants' oral motion for a protective order is hereby denied;

2. Plaintiffs' motion to compel defendants Steve Holcomb and Vantage Income Properties to respond to their request for production of documents is granted;

3. By April 9, 1987, Defendants must respond to plaintiffs request for production of documents dated February 23, 1987.

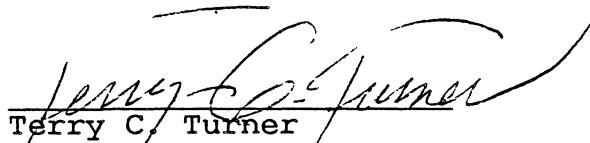
DATED this 9th day of April 1987.

BY THE COURT:



Honorable Timothy Hanson  
District Court Judge

APPROVED AS TO FORM:



Terry C. Turner  
Attorney for defendants  
Steve Holcomb and Vantage  
Income Properties

ATTEST

H. DIXON HINDLEY



By

Deputy Clerk

000033

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,	:	FOR PRODUCTION OF
BRUCE HONEY, and STEVE	:	DOCUMENTS
HOLCOMB,	:	
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.



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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.

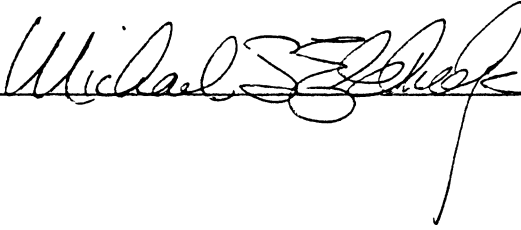
DATED this 14<sup>th</sup> day of October, 1987.

  
MICHAEL S. ELDREDGE  
Co-counsel for Defendants

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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 14<sup>th</sup> day of October, 1987.

  
\_\_\_\_\_

000040

James L. Christensen (Bar No. A0639)  
Paul D. Newton (Bar No. 4382)  
CORBRIDGE, BAIRD & CHRISTENSEN  
Attorneys for Plaintiff  
215 South State, Suite 800  
Salt Lake City, Utah 84111  
Telephone: (801) 534-0909

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

OCT 26 1987

H Dixon Hindley, Clerk 3rd Dist. Court  
By \_\_\_\_\_ Deputy Clerk

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

MARIAN H. WEBB and JILL W. BROWN,	)	
	)	
Plaintiffs,	)	ORDER
	)	
vs.	)	
	)	
VANTAGE INCOME PROPERTIES, BRUCE HONEY and STEVE HOLCOMB,	)	
	)	Civil No. C86-1302
Defendants.	)	Judge Timothy Hanson

On October 5, 1987, plaintiffs' Motion to Strike Defendants' Answer and enter default judgment came on for hearing before the above-entitled court. Plaintiffs were represented by Paul D. Newton and defendants were represented by Michael S. Eldredge. The court, having reviewed the pleadings and other documents on file, having heard arguments of counsel and good cause appearing therefor, does hereby order, adjudge and decree as follows:

1. Defendant Bruce Honey is hereby ordered to respond to plaintiffs' Third Set of Request for Production of Documents.

2. Also under the Third Set of Request for Production of Documents, defendants Steve Holcomb and Vantage Income Properties are hereby ordered to modify the response to request no. 2 to

show that the document requested cannot be located and was not delivered to plaintiffs.

3. Because defendants Steve Holcomb and Vantage Income Properties failed to meet their burdens to provide the court with sufficient information from which the court could make an intelligent evaluation of the claim of privilege against self-incrimination, defendants Steve Holcomb and Vantage Income Properties are hereby ordered to provide the court with sufficient information from which the court can make an intelligent evaluation of their claim of privilege against self-incrimination as asserted in these defendants' initial response to request nos. 3 and 4 under Plaintiffs' Third Set of Request for Production of Documents.

4. The deadline for the responses required under paragraphs 1, 2 , and 3 above is October 15, 1987.

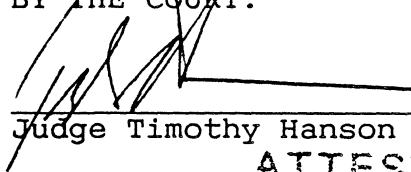
5. The court hereby preserves its ruling on plaintiffs' Motion under Rule 37 of the Utah Rules of Civil Procedure to strike defendants' Answer and enter default judgment pending the defendants' compliance with all orders herein within the required time limit of October 15, 1987, and then the court will grant or deny plaintiffs' motion.

6. Plaintiffs' Motion for Attorney's Fees and Costs is hereby granted subject to the court's later determination of the sum to award.

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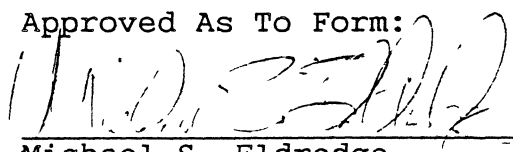
DATED this 26 day of October, 1987.

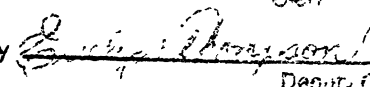
BY THE COURT:

  
\_\_\_\_\_  
Judge Timothy Hanson

ATTEST  
H. DIXON HINDLEY  
Clerk

Approved As To Form:

  
\_\_\_\_\_  
Michael S. Eldredge  
Co-Counsel for Defendants

By   
\_\_\_\_\_  
Deputy Clerk

Winn  
- US -  
Vantage Income Properties



OFFICE

DEC 15 1987

DEC 15 1987  
W. J. K. R.

MARIAN H. WEBB and JILL W. BROWN, )  
)  
)  
Plaintiffs, )  
)  
vs. )  
)  
VANTAGE INCOME PROPERTIES, )  
BRUCE HONEY, and STEVE )  
HOLCOMB, )  
)  
Defendants. )

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SANCTIONS AND TO  
PUBLISH DEPOSITION OF  
DEFENDANT STEVE HOLCOMB

Civil No. C86-1302

Judge Timothy Hansen

HEREBY ORDERS, ADJUDGES AND DECREES as follows:

1. In his deposition taken on December 4, 1986, defendant Steve Holcomb testified that "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 that we had performed." Plaintiffs have a right to verify the truth of the preceding statement and others like it. By making such a statement, defendants waived their right to raise the Fifth Amendment under the U.S. Constitution as an objection and privilege to Request Nos. 3 and 4 under plaintiffs' Request for Production of Documents dated February 23, 1987.

2. Defendants cannot assert the Fifth Amendment as an objection and privilege to plaintiffs' request for production of documents when defendants have failed to show and would not represent that there is anything contained within such documents that is incriminating.

#### CONCLUSIONS OF LAW

1. Plaintiffs' Motion to Publish Deposition of Steve Holcomb is granted.

2. Defendants have not met their burden in asserting the Fifth Amendment and have not complied with paragraph 3 of the court's Order dated October 26, 1987, requiring sufficient information from which the court can make an intelligent evaluation of defendants' claim of privilege against self incrimination.

3. Plaintiffs' Motion for Sanctions is granted subject to the following conditions:

a. Within ten (10) days of the date of this Order, defendants shall produce to plaintiffs copies of the documents requested by plaintiffs under their Request for

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Production of Documents dated February 23, 1987, request nos. 3 and 4;

b. In the event defendants fail to produce to plaintiffs the documents requested by request nos. 3 and 4, then plaintiffs, by ex parte motion supported by affidavit, may move the court for an order striking defendants' pleadings and Answers and granting plaintiffs judgment against defendants as prayed for in plaintiffs' Complaint.


4. Because defendants have asserted the Fifth Amendment without any foundation, plaintiffs are entitled to their costs, including attorney's fees, for the hearings on October 5, 1987, and December 7, 1987, which sums the court shall determine at a later date.

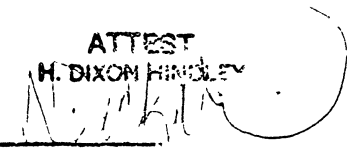
DATED this 15 day of December, 1987.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Timothy Hanson

Approved As To Form:

  
\_\_\_\_\_  
Michael S. Eldredge  
Terry C. Turner  
Co-Counsel for Defendants

ATTEST  
H. DIXON HINDLEY  
  
BY \_\_\_\_\_

# County of Salt Lake - State of Utah

000046

Marian L. Wehler, et al  
Plaintiff

Vantage Income Properties, et al  
Defendant

CASE NO: 086-1302

Type of hearing: Div. \_\_\_\_\_ Annul. \_\_\_\_\_ Supp. Order \_\_\_\_\_ OSC \_\_\_\_\_ Other ✓  
 Present Pltf. \_\_\_\_\_ Deft \_\_\_\_\_  
 P. Atty: Paul Newton (P)  
 D. Atty: Michael Eldredge (P)  
 Sworn & Examined: Jerry Turner (P)  
 Pltf: \_\_\_\_\_ Deft: \_\_\_\_\_  
 Others: \_\_\_\_\_

Summons \_\_\_\_\_ Stipulation \_\_\_\_\_  
 Waiver \_\_\_\_\_ Publication \_\_\_\_\_  
☐ Default of Pltf/Deft Entered  
 Date: February 1, 1988  
 Judge: TIMOTHY R. HANSON  
 Clerk: EVELYN THOMPSON  
 Reporter: BARRY WEINSTEIN  
 Bailiff: JACK AIRSMAN

## ORDERS.

- ☐ Custody Evaluation Ordered ☐ Custody Awarded To \_\_\_\_\_  
☐ Visitation Rights \_\_\_\_\_
- ☐ Pltf/Deft Awarded Support \$ \_\_\_\_\_ × \_\_\_\_\_ = \_\_\_\_\_ Per Month  
☐ Pltf/Deft Awarded Alimony \$ \_\_\_\_\_ Per Month/Year ☐ Alimony Waived  
☐ Payments to be made through the Clerk's Office: \_\_\_\_\_
- ☐ Atty fees to the \_\_\_\_\_ in the amount of \_\_\_\_\_ ☐ Deferred  
☐ Home To \_\_\_\_\_
- ☐ Furnishings To: \_\_\_\_\_ Automobile To \_\_\_\_\_  
☐ Each Party Awarded their Personal Property  
☐ Pltf/Deft to Maintain Debts and Obligations  
☐ Pltf/Deft. to Maintain Insurance on Minor Children  
☐ Restraining Order Entered Against \_\_\_\_\_  
☐ Pltf/Deft Granted Judgment for Arrearage in the Sum of \$ \_\_\_\_\_  
☐ 90-Day Waiting Period is Waived  
☐ Divorce Granted To \_\_\_\_\_ As \_\_\_\_\_  
☐ Decree To Become Final ☐ Upon Entry ☐ 3-Month Interlocutory  
☐ Former Name of \_\_\_\_\_ Is Restored
- ☐ Based on the failure of Deft to appear in response to an order of the court and on motion of Pltfs counsel, court orders \_\_\_\_\_ / \_\_\_\_\_ shall issue for Deft \_\_\_\_\_  
 Returnable \_\_\_\_\_ Bail \_\_\_\_\_
- ☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice

☒ Based on <sup>arguments</sup> written stipulation of respective counsel/motion of Plaintiff's counsel, court orders Judgement  
will be entered on the Rice Issues - all other  
issues will be stayed pending determination  
from Supreme Court. The Court will address  
the atty fees issue which have been  
reserved through these proceedings. The  
Court will hold conference by phone.

1 these cover concepts of proximate cause. But just to be  
2 extraordinarily cautious in this matter, I think it's  
3 appropriate to allow that inquiry, and I will consider  
4 it. And I'm not going to assume for the sake of this  
5 ruling that the defendants are foreclosed from examining  
6 the question of proximate cause, because I intend to  
7 examine it in this ruling.

8 The knowledge we need to keep in mind here is that  
9 on the first cause of action, there was no question  
10 about, it starts on page eight of the complaint, and  
11 paragraph twenty-two, which is the first paragraph in the  
12 first cause of action, which alleges the Rice claim under  
13 Section 76-10-1601, I believe, and following sections of  
14 the Utah Code, it incorporates all proceeding paragraphs.  
15 And those preceding paragraphs are the basis for, at  
16 least in part, the claim under the racketeering cause of  
17 action. And I don't like that word, because that implies  
18 something that's not there. It implies some criminal  
19 conduct that is not envisioned by a civil statute.

20 In any event, it's this action. I prefer to call it  
21 a fraud cause of action, statutory fraud cause of action,  
22 because that's really what it is. I think the code that  
23 deals with this statute specifically indicates. For  
24 example, in Section 76-10-1604, talking about -- excuse  
25 me, 1605, talking about remedies, and damages, and et

1 cetera, the legislature in sub part three indicate that  
2 the action is grounded in fraud action and go on to state  
3 that it's subject to arbitration under Chapter 31, Title  
4 78.

5 That suggests to me that what the legislature had in  
6 mind that this is a traditional fraud claim, but it has  
7 been reduced to common law fraud, reduced to statute and  
8 adopted by the legislature in a particular set of  
9 circumstances. And while common law fraud can encompass  
10 any activity, this is limited to the Rice statute -- is  
11 limited to the activities described in the statute  
12 itself, but it is a fraud statute. And I prefer to use  
13 that term rather than racketeering.

14 That envisions all kinds of mob things with all the  
15 traditional concepts that run with that type of language,  
16 and that just doesn't have to be present in an action  
17 brought under this statute. In any event, paragraphs  
18 seven through twenty-one are encompassed in the first  
19 cause of action. First cause of action is one in which  
20 the default has been entered, and you all understand why  
21 the default is there, and we don't need to discuss that  
22 further, but in any event, the default is there, and  
23 that's where we are.

24 The principle note, one of the allegations in  
25 paragraph eleven -- I don't mean to exclude the others,

FILED IN ( ) RK'S OFFICE  
Salt Lake County Utah

MAR 28 1988

H Dixon Hindley, Clerk 3rd Dist. Court  
By E. Thompson  
Deputy Clerk

## STATE OF UTAH

Judge Timothy Hanson

Pursuant to (a) Plaintiffs' Motion to Strike Defendants' Answer and Enter Default Judgment dated September 18, 1987; (b) Plaintiffs' Motion for Sanctions dated October 29, 1987; (c) Order Granting Plaintiffs' Motion for Sanctions dated December 15, 1987; (d) Plaintiffs' Ex Parte Motion for an Order Striking Defendants' Pleadings and answers and Granting Plaintiffs Default Judgment against Defendants; (e) Affidavit of James L. Christensen in Support of Ex parte Motion; (f) the Court's Order arising out of a hearing on January 4, 1988; (g) Defendants Notice of Intent Not to Produce Documents dated January 21, 1988; (h) Plaintiffs' Motion to Strike Defendants' Answers and Grant Plaintiffs' Judgment; and (i) An evidentiary hearing on February 9, 1988 during which the Court took evidence on the issues of

causation and damages, the court having previously ruled on February 1, 1988 that Plaintiffs' were entitled to default judgment on their first cause of action and the Court being fully advised in the premises and having reviewed the pleadings and other documents on file and having heard arguments of counsel and having taken evidence on the issues of causation and damages and good cause appearing therefore, the Court hereby makes the following findings of fact and conclusions of law and judgment:

FINDINGS OF FACT

Based upon defendants' default and the evidence received by the Court, the Court hereby makes the following findings of fact as to defendants Vantage Income Properties and Bruce Honey (hereinafter "Defendants"):

1. The factual allegations contained in paras. 7 through 21 of Plaintiffs' complaint are deemed true.

2. Defendants knew or had reason to know that plaintiffs lacked business experience, knowledge and sophistication concerning purchasing and operating rental income property or real estate generally, especially buying and holding real estate for the short term.

3. Plaintiffs' intended to hold the Clearbrook property for a short period of time; the principal purpose in purchasing this property was to turn it around, and not to keep it.

4. Epco is an assumed name and has no impact on the hearing on damages.

5. Plaintiffs bought the Clearbrook property because of



the representations of defendants; plaintiffs would not have bought the property otherwise.

6. Defendants knew of the plaintiff's line of credit from which plaintiff Marion H. Webb borrowed most of the down payment used for purchasing the Clearbrook property.

7. Plaintiffs paid \$35,000.00 as a down payment for the purchase of the Clearbrook property.

8. Plaintiffs incurred interest expense because of the credit line loan.

9. Plaintiff Marion Webb's need to obtain a mortgage to pay off the credit line was a reasonably foreseeable act resulting from defendants fraudulent conduct

10. Plaintiffs have incurred interest expense of \$10,791.92 in payments on the credit line and the new mortgage.

11. Plaintiffs have incurred closing costs of \$2,005.63 which were proximately related and reasonably foreseeable because of the fraudulent acts of defendants.

12. Plaintiffs have incurred attorneys fees in the amount of \$6,521.00.

13. Neither defendant Vantage Income Properties nor its successors has made demand upon plaintiff for payment of the trust deed note in the amount of \$16,000.00 dated July 2, 1985.

14. The trust deed securing the above trust deed note was subject to a senior mortgage.

15. The senior mortgage has been foreclosed.

16. The Court makes no findings as to defendant Steve

Holcomb who filed a petition for relief in bankruptcy, File No. 88A-00959 in the United States Bankruptcy Court for the District Court of Utah, Central Division.

17. The Findings, Conclusions and Judgment contained herein are the same as those previously served upon defendants' counsel by mailing on February 16, 1988 except that no finding nor conclusion is made nor judgment entered against Steve Holcomb.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the court hereby makes the following conclusions of law:

1. Pursuant to prior orders of the court, plaintiffs are entitled to an order striking defendants' answers and pleadings regarding plaintiffs' first cause of action and plaintiffs are entitled to a default judgment on their first cause of action.

2. Defendants have defrauded plaintiffs.

3. Damages discussed in the findings were all reasonably foreseeable and proximately caused by defendants in light of their fraudulent conduct.

4. Damages are to be trebled pursuant to Utah Code Annotated § 76-10-1605 (as enacted in 1981) which section governs this case.

5. The court's order disposes of significant issues of this case.

6. Plaintiffs have not been damaged by Defendants failure to demand payment of the \$16,000.00 trust deed note.

7. The principal reason for plaintiffs' loss was the fraud

of defendants.

8. The \$16,000.00 trust deed note is unsecured.

9. The court reserves the right to include Steve Holcomb in these findings and conclusions and judgment herein at such time as the automatic stay in his bankruptcy does not apply.

ORDER GRANTING DEFAULT JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, the court hereby orders, adjudges and decrees as follows:

1. Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the court expressly determines and concludes that there is no just reason for delay and expressly directs that a final judgment be entered on plaintiffs' first cause of action which judgment is entitled to direct appeal to the Utah Supreme Court.

2. The answer and pleadings of defendants Vantage Income Properties and Bruce Honey are hereby stricken as to plaintiffs' first cause of action.

3. Plaintiffs are granted judgment against defendants Vantage Income Properties and Bruce Honey, jointly and severally, for actual and consequential damages in the sum of \$47,077.55.

4. Under plaintiffs' first cause of action, damages are hereby trebled pursuant to Utah Code Ann. § 76-10-1605 (as enacted in 1981) and judgment is hereby granted in favor of Plaintiffs and against all defendants Vantage Income Properties and Bruce Honey, jointly and severally, for the additional sum of \$94,155.10.

5. Plaintiffs are hereby awarded judgment against all defendants Vantage Income Properties and Bruce Honey, jointly and severally, for attorneys fees in the amount of \$6,521.00.

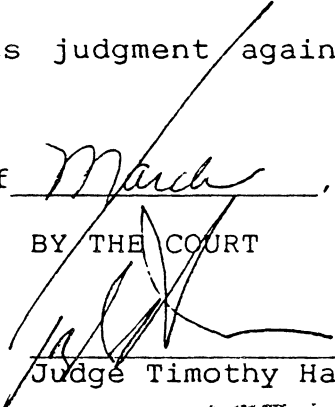
6. Plaintiffs are entitled to interest on all of the above money judgments at the legal rate of 12% until such judgments are paid in full.

7. To stay Plaintiffs enforcement of the above money judgments, Defendants must post a supersedeas bond in the sum of \$53,598.55 or an appropriate property bond in double the amount of money damages (not trebled).

8. The court reserves judgment against defendant Steve Holcomb.

DATED this 28 day of March, 1988.

BY THE COURT

  
\_\_\_\_\_  
Judge Timothy Hanson

By \_\_\_\_\_