

1989

# Leon Sprouse v. Roy N. Jager, Artie Edmunds, and Interwest Commercial Properties : Brief of Appellant

Utah Court of Appeals

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**BRIEF**

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IN THE COURT OF APPEALS

DOCKET NO. 89-642 CA OF THE STATE OF UTAH

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LEON SPROUSE,

:

Plaintiff,

:

vs.

ARJEN W. JAGER, NADA H.

:

JAGER, ARTIE EDMUNDS,

LLOYD WALTERS, and JOHN DOES

:

1 through V,

:

Defendants.

Case No. 890642-CA

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ROY N. LARSEN, ARTIE  
EDMUNDS, and INTERWEST  
COMMERCIAL PROPERTIES,

:

Third-Party  
Plaintiffs-Respondents,

:

vs.

:

LEON SPROUSE,

:

Third-Party  
Defendant-Appellant.

:

Oral Argument  
Category No. 14b

---

**BRIEF OF APPELLANT**

---

APPEAL FROM THE FINAL JUDGMENT OF THE  
FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY,  
UTAH, THE HON. J. PHILIP EVES, PRESIDING

---

FRED D. HOWARD and  
LESLIE W. SLAUGH, for:  
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ATTORNEY FOR RESPONDENTS

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

---

LEON SPROUSE, :

Plaintiff, :

vs. :

ARJEN W. JAGER, NADA H. :

JAGER, ARTIE EDMUNDS, :

LLOYD WALTERS, and JOHN DOES :

1 through V, :

Defendants. :

Case No. 890642-CA

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ROY N. LARSEN, ARTIE :

EDMUNDS, and INTERWEST :

COMMERCIAL PROPERTIES, :

Third-Party :

Plaintiffs-Respondents, :

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ATTORNEY FOR RESPONDENTS

## LIST OF PARTIES

In addition to the parties reflected on the cover, Heritage Savings and Loan, formerly Heritage Thrift and Loan, was named as a third-party defendant in a pleading filed September 15, 1986. (R. vol. I, p. 15.) The claims against Heritage Savings and Loan were dismissed without prejudice on January 12, 1987. (R. vol. I, pp. 121-22.)

In addition to the attorneys reflected on the cover, the following attorneys entered appearances in this action:

For the plaintiff:

Gary W. Pendleton of Pendleton & Terry, St. George, Utah.

R. Clayton Huntsman, St. George, Utah.

For Arjen W. Jager and Nada H. Jager:

Terry L. Wade of Snow & Nuffer, St. George, Utah.

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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LEON SPROUSE,	:	
Plaintiff,	:	Case No. 890642-CA
	:	
vs.	:	
	:	
ARJEN W. JAGER, NADA	:	
H. JAGER, ARTIE	:	
EDMUNDS, LLOYD WALTERS,	:	
and JOHN DOES 1 through	:	
V,	:	
Defendants.	:	

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ROY N. LARSEN, ARTIE	:	
EDMUNDS, and INTERWEST	:	
COMMERCIAL PROPERTIES,	:	
Third-Party	:	
Plaintiffs-Respondents,	:	
	:	
vs.	:	
	:	
LEON SPROUSE,	:	
	:	
Third-Party	:	
Defendant-Appellant.	:	

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JURISDICTION

This is an appeal as of right from the judgment of the Court in a civil case following a bench trial. The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(j) (Supp. 1989). The Supreme Court transferred this case to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1989). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1989).

## ISSUES PRESENTED

1. Is a modification of the payment terms of a real estate commission required by the statute of frauds to be in writing and signed by the real estate broker?

2. Did the evidence establish as a matter of law that Edmunds consented to and accepted the modification of a contract for payment of a real estate commission and was the trial court's finding, that Edmunds did not consent to the modification, contrary to the great weight of the evidence?

3. May a party selectively claim the benefits of lien, interest, and attorney fee provisions of a contract while repudiating other integral portions of the same contract?

4. Did the trial court err in awarding Edmunds all of his attorney fees incurred in this litigation where most of the fees were not related to the point on which plaintiff prevailed?

## DETERMINATIVE PROVISIONS

Utah Code Ann. § 25-5-4 (1989), as in effect at the times in issue, provided, in pertinent part, as follows:

In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

. . . .

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Section 25-5-4 was amended in 1989 effective April 24,

1989, but no substantive changes were made in the quoted provisions. Utah Code Ann. § 25-5-4 (Supp. 1989).

## STATEMENT OF THE CASE

### A. Nature Of The Case.

This is a civil case to recover a real estate commission. The case arises out of the sale of a motel in St. George, Utah. Numerous other claims were asserted among the parties but are not relevant to the issues raised on appeal.

### B. Course Of Proceedings And Disposition Below.

Leon Sprouse commenced this action on September 10, 1986, by filing a complaint against Arjen W. Jager to declare a forfeiture of Jager's interest, under a Uniform Real Estate Contract, in the motel which Jager had purchased from Sprouse. (R. vol. I, pp. 1-7.) Artie Edmunds, although not then a party to the action, filed an affidavit claiming an interest in the property. (R. vol. I, p. 47.) Sprouse ultimately amended his complaint to seek judicial foreclosure of all interests inferior to his vendor's interest under the Uniform Real Estate Contract, and named Artie Edmunds and others as additional defendants. (R. vol. I, pp. 93-103.) Arjen Jager asserted a counterclaim against Sprouse alleging that Sprouse made fraudulent misrepresentations to induce Jager to purchase the motel, and filed a cross-claim against Artie Edmunds making essentially the same allegations. (R. vol. I, pp. 107-20.) Edmunds filed a counterclaim against Sprouse for a declaration that he had a lien on

the motel pursuant to a "Note/Agreement/Assignment" and alleged that his lien should be paid first from the proceeds of any foreclosure sale, and also cross-claimed against Jager for foreclosure of that lien. (R. vol. I, pp. 126-34.)

A judgment and decree of foreclosure was ultimately entered against the defendants. (R. vol. II, pp. 96-99, 190.) The property was sold at a sheriff's sale on December 10, 1987, and the property was sold to Leon Sprouse for a credit bid of \$360,000.00. (R. vol. II, pp. 102-03.) The remaining claims by and against Jager were subsequently dismissed by stipulation of the parties. (R. vol. II, pp. 194-95.)

On October 22, 1987, which was subsequent to the hearing which resulted in the Judgment and Decree of Foreclosure, but prior to the entry of that Judgment, Roy N. Larsen, Artie Edmunds, and Interwest Commercial Properties, as third-party plaintiffs, filed a "Third-Party Complaint in Intervention" against Leon Sprouse, as third-party defendant. (R. vol. II, pp. 83-90.) The Third-Party Complaint in Intervention sought recovery of a real estate commission from Sprouse. Sprouse counterclaimed asserting that the third-party plaintiffs had misrepresented Jager's financial ability and sought dismissal of the claim for a commission and judgment for damages. (R. vol. II, pp. 111-20.) The case proceeded to trial on the Third-Party Complaint in Intervention and Sprouse's counterclaim in the

third-party action.<sup>1</sup> The court after trial found the issues in favor of the third-party plaintiffs and entered Reinstated Findings of Fact and Conclusions of Law and Reinstated Judgment on July 12, 1989.<sup>2</sup> (R. vol. II, pp. 147-53, 154-55.)

Sprouse filed his Notice of Appeal on August 10, 1989. (R. vol. III, pp. 194-95.) At the time the Notice of Appeal was filed, Sprouse had pending a motion under Utah R. Civ. P. 60(b) for relief from the "Order Reinstating Original Findings of Fact and Conclusions of Law and the Original Judgment Nunc Pro Tunc." (R. vol. III, pp. 162-65.) The motion was denied by Order entered on September 1, 1989. (R. vol. III, pp. 201-02.)

C. Statement Of Facts.

This action arises out of the sale of the Oasis Motel in St. George, Utah. Leon Sprouse, the owner of the motel, had

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<sup>1</sup>Sprouse is unaware of any order which formally dismissed Sprouse's initial complaint against Edmunds or Edmunds' counter-claim against Sprouse.

<sup>2</sup>The convoluted procedural history which led to the entry of "reinstated" findings, conclusions and judgment is not relevant to the issues raised on appeal and is not set forth in detail. Briefly stated, Edmunds submitted proposed findings of fact and conclusions of law and a judgment, and Sprouse objected to the form of the proposals. The proposals were nevertheless inadvertently signed by the court, but not entered, and were subsequently vacated by minute entry. The court then initially sustained Sprouse's objections to the proposed findings and conclusions and directed Edmunds to prepare a new proposal. Edmunds thereafter asserted that Sprouse's initial objection had been untimely and requested that the initial findings of fact and conclusions of law and judgment be reinstated. Sprouse's counsel inadvertently failed to appear at the hearing on the motion for reinstatement, and the motion was granted. Sprouse thereafter moved to vacate the reinstated findings and judgment. The court denied the motion to vacate.

signed a listing agreement with Interwest Commercial Properties, but it had expired on October 12, 1984. (Exhibit No. 1.) In February, 1985, Artie Edmunds, a real estate sales agent for Interwest Commercial Properties (Tr. 77), contacted Sprouse to inquire whether he would be interested in selling the motel to a potential purchaser whom Edmunds had located. (Tr. 84, 165.) No listing agreement was in force at that time. The prospective purchaser, Arjen Jager, had no cash and offered other properties in trade for the down payment. (Tr. 167.) An Earnest Money Sales Agreement was ultimately signed between Arjen Jager and Leon Sprouse on March 11, 1985. (Exhibit No. 2, copy attached in Appendix C.)

The Earnest Money Sales Agreement included a provision signed by Sprouse wherein Sprouse agreed to pay "Artie Edmunds-Interwest Commercial Properties" a \$25,000.00 real estate commission. Sprouse testified that Edmunds had agreed, prior to Sprouse signing the Earnest Money Sales Agreement, that payment of the commission was contingent on Jager performing his obligations under the contract, and agreed to include a provision to that effect in the final closing documents. (Tr. 177-78.) Edmunds disputed that testimony. (Tr. 118.)

The transaction closed on Friday, March 29, 1985. The closing documents were prepared by James Ivins, an attorney and owner of Meridian Title Company. (Tr. 211.) The Earnest Money Sales Agreement was replaced by a Uniform Real Estate Contract. (Exhibit No. 3.) Ivins also prepared a "Note/Agreement/Assign-

ment" to set forth the obligation to pay the real estate commission. It is this Note/Agreement/Assignment (hereinafter "NAA") which was the primary focus of the controversy in this action.

Mr. Ivins testified that his instructions on what to prepare for the closing regarding the real estate commission came only from Mr. Edmunds. (Tr. 215.) He testified that the instructions came both by telephone call (Id.) and by a note mailed to him by Mr. Edmunds. (Tr. 236, 243, Exhibit No. 24.) Ivins specifically testified that Edmunds instructed Ivins that Sprouse was to have no personal liability for the real estate commission if Jager defaulted. (Tr. 213-14, 245-47.) Edmunds acknowledged giving instructions to Ivins that payment of the commission was to be deferred and paid over 48 months (Tr. 104), and acknowledged that he had sent a note (Exhibit 24) to Mr. Ivins concerning the commission. (Tr. 256, l. 21-22.) Edmunds denied making any statements to Ivins regarding what would happen on the real estate commission if Jager defaulted in his payments (Tr. 105), and specifically denied that he had agreed that Sprouse would not be personally liable for the real estate commission. (Tr. 118.)

The NAA was signed by Leon Sprouse with the other documents at the closing. (Tr. 117, 176, 217.) The NAA is signed only by Sprouse. Ivins prepared the NAA for signature only by Sprouse because promissory notes are usually signed only by the promisor

(Tr. 233), and because he was not aware of the statute of frauds relating to real estate commission agreements. (Tr. 242.)

On the following Tuesday, April 2, 1985, Interwest Commercial Properties assigned the NAA to Edmunds. (Tr. 121, Exhibit 16.) On April 24, 1985, Edmunds assigned the NAA to Draper Bank & Trust as security for a loan. (Tr. 123, Exhibit 17.) He reacquired the NAA on September 24, 1986, after this action was commenced. (Tr. 124; Exhibit 19.)

Jager took possession of the motel on April 1, 1985. (Tr. 48.) He made his payments on the contract regularly until May, 1986. (R. vol. I, p. 158.) A portion of each of the payments had been applied to the real estate commission, and the remaining principal balance of the \$25,000.00 commission, at the time Jager stopped making payments, was \$19,226.80. (Exhibit 21.) Jager relinquished possession of the motel to Sprouse on June 28, 1987 (Tr. 50, 51, 61), and Sprouse purchased the motel at the foreclosure sale.

#### SUMMARY OF ARGUMENT

The trial court found that Sprouse did not carry his burden of proof in proving that there had been a modification of the agreement to pay a real estate commission which was initially set forth in the Earnest Money Sales Agreement. The trial court's finding was based in part on the legal conclusion that any modification of the payment terms for the real estate commission was within the statute of frauds and required to be signed by the broker. The statute of frauds does not, however,



apply to modifications of the payment terms of a real estate commission contract. The statute of frauds requires only that the contract of employment (the agreement to pay a commission) be in writing. Once the contract of employment is in writing, the parties may modify the payment provisions of that contract by parol. Where the trial court's factual finding was based on an erroneous assumption of law, the case must be remanded for a new trial.

The trial court's finding, that Sprouse failed to carry his burden of proof of showing that the real estate commission agreement was modified, was also contrary to the great weight of the evidence. Every witness with personal knowledge of the facts, except for Edmunds, testified that Edmunds had agreed that Sprouse would not be personally liable for the commission. The evidence further established, without dispute, that Edmunds treated the NAA as being the sole document which governed the real estate commission obligation. This is reflected in an assignment of the NAA on the Tuesday following the Friday closing, and continuing through the initial pleadings filed by Edmunds in this action. His self-serving denial of consent to the NAA was contrary to the great weight of the evidence and the court erred in failing to find that he had consented to the NAA.

Notwithstanding the trial court's conclusion that Sprouse could not enforce the beneficial provisions of the NAA, the trial court enforced those provisions of the NAA adverse to Sprouse. Piecemeal enforcement of a contract is not permis-

sible. Either the entire contract was agreed to by the parties, or no portion of it was. The trial court's award of prejudgment interest at 12% per annum and the award of attorney fees were both based on provisions of the NAA and must therefore be vacated.

The award of attorney fees is, in any event, not supported by the evidence. Edmunds was entitled to recover attorney fees, if at all, only with respect to the issues on which he prevailed. The testimony showed that only one-third of the \$9,000.00 attorney fees were incurred with respect to the issues on which Edmunds prevailed.

## ARGUMENT

### POINT I

#### THE MODIFICATION OF THE REAL ESTATE COMMISSION AGREEMENT WAS NOT WITHIN THE STATUTE OF FRAUDS.

The trial court's finding that "defendant has failed to meet his burden of proof on his claim that there was a written or oral modification of his obligation to pay a commission" (Reinstated Findings of Fact, para. 8, R. vol. III, p. 149) was based in part on the court's legal conclusion that any modification of the real estate agreement was required by the statute of frauds to be in writing. (Conclusions of Law, para. 4, R. vol. III, p. 152.) Review of this question of statutory construction should be under a correctness standard with no deference given to the trial court's ruling nor to the finding based thereon. Nephi City v. Hansen, 779 P.2d 673, 674 (Utah 1989).

Sprouse acknowledges for the purpose of this appeal that the Agreement to Pay Real Estate Commission contained in the Earnest Money Sales Agreement dated March 11, 1985, constituted an enforceable obligation pay a real estate commission.<sup>3</sup> The record in this case establishes, however, that there was a subsequent modification of that agreement, the terms of which are set forth in the Note/Agreement/Assignment ("NAA") dated April 1, 1985. The NAA was signed, however, only by Leon Sprouse and was not signed by Edmunds or his principal broker. The trial court held that the modification was barred by the statute of frauds.

The statute of frauds does not apply to this modification because (1) the NAA modified only the terms of payment, whereas the writing requirement of the statute of frauds applies only to the term of employment, (2) neither Edmunds nor his broker was the "party to be charged" and their signatures were not required by the statute of frauds, and (3) the requisite signature was provided in any event by documents signed by Edmunds and his broker as part of the same transaction. These arguments are addressed in order.

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<sup>3</sup>Sprouse contended at trial that the agreement was unenforceable because of Edmunds' failure to procure a ready, willing, and able buyer, and by Edmunds' misrepresentations concerning Jager's ability to pay for and operate the motel. The facts were in dispute with respect to that issue, and the trial court found the issues in favor of Edmunds. Sprouse accordingly does not challenge that finding on appeal.

- A. Because The NAA Altered Only Terms Of Commission Payment, And Not Terms Authorizing The Broker To Sell, The NAA Is Not Within The Statute Of Frauds.

The general rule governing modifications of contracts within the statute of frauds is "that if the original agreement is within the statute of frauds, a subsequent agreement that modifies any of the material parts of the original must also satisfy the statute." Allen v. Kingdom, 723 P.2d 394, 396 (Utah 1986) (emphasis added). Yet, there are many exceptions. As indicated above, if a subsequent modification is not a "material part" of the contract, the modification is not within the statute. The discerning question is what is a "material part" of the contract.

In C. J. Realty, Inc. v. Willey, 758 P.2d 923- (Utah Ct. App. 1988), the court discussed what is "material" in a broker's contract. After finding that Utah Code Ann. § 25-5-4(5) applies to brokers' contracts generally, including finders' contracts, the court said that "the essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of employment." Id. at 928 (quoting Pray v. Anthony, 96 Cal. App. 772, 274 P. 1024, 1029 (1929)). The Utah Code itself provides that:

In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

. . . .

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4 (1989 (prior to 1989 amendment)) (emphasis added). It is clear that the "material parts" of a broker's contract are those terms that employ him. Subsequent modification of those terms must be in writing, and subscribed by the party to be charged. Golden Key Realty, Inc. v. Mantas, 669 P.2d 730, 732 (Utah 1985). In this instance, however, the NAA does not alter terms that "authorize" or "employ." Mr. Edmunds was previously authorized to sell the property for a commission, and had performed. Rather, the NAA alters the terms for compensation and is nothing more than a security agreement. These terms are not "material parts" of the original contract within the statute of frauds.

Utah Code Ann. § 25-5-1 makes it clear that the purpose of the statute of frauds is to protect interests in real property. In particular, the purpose of § 25-5-4(5) is "to protect property owners from fraudulent and fictitious claims for commissions." C. J. Realty, Inc., 758 P.2d at 927 (citing Williams v. Singleton, 723 P.2d 421, 424 (Utah 1986)). In other words, because the owner employing the broker has an interest in real property, the legislators sought to protect him against claims for commission when the brokers were never "authorized" or "employed." As the result, the contract that "authorizes" or "employs" the broker must be in writing and subscribed by the

party to be charged; while the contract involving only the terms of commission does not.

The Utah Supreme Court has stated several times that § 25-5-4(5) does not apply to terms of commission. In Fowler v. Taylor, 554 P.2d 205 (Utah 1976), a dispute arose between two brokers over the terms of their commissions. The contract between the two was oral, and the defendant contended that because it was oral, the statute of frauds barred its performance. The court held that it did not. The contract was merely an agreement over the terms of commission. 554 P.2d at 208.

Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985), involved a situation more analogous to the one presented here. In Golden Key, the issue was whether an executory accord over the terms of commission was within the statute of frauds. The court found that an accord is not within the statute of frauds even though the original contract is, unless the accord itself is the type of contract within the statute. 699 P.2d at 732-33. The court held that the modification contract was not within the statute, although it altered the terms of commission and was between the broker and the landowner. Id. The NAA in the instant case similarly was not within the statute of frauds.

B. Even If The NAA Is Within The Statute Of Frauds, The Broker Is Not A "Party to be Charged" And Need Not Evince Acceptance Of The NAA By Signature.

Every contract for the sale of land must be "in writing subscribed by the party by whom the lease or sale is to be

made." Utah Code Ann. § 25-5-3 (1989). In other words, the party conveying the land must sign the contract to satisfy the requirements of the statute. Williams v. Singleton, 723 P.2d 421, 424 (Utah 1986). This is to protect owners having an interest in real property from buyers suing to force sale. Buyers, on the other hand, need not sign the contract to make it enforceable because they are not "the party to be charged." Id. LeVine v. Whitehouse, 37 Utah 260, 109 P. 2 (1910).

With real estate commissions, the same rule applies. Contracts authorizing or employing the broker to sell property are within the statute of frauds to protect the landowners against fraudulent claims for commission. Fowler v. Taylor, 554 P.2d 205, 208 (Utah 1976). Landowners have an interest in real property that merits the statute's protection. Consequently, only the landowner must sign the real estate contract authorizing and employing the sale to satisfy the requirements of the statute.

Any modification of a contract employing a broker is also within the statute of frauds and must be signed by the landowner as well. Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732, 733 (Utah 1985). Nevertheless, it does not follow that the broker must sign a modification to satisfy the statute. Modifications must meet the same statutory requirements as the original, Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741, 742 (Utah 1982), but no requirement exists for the broker to sign the original. Simply because the broker gets a commission

does not mean that he acquires an interest in land that merits the statute's protection. The broker has no such interest. His fight is only for a commission, and the statute was not enacted for that purpose. See Fowler, 554 P.2d at 208; see also Golden Key Realty, 699 P.2d at 732, 733.

This is not to say that the vendor may unilaterally alter the terms of the broker's commission; neither can the vendor alter terms of the sale without the vendee's assent. Clearly, the broker has rights in the contract and any modification must be assented to. The point is that he need not assent by signature. The broker is not "a party to be charged" and can evince acceptance of a modification as any party would who is not a party to be charged.

In this case, Mr. Edmunds' signature as assignee of the Assignment of Contract and as assignor of the Assignment of Note (Exhibits 16 and 18, respectively), his receipt of payments pursuant to the NAA, and his attempts to claim benefits under the NAA obviously manifest his assent to the NAA instrument and bind him to its terms.

C. Even If The NAA Is Within The Statute Of Frauds And Edmunds Is A Party To Be Charged, A Sufficient Writing Exists That Will Satisfy The Statute.

Most American jurisdictions agree that "[c]ompliance with the Statute of Frauds is not limited to a single, signed piece of paper, but may be evidenced by several documents clearly related." Knight v. American Nat'l Bank, 756 P.2d 757, 760 (Wash. App. 1988). Utah has long accepted this rule. See



Miller v. Hancock, 67 Utah 202, 246 P. 949, 951, 952 (1926) (several deeds to exchange land satisfied the statute though not signed by all parties); Midwest Realty v. City of West Jordan, 541 P.2d 1109, 1111 (Utah 1975) (city council's minutes containing the terms and provisions of an agreement satisfied the statute); In re Estate of Bonny, 600 P.2d 548, 549, 550 (Utah 1979) (three receipts which referred to a real estate transaction as a "sale," stated the consideration for the sale, acknowledged receipt of part payment, referred to "11 acres in Alpine," and were subscribed by the seller satisfied the statute); Gregerson v. Jensen, 617 P.2d 369, 372, 373 (Utah 1980) (an unsigned deed that contained the names of the parties and a description of the land involved, and a signed check referring to the deed, satisfied the statute).

In Gregerson, the Utah Supreme Court outlined the requirements that several writings must meet to satisfy the statute of frauds. The court found that several writings may be construed together as containing all the terms of a contract, though they are not all signed by the party to be charged, provided that some nexus between the writings is shown. Gregerson, 617 P.2d at 372, 373. This nexus can be shown "either by express reference in the signed writing to the unsigned one, or by implied reference gleamed [sic] from the contents of the writings and the circumstances surrounding the transaction." Id. at 373 (emphasis added). If the reference in the signed writing is implied, the writings must "clearly refer to the same

subject matter or transaction." Id. Moreover, an implied reference may be shown by parol evidence. Id. In Gregerson, the court found that because there was an implied reference in the signed check to the unsigned deed and several express references to the contract, including the contents of the deed, together with the fact that the bank had custody of the deed within a few days after part payment and that the vendor acknowledged the propriety of the deed, a sufficient nexus between the writings existed, and the writings satisfied the statute of frauds.

In this instance, three writings satisfy the demands of the statute. They are: (1) the NAA, granting Interwest a security interest in the payments Leon Sprouse received under his contract dated March 29, 1985 (Exhibit 15); (2) the Assignment of Contract by which Interwest assigned its rights in the NAA to Artie Edmunds (Exhibit 16); and (3) the Assignment of Note by which Artie Edmunds assigned his rights in the NAA to Draper Bank & Trust (Exhibit 18). Because the NAA and the Assignment of Contract are dispositive in this matter, this discussion will focus on those two writings.<sup>4</sup>

A clear nexus exists between the NAA and the Assignment of Contract that satisfies the statute of frauds. The Assignment provides that the seller in the contract dated March 29, 1985,

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<sup>4</sup>However, virtually everything discussed about the nexus between the NAA and the Assignment of Contract applies with equal force to the nexus between the NAA and the Assignment of Note.

"has conveyed to Interwest Commercial Properties a security interest of \$25,000.00 as set forth in the attached note agreement dated April 1, 1985." (Exhibit 16.) Leon Sprouse is the seller referred to. The NAA is the only note agreement by which, on April 1, 1985, Leon Sprouse granted to Interwest a \$25,000.00 security interest in his contract. The Assignment can have reference to no other writing but the NAA. Moreover, the NAA was attached to the Assignment and was dated the day before the Assignment.

Without question, the Assignment refers to the NAA. The Assignment was signed by Interwest, the secured party in the NAA, and by Mr. Watson, the owner of Interwest. The Assignment is a signed writing with an "express reference" to the unsigned NAA, and these two writings, taken together, satisfy the statute of frauds. See Gregerson, 617 P.2d at 373. These two writings plainly show that the NAA modifies Leon Sprouse's original contract to employ Interwest or Mr. Edmunds as contained in the Earnest Money Sales Agreement and that enforcement of the NAA is not barred by the statute of frauds.

## POINT II

### THE GREAT WEIGHT OF THE EVIDENCE ESTABLISHED THAT EDMUNDS CONSENTED TO THE MODIFICATION OF THE REAL ESTATE COMMISSION AGREEMENT.

The trial court found that "defendant has failed to meet his burden of proof on his claim that there was a written or oral modification of his obligation to pay a commission . . . ." (Findings, para. 8, (R. vol. III, p. 149).) This finding should

be reversed by this court because it is contrary to the great weight of the evidence. In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

Sprouse testified at trial that Edmunds had agreed, prior to the execution of the Earnest Money Sales Agreement on March 11, 1985, that payment of the \$25,000.00 commission would be contingent upon receiving payments from the buyers, Jager. This testimony was corroborated by the only independent witness, James Ivins, who prepared the documents which were signed at the closing of the transaction. Mr. Ivins testified that Edmunds had instructed him that payment of the commission was contingent upon receiving payments from Jager, and that Sprouse was to have no personal liability for payment of the commission. Ivins testified that he prepared the NAA to reflect that agreement. Edmunds and his principal broker accepted the NAA, and the principal broker assigned it to Edmunds on April 2, 1985. On April 24, 1985, Edmunds assigned the NAA to Draper Bank & Trust as security for a loan.

Shortly after this action was commenced, Edmunds filed an affidavit claiming rights in the subject property by virtue of the NAA. (R. vol. I, pp. 47-50.) Edmunds thereafter filed his Answer to Second Amended Complaint; Counterclaim Against Plaintiff and Cross-Claim Against Jagers. (R. vol. I, pp. 126-34, copy attached as Appendix G.) Edmunds therein claimed an interest in the real property under the NAA, and counterclaimed against Sprouse to assert that interest. He also cross-claimed

against Jager seeking foreclosure and a deficiency judgment in the event the proceeds of foreclosure were insufficient to satisfy Edmunds' claim. Most notably, he did not pray for a money judgment against Sprouse on the real estate commission. This apparently deliberate acknowledgement of no right to a money judgment against Sprouse continued through the pre-trial order. (R. vol. I, pp. 154-63.) It was not until after Sprouse filed a motion for summary judgment, asserting that Edmunds' right to recover the commission had terminated by Jager's default (R. vol. I, pp. 180-81, 217-33), that Edmunds first asserted that the NAA was not binding and enforceable and that Sprouse was personally obligated to pay the commission. (R. vol. I, pp. 236-40, 241-50.)

Edmunds' principal broker, Roy Larsen, testified that he understood that the brokerage had agreed to take a note for the payment of the commission with deferred payments (Tr. 25), and that the note (the NAA) was subsequently assigned in full to Edmunds (Tr. 27). Edmunds, who was the only representative of the brokerage who attended the closing, testified that payment of the commission was not provided for in the settlement statement, because it would be paid under a note. (Tr. 110.) That note was the NAA. (Tr. 121.)

In summary, all of the evidence at trial established that Edmunds and his broker had treated the obligation to pay the commission as being contained solely in the NAA, and had accepted the NAA and the benefits received under it. The only

contrary testimony was the self-serving testimony of the principal broker, who testified that he had not agreed to any modification of the commission agreement. (Tr. 26.) He further testified, however, that a week or two after closing he became aware of the provision in the NAA which states that Sprouse was not personally obligated to pay the real estate commission, and stated that he discussed that provision with Mr. Edmunds at that time. (Tr. 27.) Edmunds denied that he had ever heard of that provision until after the litigation was commenced. (Tr. 119-20.)

The only other evidence offered against the enforceability of the NAA was the self-serving testimony of Mr. Edmunds, who acknowledged receiving the NAA and assigning it to his bank as security for a loan, but who claimed he was not aware of the provision limiting Sprouse's personal liability and that he did not agree to any such provision.

Where all the evidence showed that both Edmunds and his principal broker had accepted the NAA and that all their acts, until well after the commencement of this litigation, were in accordance with the proposition that Sprouse was not personally liable for payment of the commission, and where the only independent testimony established that Edmunds had specifically dictated the terms of the NAA and had agreed to them, the trial court's finding that Sprouse failed to carry his burden of proof of showing consent to the modification was clearly erroneous.

Sprouse is aware of the numerous decisions which hold that the findings of the trial court on disputed issues of fact will not be reversed unless clearly erroneous, and that great deference is given to the trial court's ability to assess the credibility of the witnesses. The Utah Supreme Court has also frequently stated, however, that self-serving statements of a witness are entitled to little weight, particularly where the witness's actions contradict his statements. For example, in First Security Bank of Utah v. Shiew, 609 P.2d 952 (Utah 1980), the Court addressed the question of whether an after-acquired property clause, or dragnet clause, in a mortgage agreement executed by Shiew in Monticello, Utah, also operated to secure a subsequent loan obtain by Shiew from the bank in Price, Utah. The Court established that one of the factors in determining whether the dragnet clause was enforceable was whether the bank had relied on the security in extending the loan. 609 P.2d at 957. The bank officer who prepared the Price loan testified that he was aware of the Monticello loan and was aware of the dragnet clause in the mortgage and relied on the Monticello property as constituting additional security for the Price loan. (609 P.2d at 958-59) (Hall, J., dissenting). A majority of the Court nonetheless held that "[t]he self-serving statements of the bank officer" were "of no evidentiary value." 609 P.2d at 957.

Of similar effect is Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966). The plaintiff in

that case sought to overcome the presumption of delivery of certain deeds which he had previously executed in favor of his children, and which he claimed were intended to be effective only upon his death. The Supreme Court affirmed summary judgment against the plaintiff, notwithstanding his clear testimony concerning his intentions, stating that his "testimony that he did not intend title to pass prior to his death is self-serving and inconsistent with his actions." 413 P.2d at 810. See also Pollesche v. K-Mart Enterprises of Utah, Inc., 520 P.2d 200, 203 (Utah 1974) (judgment of dismissal in jury action at close of plaintiff's evidence affirmed notwithstanding the plaintiff's testimony, because the testimony was self-serving).

The trial court's reliance in the instant case on the self-serving statements of Edmunds and his principal broker, to the exclusion of all the other evidence, including the only independent testimony, was clearly erroneous. The evidence established as a matter of law that Edmunds accepted the NAA, and was bound by all provisions of it.

### POINT III

#### THE TRIAL COURT ERRED IN ENFORCING PORTIONS OF THE NAA WHILE HOLDING OTHER PORTIONS UNENFORCEABLE.

The trial court's ruling in this case permitted Edmunds to have his cake and eat it too. The trial court held that Edmunds was not bound by the provision of the NAA which eliminated the personal liability of Sprouse, yet held that Edmunds was entitled to recover benefits under the other portions of the



NAA, specifically those relating to a lien on the subject premises, provisions relating to interest, and provisions relating to attorney fees. This legal conclusion should be reviewed by this court on a correctness standard with no deference to the trial court.

The NAA was clearly an "entire," as opposed to "severable," contract. The distinction between the two depends on the intent of the parties:

A contract is severable or entire depending on the intent of the parties at the time they entered into the contract.

This intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from the extrinsic parol evidence of the intentions.

Management Services Corp. v. Development Associates, 617 P.2d 406, 408 (Utah 1980) (citations omitted).

The four corners of the NAA will admit of no other conclusion but that it was an "entire" contract. Nothing in the contemporaneous writings would alter that conclusion, and it is further supported by the extrinsic parol evidence. Sprouse testified, and there was no contrary evidence, that his acceptance of the Earnest Money Sales Agreement and his execution of the NAA was contingent upon the understanding that he would not be personally liable for the sales commission. (Tr. 179.)

Because the contract was entire, severable enforcement was improper. Either the whole contract must be enforced, or no portion of it.

The trial court's award of 12% pre-judgment interest is supported only by the NAA. Sprouse argues that the NAA should be binding in all respects. If this Court holds that it is not binding, however, it follows that the interest at 12% must be reversed. Absent the provisions of the NAA, the maximum interest which may be charged is 10%. Utah Code Ann. § 15-1-1(2) (Supp. 1989).<sup>5</sup>

Edmunds' claim of a lien on the motel and to an entitlement to the proceeds of the foreclosure is similarly based solely on the NAA. Sprouse disputes Edmunds' claim to an interest in the proceeds of foreclosure, because there were no such proceeds. Sprouse purchased the property at the foreclosure sale by a credit bid, i.e., the bid of \$360,000.00 was credited against Jager's obligation to Sprouse, and reduced the obligation by that amount. No cash was paid. It follows that there was no proceeds upon which a lien could attach. In any event, however, the right to a lien arises only out of the NAA. The Court's judgment providing for a lien is an error for the reasons discussed above.

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<sup>5</sup> The 12% interest rate provided in Utah Code Ann. § 15-1-4 (1989) applies only to judgments other than on a contract. Judgments on contracts bear interest at the rate specified in the contract. Where no interest rate was specified, it follows that the statutory rate of 10% would apply both before and after judgment.

Finally, the Court's award of attorney fees is grounded only in the NAA.<sup>6</sup> The entire award of attorney fees must be vacated.

#### POINT IV

#### THE AWARD OF ATTORNEY FEES IS NOT SUPPORTED BY THE EVIDENCE.

The Trial Court awarded judgment against Sprouse for \$9,000.00 for attorney fees. The entire text of the testimony relating to attorney fees is set forth in Appendix H. Notably lacking is any testimony as to the reasonableness of the fees. Even if the fees were determined to be reasonable, the evidence established that Edmunds was entitled to recover, at most, a fee of only \$3,000.00. In addition, the previous point establishes that there was no contractual basis for an award of any attorney fees.

"An award of attorney fees must be based on evidence in the record which supports the award." Regional Sales Agency v. Reichert, 122 Utah Adv. Rep, 46, 49 (Utah Ct. App. Nov. 24, 1989). This requirement is not satisfied by merely testifying as to the number of hours spent. In Talley v. Talley, 739 P.2d 83 (Utah Ct. App. 1987), for example, this Court reversed an award of attorney fees where no evidence of reasonableness was presented:

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<sup>6</sup> The findings also assert that the award of attorney's fee is based on a provision of the Earnest Money Sales Agreement. The copy of the Earnest Money Sales Agreement admitted into evidence, however, does not contain any provision relating to attorney fees. (Exhibit 2.)

At the close of plaintiff's case, her counsel proffered testimony and produced an exhibit itemizing the time and costs expended by him, his associate, and his clerk, and the hourly rates charged for each. Conspicuously absent is any evidence "regarding the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce actions in the community . . . ." Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980).

739 P.2d at 84. The Court in Talley accordingly reversed the award of attorney fees.

Although Talley dealt with a divorce case, the same principles apply to all cases where an award of attorney fees is sought. Regional Sales Agency, supra. The evidence in this case is wholly insufficient to support a finding of reasonableness. The entire award must therefore be reversed.

Even if this Court were to determine that the evidence was sufficient to justify the award of some attorney fees, the evidence clearly does not justify the award of a fee of \$9,000.00. A party is entitled to recover attorney fees only on the issue on which is prevailed. Mountain States Broadcasting Co. v. Neale, 776 P.2d 643, 649 n. 10 (Utah Ct. App. 1989), rehearing denied, 113 Utah Adv. Rep. 41 (Ct. App. July 20, 1989).

Edmunds' attorney testified at trial that only one-third of his time, or \$3,000.00, was spent in pursuing recovering on the promissory note (the NAA), the issue upon which Edmunds

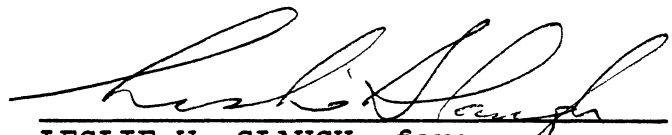
ultimately prevailed. The balance of the award must be disallowed in any event.

#### CONCLUSION

The Note/Agreement/Assignment executed by Sprouse was accepted, as a matter of law, by Edmunds, both by his signature to other documents executed as part of the same transactions, and by his subsequent assignment of and reliance on the agreement. This case should be remanded with instructions to dismiss the complaint against Sprouse.

In the alternative, the case should be remanded with instructions to vacate the award of interest at 12%, to vacate the attorney fees, and to vacate the judgment granting Edmunds a lien on the proceeds of the foreclosure sale. As a final alternative, the attorney fees award should be reduced to \$3,000.00.

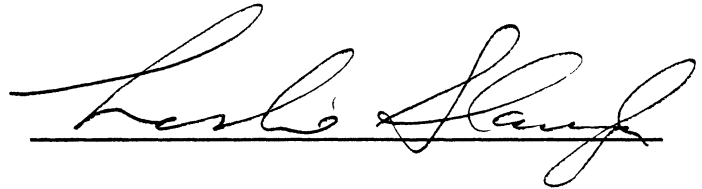
DATED this 8th day of January, 1989.

  
LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 8th day of January, 1990.

John L. Miles, Esq.  
60 North 300 East  
St. George, Utah 84770

A handwritten signature in cursive script, appearing to read "Herb Stang", is written over a horizontal line.

## **APPENDIX "A"**

### **Reinstated Findings of Fact and Conclusions of Law**

FIFTH JUDICIAL DISTRICT  
WASHINGTON COUNTY

WRIGHT & MILES  
By: John L. Miles  
Attorneys for Third-Party Plaintiffs  
60 North 300 East  
St. George, Utah 84770  
Telephone: (801) 628-2612

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CLERK *[Signature]*  
DEPUTY \_\_\_\_\_

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

LEON SPROUSE,	)	
Plaintiff,	)	
	)	REINSTATED
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
ARJEN W. JAGER, NADA H. JAGER,	)	JULY 11, 1989 <u>NUNC</u>
ARTIE EDMUNDS, LLOYD WALTERS,	)	<u>PRO TUNC</u> FOR
and JOHN DOES I through V,	)	NOVEMBER 9, 1988
Defendants.	)	
	)	
ROY N. LARSEN, ARTIE EDMUNDS,	)	
and INTERWEST COMMERCIAL	)	
PROPERTIES,	)	
Third-Party Plaintiffs,	)	
	)	
vs.	)	
	)	
LEON SPROUSE,	)	Civil No. 86-0982
Third-Party Defendant.	)	

The above-entitled matter came on regularly for trial on July 1, 1988 on the third-party plaintiffs' (hereinafter referred to as plaintiffs) complaint against third-party defendant (hereinafter referred to as defendant) and on the counterclaim said defendant filed against plaintiffs, the pleadings having been properly joined. Plaintiffs appeared with their attorney, John L. Miles, and presented evidence, testimony and witnesses in their behalf, and defendant Leon Sprouse appeared with his attorney, R. Clayton Huntsman, and presented evidence, testimony and witnesses in his behalf. The matter was fully tried to the Court, the Honorable J. Philip Eves, District Court Judge, presiding. At the conclusion of the trial, both parties having rested, the Court requested counsel for both parties to submit simultaneous memoranda on July 18, 1988 on



one legal issue and to also submit any closing argument in writing at the same time. The parties having filed their memoranda and closing arguments, and the Court having heard the evidence and testimony at trial, and having reviewed the memoranda and written closing arguments, and good cause appearing, now makes and enters its Findings of Fact and Conclusions of Law, as follows:

#### FINDINGS OF FACT

1. That this Court has jurisdiction of the parties and of the subject matter in this action and that venue is appropriate before this Court. The Court finds that plaintiff Roy N. Larsen is, and was at all material times herein, a licensed Utah real estate broker, and is entitled to bring this action for the recovery of the commission sought in this case.

2. The Court finds that defendant entered into a valid and binding agreement to pay a real estate commission of \$25,000.00 when defendant executed the Earnest Money Sales Agreement (Trial Exhibit P-2) on March 11, 1985, in which defendant accepted the offer of Argen Jager to purchase his Oasis Motel property.

3. The Court finds that, by the explicit language contained in the section of the Earnest Money Sales Agreement titled AGREEMENT TO PAY REAL ESTATE COMMISSION, that defendant agreed to pay the \$25,000.00 commission at the time of closing.

4. The Court finds that the closing on defendant's sale of the Oasis Motel to Argen Jager was held and completed on March 29, 1985 in St. George, Utah, and that Argen Jager took possession of the Oasis Motel and made monthly payments to defendant for 13 months before defaulting by failing to make the payment due June 1, 1986.

5. The Court finds that plaintiffs had procured a buyer who was ready, willing, and able and who was accepted by defendant and that the commission was fully earned and due at said closing on March 29, 1985.

6. The Court finds that none of the commission was paid at the closing because there were no funds available at

closing as defendant had agreed to accept equity in traded properties as Arjen Jager's \$85,000.00 down payment.

7. The Court finds that plaintiffs, at defendant's request, orally consented to a deferred payment of the commission merely to accommodate the defendant by providing a convenient mode or method of payment, as the funds to pay the commission were not available at the closing. The Court finds that this oral arrangement only changed the time of payment and did not change or alter defendant's obligation to pay the commission. The Court further finds that defendant, but not plaintiffs, signed Trial Exhibit P-15, a "NOTE/AGREEMENT/ASSIGNMENT". The Court finds that the "note" and "assignment" portions of Trial Exhibit P-15 is binding on defendant and obligates defendant to pay twelve (12%) percent interest on the commission and costs and expenses of collection, including a reasonable attorney's fee, and secures those obligations by a partial assignment of the Arjen Jager Uniform Real Estate Contract. The Court finds that Trial Exhibit P-15 is not binding on plaintiffs, specifically the "agreement" portion, as it was not signed by plaintiffs, nor does the Court find that plaintiffs orally agreed to the "agreement" portion, as set out in the second to last paragraph.

8. The Court finds that defendant has failed to meet his burden of proof on his claim that there was a written or oral modification of his obligation to pay a commission, which modification defendant contends would release or excuse him from further payments on the commission obligation if Mr. Jager defaulted. The Court further finds that defendant has failed to meet his burden of proof on his claim that plaintiffs' acceptance of 13 monthly payments was either part performance of such a modified written or oral agreement or a waiver of plaintiffs' claim for the commission. The Court finds that plaintiffs' acceptance of 13 monthly payments were not acts that were exclusively referable to any modification of the commission agreement, but that accepting such payments was consistent with defendant's obligation to pay the commission in deferred payments as set forth in the "note" portion of Trial Exhibit P-15. The

acceptance of such payments is therefore not evidence of nor part performance of the "agreement" portion of Trial Exhibit P-15.

9. The Court finds that plaintiffs and defendant did not enter into any written or oral agreement that would modify or alter defendant's agreement and obligation to pay the \$25,000.00 commission.

10. The Court finds that the balance due as of July 1, 1988 on defendant's obligation to pay a \$25,000.00 commission, after giving credit for the 13 monthly payments received, is \$24,239.46.

11. The Court finds that plaintiffs are entitled to a judgment for said balance of \$24,239.46, and that the judgment should carry interest at the rate of twelve (12%) percent per annum from July 1, 1988 until paid.

12. The Court finds that the Earnest Money Sales Agreement (Trial Exhibit P-2) provides in paragraph B of its General Provisions that any defaulting party is obligated to pay all costs and expenses, including a reasonable attorney's fee, which may arise from enforcing the agreement, and that defendant is therefore obligated to pay plaintiffs' reasonable attorney's fees. In addition, as independent grounds for the recovery of attorney's fees, the Court finds that Trial Exhibit P-15 obligates defendant to pay all costs and expenses of collection, including a reasonable attorney's fee, if defendant defaulted on his agreement to pay the commission in monthly installments. The Court finds that defendant did default on the payments required by Trial Exhibit P-15, and that plaintiffs are therefore entitled to recover their costs and a reasonable attorney's fee.

13. The Court finds that a reasonable attorney's fee in this matter is \$9,000.00, based upon evidence that plaintiffs' attorney devoted in excess of 150 hours at an hourly rate of \$60.00 per hour, which rate the Court finds reasonable.

14. The Court finds that defendant gave plaintiffs an assignment of a \$25,000.00 interest in the Uniform Real Estate Contract (Trial Exhibit P-3) when defendant signed Trial Exhibit P-15. The Court further finds that plaintiffs are therefore

entitled to share in the proceeds from the sheriff's sale of the Oasis Motel, which the Court finds was held on December 10, 1987, at which the Oasis Motel property was sold to defendant as the highest bidder for the bid of \$360,000.00.

15. The Court finds, on the defendant's counterclaims, that defendant has failed to meet his burden of proof by clear and convincing evidence that plaintiffs made any material false or misleading statements or representations in connection with the sale of the Oasis Motel to Argen Jager or that defendant justifiably relied thereon to his detriment. Further, the Court finds that plaintiffs did not negligently make any false representations in this matter, nor has defendant shown any evidence that plaintiffs breached any contract or agreement or their fiduciary duty to defendant. Therefore, the Court finds that the counterclaims of the defendant are without merit and should be dismissed with prejudice and on the merits.

16. The Court finds that a judgment was previously signed and entered in this matter on November 5, 1987 in favor of defendant and against Arjen W. Jager in the amount of \$472,473.40. The Court finds that this judgment includes the commission which defendant now seeks to avoid. The Court finds defendant's positions inconsistent, and finds that by obtaining a judgment against Mr. Jager that includes the commission, defendant has acknowledged his own liability for the commission, and that this constitutes independent grounds in support of the above findings that defendant is liable for the commission.

17. The Court finds that the defendant and plaintiffs, by arranging to pay the commission with monthly payments over a four year period as provided in Trial Exhibit P-15 and as shown by Trial Exhibit P-20, manifested their intent that the commission should be paid in full long before the Uniform Real Estate Contract with Mr. Jager (Trial Exhibit P-3) was paid in full. The Court finds that the parties intended that the commission would be fully paid by the time the Jager contract balance was approximately \$375,000.00 as shown by Trial Exhibit P-22. The Court finds that defendant gave plaintiffs a partial

assignment of a \$25,000.00 interest in the Jager contract to secure the payment of the commission (see finding 7 above). The Court finds that under these circumstances where the intent was to pay the commission first, it is equitable to apply the \$360,000.00 proceeds of the Sheriff's sale first to the commission, and the balance to the retained interest of defendant. The Court finds that the assignment and Sheriff's sale constitute independent grounds for plaintiffs' recovery of a commission from defendant.

#### CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction of the parties and of the subject matter and that venue is proper.

2. The Court concludes that UCA §25-5-4(5) requires a real estate commission agreement to be in writing.

3. The Court concludes that Trial Exhibit P-2 (Earnest Money Sales Agreement) contains an enforceable written agreement obligating defendant to pay plaintiffs a \$25,000.00 commission.

4. The Court concludes that when a commission agreement is required by law to be in writing, that any alteration or modification thereof must also be in writing and signed by the party, plaintiffs in this case, to be charged with the modified agreement. The Court concludes that there is no evidence of any written modification which has been signed by plaintiffs.

5. The Court concludes that before the doctrine of part performance can take an alleged oral modification of a commission agreement out of the statute of frauds, the part performance must consist of sufficient acts that are exclusively referable to the oral agreement. The Court concludes that defendant has failed to meet his burden by showing any acts of part performance that are exclusively referable to the alleged oral modification that would excuse payment of the commission if Mr. Jager defaulted.

6. The Court concludes that there was no written or oral modification of defendant's obligation to pay a \$25,000.00 commission, but only an agreement to provide a convenient mode or

method for deferred payment.

7. The Court concludes that plaintiffs are entitled to judgment in the principal sum of \$24,239.46 on the commission agreement and note, and the Court awards plaintiffs attorney's fees of \$9,000.00, for a total judgment of \$33,239.46, said judgment to bear interest at the rate of twelve percent (12%) per annum from July 1, 1988 until paid.

8. The Court concludes that the plaintiffs are entitled by law to file their memorandum of costs, and that such costs shall be included as part of the judgment.

9. The Court concludes that defendant's counterclaims against plaintiffs should be dismissed with prejudice and on the merits.

DATED this 12<sup>th</sup> day of July, 1989.

  
J. PHILIP EVES  
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 11th day of July, 1989, I served an unsigned copy of the above and foregoing Reinstated Findings of Fact and Conclusions of Law on Fred D. Howard, attorney for Leon Sprouse, by depositing a copy in the United States mail, first-class postage prepaid, addressed to Fred D. Howard, 120 East 300 North, P.O. Box 778, Provo, Utah 84603.



## **APPENDIX "B"**

### **Reinstated Judgment**

FIFTH JUDICIAL DISTRICT COURT  
COUNTY OF WASHINGTON

WRIGHT & MILES  
By: John L. Miles  
Attorneys for Third-Party Plaintiffs  
60 North 300 East  
St. George, Utah 84770  
Telephone: (801) 628-2612

'89 JUL 12 AM 11 18

CLERK                       
DEPUTY                     

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

LEON SPRUCUSE,	)	
Plaintiff,	)	REINSTATED
	)	JUDGMENT
vs.	)	
	)	JULY 11, 1989 NUNC
ARJEN W. JAGER, NADA H. JAGER,	)	PRO TUNC FOR
ARTIE EDMUNDS, LLOYD WALTERS,	)	NOVEMBER 9, 1988
and JOHN DOES I through V,	)	
Defendants.	)	
	)	
ROY N. LARSEN, ARTIE EDMUNDS,	)	
and INTERWEST COMMERCIAL	)	
PROPERTIES,	)	
Third-Party Plaintiffs,	)	
	)	
vs.	)	
	)	
LEON SPROUSE,	)	Civil No. 86-0982
Third-Party Defendant.	)	
	)	

This matter having come on for trial on July 1, 1988 on third-party plaintiffs' (hereinafter referred to as plaintiffs) complaint against third-party defendant Leon Sprouse and on the counterclaim filed by Mr. Sprouse against plaintiffs, with plaintiffs appearing with their attorney, John L. Miles, and Mr. Sprouse appearing with his attorney, R. Clayton Huntsman, and the pleadings being properly joined, and the Court having heard the testimony of the witnesses and considered the evidence presented, and the matter having been fully tried to the Court, and the Court having made its Revised Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the counterclaims of defendant Leon Sprouse against third-party plaintiffs are hereby dismissed with

next  
205B  
476-477




prejudice and on the merits.

2. That the third-party plaintiffs Roy H. Larsen, Artie Edmunds, and Interwest Commercial Properties have judgment against defendant Leon Sprouse in the amount of \$33,239.46, plus costs of Court.

3. That this judgment bears interest at the judgment rate of twelve (12%) percent per annum from July 1, 1988 until paid as provided by law.

DATED this 12<sup>th</sup> day of July, 1989.

  
J. PHILIP EVES  
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 11th day of July, 1989, I served an unsigned copy of the above and foregoing Reinstated Judgment on Fred D. Howard, attorney for Leon Sprouse, by depositing a copy in the United States mail, first-class postage prepaid, addressed to Fred D. Howard, 120 East 300 North, P.O. Box 778, Provo, Utah 84603.



## **APPENDIX "C"**

### **Earnest Money Sales Agreement (Exhibit 2)**

# EARNST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read both front and back carefully before signing.

## EARNST MONEY RECEIPT

DATE: 3/8/85



The undersigned Buyer Ajman Jager

hereby deposits with Agent/Broker Company

as EARNST MONEY, the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), in the form of \_\_\_\_\_ which shall be deposited in accordance with applicable State Law.

Ante Edmunds / Interstate Comm  
Agent/Broker Company

Received by: Ante Edmunds

## OFFER TO PURCHASE

1. **PROPERTY DESCRIPTION** The above stated EARNST MONEY is given to secure and apply on the purchase of the property situated at 231 W. St. George Blvd in the City of St. George County of Washington Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section 4. Said property is more particularly described as: Case Notes

### CHECK APPLICABLE BOXES:

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

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

(a) **Included Items.** Unless excluded below, this sale shall include all fixtures and any of the following items if presently attached to the property: plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: all items presently on property that pertain to motel operation

(b) **Excluded Items.** The following items are specifically excluded from this sale: all specimens and items

(c) **Connections:** Seller represents that the above property is connected to:

☒ public sewer; ☐ septic tank; ☒ municipal water; ☐ well; ☐ natural gas; ☐ irrigation water/secondary system; ☐ other sanitary system (specify) \_\_\_\_\_

(d) **Utilities, Improvements, and Other Rights.** The property presently has or is served by the following:

☒ public water main; ☐ well; ☐ water stub in; ☒ sewer main; ☐ private water main; ☐ gas main; ☒ electric distribution line; ☐ gas distribution line; ☒ telephone; ☐ ingress and egress by private easement; ☒ dedicated road; ☐ crops; ☒ sidewalk; ☒ curb & gutter; ☐ water rights, specify \_\_\_\_\_; ☐ mineral rights, specify \_\_\_\_\_; ☐ other, specify \_\_\_\_\_

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

(f) **Buyer Inspection.** Buyer has made a visual inspection of the property and subject to Section (d) above accepts it in its present physical condition, except: NO exceptions

2. **PURCHASE PRICE AND FINANCING.** The total purchase price for the property is four hundred seventy five thousand Dollars (\$ 475,000) which shall be paid as follows:

\$ see 85,000 which represents the aforescribed EARNST MONEY DEPOSIT:

\$ withhold representing the approximate balance of CASH DOWN PAYMENT at closing.

\$ \_\_\_\_\_ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at \_\_\_\_\_% per annum with monthly payments of \$ \_\_\_\_\_ which includes: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance.

\$ \_\_\_\_\_ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by Buyer, which obligation bears interest at \_\_\_\_\_% per annum with monthly payments of \$ \_\_\_\_\_ which includes: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance.

\$ 39,000 representing balance, if any, including refinancing, to be paid as follows: seller to carry balance of 10.5% on 39,000 with 362 payments of 236.23 with interest and principal due and payable to you from date of closing. Balance to be written with two contracts with separate amounts, to be directed prior to closing.

\$ 475,000 TOTAL PURCHASE PRICE

If outside financing is required, Buyer agrees to use best efforts to procure same and this offer is made subject to Buyer qualifying for and lending institution granting said loan. Buyer agrees to make application for said loan within \_\_\_\_\_ days after Seller's acceptance of this Agreement, at an interest rate not to exceed \_\_\_\_\_. Buyer further agrees to obtain a written commitment for said loan, and if the commitment is not obtained within a reasonable time, this Agreement is voidable at the option of Seller.

amount of purchase price ☐ an abstract of title brought current, with an attorney's opinion (See Paragraph I).

4. **INSPECTION OF TITLE.** Within 10 days after acceptance of this offer, Seller shall provide Buyer with either a commitment for title insurance or an abstract of title brought current with an attorney's opinion. Buyer shall have a period of 5 days after receipt thereof to examine and accept. If Buyer does not accept, Buyer shall mail written notice thereof, by certified mail, return receipt requested, within the prescribed time period. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: to be given by buyer prior to closing.

6. **SELLER WARRANTIES.** Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing. Exceptions to the above shall be limited to the following: no exceptions

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: subject to final inspection of each aspect of work & search, subject to buyer retaining the mortgage as made

8. **CLOSING OF SALE.** This Agreement shall be closed on or before April 1 1985 at a reasonable location to be designated by Seller, subject to Paragraph K on the reverse side hereof. Upon demand, Buyer and Seller shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Paragraph L on reverse side, shall be made as of ☒ date of possession ☐ date of closing ☐ other \_\_\_\_\_

9. **POSSESSION.** Seller shall deliver possession to Buyer on April 1 unless extended by mutual agreement of parties.

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

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 11:00 AM PM March 12 1985 to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

DATE 3-8-85

SIGNATURE OF BUYER

[Signature]

CHECK ONE

**ACCEPTANCE OF OFFER TO PURCHASE-**

☒ Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

**COUNTER OFFER**

☐ Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications or specified in the attached Addendum and presents said COUNTER OFFER for Buyer's acceptance.

DATE 3/11/85  
TIME 6:30 (AM-PM)

SIGNATURE OF SELLER

[Signature]

**REJECTION**

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

**AGREEMENT TO PAY REAL ESTATE COMMISSION**

CHECK ONE

☐ This property is listed by \_\_\_\_\_ Listing Agent/Broker Company and a real estate commission shall be paid in accordance with the Sales Agency Agreement. The Selling Agent/Broker Company is \_\_\_\_\_

☒ Fisher Colquhoun - Interstate Commercial Properties Listing and Selling Agent/Broker Company has been authorized to offer this property for sale and Seller agrees to pay a real estate commission of 6.5% as consideration for its efforts in procuring Buyer. Said commission shall be payable at closing or upon Seller's default on this Agreement, whichever occurs first. The amount or due date thereof cannot be changed without the prior consent of the Listing and Selling Agent/Broker Company.

DATE 3-11-85

SIGNATURE OF SELLER

[Signature]

ADDENDUM TO  
EARNEST MONEY SALES AGREEMENT

☒ ATTACHMENT

(Check Box)

☐ COUNTER OFFER

Reference is made to EARNEST MONEY SALES AGREEMENT dated 3/8/85 1985, between  
Aspen Jager (Buyer) and Leon Sproule (Seller)  
pertaining to the property situated at 231 W. St. George Blvd  
St George City Washington County, State of Utah.

Acceptance of the attached offer is contingent upon mutual agreement to the following modified or additional terms and/or conditions which, upon acceptance, shall be deemed incorporated in the offer previously set forth and shall control the terms of said instrument.

- continued agreements:
- ① buyer to carry on contract the balance owed to the 1st mortgage holder on trade properties, with terms & interest on contract to be the same as the first mortgage holder.
  - ② seller to honor existing sales agreement on trade properties for a period of 6 months. In that time if trade properties are sold at a higher amount than allowed in trade, after commission the difference will be credited to buyer.
  - ③ buyer to complete driveway and landscaping on duplex with money presently held in escrow on or before June 1st 1985 weather permitted permitting.

If counter offer, it expires at \_\_\_\_\_ a.m., p.m. 19\_\_\_\_.

All above modifications or additions are hereby approved and accepted.

6:30 a.m. 3-11-85 Leon Sproule 12:00 a.m. 3-8-85  
Date Seller Date Buyer  
\_\_\_\_ a.m., p.m. \_\_\_\_\_ a.m., p.m. \_\_\_\_\_  
Date Seller Date Buyer

DOCUMENT RECEIPT

(Utah State Law requires broker to furnish copies of this contract bearing all signatures to Buyer and Seller. Dependent on the method used, one of the following forms must be completed.)

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

Leon Sproule 3-11-85 Aspen Jager 3-8-85  
Seller Date Buyer Date  
\_\_\_\_ Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date

OR

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

(Broker) by \_\_\_\_\_

ADDENDUM TO  
EARNEST MONEY SALES AGREEMENT

☒ ATTACHMENT

☐ COUNTER OFFER

(Check Box)

Reference is made to EARNEST MONEY SALES AGREEMENT dated 3/8/85 19\_\_\_\_, between  
Aryn Jager (Buyer) and Leon Sproue (Seller)  
pertaining to the property situated at 231 W St George Blvd  
St George City Washington County, State of Utah.

Acceptance of the attached offer is contingent upon mutual agreement to the following modified or additional terms and/or conditions which, upon acceptance, shall be deemed incorporated in the offer previously set forth and shall control the terms of said instrument.

Down payment to consist of the following:

Assignment of Contract:

\$58,000 @ 11% approx 24 yrs left \$25,000 pm  
1st covered is approx \$8,000 @ 8 1/2% approx 2 yrs left, 240k (pm)

\* Equity allowed: \$50,000 +

Duplex located at: 650 E Hollywood (1525 So) SLC  
existing 1st = \$60,000 @ 12 1/2% variable \$640 (pm)  
total value allowed \$85,000

\* equity shared \$25,000

House located at 245 So 1200 W SLC  
existing 1st = \$32,000 @ 12 1/2% variable \$336 (pm)  
total value allowed \$42,000

\* equity shared \$10,000 +

If counter offer, it expires at \_\_\_\_\_ a.m., p.m. 19\_\_\_\_.  
All above modifications or additions are hereby approved and accepted.

6:30 a.m. 3-11-85 Leon Sproue 12:00 a.m. 3-8-85  
Date Seller Date Buyer  
\_\_\_\_ a.m., p.m. \_\_\_\_\_ a.m., p.m. \_\_\_\_\_  
Date Seller Date Buyer

DOCUMENT RECEIPT

(Utah State Law requires broker to furnish copies of this contract bearing all signatures to Buyer and Seller. Dependent on the method used, one of the following forms must be completed.)

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

Leon Sproue 3-8-85 Aryn Jager 3-8-85  
Seller Date Buyer Date  
\_\_\_\_ Seller \_\_\_\_\_ Buyer \_\_\_\_\_  
\_\_\_\_ Date \_\_\_\_\_ Date \_\_\_\_\_

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

\_\_\_\_ (Broker) by \_\_\_\_\_

## **APPENDIX "D"**

**Note/Agreement/Assignment (Exhibit 15)**

NOTE/AGREEMENT/ASSIGNMENT

\$25,000.00

St. George, Utah

April 1, 1985

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of  
INTERWEST COMMERCIAL PROPERTIES, at 420 West 145 North, St. George  
Utah 84770

TWENTY-FIVE THOUSAND \* \* \* DOLLARS (\$25,000.00),

together with interest from date at the rate of Ten and one-half per cent (10.5%) per annum on  
the unpaid principal, said principal and interest payable as follows:

The sum of \$640.00 commencing on or before May 1, 1985 and the  
sum of \$640.00 on or before the 1st day of each and every month  
thereafter until the full amount is paid.

This note shall be due and payable in full upon the full payment  
to Leon Sprouse of all amounts owed to him on the sale of the  
Oasis Motel, if not earlier paid.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any  
such installment not paid when due shall bear interest thereafter at the rate of Twelve per  
cent (12.0%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in  
the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its  
option and without notice or demand, may declare the entire principal balance and accrued interest due and  
payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with  
or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including  
a reasonable attorney's fee.

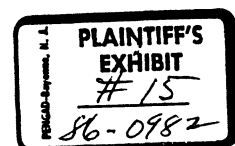
The Undersigned hereby sells, assigns and sets over to INTERWEST  
COMMERCIAL PROPERTIES a \$25,000.00 interest as security for the  
payments set forth above in and to that certain Uniform Real Estate  
Contract dated March 29, 1985 by and between Leon Sprouse, Seller,  
and Arjen W. Jager, Buyer, covering the Oasis Motel, located at 231  
West St. George Blvd, St. George, Utah.

Further, the Undersigned hereby authorized and directs the escrow  
holder, Heritage Thrift and Loan to pay from the payments received  
under said escrow the full amount of this note/agreement to Interwest  
according to the terms of this agreement.

The parties hereto understand and agree that this instrument does  
not obligate the undersigned to personally pay the amounts set forth  
herein. The obligation for payment hereunder arises only out of the  
payments received by Heritage under the Uniform Real Estate Contract  
referred to above.

In the event that the buyer (Jager) or his heirs or assigns fails  
or refuses to make the required payments under said Uniform Real Estate  
Contract, Interwest Commercial Properties may step in and take over  
said contract, So Long as money is owed under this agreement.

LEON SPROUSE





## **APPENDIX "E"**

### **Assignment of Contract (Exhibit 16)**

## ASSIGNMENT OF CONTRACT

THIS AGREEMENT, made in the City of St. George, State of Utah on the 2nd day of April, 1985, by and between Interwest Commercial Properties at 420 West 145 North, St. George, Ut. 84770 hereinafter referred to as the assignors, and Artie Edmunds at 165 So. 200 W. Washington, Ut. 84780 hereinafter referred to as the assignees,

### WITNESSETH:

WHEREAS, under date of March 29, 1985, LEON SPRINGER Arjen W. Jager, as sellers, entered into a Uniform Real Estate Contract with as buyers, of Washington, Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Washington, State of Utah, and more particularly described as follows:  
See attached Schedule A.....

Whereas the Seller has conveyed to Interwest Commercial Properties a security interest of \$25,000 as set forth in the attached note agreement dated April 1, 1985. Further the undersigned owner of Interwest Commercial Properties, Mel Watson does assign and transfer all interest in said note to Artie Edmunds of St. George Utah.

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in said property above described as evidenced by said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to said above described property as evidenced by the aforesaid ~~XXXXXX XXXXXX XXXXXX~~ security note of April 1, 1985, concerning the above described property.
2. That to induce the assignees to pay the said sum of money and to accept the said contract, and the rights obligation pursuant thereto the assignors hereby represent to the assignees as follows:
  - a. That the assignors have duly performed all the conditions of the said contract.
  - b. That the contract is now in full force and effect and that the unpaid balance of said contract is \$ 25,000, with interest paid to the 1st day of April, 1985.
  - c. That said contract is assignable.
3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:
  - a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.
  - b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.

[Signature]  
WITNESS

[Signature]  
WITNESS  
Furnished by:  
DAVID T. GILBERT

Interwest Commercial Properties  
Mel Watson Owner  
ASSIGNORS

X Artie Edmunds  
ASSIGNEES

PLAINTIFF'S  
EXHIBIT  
# 16

## **APPENDIX "F"**

### **Assignment of Note (Exhibit 18)**

SEEK COMPETENT ADVISE"

ASSIGNMENT OF ~~XXXXXX~~ NOTE

#18  
86-0982

THIS AGREEMENT, made in the city of **Draper**, State of Utah on the **24th** day of **April** 19**85** by and between **ARTIE EDMUNDS**

hereinafter referred to as the assignors, and **DRAPER BANK AND TRUST**,  
hereinafter referred to as the assignees,

WITNESSETH:

WHEREAS, under date of **4-1-85**, 19**85**, **LEON SPROUSE, Maker**  
~~XXXXXX~~ with **INTERWEST COMMERCIAL PROPERTIES**, as payee  
~~XXXXXX~~ of **St. George**, Utah, which contract is delivered herewith, wherein and  
whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, con-  
ditions, and provisions therein set forth, all that certain land, with the buildings and improvements  
thereon, erected, situate, lying and being in the County of \_\_\_\_\_, State of Utah,  
and more particularly described as follows:

Note further assigned to **Artie Edmunds** by **Interwest Commercial Properties**  
by assignment dated **April 2, 1985**, all payments on said note to now be paid  
to **DRAPER BANK AND TRUST**, 903 East 12300 South, Draper, Utah 84020, by reason  
of this assignment.

to which agreement in writing, reference is hereby made for all of the terms, conditions and provi-  
sions thereof, and:

WHEREAS, the assignee desire to acquire from the assignors all of the right, title and interest  
of the assignors in said property above described as evidenced by said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors is in consideration of the Payment of Ten Dollars and other good and valu-  
able consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their  
right, title and interest in and to said above described property as evidenced by the aforesaid Uni-  
~~XXXXXX~~ NOTE dtd 4-1-85, 19**85**, concerning the above described  
property.
2. That to induce the assignees to pay the said sum of money and to accept the said contract,  
and the rights obligation pursuant thereto the assignors hereby represents to the assignees as  
follows:
  - a. That the assignors have duly performed all the conditions of the said contract.
  - b. That the ~~contract~~ **NOTE** is now in full force and effect and that the unpaid balance of said con-  
**NOTE** is \$ **25,000.00**, with interest paid to the **4-1-85** .. day of .. ..  
19**85** .. ..
  - c. That said contract is assignable.
3. That the assignors are executing and delivering this agreement, as security for a loan made  
to assignors under the terms of a promisory note of even date herewith.

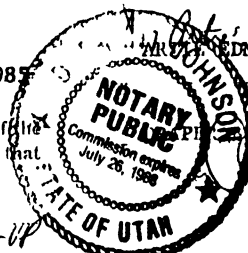
IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day  
and year first above written.

STATE OF UTAH  
COUNTY OF SALT LAKE

Before me this **24th** day of **April** 19**85**  
personally appeared **ARTIE EDMUNDS**

the signer/s of the  
foregoing assignment who duly acknowledge to me that  
they executed the said

NOTARY PUBLIC



ASSIGNORS

**DRAPER BANK AND TRUST**

ASSIGNEES

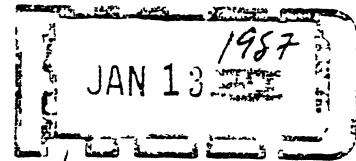
SR VP

## **APPENDIX "G"**

**Answer to Second Amended Complaint;  
Counterclaim Against Plaintiff and  
Cross-Claim Against Jagers**

WRIGHT & MILES  
John L. Miles  
Attorney for Defendant Edmunds  
60 North 300 East  
St. George, Utah 84770  
Telephone: (801) 628-2612

FIFTH JUDICIAL DIST COURT  
WASHINGTON COUNTY



*Edmunds* CLERK  
DEPUTY

IN THE DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH

LEON SPROUSE,	)	ANSWER TO SECOND AMENDED
	)	COMPLAINT; COUNTERCLAIM
Plaintiff,	)	AGAINST PLAINTIFF AND
	)	CROSS-CLAIM AGAINST JAGERS
	)	
vs.	)	
	)	
ARJEN W. JAGER, NADA H. JAGER,	)	
ARTIE EDMUNDS, LLOYD WALTERS,	)	
and JOHN DOES I throgh V,	)	
	)	
Defendants.	)	Civil No. 86-0982
	)	<i>R#2445</i>

COMES NOW defendant Artie Edmunds (hereinafter referred to as "Edmunds"), by and through his attorney, John L. Miles, and answers, counterclaims, and cross-claims as follows:

ANSWER TO COMPLAINT

1. Defendant Edmunds denies the allegations of paragrpah 1 of the second amended complaint (hereinafter referred to as "complaint"). Defendant Edmunds claims he is the present owner of a \$25,000.00 assignment of part of said contract, given by plaintiff to Interwest Commercial Properties, and that he is therefore a necessary party plaintiff in any foreclosure action. Attached hereto as Exhibit "A", and incorporated herein by this reference, is a copy of the NOTE/AGREEMENT/ASSIGNMENT given by plaintiff and which Edmunds now owns, pursuant to an ASSIGNMENT OF CONTRACT attached hereto as Exhibit "B", and made a part hereof by this reference.

2. Defendant Edmunds admits the allegations of paragraphs 2, 3 and 4 of the complaint.

3. Answering paragraph 5 of the complaint, defendant Edmunds admits that he became aware, on or about September 16, 1986, that a lawsuit had been commenced between plaintiff and

defendant Jager, but denies any specific knowledge about the alleged defaults of defendant Jager until on or about December 2, 1986, when a notice was served upon his attorney, and denies the remainder of said paragraph 5.

4. Defendant Edmunds admits the allegations of paragraph 6 of the complaint.

5. Defendant Edmunds denies the allegations of paragraph 7 of the complaint. Defendant Edmunds, as the owner of part of the subject Uniform Real Estate Contract, claims that he is a necessary party plaintiff in any action pursuant to said contract, and claims that his contractual rights thereunder are equal to those of plaintiff, the only difference being that his claim is of a lesser amount than plaintiff, i.e., the balance due (including interest and attorney's fees) on the \$25,000.00 assignment. Further, defendant Edmunds also claims the right, pursuant to Exhibits "A" and "B", and at his election, to take over the contract and begin making monthly payments to plaintiff at the time plaintiff delivers possession to him, but denies that he must make up all delinquent payments that accrued prior to the time defendant Edmunds was offered possession.

6. Defendant Edmunds denies the allegations of paragraph 8 of the complaint, as defendant Edmunds claims to be a necessary party in making such an election.

7. Defendant Edmunds denies the allegations of paragraph 9 of the complaint for lack of knowledge.

8. Defendant Edmunds admits the allegations of paragraph 10 of the complaint, and any such claimed interest of defendant Nada H. Jager would also be inferior and subordinate to defendant Edmunds assignment of plaintiff's lien.

9. Defendant Edmunds denies the allegations of paragraph 11 of the complaint for lack of knowledge.

10. Defendant Edmunds admits the allegations of paragraph 12 and 13 of the complaint, and any such claimed interest of defendant Walters or others would also be inferior and subordinate to defendant Edmunds assignment of plaintiff's lien.

### COUNTERCLAIM AGAINST PLAINTIFF

1. That defendant Edmunds is the present owner of a \$25,000.00 interest in the Uniform Real Estate Contract between plaintiff and defendant Jager.

2. That plaintiff gave, for valuable consideration, an assignment of a \$25,000.00 interest in said contract to Interwest Commercial Properties, as shown by the attached Exhibit "A".

3. That Interwest Commercial Properties thereafter assigned, for valuable consideration, the \$25,000.00 interest in said contract to Edmunds, as shown by the attached Exhibit "B", and Edmunds is the present owner thereof.

4. That Edmunds is therefore a necessary party plaintiff in any foreclosure action.

5. That pursuant to the provisions of Exhibit "A", in the event of the sale of Oasis Motel, Edmunds is entitled to full payment of the balance owing on said \$25,000.00, plus costs and attorney's fees. Edmunds is entitled to such full payment irrespective of how the Oasis Motel is sold and irrespective of the price obtained. Upon the payment to plaintiff of the amounts owed to him on any such a sale, the plaintiff is obligated to pay Edmunds in full at that time.

6. That the Court should therefore order plaintiff to pay the balance owed to Edmunds immediately upon any sale, including a foreclosure sale.

7. That Exhibit "A" also directs the escrow holder to pay the "full amount of this note/agreement" (emphasis added) from the payments received, and that paragraph 16C of the contract, under which plaintiff is proceeding, empowers the escrow holder or agent to act as Trustee in any such foreclosure.

8. That the Court should direct Heritage Savings & Loan, the Escrow Agent appointed by plaintiff and defendant Jager, to apply the foreclosure proceeds first to the balance owed to Edmunds and then to the balance owed to plaintiff.

9. That there has been a default in the payments required by said Exhibit "A" in that no payments have been made for several months.



10. That said Exhibit "A" provides for payment of Edmunds attorney's fees and costs in the event of any default, and the Court should award costs and a reasonable attorney's fee, and order that the same be paid in full along with the principal and interest owing upon any sale.

11. That, as an alternative allegation in the event the Court finds that Edmund's claim should not be paid first, then Edmunds alleges that he is the owner and holder of an undivided interest in the entire Uniform Real Estate Contract, and that any payments received on said contract should be allocated to Edmunds on a pro rata basis, with the numerator being the balance (principal, interest, costs, and attorney's fees) owed to Edmunds and the denominator being the balance (principal, interest, costs, and attorney's fees) owed to plaintiff.

12. That Exhibit "A" gives Edmunds the right or option to take over the contract in the event defendant Jager fails to make the required payments.

13. That Edmunds is entitled to reasonable notice of Jager's failure to make the required payments before being called upon to either exercise that option to take over the contract or to forego that option.

14. That Edmunds was not afforded the opportunity to exercise said option until defendant Jager was six or seven months behind on his payments.

15. That Edmunds is entitled to exercise that option without being required to make up all the monthly payments which have accrued or will accrue prior to the time he was given notice and prior to the time he is allowed to take over without making up all those payments.

16. That Edmunds is willing, able, and desirous of exercising his option to take over the contract and to begin making the regular monthly payments, but he is not able to make up the payments that accrued prior to the time he was given notice and opportunity to exercise his option.

17. That Edmunds is entitled to possession of the

premises concurrently with the accrual of his obligation to begin making the regular monthly payments to plaintiff, and until plaintiff is able to place Edmunds in possession, Edmunds is not required to make up any accrued payments or to make any ongoing payments.

18. That Edmunds is willing and able to take over the contract and to begin making monthly payments as they come due as soon as possession can be delivered to him, but without the obligation to make up any accrued and delinquent payments.

CROSS-CLAIM AGAINST DEFENDANTS JAGER

1. That Edmunds is the owner and holder of a \$25,000.00 interest in and to the payments due under that certain Uniform Real Estate Contract between plaintiff, as Seller, and defendant Arjen W. Jager, as Buyer, as shown by the Exhibits "A" and "B" attached hereto and incorporated herein by this reference.

2. That Edmunds, under the assignment wherein he obtained said \$25,000.00 interest, also obtained all of the rights of a Seller under paragraph 16 of said contract, including the right to treat the contract as a note and mortgage under paragraph 16C and to foreclose thereon.

3. That defendant Arjen W. Jager has defaulted on his payments under said contract by failure to make payments for the months of June, 1986 through January, 1987.

4. That Edmunds is an indispensable party to any foreclosure attempt by plaintiff as the owner of an interest in said contract.

5. That Edmunds hereby elects the remedy of paragraph 16C of said contract, and elects to join with plaintiff in the foreclosure of the property described in plaintiff's complaint under said paragraph, and Edmunds hereby declares the acceleration of all sums due under the contract.

6. That any interest claimed by defendant Nada H. Jager in the property by reason of a deed recorded 6/21/86 in Book 380, Page 380 of the records of the Washington County Recorder is inferior and subordinate to Edmunds interest and lien

in the contract which is sought to be foreclosed by this cross-claim.

7. That Edmunds is entitled, pursuant to the terms of Uniform Real Estate Contract, paragraph 14, to an award of his attorney's fees and costs in this matter by reason of the default of defendant Arjen W. Jager.

8. That the Court should order the property sold at a foreclosure sale, and order the proceeds of the sale applied as required by law, and that after application of such proceeds, should there be a balance due and owing to Edmunds on the \$25,000.00 interest he acquired by assignment of said contract, then Edmunds is entitled to a deficiency judgment against defendant Arjen W. Jager for that balance then owing.

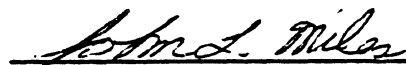
WHEREFORE, Edmunds prays for judgment as follows:

1. On the counterclaim against plaintiff, for judgment declaring that Edmunds interest in the contract, together with costs and attorney's fees found by the Court, is required to be paid first from any proceeds of sale or other payments on the contract, prior to any payment to plaintiff. Alternatively, for judgment declaring that Edmunds interest in the contract, together with costs and attorney's fees, is that of an undivided interest in the entire contract and is required to be paid on a pro rata basis with the interest of plaintiff from any proceeds of a foreclosure sale or any other payments. Further, for judgment allowing Edmunds to take possession of the premises under his option without being liable to pay plaintiff the accrued and past due monthly payments under the contract, which are the obligation of defendant Jager who has been in possession, or which plaintiff has waived by failing to give Edmunds reasonable notice and opportunity to exercise the option and for failure to deliver possession of the premises to Edmunds concurrently with said notice and opportunity.

2. On the cross-claim against defendants Jager, for judgment foreclosing the interest of said defendants in the subject property, both real and personal, and that the Court order the property sold and the proceeds be distributed as

required by law to any prior interests, to the costs and attorney's fees of this foreclosure action, as found by the Court, and then to the amounts due Edmunds and plaintiff, as the Court determines their respective interests, and that Edmunds be awarded a deficiency judgment against defendant Arjen W. Jager for all amounts remaining unpaid after said foreclosure sale.

DATED this 12th day of January, 1987.

  
John L. Miles  
Attorney For Artie Edmunds

MAILING CERTIFICATE

I hereby certify that on the 13th day of January, 1987, I mailed a true and accurate copy of the foregoing document on each of the following by first-class U. S. Mail, postage prepaid:

GARY W. PENDLETON  
Pendleton & Terry  
50 East 100 South, Suite 101  
St. George, Utah 84770

TERRY L. WADE  
Snow, Nuffer, Engstrom & Drake  
50 East 100 South #302  
P.O. Box 386  
St. George, Utah 84770

  
~~Secretary~~

NOTE/AGREEMENT/ASSIGNMENT

\$25,000.00

St. George, Utah

April 1, 1985

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of  
INTERWEST COMMERCIAL PROPERTIES, at 420 West 145 North, St. George  
Utah 84770

TWENTY-FIVE THOUSAND \* \* \* DOLLARS (\$25,000.00),

together with interest from date at the rate of Ten and one-half per cent (10.5%) per annum on  
the unpaid principal, said principal and interest payable as follows:

The sum of \$640.00 commencing on or before May 1, 1985 and the  
sum of \$640.00 on or before the 1st day of each and every month  
thereafter until the full amount is paid.

This note shall be due and payable in full upon the full payment  
to Leon Sprouse of all amounts owed to him on the sale of the  
Oasis Hotel, if not earlier paid.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any  
such installment not paid when due shall bear interest thereafter at the rate of Twelve per  
cent (12.0%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in  
the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its  
option and without notice or demand, may declare the entire principal balance and accrued interest due and  
payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with  
or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including  
a reasonable attorney's fee.

The Undersigned hereby sells, assigns and sets over to INTERWEST  
COMMERCIAL PROPERTIES a \$25,000.00 interest as security for the  
payments set forth above in and to that certain Uniform Real Estate  
Contract dated March 29, 1985 by and between Leon Sprouse, Seller,  
and Arjen W. Jager, Buyer, covering the Oasis Hotel, located at 231  
West St. George Blvd, St. George, Utah.

Further, the Undersigned hereby authorized and directs the escrow  
holder, Heritage Thrift and Loan to pay from the payments received  
under said escrow the full amount of this note/agreement to Interwest  
according to the terms of this agreement.

The parties hereto understand and agree that this instrument does  
not obligate the undersigned to personally pay the amounts set forth  
herein. The obligation for payment hereunder arises only out of the  
payments received by Heritage under the Uniform Real Estate Contract  
referred to above.

In the event that the buyer (Jager) or his heirs or assigns fails  
or refuses to make the required payments under said Uniform Real Estate  
Contract, Interwest Commercial Properties may step in and take over  
said contract, So long as money is not under the agreement.

LEON SPROUSE

EXHIBIT # "A"

"THIS IS A LEGALLY BINDING CONTRACT IF NOT UNDERSTOOD. SEEK COMPETENT ADVICE

### ASSIGNMENT OF CONTRACT

THIS AGREEMENT, made in the City of St. George, State of Utah on the 2nd day of April, 1985, by and between Interwest Commercial Properties at 420 West 145 North, St. George, Ut. 84770 hereinafter referred to as the assignors, and Artie Edmunds at 165 So. 200 W. Washington, Ut. 84780 hereinafter referred to as the assignees,

#### WITNESSETH:

WHEREAS, under date of March 29, 1985, Leon Sprouse as sellers, entered into a Uniform Real Estate Contract with Arjen W. Jager as buyers, of Washington, Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Washington, State of Utah, and more particularly described as follows:  
See attached Schedule A.....

Whereas the Seller has conveyed to Interwest Commercial Properties a security interest of \$25,000 as set forth in the attached note agreement dated April 1, 1985. Further the undersigned owner of Interwest Commercial Properties, Mel Watson does assign and transfer all interest in said note to Artie Edmunds of St. George Utah.

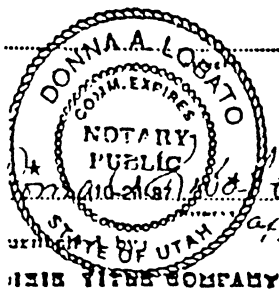
to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in said property above described as evidenced by said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to said above described property as evidenced by the aforesaid ~~XXXXXXXXXXXXXXXXXXXX~~ security note of April 1, 1985 concerning the above described property.
2. That to induce the assignees to pay the said sum of money and to accept the said contract, and the rights obligation pursuant thereto the assignors hereby represent to the assignees as follows:
  - a. That the assignors have duly performed all the conditions of the said contract.
  - b. That the contract is now in full force and effect and that the unpaid balance of said contract is \$25,000 with interest paid to the 1st day of April, 1985.
  - c. That said contract is assignable.
3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:
  - a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.
  - b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

IN WITNESS WHEREOF, The parties hereto have hereunto set their hands and seals the day and year first above written.



Interwest Commercial Properties  
Mel Watson Owner  
ASSIGNOR  
Artie Edmunds

Appraiser Artie Edmunds - only

## **APPENDIX "H"**

**Transcript of testimony on attorney fees (pages 162-64)**

1 attorney's fees.

2 THE COURT: Do you want to cross Mr. Miles on  
3 attorney's fees, Mr. Huntsman?

4 MR. HUNTSMAN: Maybe we can reach a stipulation as  
5 to the reasonableness. Obviously I'm going to object if  
6 I'm obligated --

7 THE COURT: Do you know what he's going to testify  
8 to?

9 MR. MILES: Should I make a proffer?

10 MR. HUNTSMAN: Make a proffer.

11 THE COURT: All right.

12 MR. MILES: Your Honor, I testify that on this  
13 lawsuit, I have spent at least 150 hours of time. I say  
14 "at least" because I haven't kept exact records. I began  
15 to keep some records when we got into the lawsuit and the  
16 Court was asking questions about my attorney's fees on an  
17 hourly basis. Because my agreement with Mr. Edmunds was  
18 on a contingency; so, I didn't see the need to keep  
19 records.

20 But I did keep records, and I know that I've  
21 spent at least 150 hours on this case. And my hourly fee  
22 is \$60 an hour, and that would come to \$9,000 on  
23 attorney's fees.

24 Now, I need to qualify that a little bit  
25 because this case has been complicated, and there's been



1 several issues. This case has not all been about the suit  
2 to recover the commission. That's what we're trying  
3 today, but not all of my time was spent on that part of  
4 it.

5 So to help the Court and counsel the best I  
6 could, I would have to say that in defending the  
7 counterclaim that was brought by Mr. Jager and for  
8 misrepresentation on the part of both Mr. Sprouse and  
9 Mr. Edmunds, I probably spent at least a third of my time  
10 on defending that counterclaim, and probably another third  
11 of my time was involved in trying to assert our rights to  
12 participate in a foreclosure and in working through the  
13 foreclosure with Mr. Pendleton and the arguments and  
14 hearings we had on that part of it. So about a third,  
15 actually, of my time has been trying to collect the note.

16 THE COURT: So you're testifying your fees that  
17 you're asking for today are \$3,000?

18 MR. MILES: I'm asking for 9,000, but that would  
19 include the whole case. But I need to tell the Court that  
20 not all of it was on the note. And if the Court finds  
21 that I can only recover on the note, then it would be  
22 3,000.

23 THE COURT: Mr. Huntsman, do you accept that  
24 proffer, that that's what he would testify if he were  
25 called and sworn?

1 MR. HUNTSMAN: That that's what he would testify  
2 to, yes, sir.

3 THE COURT: Do you wish to cross-examine?

4 MR. HUNTSMAN: No, Your Honor.

5 THE COURT: All right. We'll accept the proffer,  
6 then.

7 Anything else, Mr. Miles?

8 MR. MILES: No. We rest at this point, Your Honor.

9 THE COURT: All right. The defense?

10 MR. HUNTSMAN: I'd like to call Leon Sprouse, Your  
11 Honor.

12 THE COURT: All right. Mr. Sprouse, come forward  
13 and face the clerk and raise your right hand, please.

14

15 ELMER LEON SPROUSE,  
16 the witness herein, having been  
17 first duly sworn, was examined  
18 and testified as follows:

19

20 DIRECT EXAMINATION

21 BY MR. HUNTSMAN:

22 Q. State your full name for the record, please.

23 A. Elmer Leon Sprouse.

24 Q. Where do you live, Mr. Sprouse?

25 A. 6291 South Pecos Road, Las Vegas, Nevada.