

2000

Wells Fargo Bank v. Michael J. Kearns : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark A. Larsen; Joleen S. Mantas; Larsen and Mooney; Attorney for Appellant.

Mark S. Swan; Mark E. Medcalf; Richer, Swan and Overholt; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Wells Fargo Bank v. Kearns*, No. 20000271 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2700

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

WELLS FARGO BANK, N.A.,

Plaintiff and Appellee,

v.

MICHAEL J. KEARNS,

Defendant and Appellant.

Appellate Court No. 20000271

Civil No. 990908206

Priority No. 15

BRIEF OF APPELLEE, WELLS FARGO BANK, N.A.

On Appeal from the Judgment of
the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Sandra N. Peuler, District Judge

Mark S. Swan, USB# 3873
Mark E. Medcalf, USB# 5404
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, #450
Midvale, Utah 84047-4139
Telephone: (801) 561-4750
Attorneys for Plaintiff/Appellee

Mark A. Larsen
Joleen S. Mantas
Larsen & Mooney Law
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

WELLS FARGO BANK, N.A.,

Plaintiff and Appellee,

v.

MICHAEL J. KEARNS,

Defendant and Appellant.

Appellate Court No. 20000271

Civil No. 990908206

Priority No. 15

BRIEF OF APPELLEE, WELLS FARGO BANK, N.A.

On Appeal from the Judgment of
the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Sandra N. Peuler, District Judge

Mark S. Swan, USB# 3873
Mark E. Medcalf, USB# 5404
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, #450
Midvale, Utah 84047-4139
Telephone: (801) 561-4750
Attorneys for Plaintiff/Appellee

Mark A. Larsen
Joleen S. Mantas
Larsen & Mooney Law
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Attorney for Defendant/Appellant

TABLE OF CONTENTS

JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES	1
DETERMINATIVE RULES AND STATUTES	3
STATEMENT OF THE CASE	5
A. Nature of the Case	5
B. Course of Proceedings	5
C. Disposition of Trial Court	6
STATEMENT OF FACTS	6
SUMMARY OF ARGUMENTS	13
INTRODUCTION	13
ARGUMENT	14
POINT I	14
THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT WAS FILED MORE THAN THREE MONTHS AFTER THE JUDGMENT WAS ENTERED.	14
POINT II	17
THE TRIAL COURT CORRECTLY DETERMINED THAT KEARNS' FAILURE TO ANSWER THE COMPLAINT WAS NOT DUE TO EXCUSABLE NEGLIGENCE.	17
POINT III	22
KEARNS DOES NOT HAVE A MERITORIOUS DEFENSE.	22
A. Kearns' claim that the Complaint should have been adjudicated in arbitration is not a meritorious defense.	23
B. The award of attorney's fees in the Judgment and the potential existence for a Counterclaim do not establish a meritorious defense.	25
POINT IV	26
A BALANCE OF THE EQUITIES OF THIS CASE CLEARLY SHOW THAT THE TRIAL COURT CORRECTLY APPLIED ITS BROAD DISCRETION IN DENYING	

KEARNS' MOTION TO SET ASIDE DEFAULT JUDGMENT	26
POINT V	31
KEARNS' AFFIDAVIT IS FRIVOLOUS, AND THEREFORE WELLS FARGO SHOULD BE AWARDED ITS ATTORNEY'S FEES AND COSTS ON APPEAL.	31
CONCLUSION	33

ADDENDUM

1. Michael J. Kearns' Reply Memorandum in the case In the Matter of the THOMAS F. KEARNS JR. and MARY DURKIN KEARNS Trust, in the Third Judicial District Court, State of Utah, Case Number 993900489, before the Honorable J. Dennis Frederick, dated August 26, 1999. (Thomas Kearns Trust Action).
2. Second Affidavit of Michael J. Kearns in the Thomas Kearns Trust Action dated August 26, 1999.
3. Default Judgment in the case Wells Fargo Bank, N.A. v. Michael J. Kearns, in the Third Judicial District Court, State of Utah, Case Number 990908206, dated September 23, 1999.
4. Affidavits of Michael J. Kearns and Miriam C. Kearns in support of Michael J. Kearns' Motion to Set Aside Default Judgment, Civil No. 990908206, dated December 27, 1999.

TABLE OF AUTHORITIES

Cases

<u>Airkem Intermountain v. Parker</u> , 30 Utah 2d 65, 513 P.2d 429 (1973)	17
<u>Automatic Control Products Corp. v. Tel-Tech, Inc.</u> , 780 P.2d 1258, 1260 (Utah 1989)	16
<u>Backstrom Family Ltd. Partnership v. Hall</u> , 751 P.2d 1157 (Utah Ct. App. 1988)	31
<u>Black's Title, Inc. v. Utah State Insurance Department</u> , 991 P.2d 607 (Utah App. 1999)	2, 3, 14, 18, 21, 22, 26
<u>Board of Education of Granite School Dist. V. Cox</u> , 14 Utah 2d 385, 384 P.2d 806 (1963)	21, 22
<u>Classic Cabinets, Inc. v. All American Life Insurance Co.</u> , 978 P.2d 465, 470, fn 5 (Utah App. 1999)	22
<u>DeBry v. Cascade Enterprises</u> , 935 P.2d 499, 502-03 (Utah 1997)	32
<u>Erickson v. Schenkers International Forwarders, Inc.</u> , 882 P.2d 1147 (Utah 1994)	3, 23, 24, 26
<u>Farrell v. Porter</u> , 830 P.2d 299, 302 (Utah App. 1992)	31
<u>Hunt v. Hurst</u> , 785 P.2d 414, 416 (Utah 1990)	31
<u>Jespersion v. Jespersen</u> , 610 P.2d 326 (Utah 1980)	31
<u>Katz v. Pierce</u> , 732 P.2d 92 (Utah 1986)	2, 3, 27
<u>Laub v. South Central Utah Telephone Ass'n, Inc.</u> , 657 P.2d 1304 (Utah 1982)	27
<u>M.L. v. V.H.</u> , 894 P.2d 1285, 1288 (Utah Ct. App. 1995)	15
<u>Matter of Estate of Shepley</u> , 645 P.2d 605 (Utah 1982)	31

<u>Maughan v. Maughan</u> , 770 P.2d 156 (Utah Ct. App. 189)	31
<u>Meadow Fresh Farms, Inc. v. Utah State University Department of Agriculture and Applied Science</u> , 813 P.2d 1216, 1218 (Utah App. 1991).	18
<u>Miller v. Brocksmith</u> , 825 P.2d 690, 693-94 (Utah App. 1992)	22
<u>Mini Spas, Inc. v. Industrial Commission</u> , 733 P.2d 130, 132 (Utah 1987)	18
<u>O'Brien v. Rush</u> , 744 P.2d 306 (Utah Ct. App. 1987)	31
<u>Richins v. Delbert Chipman & Sons Co., Inc.</u> , 817 P.2d 382 (Utah App. 1991)	2, 14
<u>State of Utah, by and through Utah State Department of Social Services v. Musselman</u> , 667 P.2d 1053 (Utah 1983)	2, 14, 22, 23, 24, 26
<u>Valley Leasing v. Houghton</u> , 661 P.2d 959 (Utah 1983)	19
<u>Warren v. Dixon Ranch Co.</u> , 260 P.2d 741 (Utah 1983)	19

Statutes

<u>Utah Code Ann.</u> , § 78-2-2(3)(j)	1
<u>Utah Code Ann.</u> , § 78-2-2(4)	1
<u>Utah Code Ann.</u> , § 78-31a-4	4, 24

Rules

Rule 33, <u>Utah Rules of Appellate Procedure</u>	4, 13, 31, 32, 33, 34
Rule 34, <u>Utah Rules of Appellate Procedure</u>	4
Rule 24(a)(7), <u>U.R.Civ.P.</u>	6
Rule 58A, <u>U.R.Civ.P.</u>	3, 14, 15

Rule 58A(b), <u>U.R.Civ.P.</u>	15, 16
Rule 58A(c), <u>U.R.Civ.P.</u>	15, 16
Rule 60(b), <u>U.R.Civ.P.</u>	15, 15, 16, 22, 32
Rule 60(b)(1), <u>U.R.Civ.P.</u>	2, 3, 5, 14, 17, 32, 33

IN THE UTAH COURT OF APPEALS

WELLS FARGO BANK, N.A.,

Plaintiff and Appellee,

v.

MICHAEL J. KEARNS,

Defendant and Appellant.

Appellate Court No. 20000271

Civil No. 990908206

Priority No. 15

BRIEF OF APPELLEE, WELLS FARGO BANK, N.A.

JURISDICTION AND NATURE OF PROCEEDINGS

1. Jurisdiction is conferred upon the Supreme Court pursuant to its original appellate jurisdiction under Utah Code Ann., § 78-2-2(3)(j). Pursuant to Utah Code Ann., § 78-2-2(4), the Supreme Court has transferred this matter to the Utah Court of Appeals for disposition.

2. This appeal is from an Order of the Third Judicial District Court for the State of Utah, the Honorable Judge Sandra Peuler presiding, denying Defendant's Motion to Set Aside a Default Judgment.

STATEMENT OF ISSUES

Appellee believes that Appellant's statement of issues on appeal are not correctly stated as Appellee believes that Appellant has incorrectly stated the standard of review. In addition, Appellant's failure to correctly state the standard of review has caused it to omit an issue of necessary consideration for this Court.

Consequently, Appellee will restate the issues according to the appropriate standards of review.

1. Was the Defendant's Motion for Summary Judgment filed timely pursuant to the requirements of Rule 60(b)(1), U.R.Civ.P.? Richins v. Delbert Chipman & Sons Co., Inc., 817 P.2d 382 (Utah App. 1991); State of Utah, by and through Utah State Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983).

2. Did the Trial Court clearly abuse its discretion in ruling that Mr. Kearns failed to show that the default judgment against him was due to "excusable neglect"? The ruling of the District Court is entitled to considerable discretion and the Appellate Court is not to interfere with the broad discretion of the Trial Court absent a showing of clear abuse of that discretion. Black's Title, Inc. v. Utah State Insurance Department, 991 P.2d 607 (Utah App. 1999); Katz v. Pierce, 732 P.2d 92 (Utah 1986).

3. Did the Trial Court clearly abuse its discretion in finding that Defendant failed to show he had a meritorious defense? The standard of review has been misstated by the Appellant. The latest statement of the standard on whether a Trial Court has correctly denied a motion to set aside a default judgment was stated by this Court in Black's Title, Inc. v. Utah State Insurance Department, 991 P.2d 607 (Utah App. 1999). The Utah Supreme Court has stated that the proper legal standard for determining whether a defense is meritorious is a question of law which

is reviewed for correctness (Erickson v. Schenkers International Forwarders, Inc., 882 P.2d 1147 (Utah 1994)). However, in subsequent cases, this particular correctness standard has been applied so the Trial Court's decision will not be interfered with unless there is a clear showing of an abuse of its considerable discretion. Black's Title, Inc., 991 P.2d at 610; Katz, 732 P.2d at 93. Thus, the Appellant's statement that no deference is given to the trial judge's decision appears to be an erroneous statement of the standard of review with regard the determination of whether a meritorious defense exists.

DETERMINATIVE RULES AND STATUTES

Rule 60(b)(1), U.R.Civ.P., provides, in pertinent part:

On motion and upon such terms as are just, the Court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . The motion shall be made within a reasonable time and for reasons (1), (2), or (3) not more than three months after the judgment, order or proceeding was entered or taken.

Rule 58A, U.R.Civ.P., states in pertinent part as follows:

(b) Judgment in other cases. Except as provided in Subdivision (a) hereof, and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) When judgment entered; notation and register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as hereinabove provided. The Clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

Section 78-31a-4, Utah Code Ann.

(1) The Court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly.

(2) If an issue subject to arbitration under the alleged arbitration agreement is involved in an action or proceeding pending before a court having jurisdiction to hear motions to compel arbitration, the motion shall be made to that court. Otherwise, the motion shall be made to a court with proper venue.

Rule 33, Utah Rules of Appellate Procedure

(A) *Damages for Delay or Frivolous Appeal.* Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney's fees to the prevailing party. The Court may order that the damages be paid by the party or by the party's attorney.

(B) *Definitions.* For the purposes of these rules, a frivolous appeal, motion, brief, or other papers one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law. An appeal, motion, brief, or other paper inopposed for the purpose of delay is one inopposed for any improper purpose such as to harass, cause needless increase in the costs of litigation, or gain time that will benefit only the party filing the appeal, motion, brief or other paper.

STATEMENT OF THE CASE

A. Nature of the Case

This matter concerns an appeal from the denial of the Defendant Michael J. Kearns' ("Kearns") Motion to Set Aside the Default Judgment entered against him and in favor of Plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo").

As in all cases reviewing a trial court's decision to refuse to set aside a default judgment, the issues concern whether (1) the defendant timely filed a motion to set aside the default judgment; (2) the defendant showed excusable neglect as required by Rule 60(b)(1); and, (3) if there was a sufficient showing of excusable neglect, whether the defendant demonstrated a meritorious defense.

After full briefing by the parties concerning the facts and circumstances surrounding the complaint, Kearns' conduct after being served with the Complaint, the arguments regarding the alleged timeliness of the filing of his motion, his alleged excusable neglect, and his alleged meritorious defense, the Trial Court correctly determined that Kearns' motion was meritless and denied the Motion to Set Aside the Default Judgment leaving the Judgment in place.

B. Course of Proceedings

On August 9, 1999, Plaintiff Wells Fargo Bank, N.A. filed a Complaint against Michael J. Kearns stemming from a dispute arising from a line of credit agreement entered into between Mr. Kearns and Wells Fargo Bank. The Complaint was served upon Mr. Kearns by substitute service on his wife, Miriam Kearns, on August 23,

1999. When no answer was filed, default pleadings were submitted to the Third Judicial District Court on September 13, 1999. On September 23, 1999, the Honorable Judge Peuler signed the Judgment in favor of Plaintiff and against Defendant in the total amount of \$272,390.03. After the entry of the Default Judgment, Wells Fargo Bank entered in a course of post-judgment collection proceedings, including the issuance of a Writ of Execution, Writs of Garnishment and a Motion and Order Supplemental Proceeding. On December 27, 1999, Michael Kearns filed a Motion to Set Aside the Default Judgment. After the matter was fully briefed by the parties, Judge Peuler ruled by Minute Entry denying the Defendant's Motion. A final Order was entered by the Court on March 1, 2000, denying Michael Kearns' Motion to Set Aside the Default Judgment.

C. Disposition of Trial Court

The Honorable Sandra N. Peuler denied Mr. Kearns' Motion to Set Aside the Default Judgment stating in her minute entry that the ruling was based upon the arguments raised and set forth in Wells Fargo's Memorandum in Opposition to Michael Kearns' Motion. A final Order was entered by Judge Peuler on March 1, 2000.

STATEMENT OF FACTS

As Appellant did not set forth a statement of facts as required by Rule 24(a)(7), Utah Rules of Civil Procedure, Appellee sets them forth as follows:

1. On January 28, 1998, Defendant Michael J. Kearns ("Kearns") signed a Line of Credit Application securing a line of credit from Wells Fargo Bank, N.A. ("Wells Fargo") in the amount of \$250,000.00. (R. 5-10).
2. On or about February 13, 1998, Kearns used the line of credit by obtaining a cashier's check in the amount of \$250,000.00. (R. 2, 140).
3. Kearns made the required interest payments on the line of credit from June 1998 through December 1998 at which time Kearns ceased making payments. (R. 115).
4. On or about August 9, 1999, Wells Fargo filed a Complaint against Kearns with the Third Judicial District Court, Salt Lake County, Salt Lake Department, to collect the outstanding loan. (R. 1-10).
5. On August 23, 1999, Kearns was served with a Complaint through substitute service on Kearns' wife, Miriam C. Kearns at Kearns' principal residence. (R. 13-15).
6. At the time of the service of the Complaint, Kearns was involved in separate litigation entitled In the Matter of the THOMAS F. KEARNS JR. and MARY DURKIN KEARNS Trust, in the Third Judicial District Court, State of Utah, Case Number 993900489, before the Honorable J. Dennis Frederick ("Thomas Kearns Trust Action"). (R. 116, 142-168).

7. Kearns was represented by attorneys Eric C. Olson and Matthew K. Richards of the law firm of Kirton & McConkie in the Thomas Kearns Trust Action. (R. 116, 142-168).

8. On or about August 26, 1999, **three (3) days after being served with the subject Complaint**, Kearns filed a Reply Memorandum in the Thomas Kearns Trust Action. (R. 142-155). (See, Addendum # 1.)

9. In the Reply Memorandum filed by Kearns in the Thomas Kearns Trust Action, it states that *“Michael has been sued by the very entity that owes him a fiduciary duty”*. (R. 151) (See, Addendum # 1 at page 10.)

10. In support of the Reply Memorandum filed in the Thomas Kearns Trust Action, Kearns filed a personal sworn Affidavit entitled “Second Affidavit of Michael J. Kearns”. This was signed by Kearns on **August 26, 1999** and subscribed and sworn in front of a notary public **three (3) days after being served with the subject Complaint**. (R. 157-167). (See, Addendum # 2.)

11. In this Second Affidavit, Kearns states on August 26, 1999, as follows: *“On August 23, 1999, I was served with a Summons and Complaint, dated August 9, 1999, and attached hereto as Exhibit Q whereby the bank initiated litigation against me seeking payment of the entire loan amount, interest and litigation costs.”* (R. 166-167). (See, Addendum # 2, Page 10, paragraph 37.)

12. The Exhibit Q referenced in the Kearns Trust Action is the Wells Fargo complaint which initiated this action. (R. 117, ¶ 16; R 170-181). (See, Addendum # 2.)

13. On September 13, 1999, Wells Fargo submitted the subject Default Judgment with the Third Judicial District Court with accompanying documents. (R. 16-21).

14. On **September 23, 1999**, (30 days after Kearns was served) the Default Judgment was signed by the Honorable Judge Sandra Peuler and filed by the Clerk of the Court. (R. 22-23). On September 27, 1999, the Default Judgment was entered in the registry of judgments. (R. 22). (See Addendum #3.)

15. The Default Judgment was entered against Kearns and in favor of Wells Fargo in the sum of \$266,351.85 with costs in the sum of \$107.00, attorney's fees in the sum of \$837.00, and interest in the sum of \$5,094.18, for a total Judgment of \$272,390.03. (R. 22-23).

16. On September 29, 1999, Wells Fargo, by and through its counsel, filed and mailed a Notice of Entry of Default Judgment to Kearns which was filed with the Court on October 1, 1999. (R. 26-27). This Notice identified the entry date of the judgment as September 23, 1999.

17. On or about September 29, 1999, Wells Fargo filed a Motion and Order in Supplemental Proceedings which was issued requiring Kearns to appear for

examination on October 26, 1999. The Order in Supplemental Proceedings was served on Kearns on October 6, 1999. (R. 44-46).

18. On or about October 4, 1999, Wells Fargo had issued multiple Writs of Garnishment, including a Writ of Continuing Wage Garnishment upon Kearns' own company, Michael J. Kearns dba Michael J. Kearns & Associates. This was served on the company on October 6, 1999. Neither Kearns nor his company ever responded to the Writ of Garnishment. (R. 50-55).

19. On or about October 5, 1999, Wells Fargo had issued a Writ of Execution which was served upon Kearns or his wife on October 6, 1999. At the time of service, Kearns' 1986 Saab and 1996 Saab were towed and held pending an execution sale. (R. 38-39).

20. On October 6 and 7, 1999, Mark S. Swan, Wells Fargo's attorney, was contacted by Jerome Mooney, who represented himself to be Kearns' attorney, regarding a possible settlement of the subject claim. (R. 101-102).

21. On October 19, 1999, Kearns sent correspondence to Richard M. Kovacevich, President of Wells Fargo & Company in which he stated:

"That I owe this money has never been in question. . . . I have never stated anything to the contrary. . . ." (R. 183-184).

22. On October 22, 1999, Mark S. Swan prepared and mailed correspondence to Jerome Mooney informing him of Wells Fargo's intention to move forward with the Supplemental Order examination which was scheduled for October

26, 1999, due to the fact that Kearns had not responded to the garnishments, and the need to proceed forward with collection of the Judgment. (R. 102).

23. On October 26, 1999, an attorney for Wells Fargo attended the Supplemental Order Examination. Neither Kearns nor his attorney, Jerry Mooney, attended the examination. (R. 102).

24. On November 3, 1999, Mark S. Swan had another telephone conversation with Jerry Mooney regarding possible settlement of this matter. (R. 102).

25. On November 5, 1999, Mark S. Swan sent correspondence to Jerome Mooney regarding the possible settlement of the matter and the need to settle this matter quickly because of the accruing interest and the storage fees which were increasing daily on the two Saabs being held under the Writ of Execution. (R. 102).

26. On or about November 9, 1999, Mark S. Swan sent correspondence to Jerome Mooney withdrawing the unilateral forbearance from collection due to Kearns' misrepresentations, and Wells Fargo served a Writ of Non-Wage Garnishment (Post-Judgment) upon Donald J. Showalter, Trust Manager for Wells Fargo Bank, Private Client Services, and successfully seized an amount sufficient to pay the judgment in full. (R. 102).

27. On November 9, 1999, Jerome Mooney sent responding correspondence to Mark S. Swan indicating that Kearns would pay off the judgment before November 22, 1999. (R. 102).

28. On or about December 2, 1999, Kearns delivered to Wells Fargo a Bank One Official Check in the amount of \$282,325.08, satisfying the full judgment against him. (R. 120).

29. On December 8, 1999, Wells Fargo filed a Satisfaction of Judgment with this Court and released the Garnishment. (R. 73-74).

30. On Monday, December 27, 1999, Kearns filed this Motion to Set Aside Default Judgment. (R. 77-80).

31. In Support of Kearns' Motion to Set Aside Default Judgment, Kearns filed his own Affidavit and an Affidavit of his wife, Miriam C. Kearns. (R. 95-100). (See, Addendum # 4.)

32. After Kearns' Memorandum in Support, Wells Fargo's Memorandum in Opposition and Kearns' Reply Memorandum, and the Motion were duly submitted to the Court, the Honorable Judge Sandra N. Peuler ruled pursuant to a minute entry on January 31, 2000, that Kearns' Motion to Set Aside the Default Judgment was not well taken. (R. 207-208).

33. On March 1, 2000, the Honorable Sandra N. Peuler, Third Judicial District Court Judge, signed the Order Denying Defendant's Motion to Set Aside Default Judgment, which was filed with the Court on March 2, 2000. (R. 241-243).

34. On March 28, 2000, Kearns filed a Notice of Appeal of the Order Denying Kearns' Motion to Set Aside Default Judgment. (R. 244-246).

SUMMARY OF ARGUMENTS

INTRODUCTION

This Court should uphold the decision of the Trial Court by finding it did not clearly abuse its considerable discretion in denying Kearns' Motion to Set Aside the Default Judgment. The Motion to Set Aside was filed three (3) days late. There are sufficient facts and circumstances to show that the default judgment resulted from Kearns' lack of due diligence and due to Kearns' inexcusable neglect. Even if Kearns exercised due diligence and had excusable neglect, the Trial Court did not clearly abuse its discretion in denying Kearns' motion due to the lack of a meritorious defense. Kearns has continuously admitted owing the obligation, and therefore, there is no meritorious defense.

Lastly, there are sufficient other grounds for this Court to uphold the Trial Court's decision and find that there was not a clear abuse of the Trial Court's broad discretion.

After review of the facts and circumstances surrounding this appeal, this Court should affirm the Trial Court's decision and grant Wells Fargo damages against Kearns or Kearns' attorney pursuant to Rule 33, Utah Rules of Appellate Procedure.

ARGUMENT

POINT I

THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT WAS FILED MORE THAN THREE MONTHS AFTER THE JUDGMENT WAS ENTERED.

It appears from numerous appellate decisions in this state that the first inquiry regarding a Rule 60(b)(1) motion is whether the motion was timely filed. Black's Title, 991 P.2d at 610; Richins, 817 P.2d at 387; and Musselman, 667 P.2d at 1055-56. While this does not appear to be the basis of the Trial Court's ruling, this is an important issue for this Court to consider. Since the dates are without dispute, it would appear that the application of the timing rule contained in Rule 60(b), as that is defined by Rule 58A, would be a question of easy determination and result in summary disposition of this matter.

It is without dispute that the Default Judgment in this case was signed on September 23, 1999, and was stamped "Filed District Court Third Judicial District September 23, 1999, by K. Grotepas, Deputy Clerk" on its face. (R. 22-23). (See, Addendum # 3.) It is also without dispute that this same Default Judgment was entered in the Registry of Judgments on September 27, 1999. (R. 22). (Addendum # 3.) It is without dispute that Kearns' Motion to Set Aside the Default Judgment was filed with the Third District Court on December 27, 1999, at 4:22 p.m. (R. 77-80). Thus, Kearns' Motion to Set Aside the Default Judgment can only be considered timely if the 3-month time period begins running from September 27, 1999, the date of entry into the Registry of Judgments. If the time period began running on

September 23, 1999, then the Kearns' Motion was untimely. An untimely motion to set aside default judgment is a fatal defect, which renders other inquiries under Rule 60(b) moot. M.L. v. V.H., 894 P.2d 1285, 1288 (Utah Ct. App. 1995).

Rule 60(b) states that “the motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than three months after the **judgment**, order or proceeding **was entered or taken**.” (emphasis added). Wells Fargo believes that the phrase “entered or taken” in Rule 60(b), must be defined and construed in connection with the language of Rule 58A(b) and (c). Rule 58A states as follows:

(b) *Judgment in other cases.* Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and **filed with the clerk**. (emphasis added)

(c) *When judgment entered; notation and register of actions and judgment docket.* A judgment is complete and shall be deemed entered for all purposes, except the creation of lien on real property, when the same is **signed and filed** as hereinabove provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket. (emphasis added)

The language of Rule 58A says “filed **with** the Clerk,” not “filed **by** the Clerk”. That language would indicate that once the Judge signs the Judgment and gives it to the court clerk (i.e. files it) that it is a final judgment regardless of when it is entered in the register of actions and the judgment docket. In this case it is without dispute that the Judgment was signed by the Honorable Sandra N. Peuler, Third Judicial District Court Judge, on September 23, 1999. It is also without question that it was filed with the Clerk of the Court on September 23, 1999. (See, Court stamp

on Addendum # 3.) Consequently, the term “entered” in Rule 60(b) is defined by Rule 58A(b) and (c). Since a judgment is entered when it is signed and filed “with the clerk” then it should be without dispute that the judgment in this case was “entered” on September 23, 1999. The use of September 27, 1999, the date when Judgment was filed in the Judgment Register is not the date of entry for Rule 60(b) purposes.

Kearns filed his Motion to Set Aside on Monday, December 27, 1999, more than three months after the judgment was “entered”. To be timely, it should have been filed by Friday, December 24, 1999. As it was untimely, it should have been denied by the Trial Court on that basis alone. Kearns was specifically informed of the date of the entry of the Judgment pursuant to a Notice of Entry of Default Judgment filed on behalf of Wells Fargo, which was mailed to Kearns on September 30, 1999. (R. 26-27). Not only did Kearns have actual notice, but his counsel, once involved in this matter on October 7, 1999 (R. 102), had a personal obligation to check with the Clerk of the Court as to the date of entry. See, Automatic Control Products Corp. v. Tel-Tech, Inc., 780 P.2d 1258, 1260 (Utah 1989). Thus, there can be no argument that his attorney did not have notice and sufficient time to file the motion in a timely manner.

Thus, this Court should determine that the Motion to Set Aside the Default Judgment was without merit because it was untimely.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THAT KEARNS' FAILURE TO ANSWER THE COMPLAINT WAS NOT DUE TO EXCUSABLE NEGLIGENCE.

Kearns claims that the Trial Court abused its discretion in refusing to vacate the Judgment because Kearns alleges that he had sufficient "excusable neglect" to meet the standards under Rule 60(b)(1) to set aside the default judgment. Unfortunately in support of his argument, Kearns skews the law by only quoting language that talks about the policy of allowing a party to have his day in court. What Kearns does not do is appropriately cite to this Court any of the cases defining the balancing that is to be used in finding "excusable neglect" and how that term is defined and applied in specific circumstances. When these cases are reviewed and applied, it is clear that the Trial Court did not abuse its discretion in finding that Kearns' neglect was not excusable under the specific facts of this case.

The policy considerations set forth by Kearns are not nearly as one-sided as they appear from his brief. In discussing these policy considerations, the Utah Supreme Court in Airkem Intermountain v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973), the Utah Supreme Court stated:

For this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand **more than a mere statement that a person did not have his day in court** when full opportunity for a hearing was afforded to him or his representative. The movant must show that he has used *due diligence* and that he was prevented from appearing by circumstances over which he had no control. Id. 431 (emphasis in bold added).

See also, Black's Title, Inc., 991 P.2d at 611.

This excusable neglect standard has also been described as the “exercise of ‘due diligence’ by a reasonably prudent person under similar circumstances.” Mini Spas, Inc. v. Industrial Commission, 733 P.2d 130, 132 (Utah 1987). See also, Meadow Fresh Farms, Inc. v. Utah State University Department of Agriculture and Applied Science, 813 P.2d 1216, 1218 (Utah App. 1991).

Kearns was never prevented from appearing. Rather than showing “due diligence”, the facts show that Kearns made a conscious decision to not answer the Complaint and knowingly accepted the consequences.

Kearns was served with the Complaint on **August 23, 1999**, through substitute service on Kearns' wife. The Complaint stemmed from Kearns' failure to make the minimum interest payments on a \$250,000.00 line of credit with Wells Fargo and subsequent refusal to pay the full amount of the loan after acceleration. Kearns claims in paragraph 3 of his Affidavit that “[d]ue to my wife's preoccupation with sustaining my son's life, she neglected to bring the Complaint to my attention for **several days**” (emphasis added) (Addendum #4). Kearns states in paragraph 4 of his Affidavit that “[o]nce Mrs. Kearns alerted me to the Complaint, **I failed to file an answer or bring it to my attorney's attention** due to my own preoccupation with my son's condition” (emphasis added) (Addendum #2). Apparently these “facts” are supposed to show that Kearns did not give the Complaint to his attorney before the

default was entered. These alleged “facts” are the only sworn statements given by Kearns to support his claim of excusable neglect.

Assuming that Kearns’ son was in fact ill, it is clear that this had nothing to do with **Kearns’** ability to timely answer the Complaint¹. Kearns’ wife did not wait “several days” before giving the subject Complaint to Kearns. On **August 26, 1999**, Kearns filed the Second Affidavit of Michael J. Kearns in the Thomas Kearns Trust Action (Addendum #2). **This Affidavit was filed three days after the subject Complaint was served on Kearns’ wife.** Kearns stated in the Second Affidavit that:

“On August 23, 1999, I was served with a summons and complaint, dated August 9, 1999, and attached hereto as Exhibit Q, whereby the Bank initiated litigation against me seeking payment of the entire loan amount, interest, and litigation costs.”

Because Kearns refers to the Complaint in his Affidavit and attaches it as an exhibit on August 26, 1999, Kearns’ statement that his wife failed to give him the Complaint for “several days” must mean three days or less.

Additionally, Kearns’ sworn statement that he failed to bring the Complaint to his attorney’s attention due to his preoccupation with his son’s condition is false. In the Thomas Kearns Trust Action, Kearns was represented by Eric C. Olson and Matthew K. Richards of the law firm of Kirton & McConkie. **Kearns’ attorneys filed**

¹ Even if Kearns’ son was ill, inconvenience or press of personal or business affairs does not constitute excusable neglect. Valley Leasing v. Houghton, 661 P.2d 959 (Utah 1983), nor does even personal illness, Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1983).

a Reply Memorandum in the Thomas Kearns Trust Action on August 26, 1999, three days after the service of the subject Complaint. On page 10 of the Reply Memorandum, **Kearns' attorneys** stated that:

*“ . . . [O]nce Michael followed through with his threats to seek a new trustee, collection efforts began and **Michael now has been sued by the very entity that owes him a fiduciary duty.**”*

Thus, Kearns not only informed his attorneys of the subject Complaint, he supplied his attorneys with the Complaint, and his attorneys used the subject Complaint as an exhibit in the Thomas Kearns Trust Action **only three days after it was served** on Kearns' wife. Thus, Kearns' attorneys had at least until September 23, 1999, (the date of the Default Judgment) to answer the Complaint, or **28 days** from the date it was used by Kearns and his attorneys in the Thomas Kearns Trust Action. Kearns and his attorneys' failure to timely answer was not the result of “excusable neglect.”

The excuse that Kearns offers to support his claim of “excusable neglect” and to pass that test that he used the due diligence of an ordinary person in responding to the complaint was that he was “preoccupied” with his son's illness. However, this statement is insufficient to establish excusable neglect. The effect of illness in demonstrating “excusable neglect” has been reviewed several times by Utah courts.

The most recent application of the illness claim is as follows:

Consequently, the Utah Supreme Court has held that “[i]llness alone is not sufficient to make neglect in defending one's actions excusable.” *Warren v. Dixon Ranch Co.*, 123 Utah 416, 420-21, 260 P.2d 741, 743 (1953). A movant seeking relief may not simply rest on the assertion that he was ill to excuse his inactions; he must show that the nature of the **illness**

incapacitated him such that he was **unable to act**. See, *Id.* at 743 (We are not told the nature of the illness and it does not appear that the appellant. . .was so incapacitated the he could not have called an attorney to have his rights and the rights of the corporation protected”). Here, Black merely asserted that he was under a doctor’s care and unable to work. He neither described the illness, nor explained how it **wholly prevented him from taking the steps required to remain in contact with counsel**, Black’s Title or the Department. In the absence of such showing, Black’s assertion does not demonstrate his neglect was excusable. (emphasis added).

Black’s Title, 991 P.2d at 611. There are no facts that show that the illness of Kearns’ son was of such an extensive nature that it “incapacitated” Kearns such that he was unable to act and that it “wholly prevented him” from responding to the Complaint. In fact, it is quite clear that the illness did not prevent Kearns from using the Complaint and communicate with his attorney in another court action. An answer to the subject Complaint, would presumably have been a simple pleading, such as a general denial, if Kearns claimed he did not owe the money (even though he has always admitted that the owed the money).

Based upon the above, Kearns is clearly attempting to mislead this Court. Kearns’ failure to answer the subject Complaint was not caused by excusable neglect, but appears to be the result of a conscious decision not to answer, or through pure indifference on the part of Kearns². Kearns did not use due diligence after receiving the subject Complaint and was not incapacitated or wholly prevented

² This Court can conclude, based upon the facts, that Kearns’s failure to respond to the Complaint was a deliberate choice. Board of Education of Granite School District v. Cox, 384 P.2d 806, 808 (Utah 1963).

from answering the Complaint by circumstances which were outside his control. In fact, Kearns was in total control of the circumstances. Therefore, Kearns' Motion to Set Aside Default Judgment must was correctly denied.

POINT III

KEARNS DOES NOT HAVE A MERITORIOUS DEFENSE.

The first inquiries on a Rule 60(b) motion to set aside a default judgment are whether the motion is timely filed and whether there has been sufficient excusable neglect. Black's Title, Id. at 610. Only after those two thresholds are resolved in favor of the movant, does the issue of meritorious defense arise. If Kearns cannot persuade this Court that the Trial Court clearly abused its discretion with regard to the first two levels of inquiry, then the issue of meritorious defense is not even considered. Thus, a movant may have a meritorious defense, but if he fails the timeliness or the excusable neglect standards, the movant will not be entitled to relief. See, State of Utah by and through Utah State Dept. of Social Services v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983); Classic Cabinets, Inc. v. All American Life Insurance Co., 978 P.2d 465, 470, fn 5 (Utah App. 1999); Miller v. Brocksmith, 825 P.2d 690, 693-94 (Utah App. 1992); Board of Education of Granite School Dist. V. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963). Kearns has not been able to demonstrate the initial threshold elements necessary to set aside the Default Judgment and the Trial Court's decision should be affirmed.

Notwithstanding these initial elements, Kearns cannot satisfy the final element as he has not set forth a meritorious defense. The single greatest reason why Kearns cannot set forth a meritorious defense is that he has admitted to the debt owed to Wells Fargo and has never disputed his obligation to Wells Fargo. Kearns has never filed a proposed answer. The filing of a proposed answer appears to be a requirement in setting forth a meritorious defense. See, Erickson v. Schenkers International Forwarders, Inc., 882 P.2d 1147, 1149-50 (Utah 1994); and Musselman, Id. at 1058. Thus, without a proposed answer before it and with the fact that Kearns has never denied liability and in fact has admitted liability subsequent to the filing of the Complaint, the Trial Court correctly determined that there was no meritorious defense. The purpose of the meritorious defense rule is to “prevent the necessity of judicial review of questions, which, on the face of the pleadings are frivolous.” Musselman, 667 P.2d at 1060; see also, Erickson, 882 P.2d at 1149. The defenses raised by Kearns in both his brief before this Court and before the Trial Court do not raise a meritorious defense to the underlying claim of liability.

A. Kearns’ claim that the Complaint should have been adjudicated in arbitration is not a meritorious defense.

Kearns correctly sets forth the language regarding arbitration. However, Kearns fails to discuss the specific language of that paragraph and its application in the present context. Upon review and application of this language, it is clear that the arbitration paragraph does not give rise to a meritorious defense in and of itself.

The pertinent language of the paragraph is as follows:

You agree that any Dispute not resolved informally, regardless of when it arose, will be settled in accordance with the terms of the Arbitration Program **at the election of any party**. . .A party to a Dispute **may** by summary proceeding bring any action in court to compel arbitration of any Dispute.

It is undisputed that Kearns did not timely “elect” to have the dispute between the parties arbitrated. The option of arbitration was first raised in Kearns’ Motion to Set Aside the Default Judgment. The arbitration agreement does not prohibit Wells Fargo from filing a lawsuit against Kearns. What the contract provides is an opportunity for Kearns to elect arbitration if he chooses once a lawsuit is filed against him. If he allows a judgment to be entered before he elects arbitration, than that right is waived. Kearns should not be able to demand arbitration now, especially since he admits the debt and has paid the Judgment. This is consistent with the Utah Arbitration Act, § 78-31a-4, which gives a party an option to motion a court to compel the parties to arbitrate if there is an arbitration agreement.

The only issue that was entitled to be tried was whether Kearns owed an obligation to Wells Fargo. Since the obligation is admitted by Kearns, the argument made by Kearns to have the judgment set aside violates the policy of the meritorious defense rule, which is to avoid judicial review of questions and pleadings which are without merit or frivolous. See, Erickson, 882 P.2d at 1149 and Musselman, 667 P.2d at 1060.

B. The award of attorney's fees in the Judgment and the potential existence for a Counterclaim do not establish a meritorious defense.

Kearns argues that somehow he was prejudiced by Wells Fargo being awarded attorney's fees and costs. However, this is not an issue that raises a meritorious defense. The fees awarded in the Judgment were the total of \$837.00 (R. 23), which was set forth in the Affidavit of Attorney's Fees (R. 17-21). The fees would certainly have been greater based upon the standard fee schedule of the American Arbitration Association as the filing fee to initiate an arbitration with a panel of three arbitrators is more than the fee awarded by the Court. Further, it is clear that since Kearns admits the debt that attorney's fees and costs would have been awarded regardless. Thus, this issue of attorney's fees does not establish a "meritorious defense" to the question of liability.

Kearns' claim that he has potential lender liability claims against Wells Fargo which could offset the undisputed obligation is also not sufficient to set forth a meritorious defense. Kearns has never filed a proposed counterclaim or any document that would identify the nature and extent of the alleged lender liability claims. In fact, the term "lender liability claims" was used for the first time in Kearns' Reply Brief in support of his Motion to Set Aside the Default Judgment. (R. 194-204). A claim or defense described no better than "lender liability claims" cannot be deemed to raise a meritorious defense because it alleges no facts pursuant to which a court can fulfill its obligations to review the proposed answer and determine as a

matter of law whether it contains a defense which is entitled to be tried. Musselman, 667 P.2d at 1058, Erickson, 882 P.2d at 1148-49.

Therefore, Kearns' original Motion to Set Aside Default Judgment was justifiably denied by the Trial Court even if Kearns could appropriately show the motion was filed in a timely manner and that there was sufficient excusable neglect. There have been no meritorious defenses presented to the obligations owed to Wells Fargo, particularly in light of Mr. Kearns' repeated admission that he "has never refuted that he owed Wells Fargo \$250,000.00 plus interest". (See, Appellant's Brief at page 15). Consequently, the trial court's decision denying the Kearns' Motion to Set Aside the Default Judgment should be affirmed.

POINT IV

A BALANCE OF THE EQUITIES OF THIS CASE CLEARLY SHOW THAT THE TRIAL COURT CORRECTLY APPLIED ITS BROAD DISCRETION IN DENYING KEARNS' MOTION TO SET ASIDE DEFAULT JUDGMENT

As stated previously, this Court is only to reverse the Trial Court if it clearly abused its broad discretion in refusing to set aside the Default Judgment. Black's Title, Inc., 991 P.2d 607 at 610. The application of this rule is on a case by case basis as noted by the Utah Supreme Court:

The trial court has broad discretion to balance the equities on a case-by-case basis, including such considerations as the preference to allow the presentation of all claims and defenses, any delay or unfairness of a party's conduct, the need for finality of judgments, and the respective hardships in denying or granting relief. *See, Warren v. Dixon Ranch Co.*, 123 Utah 416, 260 P.2d 471 (1953); *Boyce v. Boyce*, 609 P.2d 928, 931 (Utah 1981); *Airkem Intermountain v. Parker*, *supra*.

Katz, 732 P.2d at 96 (fn 2).¹

There is a particular need for the Court to balance the equities of this case. First of all, Kearns' admission of the debt seems to indicate that there is no equitable reason for the judgment to be set aside and to cause both parties to incur additional attorney's fees and waste judicial resources. There is also the fact that this debt and Judgment was paid by Kearns within the three-month time period to file the Motion to Set Aside the Default Judgment, and as a result, Kearns received a Satisfaction of Judgment. This fact creates an additional factor for consideration by the Court. In Laub v. South Central Utah Telephone Ass'n, Inc., 657 P.2d 1304 (Utah 1982), the Utah Supreme Court stated:

. . . both the six-month delay **and the fact of prior satisfaction** show that the motion was not made within a reasonable time. While we decline plaintiffs' invitation to go so far as to say that a judgment once knowingly and voluntarily satisfied becomes extinguished and is therefore never subject to modification, see Mitchell v. Lindly, Okl., 351 P.2d 1063 (1960), **we do consider the fact of prior satisfaction an important consideration in determining whether the motion to modify was made within a reasonable time. The possibility of prejudice to the nonmoving party increases significantly when the judgment has already been paid.** (emphasis added)

The following chronology of events shows that Kearns consciously decided to allow the judgment to stand and post-judgment collection efforts to proceed forward. Kearns had multiple opportunities to timely object to the Default Judgment. Kearns' actions show a pattern of waiver and laches, and thus Kearns should not now be allowed to reopen a case that is now closed, particularly when he voluntarily

paid the judgment to receive a Satisfaction of Judgment and a Release of Garnishment.

1. After obtaining the default judgment, Wells Fargo filed Motion and Order in Supplemental Proceedings on September 29, 1999. The Order required the Kearns to appear on October 26, 1999. The Order was served on Kearns on October 6, 1999.

2. On October 4, 1999, Wells Fargo caused Writs of Garnishment to be issued, one of which was on Kearns' company, Michael J. Kearns dba Michael J. Kearns & Associates. This garnishee, controlled by Kearns, never responded to the garnishment.

3. Wells Fargo caused to be issued a Writ of Execution on October 5, 1999, which was served on October 6, 1999. At this time both of Kearns' vehicles, a 1986 Saab and a 1996 Saab, were towed and held pending an execution sale. Kearns never requested a hearing or filed an objection to the seizure.

4. On October 7, 1999, Mark S. Swan, attorney for Wells Fargo, was contacted by Jerry Mooney, Kearns' attorney, regarding a possible settlement of the subject claim. Mr. Swan was amenable to settlement of the matter and waited for Mr. Mooney to get back to him regarding settlement.

5. On October 19, 1999, Kearns sent correspondence to Richard M. Kovacevich, President of Wells Fargo & Company in which he stated, *"That I owe this money has never been in question. . . . I have never stated anything to the contrary. . . ."*

6. On October 21, 1999, Mark S. Swan prepared and mailed correspondence to Jerry Mooney informing him of Wells Fargo's intention to move forward with the Supplemental Order Examination which was scheduled for October 26, 1999, due to the fact that Kearns' company had not responded to the garnishments, and the need to proceed forward with judgment collection. Mr. Swan sent this correspondence because of the fact that settlement negotiations were not moving forward.

7. On October 26, 1999, Wells Fargo's attorneys attended the Supplemental Order Examination. Neither Kearns nor any of his attorneys attended the hearing.

8. On November 2, 1999, a Bench Warrant was issued against Kearns because of his violation of the Court Order requiring him to appear for a supplemental examination.

9. On November 3, 1999, Mark S. Swan had another telephone conversation with Jerry Mooney regarding possible settlement of this matter.

10. On November 5, 1999, Mark S. Swan sent correspondence to Jerome Mooney regarding the possible settlement of the matter and the need to settle this matter quickly because of the interest and storage fees which were increasing daily on the two Saabs which were being held pursuant to the execution.

11. On November 9, 1999, Mark S. Swan sent correspondence to Jerome Mooney withdrawing the unilateral forbearance from collection due to Kearns' misrepresentations, and Wells Fargo caused a Writ of Garnishment to be served on the Trust Department of Wells Fargo Bank and successfully seized an amount sufficient to pay the judgment in full. Kearns did not file an objection to the garnishment.

12. On November 9, 1999, Jerome Mooney sent responding correspondence to Mark S. Swan indicating that Kearns would pay off the judgment before November 22, 1999.

13. On or about December 2, 1999, Kearns delivered to Wells Fargo a Bank One Official Check in the amount of \$282,325.08, satisfying the full judgment against him.

14. On December 8, 1999, Wells Fargo filed a Satisfaction of Judgment with this Court and submitted a Release of Garnishment to the necessary entities.

Obviously, Kearns and his attorneys allowed the judgment collection process to go forward without ever attempting to timely set aside the Default Judgment, despite multiple opportunities to demand hearings in the post-judgment collection proceedings. Kearns refused to participate in any of the post-judgment collection

proceedings. While Mr. Mooney has been representing Kearns in this matter³ at least since October 7, 1999, the Motion to Set Aside was his first formal appearance in this case. Only after the judgment was voluntarily paid, and Wells Fargo filed a Satisfaction of Judgment with this Court, did Kearns belatedly file the Motion to Set Aside Default Judgment. Wells Fargo was forced to go to considerable time and expense in collecting the underlying debt before it was voluntarily paid. Therefore, Kearns' delay in filing the Motion to Set Aside Default Judgment and the fact of prior satisfaction show that the Motion was not filed within a reasonable time and the attorney's fees Wells Fargo is now paying after the judgment was satisfied creates a substantial prejudice to it created solely by Kearns' tactics. Kearns' actions constitute waiver and/or laches thereby equitably estopping Kearns from having the Judgment set aside.

These factors coupled with the deemed admission by Kearns of the obligation and the possibility of prejudice to Wells Fargo since the Judgment has already been paid, are additional grounds upon which this Court can uphold the Trial Court's decision. It is well established law in the state of Utah that this Court should affirm the decision of the Trial Court if it can do so on any ground. See, Matter of Estate

³ Messrs. Larsen and Mooney represented Kearns before and at the time the subject Complaint was served as they were representing Kearns in another case pending before the Third Judicial District Court, Michael J. Kearns v. Richard Howa, Harry Rosenthal and Connie Mallet, Case No. 990904000, filed April 13, 1999, before Judge Noel, which case is still pending. (R. 127). Thus, at the time of service, Kearns had two law firms working for him.

of Shepley, 645 P.2d 605 (Utah 1982); Jespersion v. Jespersen, 610 P.2d 326 (Utah 1980). Thus, Wells Fargo would request this Court to find that there are sufficient equitable grounds in addition to legal grounds to uphold the Trial Court's decision to deny the Motion to Set Aside the Default Judgment and thereby affirm the Trial Court's decision in allowing the Default Judgment to stand.

POINT V

KEARNS' AFFIDAVIT IS FRIVOLOUS, AND THEREFORE WELLS FARGO SHOULD BE AWARDED ITS ATTORNEY'S FEES AND COSTS ON APPEAL.

Pursuant to Rule 33, Utah Rules of Appellate Procedure, if this Court determines that Kearns' appeal is either frivolous or for delay, it may award just damages that may include single or double costs and/or reasonable attorney's fees to Wells Fargo. This Court has the option of ordering that the damages be paid by Kearns or Kearns' attorney. The standard for frivolous appeal does not require a finding of bad faith. O'Brien v. Rush, 744 P.2d 306 (Utah Ct. App. 1987). A frivolous appeal is one that has no reasonable legal or factual basis. Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157 (Utah Ct. App. 1988); Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989). A frivolous appeal also has been defined as "[o]ne in which no justiciable question has been presented and. . .is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed". Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990); see also, Farrell v. Porter, 830 P.2d 299, 302 (Utah App. 1992).

Kearns' claim that he has satisfied the requirements of Rule 60(b) is full of conclusory statements and platitudes with no substantive factual basis. As such, both his motion before the trial court and his current appeal are totally absent of the facts and law necessary to show the requisite elements necessary to obtain relief under Rule 60(b)(1). It does not appear that the arguments raised by Kearns are grounded in material fact or warranted by existing law. In fact, Wells Fargo believes that Kearns is trying to manipulate the general policy of allowing a litigant to have his day in court by how he describes this case. With the facts that Kearns has personally admitted the debt, his attorney has acknowledged the debt subsequent to the Judgment, and Kearns has voluntarily paid the Judgment, there is a clear indication that there was no proper motivation for filing the original motion or this appeal. This is especially true since Kearns' appeal is a restatement of his argument before the Trial Court. The issue was so clear to the Trial Court that no oral argument was needed. Kearns' actions are causing an unnecessary expense to Wells Fargo which obtained a valid judgment on an acknowledged debt and which has no way to obtain recompense for its attorney's fees, absent this court awarding such fees and costs pursuant to Rule 33, Utah Rules of Appellate Procedure. This case seems to be close to the situation decried by the Utah Supreme Court in DeBry v. Cascade Enterprises, 935 P.2d 499, 502-03 (Utah 1997). Thus, Wells Fargo requests this Court to find that the appeal is frivolous and not warranted in law and

award Wells Fargo double its costs and reasonable compensation for the time and labor expended by its attorneys in defending the appeal.

CONCLUSION

As demonstrated above, the Trial Court correctly used its broad discretion in denying Kearns' Motion to Set Aside Default Judgment as Kearns' motion did not meet the requirements of Rule 60(b)(1), U.R.Civ.P. Kearns did not file the Rule 60(b)(1) motion within three (3) months of the default judgment being entered by the Court. Kearns' actions post-judgment, even if the motion were filed timely, were such that it would be inequitable and not meet the requirements of Rule 60(b)(1) to set aside the Default Judgment. The facts show that Kearns did not fail to answer the Complaint due to excusable neglect.


Despite Kearns' statements that he was "preoccupied" with his son's illness and did not receive the Complaint for "several days" from his wife, the facts are clear and undisputed that he was aware of the Complaint and turned the Complaint over to his attorneys who used it in another case within three days of Kearns' wife being served. Thus, there was ample opportunity for Kearns and his team of attorneys to answer a simple collection complaint. Furthermore, in light of Kearns' continual admission that he owed the obligation to Wells Fargo, his arguments regarding having a meritorious defense are meaningless. In light of the factors set forth above, it would appear that this is a frivolous appeal within the definition of Rule 33, Utah

Rules of Appellate Procedure entitling Wells Fargo to double its costs and reasonable attorney's fees.

Wherefore, Wells Fargo respectfully requests this Court to affirm the Trial Court's decision and find that the Trial Court did not abuse its broad discretion in determining that there was no reason to set aside the Default Judgment. Wells Fargo also requests that it be awarded its costs and attorney's fees pursuant to Rule 33, Utah Rules of Appellate Procedure.

DATED this 17th day of July, 2000.

RICHER, SWAN & OVERHOLT, P.C.



Mark S. Swan
Attorney for Wells Fargo/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2000, I caused two (2) true and correct copies of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

Mark A. Larsen
Joleen S. Mantas
Larsen & Mooney Law
50 West Broadway, Suite 100
Salt Lake City, Utah 84101



ADDENDUM #1

Eric C. Olson (#4108)
Matthew K. Richards (#7972)
KIRTON & McCONKIE
Attorneys for Petitioner
Michael J. Kearns
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

FILED
DISTRICT COURT
20 AUG 26 PM 4:28
SALT LAKE COUNTY
BY DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH. PROBATE DIVISION

In the Matter of

THE THOMAS F. KEARNS, JR. and
MARY DURKIN KEARNS TRUST,

:
:
: **REPLY MEMORANDUM IN**
: **SUPPORT OF PETITIONER'S**
: **MOTION FOR SUMMARY**
: **JUDGMENT AND IN OPPOSITION**
: **TO WELLS FARGO'S MOTION FOR**
: **SUMMARY JUDGMENT**

:
:
: Case No 993900489 TR

:
:
: Judge J Dennis Frederick
:

Petitioner, Michael J. Kearns ("Michael"), through counsel, submits the following Reply Memorandum in support of his Motion for Summary Judgment and in opposition to the Motion for Summary Judgment filed by Wells Fargo Bank (hereinafter "Wells Fargo" or "the Bank").

PRELIMINARY STATEMENT

Counsel paints the Bank's dealings with Michael with benign colors. Of course, that is what good advocates are supposed to do for their clients. However, protestations of disinterest do not disguise the very real conflicts existing between Michael and the Bank. Because the

Bank persists in claiming a “right” as a matter of law to remain as trustee and essentially do as it pleases under the guise of “fiduciary duty,” Michael has provided a second affidavit setting forth in greater detail the Bank’s conflicts and deficiencies. The issue here is not whether this trustee can come up with a plausible explanation for conduct at variance with the interests and desires of the primary beneficiary, but whether this Court should embrace such explanations as sufficient excuse for the perpetuation of a failed and suspect trustee relationship.

It must be remembered that Michael fought a long and expensive battle to keep some portion of the Trust’s Kearns Tribune stock intact. Now the Bank, in the name of its “rights” as trustee, wants to pursue a course calculated to undermine that victory. At the same time, Michael’s mother (“Piersol”) refuses to permit a dissolution of the Trust that would allow Michael direct control of the assets he has preserved. With the Bank now openly hostile to Michael because of nonpayment of a loan made to him solely because of his status as beneficiary of the Trust, among other reasons, the Court should terminate Wells Fargo as trustee and appoint a different institutional trustee.

STATEMENT OF MATERIAL FACTS IN DISPUTE

The Bank disputes five of Michael’s material undisputed facts but then offers several “facts” of its own that, by reason of their generality and incomplete nature, must be disputed:

The Facts Disputed By The Bank

¶¶ 13, 15 of Petitioner’s Memo—This quarrel is entirely semantic. The Bank has never been willing to admit the simple fact that it followed Michael’s investment advice for nearly eighteen months with singular success. Yet, however it may choose to garnish the reality with references to “independent judgment and discretion,” the four-fold increase in the value of the

Trust assets between September, 1997 and June, 1999 rests exclusively on Wells Fargo's willingness to rely on Michael's judgment. Conversely, the most glaring losses and lost opportunities in connection with the Trust are those instances in which the Bank disregarded Michael's wishes in its ill-advised attempt to demonstrate independence.

This point, of course, lay at the heart of the disagreement over the form of affidavit sought in the Piersol litigation. In the affidavit, the Bank insisted on characterizing its handling of the Trust in terms that dismissed Michael's input as inconsequential, which is simply not so. In refusing to give Michael his due as the one demanding a course for the Trust that proved extraordinarily beneficial, the Bank undercut his position in the Piersol dispute.

"16 of Petitioner's Memo—This rationalization by the Bank is predictable but ultimately incomprehensible. After nearly 1.5 year's success in holding the Trust asset per Michael's request and despite the recent receipt of AT&T stock that was both blue chip and produced dividends, the Bank felt compelled earlier this year to implement its discredited diversification scheme at a time when those with knowledge of the market recognized AT&T's appreciating value. Again, the Bank refuses to admit that Michael's expertise outshone Wells Fargo's slavish adherence to the diversification plan. That the ill-advised move came mere days after Piersol prevailed in opposing termination of the Trust merely added insult to injury.

"17 of Petitioner's Memo—Again, the Bank opts for characterization over substance in disputing the issue of communication between the parties. Given Michael's unique knowledge of the telecommunications and media industries and the complete absence of comparable expertise at the Bank, he should be consulted in advance of investment moves, not merely relegated to an observer's position receiving statements and notices well after the fact.

¶ 19 of Petitioner's Memo—Wells Fargo unintentionally underscores the key disagreement between the parties when it contends that Michael's "deep-seeded and irreparable loss of confidence" is "unjustified." At some point, the objective facts of a trustee-beneficiary relationship rise to a level of distrust and conflict that the law deems intolerable. Wells Fargo insists that the proffered recharacterization of its own actions and motives neutralizes any perceived conflict. In short, the Bank belittles Michael and insinuates that his perception is entirely mistaken. However, the facts documented in Michael's Second Affidavit dispel any notion that the difficulties leading to the filing of this petition are nothing more than isolated mistaken impressions.

Disputes With Respect To The Bank's "Facts"

¶¶ 1 and 2 of Bank's Memo—The Bank's precise determination regarding its "fiduciary duty" is more accurately reflected in the February 9, 1998 memo of Bank officer Rees Peterson outlining his plan to diversify as an "appropriate/prudent investment strategy." Peterson viewed the future appreciation of the TCI shares as unlikely and urged diversification from the one stock. Because of Michael's objections, this did not happen at the time. This was most fortunate because, from February, 1998 to the present, the TCI stock (now AT&T) kept intact at Michael's insistence and contrary to Peterson's recommendation has appreciated from \$3,354,208 to \$7,692,733. See Exhibit F to Second Affidavit.

The Bank's rationale for diversification seems driven principally by the need to obtain money to pay fees to itself and to pay the nominal \$416.66 annuity to Piersol. This certainly did not warrant a wholesale disposition of 20% of the Trust assets. Further, once the TCI stock

became dividend paying AT&T stock in February, 1999, even the need “to generate income” was an insufficient excuse. *See* Wells Fargo’s Memo at 7, ¶ 12.

A fair interpretation of the Bank’s insistence on diversification is a perverse need to define and safeguard its perceived “rights” as trustee to act independent of and without regard for the wishes of the beneficiary. Rather than pursue a proven course advocated by an informed and acquiescent beneficiary, the Bank confines itself to what it characterizes as a “prudent” approach apparently as protection against a non-existent threat of liability to Michael.

¶ 3 of Bank’s Memo—What the Bank fails to mention is that Michael initiated both the meeting referenced and the request to see the diversification plan. Second Affidavit ¶¶ 14, 26.

¶¶ 12 and 13 of Bank’s Memo —The important point to note is that, even though “the need to generate income for payment of Trust obligations became less crucial” with the conversion to AT&T stock (Wells Fargo’s memo at 7, ¶ 12), the Bank pressed forward with its “prudent investment policy to diversify the Trust assets” by selling off 10% of the AT&T stock.

¶¶ 14 and 15 of Bank’s Memo—It is axiomatic that no one can predict the stock market, but some people like beneficiary Michael Kearns have greater knowledge of a particular niche relevant to the proposed transaction than inexperienced portfolio managers too caught up in their Bank’s “rights” as trustee to solicit and accept timely assistance. The Bank’s strategy is without nuance or insight; it is a classic “by the book” investment strategy aimed more at self-justification than exploitation of a unique historical block of media-based equities preserved at great expense by the efforts of the sole ultimate beneficiary.

ARGUMENT

I. WELLS FARGO HAS NO BASIS FOR OPPOSING TERMINATION OF ITS TRUSTEESHIP.

Replacement of a trustee is a matter addressed to the sound discretion for the Court. The determination “is rooted in equity. . . .” *Kerper v. Kerper*, 780 P.2d 923, 937 (Wyo. 1989). Reviewing courts afford such decisions considerable deference. *Id.* Only a result reached “arbitrarily and capriciously . . . in disregard of the use of sound judgment regarding what is right under the circumstances” will result in error and reversal. *Id.*

Michael’s petition to terminate the trustee is grounded on some very specific areas of conflict that have arisen unexpectedly by virtue of outside forces operating on this unique Trust. First, the settlors of the Trust selected as trustee “Walker Bank & Trust Company,” a Utah bank with historic ties to the Kearns family. Forty-two years later, Walker Bank is no more. Unforeseen by the settlors, three mergers and acquisitions have transformed the trustee from a prominent local bank into a mere appendage of a nationwide bank holding company with no demonstrable claim on the loyalty of the Trust beneficiaries.

Second, for the first forty years of its existence, the role of the trustee was custodial. Essentially, all that the trustee did was to hold intact a controlling block of Kearns Tribune stock. Only in the last two years, with the TCI and AT&T transactions, has the role of the Trustee changed. Now, the trustee holds title to extremely valuable publicly trading securities in one of the most stable and substantial quasi-utilities in the world. The trustee wants to diversify those holdings; the sole remaining beneficiary prefers a course analogous to that charted in the first forty years—stability and patience in preserving a large block of communications stock.

Third, although but an infant when the Trust was formed, Michael has followed what appears to be an almost genetic business proclivity into the arena of media and communications.

Consequently, he has developed an interest in and knowledge of the subject matter of the Trust that necessarily make him something more than a common bystander

Finally, despite provisions in the Trust declaring it “irrevocable,” five of the six ultimate beneficiaries combined with an income beneficiary, Piersol, to terminate the Trust. All that remains in the Trust are those assets derived from the block of Kearns Tribune stock that Michael, acting in defiance of the rest of his family, fought to keep intact

The Trust today is simply not the same trust established in 1957. The trustee, the trust assets and the beneficiaries, both in numbers and expertise, have changed radically. Thus, appeals to the settlor’s choice of trustee or supposed familiarity with the Trust ring hollow in the undisputed factual context before this Court. What matters is the relationship as it exists today. So viewed, there are more than sufficient grounds to appoint a new institution to act as trustee

In the most simple terms, Wells Fargo is simply fighting for its own prerogatives—its “right” to act as trustee and obtain the benefits flowing from that status (*i.e.* fees and the assurance that its unsecured loan to Michael will be repaid) despite the fact that no one else apparently is asking the Court to retain it in this status. All Michael asks is for appointment of a different institution to fill Wells Fargo’s shoes. This remedy will hurt no one and will undeniably eliminate the hostility and conflict that has arisen from the shifting factual context surrounding this Trust

II. THE COMBINED IMPORT OF THE UNDISPUTED FACTS MANDATES REPLACEMENT OF WELLS FARGO AS TRUSTEE.

A. The Bank Has Wrongly Given Precedence To Its Conception Of Diversification Over The Express Wishes Of The Ultimate Beneficiary.

Michael fought to keep the Trust a single asset trust. Yet, once the Bank had the TCI stock in its hands, it immediately began to agitate to diversify thereby generating administrative

fees and tax liabilities. Predictably, Michael requested patience consistent with the past course that had seen an unprecedented increase in value of the Trust asset through holding the block of stock intact. To the extent that the Trust has heeded Michael's voice, the value of the Trust has grown, almost exponentially. Time and again, Michael's keener insight into the media business proved right in predicting the most beneficial course for the Trust. In contrast, left to its own devices, the Bank has sacrificed growth and appreciation for a needless retrenchment which Michael as the sole ultimate beneficiary has opposed. Certainly, the \$416.66 annual obligation to Piersol does not warrant liquidation of millions of dollars of stable AT&T stock with growth potential in exchange for stagnant municipal bonds. As will be seen, the motive for diversification necessarily runs deeper.

One can trace the conflict between Michael and the Bank from late 1997 to the present. It is not imaginary. It is not irrational. Its effects are well documented. A knowledgeable and aggressive beneficiary seeks to preserve the status quo for long-term growth, while the Bank commits itself in writing to the opposite course. Through a series of missteps on the part of the Bank and a series of undeniable successes arising from the status quo policy, Michael's confidence in the trustee has eroded. The trustee finds it necessary to assert its authority and "rights" by locking Michael out of any consultative role and proceeding with its policy of absolute prudence. *See* 63 ALR2d *Hostility Between Trustee and Beneficiary as Grounds for Removal* 523, 528 & n.5, 530 & n.15; *see also Lister v. Weeks*, 46 A 558 (N.J. 1900) (removing trustee because, *inter alia*, friction or hostility between trustee and beneficiaries arose "out of the misbehavior of the trustee").

This real conflict is brought on by the Bank's insistence on undermining the very course that the sole remaining ultimate beneficiary sacrificed so much to preserve. That such conflict is

unique to the circumstances of this Trust makes it no less understandable and debilitating to the administration of the Trust. Perhaps, a substitute trustee would pursue the identical course advocated by the Bank; however, the Bank has established a track record that calls into question its sincerity in advocating wholesale diversification.

B. The Jones Waldo Relationship Exacerbates An Already Tense Relationship.

The best that the Bank can say about Jones Waldo is that the law firm has never represented Wells Fargo as trustee for this Trust. Such assurances are little comfort in light of the expansive relationship between Jones Waldo and the Bank generally and the Bank's refusal to disclose even an outline of that relationship to Michael. (Michael's Second Affidavit ¶¶ 29-31.)

In practical reality, Michael is forced to deal with the trustee on an uneven playing field. While Piersol's attorneys are the same folks who daily represent the Bank in numerous other contexts, Michael must content himself with counsel who enjoy no such advantage. Perhaps this accounts for Wells Fargo's inexplicable anxiety over "protection of Ms. Piersol's interest" despite the fact that the annual sum of \$416.66 to which she is entitled is essentially inconsequential when viewed in the context of a Trust with nearly \$8 million in assets. See Wells Fargo's Memo at 11, ¶ 3. In the end, Jones Waldo's dual representation of Wells Fargo and Piersol is not alone determinative, but the relationship viewed in the context of historic tensions between Michael and Piersol necessarily weighs in favor of appointing a new trustee.¹

¹As stated in Michael's prior memorandum in support of his motion for summary judgment, the Bank's communications to Michael regarding important events of the Trust has been almost entirely reactive to Michael's persistent requests for information, the information is not supplied to Michael unless he asks for it. Moreover, Michael has repeatedly requested specific information regarding the Trust and the Bank has promised to supply it. After many weeks, however, Michael has not received the requested information. The information relates to: (1) fees incurred by the trustee for managing the Trust, (2) communications between the trustee and the law firm Callister Nebeker & McCullough regarding the Trust, and (3) real estate owned by the Trust that apparently derives a yearly revenue from mining or mineral rights. (Michael Second Affidavit ¶ 28.)

C. In Making The Unsecured Loan To Michael, The Bank Necessarily Compromised Its Ability To Act With Impartiality And For The Sole Best Interest Of The Beneficiary.

Several facts about the \$250,000 loan emerge from Michael's Second Affidavit that underscore the potential conflict assumed by the Bank when it elected to make the loan. First, the loan originated with the very Bank department (Private Client Services) with which Michael must deal regarding the Trust. Indeed, Larry Bywater ("Bywater"), who heads that department and who is Michael's primary contact regarding the Trust, personally facilitated the loan premised on Michael's status as beneficiary of the Trust. Bradley Wiggins, who has offered his testimony regarding the transaction, is Bywater's subordinate and can testify with knowledge only because he was the one who arranged the loan, payment of which was expressly postponed until Michael obtained access to his portion of the Trust. (Wiggins Affidavit ¶ 7.)

Second, Bywater and Wiggins initiated the collection effort against Michael. Though Wiggins now characterizes the collection effort as entirely a task for the "work-out group," the Second Affidavit paints a much different picture. Bywater and Wiggins took Michael to lunch in an effort to obtain assurances regarding repayment of the loan. At the time, they gave Michael the understanding that the Bank would not come after him because he was a valued customer. Of course, once Michael followed through with his threats to seek a new trustee, collection efforts began and Michael now has been sued by the very entity that owes him a fiduciary duty.

Wiggins' affidavit acknowledges certain anomalies about the loan that heighten the Bank's conflict. It is unsecured. (Wiggins affidavit ¶ 3.) Repayment of the principal is unnecessary until the termination of the Trust (and thus the loan is dependent on the Trust itself). (Wiggins affidavit ¶ 7.) Wiggins himself initiated the steps to place the loan in collection.

(Wiggins affidavit ¶ 13.) Indeed, the check to Michael for the loan proceeds was signed by Bywater and Wiggins. (Second Affidavit, Exhibit O.)

More than any other point raised by Michael, this state of affairs is rife with conflicts for the Bank as trustee. The Bank as trustee will disperse Trust income to Michael against which, as a judgment creditor, it must seek execution. The Bank as trustee must manage and invest Trust assets that, as a creditor of Michael, it views as the sole source for repayment of principal. Cf. *Fred Hutchinson Cancer Research v. Holman*, 732 P.2d 974, 986 (Wash, 1987) (removing trustee who had charged excessive fees because, by virtue of court order mandating repayment of fees, he became both debtor of the trust and creditor as trustee). Also, members of its Private Client Services Group, including Michael's principal Trust contact, Bywater, all of whom office adjacent to the Trust Department, will be witnesses in any litigation to enforce the loan.

It is inconceivable that, given this state of affairs, the Bank can remain impartial, disinterested and loyal to the interests of the ultimate beneficiary. The diversification program, by which the Bank seeks to convert stable but potentially appreciating AT&T stock into bonds, obviously benefits the Bank not only from the standpoint of administrative fees but also as a means of reducing any risk to the source of recovery on the loan. The Bank may also be tempted to place Trust assets in investments that will generate short-term income against which it may levy to collect the loan. This conflict destroys any justification for keeping the Bank as trustee.

D. The Disingenuous Manner In Which The Bank Has Charged The Trust With Its Attorney's Fees In This Action Provides Further Evidence Of The Bank's Compromised Position.

The final blow to the Bank's trustee status results from its precipitous assessment of attorney's fees against the Trust. In a July 7, 1999 letter, Don Showalter of the Bank's Trust

Department attempts to explain why he has charged the Trust \$3,046.35 in attorney's fees in the June, 1999, statement (Second Affidavit, Exhibit R). He represents as follows:

[T]he bank in its capacity as trustee hired the firm Callister Nebeker & McCullough to represent it in relation to your efforts to "break" the trust. While the bank continues to be a neutral party to this action, it was determined that, as trustee, the bank should be aware of the various petitions filed by both parties. This firm also was asked to file our objection to your petition to remove the bank as trustee. Our only reason for doing so is that we feel we have been acting in a prudent manner pursuant to the terms of the trust agreement by which we are bound.

(Emphasis added). In so charging the Trust assets, of which Michael is the sole ultimate beneficiary, with the fees of counsel, the Bank abandons neutrality and imposes on Michael an additional expense for challenging Piersol.

Likewise, the Bank penalizes Michael for questioning the propriety of the Bank's continuing as trustee. *See Dennis v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F.2d 893, 901 (1st Cir. 1984) (holding that the conduct of parties during the course of litigation itself can demonstrate hostility sufficient to warrant removal of a trustee). Taken together with the Bank's other actions detailed above, in the prior Memorandum in Support of Michael Kearn's Motion for Summary Judgment, and in Michael's two affidavits, the time is long past that Wells Fargo can claim complete loyalty to anyone but itself.

CONCLUSION

Viewed in the aggregate, the undisputed facts of the Bank's relationship with Michael compel the conclusion that, as a matter of law, this Court should appoint a new trustee not burdened with the conflicts of interest and historical missteps that poison the beneficiary/trustee relationship in this instance

Dated this 26th day of August, 1999.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "Matthew K. Richards", written over a horizontal line.

Eric C. Olson

Matthew K. Richards

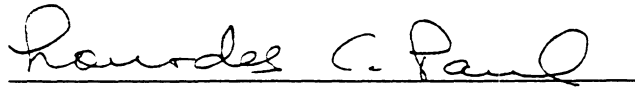
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that true and correct copy of the foregoing **REPLY MEMORANDUM**
IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO WELLS FARGO'S MOTION FOR SUMMARY JUDGMENT was
mailed, postage fully prepaid, this 26th day of August, 1999, to the following:

George E. Harris, Jr.
Jennifer Ward
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East, Suite 900
Salt Lake City, Utah 84133

Andrew H. Stone
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, #1500
Salt Lake City, UT 84101



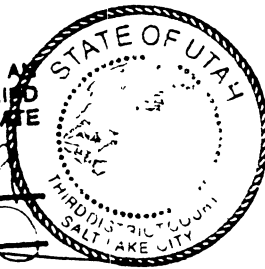
W 3000\8306\0002\mr\MemSuppMotSJ_ChangeTrustee_2Pld.wpd

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH.

DATE

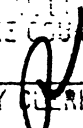
Dec. 29, 1999


DEPUTY COURT CLERK



ADDENDUM #2

Eric C. Olson (#4108)
Matthew K. Richards (#7972)
KIRTON & McCONKIE
Attorneys for Petitioner
Michael J. Kearns
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

FILED
DISTRICT COURT
93 AUG 26 PM 4: 28
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY  DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, PROBATE DIVISION

In the Matter of	:	
	:	
THE THOMAS F. KEARNS, JR. and	:	SECOND AFFIDAVIT OF
MARY DURKIN KEARNS TRUST,	:	MICHAEL J. KEARNS
	:	
	:	Case No. 993900489 TR
	:	
	:	Judge J. Dennis Frederick
	:	

Michael J. Kearns, being first duly sworn, does depose and state as follows:

1. This Affidavit supplements my earlier affidavit in this action and is a response to the affidavits filed by Wells Fargo. I make the following statements based on my personal knowledge.

2. My employment background is in the media business. For more than twenty years, I have been a publishing executive including stints with two Fortune 500 companies. During that time, I have developed contacts in the communications industry and have closely followed the growth of that industry and its investment potential. In the process, I have developed

considerable knowledge and expertise in understanding that industry from both an operational and investment standpoint.

Partial Termination of the Trust

3. Originally, I was one of six ultimate beneficiaries of the subject Trust, the other five being my siblings. (As noted in my earlier affidavit, the Trust does provide for a nominal yearly annuity to be paid to my mother Mary Piersol ("Piersol") during her lifetime in the amount of \$416.66.) In the mid-1990's, Piersol and my five siblings negotiated a partial termination of the Trust by agreeing that they would split in six equal parts the five-sixths of the Trust to which the siblings had a claim upon Piersol's death.

4. I dissented from this termination in the belief that the block of Kearns Tribune Corporation stock that was the sole Trust asset was more valuable as a block at that point in time than if it were divided up among the beneficiaries. As a consequence, the 1997 court order partially terminating the Trust left my one-sixth share intact. I am now the sole beneficiary of the corpus of the Trust subject only to my mother's nominal annual stipend.

5. I have had a keen interest in the handling of the Trust assets for two reasons: first, the sizeable block of stock of Kearns Tribune Corporation had great historical and sentimental value because my great-grandfather, former U.S. Senator Thomas Kearns, had founded that business and, second, I believed based on my knowledge of the communications industry that this block of stock had considerable intrinsic value in the emerging consolidation of media outlets.

6. My siblings and Piersol obtained direct control of the siblings' portions of the Trust at a time when the total value of the entire Trust stood at about \$6.3 million. Shortly after the partial termination of the Trust in 1997, consistent with my expectations of the market, Tele-

Communications Inc. ("TCI") purchased Kearns Tribune and the Trust's asset became publicly trading stock of much greater value than the previous block of stock.

7. With the remaining Trust assets now constituting my one-sixth portion of the original assets being held primarily for my benefit, I became concerned to ascertain the knowledge and abilities of those charged with the management of those assets as trustee and to have a voice in that management.

The Trustee and Its Employees

8. Originally, Walker Bank was named as the institutional trustee. Walker Bank had long-standing connections with the Kearns family through John Fitzpatrick, long-time publisher of *The Salt Lake Tribune* and secretary of Kearns Tribune Corporation, whose brother Joseph Fitzpatrick was head of the Walker Bank Trust Department.

9. Various corporate acquisitions and mergers had transformed the original Walker Bank first into First Interstate Bank, then Wells Fargo Bank and finally Norwest Bank doing business as Wells Fargo Bank (hereinafter "Wells Fargo" or "the Bank"). None of those presently dealing with the Trust assets has more than three years experience with the Trust.

10. In 1997, shortly before the time that the court partially terminated the Trust, I moved back to Utah with my wife. At the time, I contacted Wells Fargo directly to discuss the Trust. As already noted, I was particularly concerned to ascertain the experience and ability of those who would direct the Trust now that (a) I was the primary beneficiary of what remained in the Trust and (b) the Trust asset had become a block of publicly trading TCI stock rather than closely held Kearns Tribune stock.

11. My principal contact at Wells Fargo on Trust issues has been Larry Bywater (“Bywater”), vice-president and regional manager. Bywater offices at the north end of the second floor of the Wells Fargo Building in Salt Lake City, Utah, adjacent to the offices of Don Showalter (“Showalter”), John Tingey (“Tingey”), Rees Peterson (“Peterson”) and Brad Wiggins (“Wiggins”), all of whom are his subordinates in the Private Banking Department of Wells Fargo with whom I have dealt.

12. Showalter is a vice-president and trust officer with immediate responsibility for the Trust. Tingey is a vice president over investment management and supervises Petersen, an assistant vice-president of investment management who has day-to-day responsibility over Trust investments. Petersen has been with Wells Fargo only three years and, as I have observed him, appears to lack significant experience in investments generally or the communications market in particular.

13. Wiggins holds the same position as Petersen. As I have detailed below, I dealt with Wiggins at Bywater’s direction in connection with the unsecured \$250,000 loan mentioned at paragraph 10 of my original affidavit.

Trust Management—Deficiencies and Conflicts

14. My earliest concern about Wells Fargo relevant to the present action arose when I first contacted Tingey and Petersen in October, 1997 regarding the Trust. They then informed me of a plan to diversify the Trust assets in the wake of the TCI acquisition of Kearns Tribune stock and, at my request, showed me a two-page copy of their plan. Thereafter, I wrote to Tingey to discuss my current needs and to request that Wells Fargo not diversify the Trust assets at that time. I further noted that Wells Fargo’s role had changed from one of mere custodian of

the Kearns Tribune stock to one of asset manager. A copy of this October 8, 1997 letter is attached hereto as Exhibit A.

15. My reasoning for opposing diversification was the expectation of the market that TCI stock would appreciate and perhaps be the subject of acquisition by a larger entity.

16. I was sufficiently concerned about the stated intentions of Tingey and Petersen that I called Bywater directly in Arizona (before he had formally assumed his position in Salt Lake City with Wells Fargo following the First Interstate merger) to voice my opposition to the diversification proposed.

17. My attorney Jerry Mooney also sent a December 24, 1997 letter to Showalter confirming my opposition to diversification. A copy of this letter is Exhibit B to this affidavit. The Bank did not pursue diversification at that time.

18. My concern with Wells Fargo increased when I discovered that Tingey and Petersen were unaware of a true diversification opportunity to convert tax free 30% of the TCI stock into shares of TCI Venture Class A stock. I brought this opportunity to their attention and strongly urged them to pursue this conversion, which they did to the great advantage of the Trust. (The original TCIV.A shares acquired in March, 1998 with an initial value of \$1,096,521.75 are now shares of AT&T Corp. Liberty Media Group Class A with a value of \$2,377,799. *See* Asset and Transaction Statements dated October 31, 1997 at 5 and March 31, 1998 at 3 and Account Summary dated June 30, 1999 at 5 attached as Exhibits C, D and E respectively.)

19. A second problem with Wells Fargo arose in October, 1997, when the Bank sold 700 shares of TCI stock to pay itself fees for which all of the Kearns siblings were liable, not just me or my portion of the Trust assets. This sale is shown on page 5 of the October 31, 1997

Transaction Statement. I contacted Bywater regarding the error of charging my portion of the Trust assets with the fees incurred jointly by all present and former beneficiaries. Although it initially denied the problem, upon my further investigation and presentation of the facts, Wells Fargo eventually acknowledged its error and replaced the 700 shares of TCI stock as reflected in the March 31, 1998 statement at page 5.

20. As noted in my previous affidavit, the TCI stock eventually became AT&T stock when AT&T purchased TCI. I had heard rumors of this acquisition and conveyed them to Wells Fargo, which had no knowledge of the acquisition. This acquisition led to an even greater enhancement of the value of the Trust. All of this was consistent with my directions to the Trust and my purposes in resisting termination of the Trust in 1997. The effect on the value of the Trust from these decisions is reflected in the summary history attached as Exhibit F hereto. This shows an increase in value of the Trust asset since the partial termination of the Trust from \$1,053,233 to \$7,692,733.

21. Meanwhile, with the enhancement of the value of my portion of the original Trust assets still held intact, I finally undertook to terminate the Trust. My mother refused to agree unless I would give her, not just the same dollar amount that she had received from my siblings in 1997, but the same percentage share of the Trust assets that by now had appreciated by multiples since the partial termination of the Trust.

22. I declined her offer and sought judicial approval of the termination without her consent. Judge Wilkinson finally concluded that, notwithstanding her nominal interest in the Trust, my mother as one of the settlors had veto power over any termination of the Trust.

23. During the course of the litigation with my mother, Wells Fargo held off in its threats to diversify the Trust assets. However, no sooner had Judge Wilkinson ruled than Wells Fargo began to proceed with diversification. I urged them to hold the block of stock of AT&T, a blue chip company, intact while I attempted to negotiate some resolution with my mother. At the time, AT&T was contemplating a 3:2 split of its stock. My February 5, 1999 letter requesting further delay in diversification is Exhibit G to this affidavit.

24. I visited Peterson about ten days before the stock split. He casually mentioned to me that, as part of the Bank's initial diversification effort and contrary to my wishes, he had sold 8,000 shares of AT&T stock at \$79 per share. I was astounded that he would sell the stock while I was in the midst of negotiations with Piersol, with the stock split impending and with further news of certain regulatory matters favorable to AT&T emerging. Thereafter, I noted that, had he waited just two days, the price would have risen to \$85/share.

25. I immediately complained to Bywater, who responded: "I don't understand why they did not wait." He promised to "cancel the buy" and later called me at home to confirm that he had stopped the transaction. This was a great relief to me as the transaction would result in a \$50,000 loss to the Trust not counting capital gains taxes. Notwithstanding his earlier assurances, a short time later Bywater called again to apologize but said that "it was too late" so the trustee would exercise its "right" to do as it chose with the Trust assets. I expressed my concern and frustrations in a letter to Bywater dated March 7, 1999, that is attached as Exhibit H hereto.

26. Another area of concern over Wells Fargo's management of the Trust arose when I requested a copy of the Bank's plan for diversification of the Trust assets. I was given a two

page “computer model” for “blue chip stocks.” Out of curiosity, I asked acquaintances at a competing bank trust department and a reputable asset manager each to provide such a plan and received a sixty-page booklet outlining a host of options suitable to my particular needs as primary and ultimate beneficiary.

27. Another area of concern arose recently when the Bank calculated the amount due to me as a quarterly dividend from Trust assets. I sent a letter to Showalter dated April 29, 1999 noting that the amount proposed by the Bank well exceeded the amount I calculated as due and asking the Bank to check its numbers. By letter dated April 30, 1999, the Bank advised me that my concerns were well founded and corrected the amount owing. My April 29, 1999 letter to the Bank and the Bank’s April 30, 1999 letter to me are Exhibits I and J hereto.

28. A final concern is Wells Fargo’s failure to respond to my requests for information regarding the Trust. I specifically requested information about (1) fees incurred by the trustee for managing the Trust, (2) Trust-related communications between the Wells Fargo and the law firm Callister Nebeker & McCullough, and (3) real estate owned by the Trust that apparently derives a yearly revenue from mining or mineral rights. Wells Fargo promised me it would supply the requested information; yet, months later I have still not received it.

Perceived Conflicts of Interest

29 In the course of the litigation with Piersol over termination of the Trust, I sought information regarding the relationship between Jones, Waldo, Holbrook & McDonough, counsel for Mary Piersol, and the Wells Fargo Trust Department. My initial August 31, 1998 letter to Bywater requesting this information is Exhibit K hereto.

30. This letter was followed by two letters from my litigation counsel all seeking to find out what Piersol's counsel Jones Waldo already knew that being the extent of Jones Waldo's representation of the Trust Department. These two letters (dated September 14, 1998 and October 2, 1998 respectively) are attached as Exhibits L and N hereto.

31. Bywater's response to counsel's initial inquiries was evasive and not informative. (This response is attached as Exhibit M hereto.) It was clear that, despite its role as trustee, Wells Fargo refused to provide specifics to me as a beneficiary of the Trust Department's relationship with Jones Waldo in order to resolve my concerns about the trustees' loyalty. (Significantly, when Wells Fargo decided to oppose the present petition to change the trustee, it took the unusual step of retaining long-time Zions Bank general counsel Callister Nebeker & McCullough rather than its own outside counsel Jones Waldo.)

32. The later refusal by the Bank to sign an affidavit acknowledging my role in guiding the Trust after it had signed an opposing affidavit for Piersol demonstrated that the Bank was partisan rather than neutral.

32. In opposing my petition to terminate the Trust, Piersol's counsel obtained an affidavit from Wells Fargo to support her characterization of the relationship of Wells Fargo to the Trust beneficiaries. I was unaware of these dealings between the Trust and Piersol until the affidavit was served in the litigation. Then, Wells Fargo refused to sign an affidavit prepared by my counsel reflecting the documented fact outlined above that, indeed, I had guided and influenced the Trust management's investment decisions since the partial termination.

The Loan

34 My October 8, 1997 letter to Tingey (Exhibit A hereto) referenced my need for financing in the amount of \$150,000- \$250,000 for a business venture—the publication of *The Salt Lake Observer*. I discussed this topic with Bywater who introduced me to Wiggins, also of the Private Banking group, as one who could assist me. Wiggins, in turn, made the arrangements for the loan.

35 Wiggins and Bywater made it clear that, although the loan would be unsecured, because of my interest in the Trust the Bank would work with me and they would make the loan happen. Indeed, Wiggins and Bywater agreed that I would not be obligated to repay the principal of the loan until the Trust was terminated and I obtained access to my portion of the Trust assets. Moreover, I was able to borrow the sum of \$250,000 from Wells Fargo dealing directly with Bywater and Wiggins and no one else. Both Bywater and Wiggins signed the cashier's check delivered to me for the amount of the loan. (A copy of the check is attached as Exhibit O.)

36 When the *Observer* venture went sour, Bywater and Wiggins took me to lunch to inquire about how the loan would be paid. I left the meeting with the understanding that they would work with me as a valued trust customer so that the Bank would not come after me for repayment of the loan. Only after I concluded to seek appointment of a new trustee on April 8, 1999, did collection efforts begin.

37 On May 4, 1999, the Bank gave notice of acceleration of the credit line and demanded payment. (See Exhibit H to July 2, 1999 Memorandum in Support of Motion for Summary Judgment.) On July 7, 1999, I was sent a letter by certified mail from counsel for the Bank (Richer, Swan & Overholt, not Jones Waldo) threatening litigation. A copy of this letter is

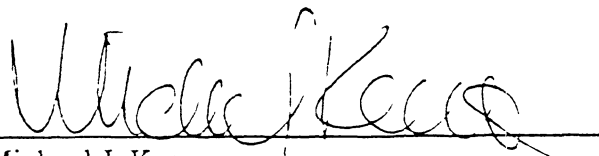
attached hereto as Exhibit P. On August 23, 1999, I was served with a summons and complaint, dated August 9, 1999 and attached hereto as Exhibit Q, whereby the Bank initiated litigation against me seeking payment of the entire loan amount, interest, and litigation costs.

Attorney's Fees

38. As a final adversarial blow, Wells Fargo has charged the Trust with the fees incurred when it elected to oppose my petition to appoint a new trustee. In correspondence to me dated July 7, 1999, Showalter falsely claimed that my petition has forced the Bank to hire its present counsel "in relation to [my] efforts to 'break' the trust" and that it was a "neutral party to this action." A copy of this letter is Exhibit R to this affidavit.

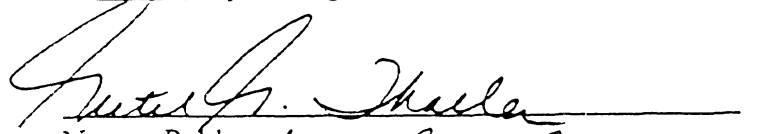
39. I believe that the Bank's most recent actions of diversifying the Trust assets, seeking collection of the loan and charging the attorney's fees to the Trust on false premises are in direct retaliation for my effort to obtain appointment of a new trustee.

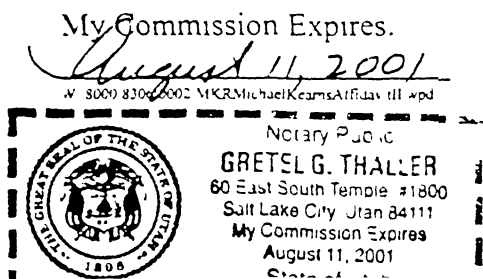
DATED this 26 day of August, 1999.


Michael J. Kearns

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 26th day of August, 1999.


Notary Public
Residing at: Salt Lake City, Utah

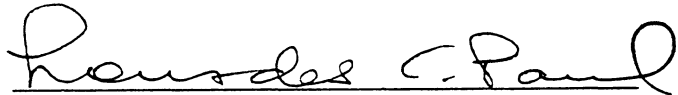


CERTIFICATE OF MAILING

I hereby certify that true and correct copy of the foregoing **SECOND AFFIDAVIT OF MICHAEL J. KEARNS** was mailed, postage fully prepaid, this 26th day of August, 1999, to the following:

George E. Harris, Jr.
Jennifer Ward
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East, Suite 900
Salt Lake City, Utah 84133

Andrew H. Stone
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street, #1500
Salt Lake City, UT 84101

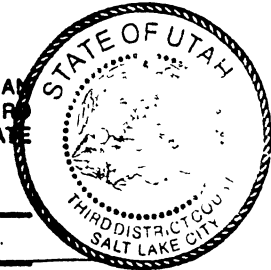


W:\8000\8306.0002\MKRMichaelKearnsAffidavit#2.wpd

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH.

DATE: Dec. 29, 1999


DEPUTY COURT CLERK



ADDENDUM #3

IMAGED

FILED DISTRICT COURT
Third Judicial District

SEP 23 1999

By K. Grotzer
SALT LAKE COUNTY
Deputy Clerk

Mark S. Swan, #3873
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047
Telephone: (801) 561-4750

Attorneys for Plaintiff

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 9/27/99

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

DEFAULT JUDGMENT

Civil No. 990908206

Judge Sandra Peuler

Defendant. Michael J. Kearns has failed to plead or otherwise defend in this action and default has been entered.

It is hereby ordered that Plaintiff be awarded Judgment against Defendant Michael J. Kearns as follows:

1. On Count One of Plaintiff's Complaint in the amount of:

\$266,351.85 Principal

as of July 7, 1999, plus interest accruing thereafter in the amount of \$59.93150 per day, plus interest at rate of 8.75% per annum on attorney's fees and court costs awarded to Plaintiff.

2. On Count One of Plaintiff's Complaint, attorney's fees and costs of Court as follows:

\$107.00	Accrued Costs to Date of Judgment
<u>\$837.00</u>	Attorney's Fees
\$944.00	TOTAL

For a total Judgment of:

\$266,351.85	Count One of Plaintiff's Complaint
\$ 5,094.18	Interest from July 7, 1999 through September 30, 1999
<u>\$ 944.00</u>	Attorney's Fees and Costs
<u>\$272,390.03</u>	TOTAL

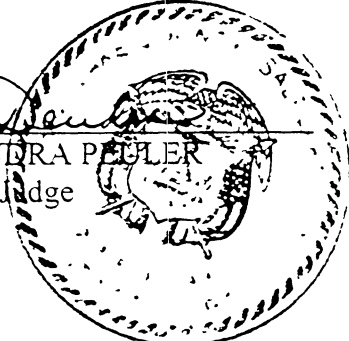
with interest accruing thereafter at the rate of \$59.93150 per day, together with interest rate of 8.75% per annum on attorney's fees and costs awarded to Plaintiff.

3. Any Judgment ordered herein may be augmented by the amount of reasonable costs and attorney's fees expended in collecting or enforcing the judgment by execution or otherwise as shall be established by affidavit from Plaintiff's counsel without further notice to Defendant.

DATED this 23 day of September, 1999.

BY THE COURT:

Sandra Pegler
HONORABLE SANDRA PEGLER
Third District Court Judge



ADDENDUM #4

Attorneys for Defendant

Judge Sandra Peuler

1. I have personal knowledge of the facts stated in this Affidavit.

2. My son was born on August 11, 1999. He suffered from severe allergies and complications with his digestive system. His condition consumed my thoughts and caused a tremendous amount of stress and anxiety on my family.

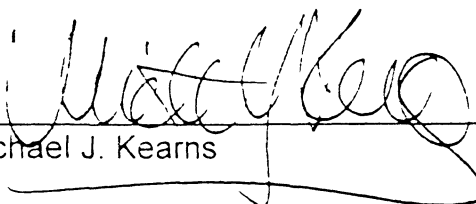
3. My wife, Miriam C. Kearns ("Mrs. Kearns"), was served with the Complaint in the present case on August 23, 1999. Due to my wife's preoccupation with sustaining my son's life, she neglected to bring the Complaint to my attention for several days.

4. Once Mrs. Kearns alerted me to the Complaint, I failed to file an answer or bring it to my attorney's attention due to my own preoccupation with my son's condition.

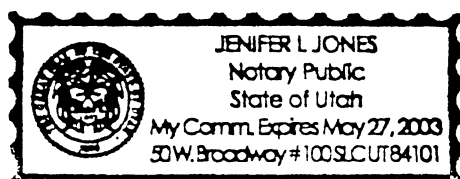
5. At the time I received this Complaint, I was engaged in efforts to terminate the Kearns Trust at Wells Fargo Bank, N.A. ("Wells Fargo"). I was the primary beneficiary of this trust, worth approximately \$8 million dollars, and assumed that this Complaint was Wells Fargo's attempt to retaliate for my efforts to terminate the trust.

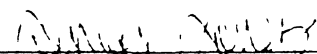
6. Sometime after the Default Judgment was entered against me, and once my son's condition had improved, I sought the assistance of an attorney because I believed I had counterclaims against Wells Fargo arising from its methods of dispute resolution in this particular situation.

Dated: December 27, 1999.


Michael J. Kearns

Subscribed to and sworn to before me on this 27th day of December, 1999.





Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Larsen & Mooney Law, and that in said capacity caused a true and correct copy of the preceding **AFFIDAVIT OF MICHAEL J. KEARNS** to be served by U.S. Mail, postage prepaid, to the following on December 27, 1999:

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047



MARK A. LARSEN (3727)
JEROME H. MOONEY III (2303)
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101
Telephone: (801) 364-6500

Attorneys for Defendant

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

WELLS FARGO BANK, N.A.

Plaintiff,

v.

MICHAEL J. KEARNS,

Defendant.

AFFIDAVIT OF MIRIAM C. KEARNS

Civil No. 990908206

Judge Sandra Peuler

Defendant Michael J. Kearns ("Mr. Kearns") submits the following Affidavit of Miriam C. Kearns in Support of His Motion to Set Aside Default Judgment:

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

Miriam C. Kearns, being first duly sworn, states as follows:

1. I have personal knowledge of the facts stated in this Affidavit.

2. On August 23, 1999, I was served with a Complaint naming my husband, Mr. Kearns as the defendant.

3. At the time I was served with the Complaint against my husband, I had recently given birth to our son who suffered from severe allergies as well as complications with his digestive system. His condition caused tremendous stress on both myself and my husband.

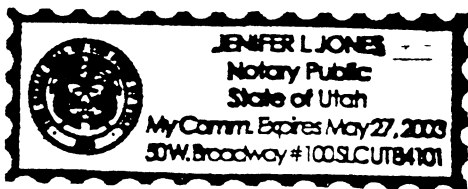
4. I was preoccupied with sustaining my son's life and neglected to immediately give the Complaint to my husband.


5. I did not read the Complaint and assumed that the basis for the dispute stemmed from outstanding parking tickets.

Dated: December 27, 1999.


Miriam C. Kearns

Subscribed to and sworn to before me on this 27th day of December, 1999.





Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Larsen & Mooney Law, and that in said capacity caused a true and correct copy of the preceding **AFFIDAVIT OF MIRIAM C. KEARNS** to be served by U.S. Mail, postage prepaid, to the following on December 27, 1999:

Mark S. Swan
RICHER, SWAN & OVERHOLT, P.C.
6925 South Union Park Center, Suite 450
Midvale, Utah 84047



May 10, 1993

Mr. Abe Gillies
GILLIES STRANSKY BREMS SMITH, ARCHITECTS
Walker Center, Suite 900
175 South Main
Salt Lake City, Utah 84111

RE: SALT PALACE RENOVATION & EXPANSION
Salt Lake City, Utah
Project No. 9211.00/File 4.6 & B-2.6

SUBJECT: CONSULTANT SERVICES AGREEMENT
Consultant Architect

Dear Abe:

This letter supercedes our previous Consultant Services Agreement letters dated October 6, 1992 and February 10, 1993 and proposes to establish in writing, a final agreement between our two firms for the provision of professional services in connection with the design and construction of the Salt Lake Convention Center Renovation and Expansion, Salt Lake City, Utah (PROJECT).

As you are aware, our Prime Agreement with Salt Lake County (COUNTY) has been amended subsequent to our original Consultant Services Agreement letter. We now wish to establish the final terms and conditions of our relationship with your firm based on this amendment and our current understanding of the scope and implementation strategy desired by the County.

A. AGREEMENT

1. The following terms and conditions shall apply to this Agreement between Thompson, Ventulett, Stainback & Associates, Inc., a Georgia corporation and Robert Norman Veale, an individual (ARCHITECT), and Gillies Stransky Brems Smith, Architects (CONSULTANT):

B. PRIME AGREEMENT

1. The Architect has entered into an Agreement dated May 20, 1992 (PRIME AGREEMENT) with the County, including Amendment No. 1 dated December 21, 1992, attached as Exhibit "A" and is hereby made a part of this Agreement, which provides for certain professional services to be furnished by the Architect in connection with the Salt Palace Renovation & Expansion project as described therein.
2. The term "Architect" when used in this Agreement shall have the same meaning as the term "Consultant" when used in the Prime Agreement, each term referring to Thompson, Ventulett, Stainback & Associates, Inc., a Georgia corporation and Robert Norman Veale, an individual.
3. The Consultant agrees to provide complete professional services for their designated portion of the Project in the same manner and to the same extent that the Architect is bound by the Prime Agreement, (as amended from time to time, with copies to the Consultant) attached as Exhibit "A", and shall render all other collateral services for their designated portion of the Project such as are customary in the industry as may be conducive to economy and sound development of the Project.
4. It is agreed in the event the Prime Agreement and this Agreement are found to be in conflict, that this Agreement shall govern as it relates to the assigned tasks and its related compensation between the Architect and the Consultant and the Prime Agreement shall govern as it relates to the professional services to be provided to the County.

THOMPSON, VENTULETT, STAINBACK & ASSOCIATES, INC.
ROBERT NORMAN VEALE, ARCHITECT

2700 PROMENADE TWO • 1230 PEACHTREE STREET N.E. • ATLANTA, GEORGIA 30309-3591 • 404/888-6600 • FAX: 404/888-6700

PLANNING
ARCHITECTURE
INTERIOR DESIGN

C. ARCHITECT/
CONSULTANT
RELATIONSHIP

1. The Architect and the Consultant understand and fully agree that each individual firm shall be fully responsible for obtaining and maintaining its Corporate and Professional Registration in the State of Utah and other legal and professional requirements, in accordance with all regulatory statutes having jurisdiction.
2. It is agreed that this Agreement is limited by the professional services for the Project as set forth in the Prime Agreement (as amended from time to time, with copies to the Consultant), attached as Exhibit "A", and shall end when performance of the Prime Agreement for the work of the Project has been fully completed; all monies received from the County have been distributed; and further all liabilities and expenses incurred on behalf of the Project, including Call Back and any and all claims by the County and others, have been fully discharged.
3. All Drawings and Specifications prepared by the Consultant in connection with the development and the construction of the Project shall bear the signature and seal of the Consultant.

No drawing or specifications shall be issued for construction by the Consultant until they have been released for construction by the Architect.

4. The Consultant shall be fully responsible for preparing its portion of the Architect's Work to comply with applicable codes and other governmental requirements using its highest degree of care, learning, skill and ability. Further, the Consultant shall be responsible to analyze Schematic, Design, Development, and/or other information provided by the Architect and to make technical design refinements and documentation of all elements for its portion of the Work. The Consultant agrees to prepare Drawings, Specifications and other documents for its portion of the Architect's Work in which it designates completely, definitely and clearly the methods and materials of construction, and shall be fully responsible for the adequacy, completeness and accuracy of the work product provided by the Consultant.
5. The Architect and Consultant hereby designate an individual upon whom the other firm can rely for decisions on behalf of each firm, who shall be referred to as the Project Representative. The Project Representatives shall be:

Architect:	H. Preston Crum
Consultant:	Abe Gillies

6. By the execution of this Agreement, each firm contracts to the other that it is possessed of that degree of care, learning, skill, and ability which is ordinarily possessed by other members of its profession and further contracts that the performance of the duties herein set forth it will exercise such degree of care, learning, skill and ability as it is ordinarily employed by other professionals under similar conditions and like circumstances and shall perform such duties without neglect, and shall not be liable except for failure to perform such degree of care, learning, skill and ability.
7. The Consultant shall for its designated portion of the Project be responsible to the Architect and shall perform "Consultant's Designated Services" in the same manner and to the same extent that the Architect is bound by the Prime Agreement and in the same manner and to the same extent that the Architect is responsible to the County.
8. Budgetary limitations shall not be a justification for breach of sound principles of Design, and further, in the event the Consultant cannot design its portion of the Project within the estimated construction contract amount, as established by the County, without disregarding sound principles of design, immediate written notice shall be made to the Architect.

D. PROJECT PUBLICITY

1. The Architect and Consultant will make every effort to secure proper recognition for all design disciplines in all Project publicity. On all publicity, the Architect will be identified as the Architect and the Consultant will be identified as the Consultant Architect, and to the maximum extent practical, engineers and other consultants will be listed immediately under or beside the Consultant Architect.
2. While neither of the parties to this Agreement anticipate that a media release would omit the mention of either of the firms, it is recognized that this can happen through no fault of either firm. It is hereby agreed that in the event only one of the parties to this Agreement is mentioned in a media release, the firm that is mentioned in the media shall attempt to have the release immediately corrected and, in addition, shall provide a written explanation to the omitted firm listing corrective measures, all within thirty (30) calendar days.

E. BID/CONSTRUCTION PACKAGES

1. It is agreed that the Bid/Construction Documents will be subdivided into two separate packages, to be competitively bid separately and constructed sequentially by separate contractors. The "Demolition" Bid/Construction Package will include the demolition and removal of the existing Accord Arena and Convention Hall on the West Temple side of the project. The "Convention Center" Bid/Construction Package will include the new general construction of the Exhibit Hall spaces, Meeting/Banquet Spaces and associated work primarily on the West Temple side of the project.
2. It is anticipated that the County will authorize a third package. The "South Temple" Bid/Construction Package will include the new Meeting Room Spaces which will be added and which will span over Second West together with adjacent support/service areas.

F. CONSULTANT'S DESIGNATED SERVICES

1. While the consultant has certain obligations for all phases of the Project as further described herein, the major work assignments of the Consultant are described as follows:
 - PROGRAMMING AND URBAN DESIGN PHASE
Minor responsibility limited to "public relations" appearances, attendance at Architect's presentations related to the Project that occur in Salt Lake City, gather support data as may be required by this phase of work (such as photographic materials, utility information and existing conditions information).
 - SCHEMATIC DESIGN PHASE
Minor responsibility limited to attendance at project meetings in Salt Lake City (primarily with but not limited to Consultant and County Meetings) for the purpose of assisting the Architect to manage and coordinate with other consultants; gather support data as may be required for this phase of work (such as existing conditions and preparation of measured drawings of special existing conditions requiring detail information).
 - DESIGN DEVELOPMENT PHASE
Minor responsibility similar to that described for the Schematic Design Phase with an increased responsibility for management and coordination with other Consultants to the Architect in Salt Lake City.
 - CONSTRUCTION DOCUMENT PHASE
Minor responsibility similar to that described for the Schematic Design Phase with additional responsibility to assist the Architect with the coordination of the work of the consultants in Salt Lake City.

Major responsibility in submitting documents for approval by appropriate governmental agencies in conjunction with the regulatory agencies having jurisdiction for this project as well as responsibility for the preparation of the "Front End" Bid

Documents (General Conditions, Instructions to Bidders, Construction Contract and Division One "General Requirements" of the Project Specifications).

Major responsibility, based on the Owner approved Design Development Documents (including the cost estimate) for the preparation of Construction Documents related to the Demolition Bid/Construction Package, the Temporary Measures Bid/Construction Package and designated areas/components of the Project including: renovations to the existing South Temple portion of the Project (such as adding Meeting Rooms in the north lobby and modifying the interior finishes of the existing Meeting Rooms/public circulation areas); renovations to the Arts Center front entrance on West Temple and renovations to the southwest storage/maintenance areas scheduled to remain. (See Exhibit "E" for graphic description of scope.)

The County has authorized a separate Temporary Measures Bid/Construction Package to accelerate certain components of construction ahead of demolition activities. The extra services required by the Consultant will be considered Additional Services and compensation will be in accordance with paragraph G-3.

— BID PHASE

Major responsibilities to include the coordination, "day-to-day" processing/management and professional consultant services of Bid/Negotiation activities from the Consultant's office in Salt Lake City. Overview project management and review will be provided by the Architect during this phase.

— CONSTRUCTION ADMINISTRATION PHASE

Major responsibilities to include the administration of the construction contracts including the coordination, "day-to-day" management, and processing of Construction Administration activities from the Consultant's office in Salt Lake City. Overview project management and review will be provided by the Architect during this phase.

— AS-BUILT PHASE

Major responsibility for coordinating and gathering necessary "As-Built" information from the Contractor and the preparation of the set of "As-Built" Documents.

2. Basic Service Consultant Architect responsibilities are identified in the following Tabulation of Professional Services.

TABULATION OF PROFESSIONAL SERVICES

SYMBOLS: "x" Major Responsibility
"o" Minor Responsibility
"—" No Responsibility

Outline Description of Services per Phase	TEMPORARY MEASURES CONSTRUCTION		DEMOLITION CONSTRUCTION		CONV. CENTER CONSTRUCTION	
	Responsibility		Responsibility		Responsibility	
	TVS&A	GSBS	TVS&A	GSBS	TVS&A	GSBS
— URBAN DESIGN AND PROGRAMMING						
Business Administration					x	—
Overview Project Management					x	—
County Review and Approvals					x	—
Programming	Not Applicable	Not Applicable	Not Applicable	Not Applicable	x	—
Urban Design					x	—
Cost Estimating					x	—
Presentations in Salt Lake					x	o
Data Gathering					o	x

Outline Description of Services per Phase	TEMPORARY MEASURES CONSTRUCTION		DEMOLITION CONSTRUCTION		CONV CENTER CONSTRUCTION	
	Responsibility		Responsibility		Responsibility	
	TVS&A	GSBS	TVS&A	GSBS	TVS&A	GSBS
— SCHEMATIC DESIGN PHASE						
Business Administration					x	—
Overview Project Management					x	—
Phase Approval by County					x	o
Manage and Coordinate Consultants					x	o
Building Code Information					x	o
Coordination with Regulatory Agencies					x	o
Schematic design studies and solutions	SAME	SAME	SAME	SAME	x	—
Sketches and Study Model					x	—
Schematic Design Drawings and Specifications					x	—
Coordination of Engineering Systems					x	—
Cost Estimates					x	—
Presentations in Salt Lake					x	o
Data Gathering					o	x
— DESIGN DEVELOPMENT PHASE						
Business Administration					x	—
Overview Project Management					x	—
Phase Approval by County					x	o
Manage and Coordinate Consultants					x	o
Formulation of Major Systems by Consultants (Structural, Mechanical and Electrical Systems)	SAME	SAME	SAME	SAME	x	—
Selection of Major Building Materials					x	—
Preparation of Documents						
Drawings					x	—
Specifications					x	—
Perspective sketches or study models					x	—
Reviewing plans with Regulatory Agencies					x	o
Cost Estimate					x	—
Presentations in Salt Lake					x	o
Data Gathering					o	x
Measured Drawings of Special Existing Conditions					—	x
— CONSTRUCTION DOCUMENT PHASE						
Business Administration	x	—	x	—	x	—
Overview Project Management	x	o	x	o	x	o
Phase Approval by County	o	x	o	x	x	o
Manage and Coordinate Consultants	o	x	o	x	x	o
Preparation of Documents						
Front End	o	x	o	x	o	x
(Owner/Contractor Contract, General & Special Conditions, Bid Documents, etc)						
Specifications	x	o	x	o	x	o
Drawings	o	x	o	x	x	o
Cost Estimate	x	o	x	o	x	o
Apply for Approvals of Governmental Agencies	o	x	o	x	o	x
Presentations	x	o	x	o	x	o
Data Gathering	o	x	o	x	o	x
Measured Drawings of Special Existing Conditions	—	x	—	x	—	x
Coordinate Independent Testing for County	o	x	o	x	o	x

Outline Description of Services per Phase	TEMPORARY MEASURES CONSTRUCTION		DEMOLITION CONSTRUCTION		CONV. CENTER CONSTRUCTION	
	Responsibility		Responsibility		Responsibility	
	TVS&A	GSBS	TVS&A	GSBS	TVS&A	GSBS
- BIDDING/NEGOTIATION PHASE						
Business Administration	x	—	x	—	x	—
Overview Project Management	x	o	x	o	x	o
County Review and Approvals	o	x	o	x	o	x
Conferences with Bidders, Consultants	o	x	o	x	o	x
Advertising for Bids	o	x	o	x	o	x
Assemblage, Reproduction & Distribution of Bid Document	o	x	o	x	o	x
Drafting of Addenda	o	x	o	x	o	x
Contractor's Questions, Substitutions	o	x	o	x	o	x
Analyze Bid	o	x	o	x	o	x
Assist County with Award of Construction Contract	o	x	o	x	o	x
- CONSTRUCTION ADMINISTRATION PHASE						
Business Administration					x	—
Overview Project Management					x	o
County Approvals					o	x
Administration of Construction Contract						
Pre-Construction Conference					o	x
Construction Administration						
Review/Approve Shop Drawings					o	x
Review/Approve Submittals					o	x
Prepare Architectural Clarification Documentation (including Field Sketches, Architect's Supplementary Instructions, Construction Change Directives, etc.)					o	x
Manage and Coordinate Consultants					o	x
Review Substitutions Requests					o	x
Administer Independent Testing Program					o	x
Design Intent Interpretations including Aesthetic Decisions and Color Selection					x	o
Process Change Orders					o	x
Approve Change Orders					x	o
Process Applications for Payment					o	x
Certify Applications for Payment					x	o
Maintain Logs of CA-related items					o	x
Periodic Site Visits & Field Reports					o	x
Process Contractor's Request for Information					o	x
Substantial Completion Visits & Reports					o	x
Final Completion Visits & Reports					o	x
Post-Completion "Call Back"					o	x
- AS-BUILT DOCUMENT PHASE						
Assemble As-Built Documentation from Contractor					o	x
Prepare Updated CAD Drawings					o	x
Assemble and Deliver to Owner					o	x

G. COMPENSATION

1. The Consultant shall be compensated for its Basic Services portion of the work for a total stipulated lump sum of Four Hundred Seventy-One Thousand, Fifty-Seven Dollars (\$471,057.00) to be earned and invoiced in accordance with the following schedule:

1) Urban Design	\$ 1,000.00
2) Programming	5,000.00
3) Architecture & Engineering	
- Schematic Phase	\$ 13,952.00
- Design Development Phase	18,602.00
- Construction Document Phase	74,409.00
- Bid Phase	32,554.00
- Construction Administration Phase	292,986.00
- As-Built Document	32,554.00
Subtotal (Architecture & Engineering Phase)	<u>\$465,057.00</u>
TOTAL (Stipulated Lump Sum)	<u>\$471,057.00</u>

2. The stipulated lump sum amount for Basic Services is based on the fixed limit of construction cost as set forth in the Prime Agreement and subsequently amended in Amendment No. 1.

If subsequent modifications to the fixed limit of construction cost are approved by the County or the scope of work set forth in the Consultant's Designated Services is modified, the Consultant's stipulated lump sum amount shall be appropriately modified.

3. The County has authorized a separate Temporary Measures Bid/Construction Package. The extra services to accelerate this portion of the work as to be provided by the Consultant will be considered Additional Services and the compensation will be \$2,500 to be invoiced in accordance with Exhibit "C".
4. Additional Service Compensation when approved by the County in writing will be on a fee basis agreed upon prior to approval and the Initiation of the work. The Architect has no obligation to compensate Additional Services unless written authorization has been obtained from all appropriate parties on the Additional Services Authorization Form attached as Exhibit "D" and is hereby made a part of this Agreement.
5. The Consultant shall be compensated for Reimbursable Expenses on an "at-cost" basis with no mark-up for those expenses incurred by the Consultant and to the extent as set forth in the Prime Agreement (Exhibit "A", Article V.3h) and paid by the County. Original supporting documentation for reimbursable expenses must be submitted to the Architect with the Consultant's monthly invoice.
6. Compensation for special reimbursable expenses by and between the Architect and Consultant which are not necessarily addressed in the Prime Agreement are clarified below:
- Cost of mylar sheets (30" x 45") for the preparation of Consultant's original drawings, costs of computer plotting and other reproduction costs necessary for progress printing between the Architect and all other consultants for coordination purposes shall be paid by the Consultant.
 - Consultant shall be responsible for preparing and updating Consultant's background drawings as needed. The Architect, based on the progress of his work, will furnish either blue-line prints or computer disks (containing DXF translations from CADDVANCE Software) of architectural floor plans for the Consultant's use in his preparation of backgrounds. Consultant cannot rely solely on computer translations for all background updates.
 - Reproduction costs to produce Consultant backgrounds from Architect's original drawings (if required) shall be paid by the Consultant.

7. All Invoices (Basic Services, Reimbursables, and Additional Services) shall be submitted in the Lump Sum Format attached as Exhibit "B" and is hereby made a part of this Agreement and shall be submitted to the Architect on or before the 10th day of the month. The Architect shall endeavor to prepare each month a composite invoice and mail to the County within 10 working days from the 10th day of the month.
8. Lump Sum Format invoices which include Additional Services shall be accompanied by a detailed breakdown of professional services rendered and this breakdown shall be submitted in the Additional Services Invoice Itemization Format attached as Exhibit "C" and is hereby made a part of this Agreement.
9. It is understood and agreed that no payment shall be due to the Consultant until such time as the Architect receives like payment from the County for services previously rendered and approved. Typically within 14 days from the date of the Architect receives payment from the County, like payment of County approved amounts will be mailed to the Consultant.
10. It is understood and agreed that the Consultant may be requested from time to time by the County, or other parties, to provide services not described in this Agreement or in the Prime Agreement. The Architect is under no obligation to compensate the Consultant for any such services unless written authorization has been established as per the procedures established in this agreement.

H. INSURANCE

1. During the life of the Prime Agreement, the Consultant shall provide and maintain in force the insurance coverage and limits as set forth hereinbelow, all in accordance with the insurance requirements of the Prime Agreement attached as Exhibit "A".
2. The required insurance shall be written by a company or companies authorized and licensed to do business in the State of Utah.
3. The Consultant shall furnish a certificate of insurance to the Architect on a form(s) standard in the insurance industry providing evidence of the maintenance of said insurance and shall provide that insurance evidenced by the certificate(s) will not be canceled or reduced except upon thirty (30) days prior written notice.
4. The minimum coverage and limits of insurance to be carried by the Consultant shall be as follows:

<u>Professional Liability:</u>	\$1,000,000	Limit (Minimum)
	Maximum of \$100,000	Deductible per Occurrence
<u>Worker's Compensation:</u>	Statutory Limits	
<u>General Liability:</u>	\$1,000,000	Limit (Minimum)
<u>Automobile Liability:</u>	\$500,000	Limit (Minimum)
<u>Excess Liability:</u>	\$1,000,000	Limit (Minimum)

I. INDEMNIFICATION

1. Each party to this Agreement hereby agrees to protect, defend, indemnify and hold harmless the other (its agents and employees) from and against any and all claims (public and private), penalties (contractual or otherwise) and damages arising directly or indirectly out of or resulting from any improper performance caused, or alleged to have been caused in whole or in part by any negligent act, error or omission, by the parties to this Agreement (its agents and employees) professional services, for its portion of the Architect's Work, as further defined herein, in the performance of the obligations under the terms and conditions of the Prime Agreement attached as Exhibit "A". This indemnification shall include an obligation of each party for this Agreement to protect the other who is found not at fault from any and all costs of defending all rights, claims, or

demands, including attorney's fees and insurance policy deductibles incurred by the other in litigation and settlement of same.

2. It is agreed as between the parties of this Agreement that in any and all actions against the other (its agents and employees), this indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation and/or benefits payable under Workmen's Compensation Acts, or any other employee benefit acts.
3. It is agreed as between the parties of this Agreement that in any and all actions, the other (its agents and employees), hereby agrees to waive all subrogation rights against the party of this Agreement who is found not at fault.
4. Anything contained in the Prime Agreement and this Agreement to the contrary notwithstanding, it is specifically understood that this indemnification paragraph shall survive the execution of this Agreement, the design and construction of the Project and the expiration of the Statute of Limitations for the Project.

J. SUCCESSORS AND ASSIGNS

1. The Architect and the Consultant respectively, bind themselves, their partners, principals, successors, assigns and legal representatives to this Agreement with respect to all covenants of this Agreement. Neither professional firm shall assign, sublet or transfer its interest in this Agreement, without the prior written consent of the other.

K. TERMINATION

1. This Agreement shall automatically terminate, if and when, the Prime Agreement attached as Exhibit "A" is terminated. The Architect shall promptly notify the Consultant of such termination.
2. It is understood and agreed that this Agreement may be terminated by either professional firm with seven (7) days written notice if other firm fails to perform in accordance with the Terms and Conditions of the Prime Agreement or this Agreement as further described herein, and further any such termination of this Agreement shall have the prior written approval of the County.
3. If the Architect is terminated, the Consultant for its completed portions of the Project shall be compensated according to Terms and Conditions of the Prime Agreement, contingent upon receipt of such payment from the County.

L. EXTENT OF AGREEMENT

1. This Agreement represents the entire integrated Agreement between the Architect and the Consultant and supercedes all prior negotiations, representations or agreements, either written or oral.
2. This Agreement may be amended only by written instrument signed by both the Architect and the Consultant.
3. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but which together constitute but one and the same Agreement.

M. FULL PERFORMANCE

1. The Architect and the Consultant hereby agree to the full performance of the terms and conditions contained herein and in the Prime Agreement. This Agreement is effective on the day and year first written above, but actually executed by the Architect and Consultant on dates indicated beside each signature hereinbelow.

The preceding terms and conditions together with the attached exhibits represents our proposed Agreement; however, you will note that our Agreement with your firm is subject to review and written approval by the County's Project Manager. A copy of this Agreement will be forwarded to Sands Brooke, the County's Project Manager, for this purpose after it is finalized. We will be pleased to discuss any items which may require further elaboration or discussion and sincerely look forward to working with you and your company on this prestigious project in Salt Lake.

Please indicate your acceptance of this Agreement by adding your signature below and returning the original to us for our files.

Sincerely,

THOMPSON, VENTULETT, STAINBACK & ASSOCIATES, INC./
ROBERT NORMAN VEALE, ARCHITECT



H. Preston Crum, AIA
Partner

HPC/jd

cc: Sands Brooke/County
Roger Neuenschwander/TVS&A
Robert Veale/TVS&A
Foster Lynn/TVS&A

Attachments:

- Exhibit "A": Prime Agreement (dated May 20, 1992) including
Amendment No. 1 (dated December 21, 1992)
- Exhibit "B": Lump Sum Format for Invoices (No Date)
- Exhibit "C": Additional Services Invoices Itemization Form (No Date)
- Exhibit "D": Additional Service Authorization Form (No Date)
- Exhibit "E": Graphic Description of Scope of Work (dated May 7, 1993)

Suspense: May 21, 1993

AGREEMENT

CONSULTANT
Gillies Stransky Brems Smith Architects

By: _____

Title: _____ Date: _____

EXHIBIT "A"

Prime Agreement (dated May 20, 1992) including
Amendment No. 1 (dated December 21, 1992)

PREVIOUSLY FORWARDED UNDER SEPARATE COVER

EXHIBIT "B"

FORMAT FOR INVOICING
(Lump Sum Fee Basis)

GILLIES STRANSKY BREMS SMITH, ARCHITECTS
 Associated Architect Consultant Services

Consultant Invoice Number: _____
 Consultant Invoice Date: _____
 TVS&Associates Project Number: 9211.00
 Project Title: SALT PALACE RENOVATION & EXPANSION
 Salt Lake City, Utah *

For Professional Services Rendered: Through (Date)
 Fee Basis: Stipulated Lump Sum \$384,000.00

<u>PHASE</u>	<u>% FEE</u>	<u>PART OF FEE</u>	<u>% COMP</u>	<u>FEE EARNED</u>	<u>LESS PREV. INVOICED</u>	<u>AMOUNT DUE THIS INVOICE</u>
A. <u>BASIC SERVICES:</u>						
1) Urban Planning		1,000.00				
2) Facilities Programming		5,000.00				
3) Architecture and Engineering						
a) Schematic Phase		13,952.00		\$	\$	\$
b) Design Development		18,602.00				
c) Construction Document		74,409.00				
d) Bid/Negotiation		32,554.00				
e) Construction Administration		292,986.00				
f) As-Built Documents		32,554.00				
Subtotal (Architecture & Engineering)		\$465,057.00		\$	\$	\$
TOTAL		\$471,057.00				
B. <u>ADDITIONAL SERVICES:</u>						
1) Previously Billed & Paid						
2) Previously Billed & Unpaid						
3) Current Items (Itemize on Attachment)						
4) Additional Service Total				\$	\$	\$
C. <u>REIMBURSABLE EXPENSES:</u>						
1) Previously Billed & Paid						
2) Previously Billed & Unpaid						
3) Current Items (Itemize on Attachment)				\$	\$	\$
D. <u>PROJECT TOTALS:</u>						
				\$	\$	\$

00213

EXHIBIT "C"

FORMAT FOR ADDITIONAL SERVICE INVOICE
(To be used only as attachment with Lump Sum Format)

SALT PALACE RENOVATION & EXPANSION
 Salt Lake City, Utah
 TVS&Associates Project No. 9211.00

Consultant Name GILLIES STRANSKY BREMS SMITH ARCHITECTS
 Consultant Invoice Number _____
 Consultant Invoice Date _____
 For Professional Services Rendered From: _____

- A. Additional Services Title _____
 B. Additional Services Authorization Number (Assigned by TVS&A): _____
 C. Fee Basis: _____
 D. Invoice Itemization for Labor Cost (Current):

<u>Job Category</u>	<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Cost</u>
a.				\$
b.				
c.				
TOTAL THIS INVOICE				\$ _____

- E. Summary for this Additional Service

	<u>FEE EARNED</u>	<u>LESS PREV. INVOICED</u>	<u>AMOUNT DUE THIS INVOICE</u>
Previously Billed and Paid	\$	\$	\$
Previously Billed & Unpaid			
Current Items (Itemized above)	_____	_____	_____
Additional Service Total	\$ _____	\$ _____	\$ _____

EXHIBIT "D"

ADDITIONAL SERVICE AUTHORIZATION FORM

TO: Thompson, Ventulett, Stainback & Associates, Inc.
Robert Norman Veale, Architect
Attention: H. Preston Crum

DATE: _____

FROM: GILLIES STRANSKY BREMS SMITH ARCHITECTS

RE: SALT PALACE RENOVATION & EXPANSION
Salt Lake City, Utah
Project No. 9211.00

Additional Service Authorization No. _____

In accordance with the Architect/Consultant Agreement, written authorization by the Architect is hereby requested for performance of the below listed Additional Service.

Additional Services Title: _____

Services to be performed by: _____

Description of Services: _____

<u>FEE</u>	<u>Lump Sum</u>	<u>Guaranteed Maximum</u>	<u>Estimated</u>	<u>Invoiced Amount</u>
	\$ _____	\$ _____	\$ _____	\$ _____

Estimated percent complete on service: _____

Additional Service to be billed to: _____
(Sub-Project Number)

Submitted by

Authorized by

Consultant

Architect

Date

Date

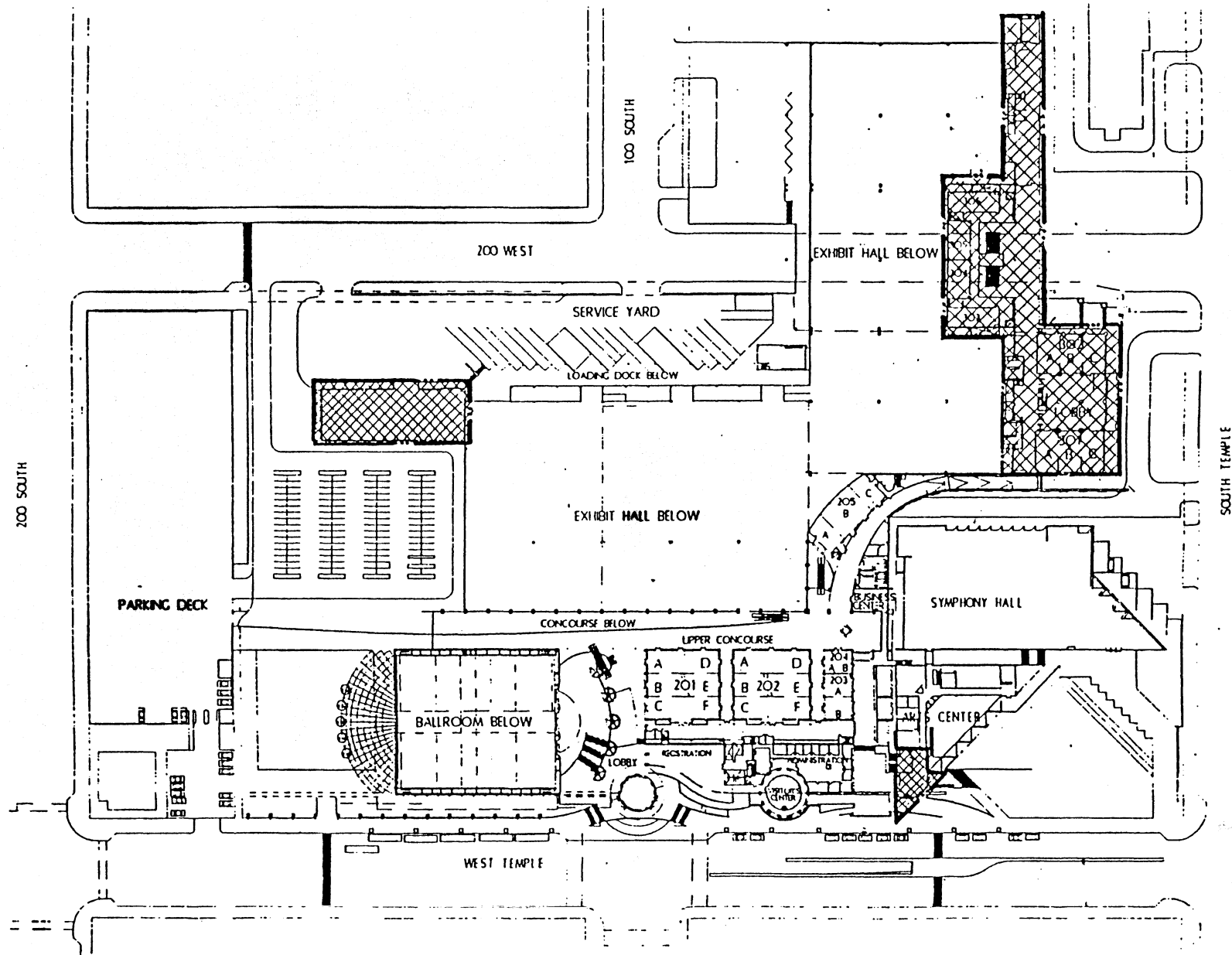
00215

EXHIBIT "E"

GRAPHIC DESCRIPTION OF SCOPE OF WORK
dated May 7, 1993

Concourse Level Floor Plan, attached

Exhibit Hall Level Floor Plan, attached



CONCOURSE LEVEL FLOOR PLAN (UPPER LEVEL)
Exhibit "E": Graphic Description of Scope of Work

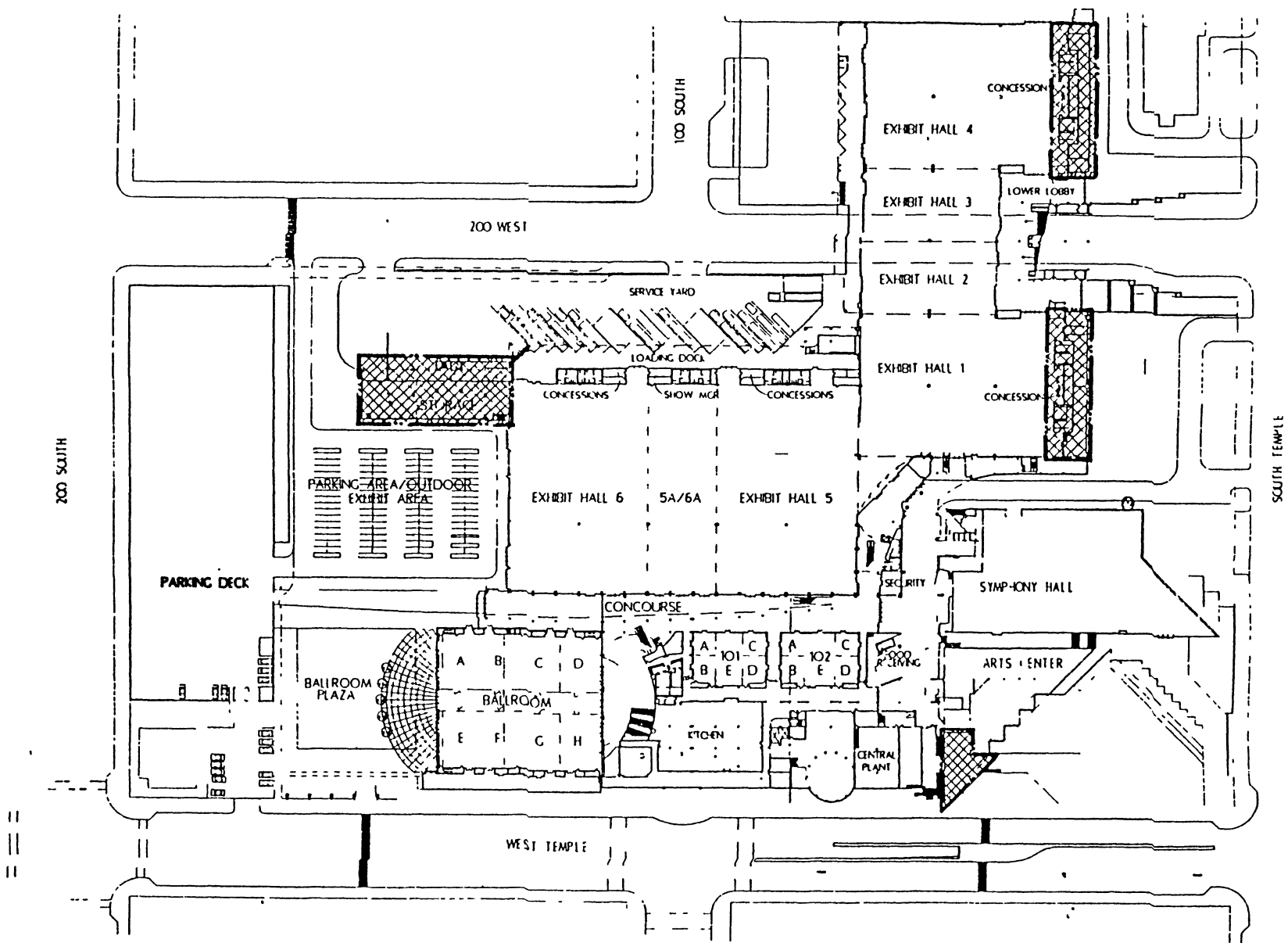


EXHIBIT HALL 11/F1 FLOOR PLAN (LOWER LEVEL)

Exhibit "E": Graphic Description of Scope of Work
May 7, 1993