

1992

Mark O. Walsh v. Judith Erickson, Jude Erickson, Peter Van Alstyne, Gerald Robinson : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Mark O. Walsh v. Judith Erickson, Jude Erickson, Peter Van Alstyne, Gerald Robinson*, No. 920222 (Utah Court of Appeals, 1992).

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

FILED

DOCKET NO.

920222

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MARK O. WALSH, ;
Plaintiff/Appellant, ; Case No. 920222-CA
vs. ;
JUDITH ERICKSON, a.k.a. JUDE ;
ERICKSON; PETER VAN ALSTYNE; ; Classification Fifteen
and GERALD ROBINSON, ;
Defendants/Appellees, ;

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BRIEF OF THE APPELLANT

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APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR
SALT LAKE COUNTY

JUDGE RICHARD MOFFAT, PRESIDING

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Utah Court of Appeals

THE CAPTION INCLUDES THE NAMES OF ALL PARTIES

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STATEMENT SHOWING JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to 78-2-2 of the Utah Code Annotated as amended in 1992, in that the matter has been transferred to the Court of Appeals by the Utah Supreme Court.

STATEMENT OF THE ISSUES INVOLVED

1. WALSH'S SALE OF HIS INTEREST IN THE PARTNERSHIP WORKED A DISSOLUTION OF THE SAME. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

2. ONCE THE DISSOLUTION OCCURRED, THE REMAINING PARTNERS CAN ONLY EITHER WIND UP THE PARTNERSHIP OR CREATE A NEW ONE. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

3. THE REMAINING PARTNERS FORMED A NEW PARTNERSHIP. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

4. AFTER THE FORMATION OF THE NEW PARTNERSHIP, WALSH WAS NO LONGER LIABLE FOR THE JET STAR DEBT. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

5. WALSH WAS NOT LIABLE FOR THE DEBT TO ROBINSON AT ANY TIME. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

6. AFTER THE FORMATION OF THE NEW PARTNERSHIP, WALSH WAS NO LONGER LIABLE FOR DEBT INCURRED IN THE ORDINARY COURSE OF

BUSINESS. Questions of law are reviewed for correctness.
Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

7. AFTER THE FORMATION OF THE NEW PARTNERSHIP, WALSH WAS ESPECIALLY NOT LIABLE FOR EXTRAORDINARY DEBT. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714 (Utah, 1985).

8. EVEN IF WALSH WERE LIABLE FOR DEBTS OF THE NEW PARTNERSHIP, THE SAME WERE TO BE DIVIDED EQUALLY BETWEEN THE PARTNERS. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

9. EVEN IF WALSH WERE LIABLE FOR THE DEBTS OF THE NEW PARTNERSHIP, DEFENDANTS/APPELLEES ARE NOT ENTITLED TO PREJUDGMENT INTEREST. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

10. WALSH, AS A MATTER OF LAW, DID NOT OWE JUDE ERICKSON ANY MONEY. Questions of Law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985)

11. THE PARTIES ENTERED INTO A CONTRACT THAT LIQUIDATED THE JUDGMENT ENTERED BY THE COURT. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

12. DEFENDANTS ARE BARRED FROM FURTHER RECOVERY BY VIRTUE OF ACCORD AND SATISFACTION. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714 (Utah, 1985)

13. DEFENDANTS ARE BARRED FROM FURTHER RECOVERY BY VIRTUE OF PROMISSORY ESTOPPEL. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

14. UNDER NO CONDITIONS WERE THE DEFENDANTS ENTITLED TO AN AWARD OF ATTORNEYS FEES. Questions of law are reviewed for correctness. Kimball vs. Campbell, 699 P.2d 714, (Utah, 1985).

DETERMINATIVE STATUTES

48-1-2 Utah Code Annotated.

48-1-3 Utah Code Annotated.

48-1-8 Utah Code Annotated.

48-1-12 Utah Code Annotated.

48-1-20 Utah Code Annotated.

48-1-24 Utah Code Annotated.

48-1-26 Utah Code Annotated.

48-1-27 Utah Code Annotated

48-1-28 Utah Code Annotated.

48-1-30 Utah Code Annotated

48-1-31 Utah Code Annotated.

48-1-32 Utah Code Annotated.

48-1-33 Utah Code Annotated.

Each of the foregoing are included in the addendum.

STATEMENT OF THE CASE

This is an appeal from the Third District Court, regarding certain rights and duties stemming from the dissolution and recreation of a new partnership.

NATURE OF THE CASE

This case involves the meaning and interpretation of the Utah Code provisions regarding partnerships.

COURSE OF PROCEEDINGS

This matter was heard on April 24 and 25, 1989, before the Honorable Richard Moffat. Various motions were heard, and the Court finally signed the FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT, in 1990.

Thereafter the parties worked a compromise and settled the matter, and the Motion for Summary Enforcement of Settlement Agreement, was heard by the Court in February, 1993.

The original matter was appealed and assigned to the Utah Court of Appeals by the Supreme Court.

A second Notice of Appeal was filed on the Motion for Summary Enforcement, which has been assigned to the Court of Appeals, and the two appeals have now been consolidated into the present action.

DISPOSITION IN LOWER COURT

Judge Moffat held for the Defendants on their counterclaim and required Walsh to pay substantial sums to the Defendants. Judge Moffat denied the Motion for Summary Enforcement.

SUMMARY OF THE ARGUMENT

Appellant submits that Judge Moffat made him the guarantor for the success of a new partnership formed after Appellant disassociated himself.

Judge Moffat ruled that Plaintiff was required to pay substantial sums to Defendants for debt incurred after he was no longer involved them, along with prejudgment interest, contrary to law.

Judge Moffat denied the Motion to Summarily Enforce Judgment and awarded Defendants attorneys fees, contrary to law.

ARGUMENT ONE

WALSH'S SALE OF HIS INTEREST IN THE PARTNERSHIP WORKED A DISSOLUTION OF THE SAME.

According to Exhibit 2, Mark Walsh and Judith Erickson, entered into an agreement on May 2, 1985.

The agreement had the following language in Section 1:

Seller shall sell and Buyer shall purchase, Seller's one-third (1/3) interest presently located at 5444 South 900 East, Murray, Utah. The sale includes Seller's rights and interest to the name "Universal Video" and "Universal Video Productions," the lease to the premises, inventory, furniture, fixtures, equipment and accounts receivable owned and used by the Seller in the business.

Appellant submits that such constitutes a dissolution of the Partnership.

The State Legislature defines dissolution in 48-1-26, U.C.A. which provides as follows in the Utah Code Annotated:

48-1-26. "Dissolution defined.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.

At the outset of the creation of the Universal Video, in December of 1984, Mark Walsh, explained to Peter Van Alstyne how critical it was to Walsh that he be a signatory on the Partnership account. Walsh felt that this was absolutely critical, as he had just left a partnership where his partner had forged Mark's signature on certain checks, and that had caused a dissolution of the prior partnership. Note the transcript at page 19.

In the early part of 1985, just a few months after the creation of Universal Video Partnership, Walsh returned home a day after payday for certain employees. Upon his arrival, he met with one of the employees and stated that he and Peter would be getting together that day to see that the employees were paid immediately.

The employee responded that she had already been paid. Note the transcript at page 104.

Walsh was furious at this forgery, and so he went to the clearing house to get copies of all of the checks that Peter Van Alstyne had forged. He then met with Peter about the checks, and Peter stated that he forged maybe 2 checks, at the most four. Walsh then produced the copies of the many, many forged checks that Peter Van Alstyne had signed Mari's name to, and Peter Van Alstyne became extremely embarrassed, and then offered to buy Mari's interest in the store, that he and Mark had talked about, about a month before. Note transcript at page 105 as well as page 10.

In addition to the foregoing, the parties agreed to attempt to sell the business as a going concern as early as early March, 1985, after some three plus months of operation. Van Alstyne stated that he and Mari prepared an ad to be run in the paper, in an attempt to sell the business and dissolve the partnership. Note the transcript at page 69.

Consistent with these expressed intentions to disassociate with each other, Walsh sold his interest to Julie Erickson, as

noted above.

Van Alstyne and Robinson were clearly on notice, because Walsh proceeded to have Jude Erickson put on as a signatory on the bank account, and the removal of Mark Walsh, as a signatory. Note pages 35 and 36 of the transcript.

The Partners in Universal Video Partnership, can not in good faith claim that they did not know of this.

In the Utah Code annotated, at 48-1-2 is the following:

INTERPRETATION OF KNOWLEDGE AND NOTICE.

(1) Within the meaning of this chapter, a person is deemed to have knowledge of a fact not only when he has actual knowledge thereof, but also when he has knowledge of such other facts that to act in disregard of them shows bad faith. Note Jenner vs. Real Estate Service, 659 P.2d 1072, (Utah, 1983).

It is without question, that the checking account required two signatures. Peter Van Alstyne could not pay a single bill without Jude Erickson's signature.

It was without dispute, at the lower Court level, that Mark Walsh insisted on being on the account, when he was a partner. So when Jude Erickson's name was placed on the account, and Mark's removed, it was a glowing manifestation to Peter Van Alstyne and Gerald Robinson, that Mark Walsh was disassociated with them in the Universal Video Partnership.

Peter Van Alstyne admitted on the stand that he had forged Mark Walsh's name to many checks, not only without Mark's authorization but absolutely contrary to Mark's expressed direction. Note transcript at page 34.

Van Alstyne and Robinson, were absolutely on notice of the

subject disassociation, as defined by the State Legislature, in 48-1-2, Utah Code Annotated, and it would be bad faith for them to deny that it happened, when it happened.

Immediately after Mark Walsh disassociated with Peter Van Alstyne and Gerald Robinson, Peter and Gerald prepared and sent a letter to the accountant that had done the books up to the time of disassociation. Note Exhibit 7.

In this document, prepared by Peter Van Alstyne who was a graduate of the University of Utah Law School, at page 2 and 3, it states:

Enclosed herewith is payment in the amount of \$425 which we believe to be a fair and equitable settlement for your services. If you are willing to accept this as payment please forward to us all of our financial records now in your possession. Acceptance of this payment will be construed as acceptance of payment in full. in the meantime, we will gladly prepare for Mark Walsh and for all partners a close-of-business tax statement as of the dissolution of that partnership. (emphasis added).

Appellant respectfully submits that it is an inescapable conclusion, that Mark Walsh disassociated himself with the other partners, towards the first of May, 1985, and the same worked a dissolution of the subject Universal Video Partnership.

ARGUMENT TWO

ONCE THE DISSOLUTION OF UNIVERSAL VIDEO PARTNERSHIP OCCURRED, THE REMAINING PARTNERS CAN ONLY EITHER WIND UP THE PARTNERSHIP OR CREATE A NEW ONE.

As noted above, once the disassociation occurred, the Partnership was dissolved as defined in 48-1-26, Utah Code Annotated, as amended in 1953.

The Partnership continues at that point however, as the

remaining Partners have the right to wind up.

In the provisions of 48-1-34 Utah Code Annotated is the following:

48-1-34 RIGHT TO WIND UP

Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner his legal representatives or his assignee upon cause shown may obtain a winding up by the Court.

Appellant submits that it is clear in the law, that Peter Van Alstyne and Gerald Robinson, could have wound up the business, liquidated the Partnership assets, and cut everyone's losses.

In the alternative, Peter Van Alstyne and Gerald Robinson, could take on new partners, invested new capital, and started new and fresh, with Mark Walsh, no longer being associated with Universal Video Partnership.

AGREEMENT THREE

THE REMAINING PARTNERS, PETER VAN ALSTYNE AND GERALD ROBINSON TOOK ON A NEW PARTNER, JUDITH ERICKSON, AND STARTED THEIR NEW PARTNERSHIP A FRESH, AND COMPLETELY DISASSOCIATED WITH APPELLANT.

As noted above, Gerald Robinson and Peter Van Alstyne wrote Exhibit 7, to the parties accountant Mr. Roger Kennard, and stated therein:

In the meantime, we will gladly prepare for Mark Walsh

and for all partners a close-of-business tax statement as of the dissolution of the partnership.

In addition to the same, as noted above, Peter Van Alstyne participated in getting Mark Walsh's name off the Partnership account, and replacing the same with Jude Erickson's name.

In addition to the foregoing, Peter Van Alstyne decides, without any notice to Mark Walsh, that he is going to personally prepay the Jet Star obligation.

This obligation was not in default, and while there would be a discount for prepaying the same, there was no need to do the same, other than Peter Van Alstyne, unilaterally decided to do so, because he wanted to be the one who was totally in control.

Not only does Peter Van Alstyne change his position in reference to any antecedent debt, he borrows new money and invests the same into his newly formed partnership. Note Transcript at page 305.

As noted on Exhibit 1, on page one in December of 1984, the parties had entered into the Jet Star contract, which provided the following:

The Promissory Note shall contain a provision entitling the Buyers to a discount from the principal amount thereof in an amount equal to the number of full calendar months remaining on the original term of the promissory note after the date upon which the Buyers pay said note in full, both principal and accrued interest.

Once Mark was out of the partnership, Peter unilaterally decides to take over his interest, and so now he is totally in control of his new partnership.

Concomitantly, Peter Van Alstyne, unilaterally decides to

take advantage of this provision in the original contract, and he then loans his newly formed partnership some \$30,000.00. Five thousand for working capital and the other \$25,000.00 to be applied to the Jet Star Obligation.

Towards the end of the trial, Defendant's call to the stand Mary Van Alstyne, who testified as follows on page 305: "He loaned, May 31st of '85, \$30,000.00, to the business." (emphasis added).

Peter did not have to do this, but apparently he was so excited about his new partnership, and being the only one in control, he unilaterally decided to make this move even though the parties were not in any kind of default in the monthly payments on this contract, and it was undisputed that the business was paying this obligation timely each month.

Almost immediately after creating this new creature, Peter Van Alstyne then attempts to get Jude Erickson to invest with him, and become a full one-third partner in this new venture, rather than a one-third partner, based upon the sale from Walsh.

Peter, a law school graduate, apparently spend a considerable amount of time studying partnership law, in order to draft and send to Judith Erickson, Exhibit 6, on or about June 3, 1985, which states in its entirety as follows:

June 3, 1985 (hand written)

In the formation of a partnership, the ability to contribute capital is of prime importance.

When we realized that Universal Video was not able to continue under the agreements Mark and Peter had with Jet Star, another partner with capital to invest was sought to replace Mark

who had no capital to invest. Towards the end of February and the first of March you, Jude, approached us indicating you had between \$15,000.00 and \$25,000.00 you would like to invest with the intent of becoming a partner. In as much as we liked your rapport with the customers, your drive and excitement in managing the business we felt you would be an excellent partner. We accepted you as a third partner based on the agreement that you and Peter would share equally in the purchase of the approximately \$60,000.00 contract with Jet Star Industries.

When the agreed upon date, May 31, 1985, for settlement with Jet Star industries arrived and you had no money to purchase your share of the contract, you breached a vital agreement which was a condition upon you becoming a partner with us. Peter has purchased the entire contract which, in effect, under Utah Partnership Law included the purchase of your capital share of the partnership. We would still like to have you be a partner in Universal Video but only the following option is available under Utah Partnership Law:

Through your contribution of time and devotion to the partnership you are legally entitled to share in the partnership determined by the value of your time and devotion. Assuming the value of the partnership assets is \$100,000, we felt that a 10% interest is an extremely generous settlement.

In order to provide you still an opportunity to become a full one third partner, we, the two general partners, invite you to meet the terms of the original agreement we had with you by repurchasing from Peter your share of the capital account, which is \$15,00.0. The offer expires Friday, June 7, 1985 at 5:00. If the offer expires we will assume that you accept a 10% interest as outlined above.

As a matter of record, we want to remind you that you were advised at an early date, by us and others, that the purchase agreement you were negotiating with Mark Walsh was, in our opinion, not prudent considering the indebtedness of the partnership at that time. You have been advised many times to obtain an attorney and re-evaluate the position that you are presently in. Our view is unchanged.

We hope that this letter clarifies the current status of the partnership of Universal Video. We look forward to continuing a profitable relationship with you.

/s/
GERALD ROBINSON

/s/
PETER VAN ALSTYNE

Not only did the written agreement from gerald and peter to

Jude, make her a partner, so did the actions of the three after the formation of the newly formed partnership.

As noted on page 46 of the transcript, Peter Van Alstyne testified that when the partners sold the assets of the business in summer of 1986, he had worked with Judith Erickson in the same, in that he kept her posted regarding the same, yet did not even communicate the same to Mark Walsh.

Q. But you did testify that you did in fact report to Ms. Erickson the full terms of the sale of the assets of the partnership, is that correct?

A. The full terms of the sale of the assets?

Q. Yes, in the spring.

A. Like May, '86?

Q. '86.

A. Right, I did.

On the same page Peter Van Alstyne testified, that there was a distribution to Judith Erickson, when the assets were sold, yet there was no distribution to Mark Walsh when the assets were sold.

On page 47, Peter Van Alstyne testified as follows:

Q. Was any payment forthcoming from the partnership after May of 1985 to Mr. Walsh? Any cash or any distribution of any kind?

A. Coming to Mr. Walsh after the sale in June of '85?
(sic)

Q. That's correct.

A. No. Absolutely not.

And that was as it should be, as Mark Walsh, had disassociated himself a whole year before, and the new partnership was formed a whole year before with Peter, Gerald and Judith.

As noted on page 114, when the new partnership gets a new accountant, immediately after the formation of the same, this action was not even discussed with Mark Walsh.,

As noted on page 114, Peter Van Alstyne testified that when he and Gerald were working out the terms of the new partnership with Judith Erickson, these terms were never even communicated to Mark Walsh, and again that was as it should be, because Mark Walsh was out of the old partnership, and these new partners could agree to whatever they wanted and Mark Walsh should not have been included in the same.

No honest person could dispute the undeniable fact, that Peter and Gerald stated in writing, and signed by each of them, that if Jude put up another \$15,000 she would have been a full one third partner, consistent with these new partners prior agreement with her, and if she did not come up with the said \$15,000 she would remain a partner with merely a one-tenth interest.

Also, apparent in this letter by the law school graduate, is the undeniable fact that Peter had been doing certain research in partnership law, regarding his newly formed partnership, and attempted to get Jude to acquiesce to a mere ten percent partner

instead of the full one third partner status sold to her by Mark Walsh.

However, it is not important that Jude be a one third partner or a one tenth partner, what can not be disputed is that Jude was a partner, both before this letter and after, as per these new partners agreement, expressly referred to in this contract, which was reduced to writing and signed by each of the "General Partners."

This letter also confirms the fact that both of these partners were aware that Mark Walsh was getting out some time ago, and that the new partners in the new partnership had felt that the price that Jude was paying to be associated with them, was way too high.

It is most interesting to note the phrase, "another partner with capital to invest was sought to replace Mark Walsh. . ." In other words, Peter Van Alstyne and Gerald Robinson wanted a different partner than Mark, and wanted one who could put up some money. Hardly a situation where they claim they did not know that Mark had sold his interest in the partnership to Jude Erickson, as noted on page 97 of the transcript.

In any event, it is without dispute that Judith Erickson became a partner in the newly formed partnership, whether it be a one-third partner as designated by the sale from Mark Walsh to Erickson, or a one-tenth partner as designated by Van Alstyne and Robinson, is not relevant, what is relevant is that she became a partner.

Perhaps even more probative of the fact that the new partners actions confirmed the new partnership, than the foregoing is the undisputed fact that Peter decided to prepay the Jet Star contract on his own.

There was no discussion or agreement regarding the same between Peter and Mark or Gerald and Mark. Peter does this on his own so that he can have exclusive control, and so he can pay a lesser amount to Jet Star, with his newly formed business.

As noted on Exhibit 6, Peter and Gerald were seeking a new partner with new capital, and Jude was the answer to their concerns.

They decided to take her on as a new partner with a full one-third interest, but she was to put capital for the status, otherwise she would remain on-tenth partner.

As noted on Exhibit 25, Peter paid the Jet Star contract, on the exact same day that he and Gerald, pressed Judith Erickson for her additional \$15,000 as reflected on Exhibit 6.

Appellant submits that perhaps the best evidence of there being a newly formed business by the new partners, is the undisputed fact that Peter Van Alstyne invests five thousand dollars, new money, into the new business, without any discussion or agreement with Mark Walsh for the same. Note page 271 and following of the transcript. This was done immediately after Mark was out and Jude was in, ie: May, 1985.

This was not the only time that Peter treats the business this way, as again in December of the same year, he again,

without any discussion or agreement with Mark, puts additional new monies into his company, which were in excess of five thousand dollars. Note page 275 of the transcript.

Appellant submits that it is undisputed, that the partners dissolved the old partnership as reflected on Exhibit 7, wherein Peter and Gerald sent the letter to the accountant, stating, "In the meantime, we will gladly prepare for Mark Walsh and for all partners a close-of-business tax statement as of the dissolution of that partnership." (emphasis added)

Immediately thereafter they work new terms for a new partnership with mark out and Judith in, either as a one-third partner if she comes up with \$15,000 or as a ten per cent partner if she does not.

As testified by Peter on page 119 of the transcript, when the partners decided to sell the assets in 1986, some whole year after Mark Walsh was out, and the new Partnership formed, no communications were to Mark, and all communication were to Judith Erickson.

Perhaps one of the most significant elements of the new partnership, as reflected by the actions of the new partners, is the undisputed fact that Mark Walsh, removed himself as a signatory on the company account, and Peter had Judith Erickson substituted on the same.

All by itself, such evidence should be dispositive, yet in this case, it is even more significant, as Peter had admitted on the stand that Mr. Walsh, dissolved his past partnership, because

one of his partners had forged Mark Walsh's name on several checks, just as Peter Van Alstyne, and Mark had totally terminated the relationship, because it was absolutely critical to Mark that he be on the checking account to make sure that things were as they seemed.

Hence, replacing Judith Erickson on the company account, was absolute evidence to Mr. Van Alstyne that she was in and Mark was out. Note transcript at pages 208 and 209.

On page 263 of the transcript a Mr. Thomas Silvester was called to testify regarding pressure from Peter, about Mark getting out and Jude getting in. Beginning on page 262:

Q. Do you recall anything more specific about that? I don't want to push you, but anything she said that Peter wanted or --

A. She said she wished he would back off a little bit so she could sort things out.

Q. But you don't recall what he was supposed to back off from doing?

A. He was pushing for a decision as to whether or not she was in or out. and that was --

The testimony becomes increasingly more probative when considered in light of Exhibit 6, where Peter is pressing for the additional \$15,000 from Jude to make her a full one-third partner or remaining a partner in the new partnership, with merely a one tenth interest.

Then coupled with all that, they treat her as a partner, by

keeping her informed all activity with the new partnership, and do not communicate at all with Mark Walsh.

They decide to sell the business a whole year after Walsh had left, and communicated the same regularly to Jude and communicated nothing to Walsh.

Furthermore they include Jude in the distribution at the time of the sale in 1986, and totally exclude Mark from the same.

Lastly and perhaps most telling, is that they put in new monies both immediately after Mark is no longer involved, and then an additional significant amount six months after the old partnership was dissolved and the new partnership created.

Appellant submits that it is without question that the old partnership involving Mark Walsh, was totally dissolved and the new partnership with Judith Erickson was created, and frankly continued business for over a year, after Mark Walsh had gone.

ARGUMENT FOUR

AFTER THE DISSOLUTION OF THE OLD PARTNERSHIP AND THE CREATION OF THE NEW PARTNERSHIP WALSH WAS NO LONGER LIABLE ON THE JET STAR OBLIGATION

As noted above, the contract with Jet Star allowed the Partners to prepay the obligation, and thereby save a thousand dollars for every month the Jet Star Loan was prepaid.

According to Defendant's Exhibit #25, the following paragraph is third from the bottom.

The undersigned shall be entitled to discount the principal balance owed hereunder by an amount equal to \$1,000 for each full calendar month remaining between the date upon which they note, both principal and interest, is paid in full, and December 15,

1986.

The Jet Star obligation was a partnership debt; ie: being paid by the partnership, and Walsh and Van Alstyne were mere guarantors of the same, should the Partnership fail to make the payments. In fact, every single monthly payment made, that is every payment made pursuant to the terms and conditions set forth in the written agreement was made by Universal Video. Note Transcript at page 286.

At the time that Walsh sold his interest in the old partnership to Jude Erickson, the obligation was current, and it had never missed or was late for any payment. Note page 256 of the transcript.

Peter Van Alstyne, immediately after Mark Walsh disassociated himself from the old partnership, decided to personally pay this obligation so that he could be the one in control.

Peter got the control that he wanted, by personally paying off this obligation, and absolutely absolving the partnership of any and all liability with the exception of a \$5,000 remaining balance, which he personally paid at a different time, some whole half year after Walsh had left, and the new partners created their new partnership.

This move by Peter to obtain his control, changed the whole nature of the debt.

Now the partnership owed nothing to Jet Star or Keith Bigler, and Peter personally owed the mortgage company on his own

home.

Walsh had agreed to pay Jet Star and Keith Bigler, but Walsh never consented to pay any mortgage company who put any mortgage on Peter Van Alstyne's personal residence.

Peter can not voluntarily pay a business debt, with no consent to notice to Walsh, and then expect that Walsh will be obligated to pay the volunteer.

For Walsh to be liable on this mortgage, the same must be reduced to writing and signed by Walsh.

Any agreement for Walsh to pay the mortgage company would be absolutely void, as a matter of law, if the agreement called for the payment of over \$500.00, took more than a year to complete or if it involved real property.

In this case, it involved all three.

There was absolutely no evidence that Mark had even made such an oral agreement, let alone a writing, and signed by Mark Walsh.

In addition to the foregoing, any agreement to stand for the debt of Peter, as a matter of law, would have to be reduced to writing and signed by Walsh.

In the Utah Code Annotated, amended in 1989, 25-5-4, states as follows:

25-5-4 CERTAIN AGREEMENTS VOID UNLESS WRITTEN AND SIGNED

The following agreements are void unless the agreement, or some memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

- (1) every agreement that by its terms is not to be performed within one year from the making of the agreement;
- (2) every promise to answer for the debt, default or

miscarriage of another.

There was no basis for Peter to prepay this obligation other than the quid pro quo of getting the control that he wanted.

Surely the business could have continued to make the payment, and there is no basis to claim that the debt obligation was in default if the prepayment was not made.

As noted on Exhibit 25, the business loan was prepaid by Peter Van Alstyne as of June 3, 1985. This is the exact same date that Peter generated Exhibit 6.

The sun did not set on the prepayment by Peter, before he is asserting his newly acquired control, as reflected on Exhibit 6.

. . . . We accepted you as a third partner based on the agreement that you and Peter would share equally in the purchase of the approximately \$60,000 contract with Jet Star Industries.

When the agreed upon date, May 31, 1985, for settlement with Jet Star Industries arrived and you had no money to purchase your share of the contract, you breached a vital agreement which was a condition upon your becoming a partner with us. Peter has purchased the entire contract which, in effect, under Utah Partnership Law included the purchase of your capital share of the partnership. . . . (emphasis added)

As noted in the transcript, throughout, Peter exercised his control that he purchased, through the entire relationship with Jude, and ultimately had her served with criminal action on Christmas Eve, 1985, to totally break her down and manipulate her. Note the transcript at page 155 wherein she states as follows:

It was on Christmas Eve. It was on Christmas Eve, and I was served these papers saying that I would be - - I think taken to jail or something. this is my understanding, that I was going to jail for it.

Actually Peter had ruthlessly caused the criminal matter brought against Jude, before he learned that certain items he claimed she stole, proved to be in the shop being repaired.

However, the point is that Peter once he obtained the control that he wanted, exercised the same to the point of abuse, as noted throughout the transcript. Note for example page 105.

Not only is Walsh's obligation to Joe Star and Keith Bigler terminated as stated above, but also by virtue of 48-1-33(3) of the Utah Partnership provisions of the Utah Code, which state as follows:

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

As noted on Defendant's Exhibit 25, Keith Bigler wrote on the bottom, "Cancelled 6-3-85"

It is true that an additional \$5,000 was paid to Bigler some six months later, however, it is absolutely clear and frankly not even disputed, that any monthly payments to Bigler, ceased as of June 3, 1985, and hence Mari Walsh's obligation also ceased.

Not only as a matter of partnership law, is Mari Walsh released from any further obligation on the Bigler agreement, but as a matter of general law, he is so released.

According to 15-4-3 of the Utah Code Annotated, as amended in 1953, is the following:

15-4-3 PAYMENT BY CO-OBLIGOR

The amount or value of any consideration received by the

obligee from one to more of several obligors, or from one or more of joint or of joint and several obligator, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligor to whom the obligor or obligor giving the consideration did not stand in the relation of a surety.

Note Horman vs. Gordon, 740 P.2d 1346, (Utah App. 1987).

Hence, as a matter of contract law, Mark Walsh is not liable for the Jet Star obligation once Peter prepaid the same. Mark Walsh is no longer liable for the Jet Star obligation as a matter of partnership law, and Walsh is not liable on the Jet Star obligation by virtue of the statutory law.

ARGUMENT FIVE

WALSH WAS NOT LIABLE FOR THE DEBT TO ROBINSON AT ANY TIME.

There can be no question that the loan of \$30,000 by Robinson was made to the partnership.

At the beginning of the trial on April 24, 1989, the parties through Counsel, stipulated to certain facts. On page 5 of the transcript, the parties stipulate as follows:

". . . and number eight, Robinson lent the sum of \$30,000 to the partnership."

According to Mr. Van Alstyne, who negotiated the loan to the partnership by Robinson, Walsh never even spoke with Robinson at all to Van Alstyne's knowledge. Note page 13 of the transcript.

According to Mr. Robinson, at page 297 of the transcript he had never met Mark.

Lastly, according to Mark Walsh, on page 180 of the

transcript is the following:

Q. What is your acquaintanceship with Gerald Robinson?

A. None. He was a partner in the store. I never met him or seen him until yesterday. (This was the second day of trial, and therefore Mark's statement is that he never even met the guy, until the first day of trial.)

Walsh testified on page 186, that he had only spoken to Robinson twice, and both of those times were after the partnership was dissolved. Note page 186.

Every witness agreed that the negotiations for the loan by Robinson to the partnership was by Peter Van Alstyne.

As noted on pages 190 and 191 of the transcript, Mark Walsh testified on direct examination as follows:

Q. And what did Peter tell you about Mr. Robinson's investment?

A. That he had put up \$30,000 that he was to be treated as a partner; he was to have a third interest and that Bruce, his son, was to be involved in the store. Bruce was going to school, and as I understand it, had just married Peter's sister. But that the store would provide employment for Bruce Robinson.

Q. Did you agree with these terms?

A. I did.

Q. But you never discussed them with Robinson, did you.

A. No. I did not.

Q. Did Peter tell you that you would be personally responsible to repay Mr. Robinson.

A. No. The understanding was at this time and always was, that neither one of us were putting in our own money. And my home had already a second on it, paying off some debts from Video Theater. And so there was no discussion about our personal liabilities. But it was very clearly understood that the store was to make those payments and was to be in the -- and the business was to be responsible for the liability.

Not only did the partners agree that there would be no

personal liability for the repayment of the loan to Robinson, they actually set up the payment to Robinson, by the business, just that way. Note page 224 of transcript.

Immediately prior to the dissolution of the partnership, Walsh represented to Jude Erickson that the partnership was making the Robinson payment. Note the transcript at page 242.

When Jude Erickson became a partner in the newly formed partnership, she confirmed that the partnership was paying the Robinson obligation. Note page 286 of the transcript.

These undisputed facts find their way into the FINDINGS OF FACT entered by the Court.

In FINDING OF FACT #2 on page 2 is the following:

2. Terms of the partnership agreement including the following;

a. Robinson's Obligations; Robinson agreed to and did loan \$30,000 to the partnership for the purpose of paying a \$25,000 payment to Jet Star Contract and \$5,000 for operating expenses. Robinson obtained the \$30,000 by taking out a second mortgage on his home, at the bank's interest rate of 16.41% per annum.

In FINDING OF FACT #57 on page 11 is the following:

57. In addition to the initial \$30,000 loan at 19.41% per annum, Robinson loaned the business \$5,200 at 13% per annum December 18, 1985"

As noted in FINDINGS #55 and #58, when the assets of the newly formed partnership were sold some year plus after Walsh had left and the initial partnership dissolved, Robinson was paid from partnership assets, upon liquidation.

The Utah Code Annotated at 25-5-4 states as follows:

CERTAIN AGREEMENTS VOID UNLESS WRITTEN AND SIGNED.

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(2) every promise to answer for the debt, default, or carriage of another.

Appellant submits that any purported agreement that Walsh pay Robinson any money is void, if not in writing, and signed by Walsh, for two reasons:

(a) it would take more than a year to complete;

(b) Walsh was to pay Robinson if, Universal Video Partnership did not.

No one can argue differently that Universal Video Partnership, made every payment, without exception, that was in fact paid to Robinson.

After the fact, Robinson is attempting to make Walsh liable, and never makes any claims against Walsh, until well over a year after the initial partnership was dissolved.

Bottomline, such an agreement that Walsh pay the Partnership debt to Robinson, is absolutely void, unless in writing and signed by Walsh. Note the legacy of cases beginning as early as First National Bank vs. Kinner, 1 U. 100.

Appellant submits that Walsh is not liable to Robinson for the loan that Robinson made to Universal Video Partnership as the same is void, even if the promise was made, which it was not.

ARGUMENT SIX

AFTER THE FORMATION OF THE NEW PARTNERSHIP, BY THE NEW PARTNERS. WALSH WAS NO LONGER LIABLE FOR DEBTS IN THE ORDINARY COURSE OF BUSINESS, OF THE NEW PARTNERSHIP.

As noted above the old partnership with Mark Walsh as a partner was dissolved.

It is absolutely without dispute that Peter Van Alstyne and Gerald Robinson and Judith Erickson, then created a wholly new and different partnership.

At the time that Mark disassociated himself with the old partnership, the bills were being paid out of the cash flow of the business.

Peter Van Alstyne testified on page 18, as follows:

Q. And during the spring -- winter and spring of 1985, you conducted business as Universal Video, is that correct?

A. That's right.

Q. And you were paying the bills out of the cash flow of the business as Universal Video, is that correct?

A. That's correct.

It is important to note that Mr. Van Alstyne and Gerald Robinson, absolutely made no effort to sell the business or in any way attempted to wind it down, at the time that Mark Walsh disassociated himself with them.

Giving Peter and Gerald every benefit of the doubt, they made no attempts to liquidate the business, to sell as a going concern; or in any way attempted to wind down the business, until several months after Mark Walsh had left.

In fact, it was a whole year plus, after Walsh had left and

the new partnership was created, that the assets of the business were sold.

Not only had Peter put in \$5,000 once he got the control he bargained for in the new partnership, he again put \$5,200 into the new business some six months later, ie: December, 1985.

A careful review of the Chytraus account, Exhibits 14, 15, & 19, show that when Mark disassociated himself with the company, approximately \$5,000 was owed. Shortly after he left, it went all of the way beyond ten thousand dollars.

Come November, 1985, it is back down to \$5,000 or thereabouts.

Hence, even taking Peter's view of the surprise coming to him regarding the Chytraus account, it is clear that at the time of the second investment in the business by Peter in December of 1985, any and all indebtedness on this account remaining after Mark Walsh had left, had been paid off, and only a new \$5,000 was put on the account, waiting for the November surprise.

As a result, the five thousand that was allegedly due on the Chytraus account when Mark Walsh had left, had been paid in full, prior to Peter putting in additional personal sums into his new business.

It may be true that he had to pay off the Chytraus account in the sum of \$5,000 more or less, in order to continue with them as a supplier, however, a careful review of the account will show that \$5,000 was generated on the account, after Mark Walsh had disassociated with the company.

As a result, it can not be said that any contribution that Peter made from personal funds, benefitted Mark Walsh in any way.

As noted above, Peter and Gerald can not bind the old partnership in any way, after dissolution has taken place, except to wind down the company.

Instead of winding down the business, they picked up the pieces and started a new one, with Jude, and then over the course of time in their new venture, they payed off the partnership debt, so that they could own the same free and clear, and therefore any profit on the same would be theirs.

Had the business not gone down because of competition in the market place, that is exactly what Peter and Gerald planned on.

Note on page 123, of the Transcript with Peter testifying:

"... my \$30,000 into the business, my \$35,000 into the business, and Gerald's were partnership debts. So we were creditors to the partnership. We paid off all of our other creditors in full and now, we were the remaining creditors. So, the \$25,000 contract from Video U.S.A. was going to pay down -- was going to pay off me and Gerald, you know. We were into it now 50 to \$60,000 so we were --"

When Peter and Gerald ultimately sold their new business, Jude, had been forced out, by Peter as noted throughout the transcript, and perhaps particularly by his attempt to have her arrested on Christmas Eve, on totally false charges.

Hence, come the summer of 1986, Peter and Gerald had to make a decision if they were going to continue the business or sell it, because it was time to renew the lease on the premises.

At this time, competition was getting the better of them, as noted on page 127, wherein Peter testified:

Q. So the real problem here is the business went sour because you couldn't meet the competition, isn't it?

A. I think there was more than that, but that was one of main reasons.

Q. A major element, was it not?

A. A major element.

It is without dispute that the competition had got the better of Peter and Gerald, as Albertsons was selling video's in the early part of 1986 for 99 cents. Note page 42, with Peter testifying:

Q. During the early months of 1986, did competition in the video rental business become increasingly stiff in your particular area?

A. Increasingly, yes.

Q. And didn't in fact Albertson's, which was in the same mall that you were located in, did it not indeed start renting videos for \$.99 ?

A. It did.

Q. It became very difficult for you to continue business, is that right?

A. Right.

Bottomline, the new partnership ran into too great a competition and could not sustain the lower prices that Albertson's were making, and so the business was about to fold in May, 1986.

It is important to note that Mark Walsh has been absolutely off the scene now for a whole year, and Jude has been forced out since about December, 1985.

As a result, it is only Peter and Gerald struggling to save their own investments in their newly formed partnership.

No one can question at this point that Peter Van Alstyne and Gerald Robinson were the only ones involved, as a quick review of Defendant's Exhibit 13, the documents reflecting the sale of the partnership assets, shows that Peter and Gerald had modified the original proposed agreement, so that the Seller was changed from UNIVERSAL VIDEO, a Utah Partnership, to the Seller being Peter Van Alstyne and Gerald Robinson.

In addition, the language of, " the undersigned, as partners of the Seller, are all of the Partners of the Seller and that" was to be totally removed from the agreement.

Lastly, the entry where Mark Walsh and the entry where Jude Erickson were to sign, were both deleted.

Why? Well, because they were not the Sellers, and they had no claim on the proceeds from the sale, just like they were not liable for the personal debt of Peter and Gerald.

It is important to note, that the final agreement expressly stated that Mark and Jude had no interest in the assets of the business.

Contrast Exhibit 13, and Exhibit 20, each admitted into evidence by Peter and Gerald. After the modification striking out the partners segment, Peter and Gerald warranted the title and ownership of the assets:

WARRANTY OF TITLE AND OWNERSHIP. The Sellers warrant that they hold undisputed title to the above assets, that no party has a security interest or claim to the assets being purchased, and that should any party assert a claim or interest in the assets, that the sellers shall vigorously defend the matter in the interest of the Purchasers. The Sellers further warrant that they are transferring their entire interest in the assets to the Purchasers, and that no other person(s) hold any interest

whatsoever in the assets sold to the Purchaser. (emphasis original)

SELLER

/s/
GERALD ROBINSON

/s/
PETER VAN ALSTYNE

It is without dispute that once the Sellers had sold the business assets, they took the proceeds from the sale and paid themselves, and nothing went to Mark, however, Jude was included with some of the unsold assets.

Why, because Mark was not a partner in this venture, and in fact by this time, neither was Jude.

These two boys, ventured off on their own, and competition got them.

However, there is absolutely no basis to suggest that Mark Walsh somehow was guarantor on their success, and that if things did not turn out "peacie" for them, Mark was to contribute to pay them back some personal monies they put up in their own business venture, months after he left, to lessen their misfortune.

ARGUMENT SEVEN

AFTER THE FORMATION OF THE NEW PARTNERSHIP, WALSH WAS ESPECIALLY NOT LIABLE FOR EXTRAORDINARY DEBT.

As noted above, once Peter Van Alstyne bought control, he borrowed five thousand dollars against his home, and put the same in his newly formed business.

A business that, without question, Mark Walsh, was not part of. There can be no question that this investment in the new partnership was surely not something that Mark Walsh approved of

or had any notice of whatsoever.

These sums were not used by Mr. Walsh in any way, nor did Mr. Walsh direct where they would be used in the slightest fashion, as he did not even know of the same.

This action by Peter is no way bound the old partners, as once the old partnership was dissolved, Peter could not bind it further, except as to wind down the business. Note 48-1-30 of the Utah Code Annotated.

One can not argue that Mark Walsh, benefited from this investment by Peter into Peter's newly formed business.

It is clear however, from the letter drafted by Mr. Van Alstyne, a law school graduate, that Jude was either going to be a one-tenth partner or a one-third partner. Note Exhibit 6.

Hence, the old partnership was dissolved, the partners went their way, and then Peter, Gerald and Jude formed a new partnership and borrowed new monies and put the same into their newly formed business.

One can not argue with the meaning found in Exhibit 6, wherein Peter states: "We accepted you as a third partner based on the agreement that you and Peter would share equally in the purchase of the approximately \$60,000 contract with Jet Star."

It is absolutely clear that the parties had reached a new agreement including Jude contributing to the enterprize, along with Peter.

Each had accepted that, and had "accepted" Jude as their new and different partner ie: Mark Walsh was out, and their new

company known as Universal Video, embarked on its new beginning.

As noted on page 241 of the transcript, at the time that old partnership ended, and the new one was formed, Universal Video was neither making money nor losing money, as it was merely servicing its debts from the cash flow.

In fact, it was one hundred per cent current with all of its creditors. Note page 256 of the transcript.

Hence, at the creation of the new partnership, with Jude, Gerald and Peter, there was no antecedent debt, for which Mark Walsh would be liable.

As of June 3, 1985, the Jet Star obligation was paid by Peter so he could obtain the control that he needed so badly. Robinson is being paid by the business, and he is current, and the day to day expenses are wholly current, and are being paid by the new Partnership, as they come due.

Bottomline, as all existing debt was paid current, no old partner could bind Walsh, after the dissolution took place.

As provided in 48-1-30, once the dissolution took place no partner can bind the partnership for additional debt:

48-1-30 GENERAL EFFECT OF DISSOLUTION ON AUTHORITY OF PARTNER

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

Hence, once the dissolution occurred by Mark Walsh selling his interest to Jude Erickson, the beginning of May, 1985, no partner could bind the partnership, and thereby bind Mark Walsh,

to any further obligations of the partnership.

Hence, Mark Walsh was no longer liable for debts incurred in the ordinary course of business, by the new partners, after the old partnership was dissolved, and the partners went their separate ways.

ARGUMENT EIGHT

EVEN IF WALSH WERE LIABLE FOR DEBTS OF THE NEW PARTNERSHIP, THE DEBTS WERE TO BE DIVIDED BETWEEN THE EXISTING PARTNERS

As noted above, Walsh was not liable for the Jet Star/Keith Bigler contract, after Peter paid it off, and took a controlling interest in his newly formed Partnership.

In addition, Mark Walsh was never liable for the Gerald Robinson loan(s), as he never signed anything saying that he would stand for the debt of another, coupled with the fact that it was over a year to complete, and every payment made was made by the business and never by Walsh, etc.

Should this Court find that Mark is liable for either of these obligations, Walsh submits that, without question, the same should have been divided equally between the four (4) partners.

In the Utah Code Annotated, at 48-1-12, as amended in 1953, is the following:

48-1-12 NATURE OF PARTNER'S LIABILITY

All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11.

(2) Jointly for all other debts and obligations of the

partnership; but any partner may enter into a separate obligation to perform a partnership contract.

As noted above, when Peter took on the Jet Star obligation, he cut Mark Walsh out of the same obligation, by virtue of 48-1-12 in subsection (2), as he as a minimum, "entered into a separate obligation to perform a partnership contract."

However, when the Court made its final ruling, instead of making Mark the Guarantor on the new partners success, and wholly cutting Gerald and Jude out of any partnership responsibility, the same should have been divided equally between all four (4) partners.

As a result, as noted on page 309 is the following:

Q. What do the figures at the bottom of that page show?

A. It says a summary of unrepaid loans owing at the end of 36 months.

Q.
and what does it say next to "Gerald?"

A. \$13,330.18

Q. And next to "Peter?"

A. \$22,281

Hence, \$35,611.18, should have been divided between the parties, rather than Mark Walsh, for some reason being made liable, for success of Peter Van Alstyne and Gerald Robinson, on their venture together, some whole year beyond Mark's association.

ARGUMENT NINE

EVEN IF WALSH WERE LIABLE FOR DEBTS OF THE NEW

PARTNERSHIP DEFENDANTS ARE NOT ENTITLED TO PREJUDGMENT INTEREST.

As noted in Argument Four. Walsh is not liable for the Jet Star obligation, once Van Alstyne took over and paid it off, to gain control of the property.

Also, as noted in Argument Seven, Walsh is surely not liable for increased indebtedness of the Defendants, when they borrow additional monies and create extraordinary debt obligations, over which Walsh had no control and not even a notice of the same.

However should this Court rule otherwise, Defendants are surely not entitled to prejudgment interest.

The Utah Code Annotated at 15-1-1(2) states as follows:

Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be ten per cent per annum.

Appellant submits that this can be the only basis for any claimed prejudgment interest, as there was no contract between the parties calling for any interest to be paid to the new partners of the new partnership by the old partner of the dissolved partnership.

Clearly from the statute, the only time that the party would be called upon to pay prejudgment interest would be when there is an agreement to pay interest, but no interest rate is specified in the agreement.

This is clear from the express language of the statute, as

the beginning sentence provides, "Unless parties to a lawful contract specify a different rate of interest. . . ."

The State Legislature has created a different arrangement when there are different claims than the ones here.

For example, 78-27-44 Utah Code Annotated, allows for the payment of prejudgment interest in personal injury actions, but then only for special damages.

This provision in the code is particularly relevant here, because the State Legislature did not allow interest on general damages. Here the lower Court not only awarded general damages to the new partners in the new partnership, from the old partner in the dissolved partnership, the lower Court also awarded prejudgment interest on the same.

As a result, the lower Court granted judgment against Walsh, as if he were some guarantee of any and all indebtedness, the new partnership took on themselves, both ordinary, as generated in the normal course and scope of the daily business, as well as extraordinary when the new partners decide to take out a new loan and create massive debts, without any notice or agreement with Walsh. Then on top of this, the lower Court added prejudgment interest on the same against Walsh.

Hence, had Walsh personally injured the Defendants, he would not be liable for prejudgment interest on general damages, however, when the new partnership went down, and new partners take over, Walsh was held liable for prejudgment interest.

The statute, 78-27-44 of the Utah Code Annotated is

additionally particularly relevant, because the same precludes prejudgment interest on future damages.

As noted in the facts, when the new partners created their new partnership, on two different occasions, they took on new and additional debt, together amounting to over ten thousand dollars. Their actions taken after Walsh was no longer in the subject partnership, was an investment that they alone took in their future profits, stemming from their new partnership.

To make Walsh pay interest on their investments, after he was disassociated, would be to make him pay interest on Defendant's future damages.

Again, had Walsh personally injured the defendants he would not be required to pay interest on future damages, however, when the new partners created the new partnership, the lower Court has held that Walsh is liable for prejudgment interest on future damages sustained by their new partnership.

Not only does such an action by the lower Court, violate the policy established by the State Legislature in 78-27-44, U.C.A. as well as the express language in 15-1-1(2) U.C.A., it violates a mountain of case law that prohibits prejudgment interest when the damages are speculative.

The policy in the case law that provides for no prejudgment interest for general damages, is that the Defendant has no way to know what the total bill is going to be, particularly when it is the trial of the underlying merits of the action, that decides the principle amount owing.

In the case at bar, Walsh never agreed to pay any principle amount to Mr. Van Alstyne or to Mr. Robinson, however, the lower Court ruled that Walsh is liable for these debts created wholly unilaterally by Van Alstyne and Robinson, plus interest on the same.

What is particularly disturbing about the same, is that the lower Court held that Walsh is locked into the interest rate that Robinson and Van Alstyne committed to pay to third persons, when he never agreed to pay the same and did not get any notice of the same whatsoever.

Surely there can be no basis in law, as there is absolutely no rational in logic or justice, that would require that Walsh pay prejudgment interest to past partners of a dissolved partnership, where the past partners create a new partnership, create new extraordinary debt, and then on top of it all make Walsh pay whatever interest rate the past partners of the dissolved partnership, happened to bargain for, months after the initial partnership was dissolved.

Hence, in December following the May, when the original partnership was dissolved, Robinson and Van Alstyne borrowed over five thousand dollars at the rate of 13 per cent. In addition thereto, a month or so after Walsh left the dissolved partnership, Van Alstyne borrows some additional five thousand dollars.

The Court, as noted in Finding of Fact 56, has ordered that Walsh contribute in the payment of over \$13,493 in prejudgment

interest alone, which is prejudgment interest on the extraordinary debt, unilaterally created by the new partners in the new partnership, after the old partners disassociated themselves, and dissolved their partnership.

Appellant submits that under no conditions would the past partners of the dissolved partnership, be entitled to prejudgment interest.

ARGUMENT TEN

WALSH DID NOT OWE JUDE ERICKSON ANY MONEY.

As noted on Exhibit 2, on May 2, 1985, Mark Walsh sold all of his right, title and interest in Universal Video to Jude Erickson.

At the time of sale, Jude had first hand/hands on exposure to the workings of the business, and was fully aware of all of the debts owing, at the time. At least as much as Mark did.

The only exception to this rule, is that Mark Walsh did not tell Jude that Peter had been out forging Mark's signature on company checks, and then lying about it.

Note on page 231:

"... There's only one thing that I recall not telling Jude, and I did that at Peter's request, initially. And that was about the forged checks and the meetings that I had with Jude; I told her everything I knew except that one thing. That was between me and Peter, initially."

Mark, according to Exhibit 2, was selling a whole third of the business to Jude for \$10,000.00.

During the course of the trial, Peter claimed to be alarmed

at the price, however, as reflected on Exhibit 6, immediately after Peter had taken Jude on as a new partner, he offered to sell her a mere 23.3 per cent for \$15,000. (She was a one-tenth partner if she paid nothing, a full 33.33 per cent if she paid \$15,000.00)

However, it is significant to note that at the time of the sale, the business was making its payments of debts, and was current. Note transcript at page 256.

Most significant, perhaps is the fact that the assets exceeded liabilities at the time of sale, to the best of Mark's knowledge. Note transcript at page 249.

There can be no question that Jude then became a partner in the new partnership, and the three partners, Peter, Gerald and Jude proceeded to create a new partnership and continue business.

It is absolutely clear and it is absolutely without dispute that these three did not attempt to close down the business, and did not wind up the old partnership, until many months later.

As noted above, it was a whole year latter that the partners sold the assets of the business.

As noted above, when the new Partnership was dissolved, Jude Erickson was included in the liquidation of its assets, and hence, to whatever degree of value she received, she got a return on her investment.

However, after taking the benefits of her agreement with Mark Walsh, she is precluded from any claim that the agreement is somehow avoidable, particularly for any claim of a lack of

consideration.

As a result, there is no basis in law, and no basis in equity to suggest that Mark Walsh would owe any money to Jude Erickson, for anything.

ARGUMENT ELEVEN

AFTER THE COURT ENTERED JUDGMENT AGAINST WALSH, THE PARTIES ENTERED INTO A CONTRACT THAT LIQUIDATED THE SAME.

As noted in the transcripts, the Appellant filed a Motion to Summarily Enforce the Settlement Agreement, and the same was heard, on February 8, 1993. Arguments Eleven, Twelve, Thirteen and Fourteen stem from this hearing.

On or about March 4, 1992, Mark Walsh and Peter Van Alostyne had a conversation about settling the above referenced matter for about \$13,250.00.

Mark was to pay Gerald Robinson the face amount of his judgment, the sum of about \$8,000.00 to Peter for his attorneys fees to Joyce Maughan, and Mark and Jude were to waive their respective claims, which were a wash.

After this discussion on the phone, Peter agreed to reduce the same to writing, which he did as Exhibit 1, which states:

JOYCE MAUGHAN
ATTORNEY AT LAW
455 SOUTH 300 EAST, SUITE 355
SALT LAKE CITY, UTAH
84111

Dear Joyce:

We will accept from Mark Walsh \$13,250 payable in full no later than May 1, 1992 (\$13,000 is the amount Gerald and Peter discussed, \$250.00 is the amount needed to pay Joyce's fees to conduct the settlement proceedings.)

Joyce Maughan is hereby instructed to convey the amount of \$13,000 received in settlement from Mark Walsh to Gerald Robinson.

On the /4/ day of /March/, 1992, before me personally appeared Peter Van Alstyne whose identity was proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged the same.

By GERALD ROBINSON

On the ____ day of ____, 1992, personally appeared before me Gerald Robinson whose identity was proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged the same.

NOTARY PUBLIC
My Commission Expires:

Prior to Gerald getting the letter, Peter had called him, and they discussed the terms and conditions outlined therein.

Thereafter Mark spoke with Gerald, and Gerald read only parts of the written agreement over the phone to Mark, ie: there

was no mention of the May 1st, date, etc.

Based upon this written agreement, Mark proceeded to raise the money to complete this contract and agreement between the parties.

Consistent therewith, Mark sends Exhibit 3, to Gerald Robinson, with the Certified Funds, Exhibit 6, in the sum of \$5,359.23.

Then a few weeks later, Mark Walsh, sends Exhibit 2, to Peter thanking him for the leadership in bringing the whole controversy to a final resolution, and tenders thereby the balance of the monies owed.

Mark hears nothing from Peter, and so he proceeds to raise the additional \$8,000 called for in the written agreement, Exhibit 1, and personally delivers the same to Peter's home in December, 1992.

Appellant submits that by virtue of the foregoing, Appellant and Appellees have an agreement and a contract to liquidate the judgment in the above referenced matter. Note Resource Management vs. Weston Ranch, 706 P.2d 1028, (Utah, 1985).

On page 33 of the transcript, Peter admitted that he and Mark had a conversation regarding the \$13,000 figure on the phone. On page 39, Peter testified that how the \$13,000 was broken down was none of Mark's business, and that Peter would divide the same between Gerald, Jude and himself.

Peter testified on page 43 and 44, that he fully expected that Mark would get a copy of this writing, when he prepared the

same and had his name notarized.

On page 47, Peter testified that he could not recall telling Mark of the May 1, 1992 deadline, but only that it would be paid in a reasonable time.

On page 53, Peter testified as to what Joyce was to do for the \$250.00 attorneys fees mentioned in the agreement.

On page 101 and 102 Peter testified that when he spoke to Gerald about Exhibit 1, Gerald did not tell Peter that he was not going to sign it.

On page 147, with Mark Walsh on the stand about Gerald Robinson signing is the following:

Q. Okay. Now, in reference to that, you heard him say that he paraphrased part of it to you, is that correct?

A. That's correct.

Q. Now, what happened, then, did he tell you that he was going to sign or he wasn't going to sign?

A. He told me that he was going to sign it to have it notarized.

Q. Are you sure about that, Mr. Walsh?

A. I'm positive about that.

It is important to note that Mark Walsh and Jude Erickson, have offsetting claims against one another. NOte transcript at page 164.

Appellant submits that the parties reduced their agreement to writing, and all of the Defendants have been paid, considering especially the fact that according to Peter he is going to pay Gerald and Jude a fair amount and whatever was left over for him was his business.

ARGUMENT TWELVE

IN THE ALTERNATIVE, WALSH IS RELEASED FROM THE JUDGMENT ON THE BASIS OF ACCORD AND SATISFACTION.

Based upon the factor, that \$13,000 plus was all that Walsh could afford, the parties compromised their positions and settled the matter.

At page 41 and 42 of the transcript, with Peter testifying is the following:

Q. It's your testimony Mark said, That's all I can raise?

A. That's all he could raise, that's what he testified?

Q. And you were going to have \$250 extra to pay Joyce to draft the settlement agreement documents, is that correct?

A. Yes.

Q. When you drafted Plaintiff's Exhibit No. 1, did Mark give you any of the terms of the agreement?

A. Yes.

On page 47, Peter further explains how he arrived at the figures outlined in Exhibit #1:

Q. Reading on here on Plaintiff's Exhibit No. 1. Thirteen thousand is the amount Gerald and Peter discussed, 250 is the amount needed to pay Joyce's fees to conduct the settlement proceedings.

Now, do you mean by that that she's going to prepare all the paper work and we're going to pay her \$250 to do the paperwork?

A. Well, there's more than that. She still had to work things out with Jude Erickson.

Q. Okay.

A. And she probably still had to work with us to determine any kind of split or breakdown of whatever is received from Mark. And then she'd have to contact you and prepare a settlement

offer, and there would probably be, you know, multiple communications between you and Joyce.

Q. Okay, So when you prepared Plaintiff's Exhibit No. 1, you thought it was settling you and Gerald and Jude? Yes or No?

A. Probably yes.

Q. Let me read on here. Mark must waive all claims against Jude Erickson.

You typed that, did you not?

A. I typed it.

Appellant submits when he speaks to Peter who drafts this agreement, and then he speaks to Gerald who tells him that he is going to sign the document, that he has a final compromise of the controversy.

At page 154, Mark Walsh testified as follows:

Q. Did --did you feel that you had an agreement, Mr. Walsh?

A. Yes, I did.

Q. When did you have an agreement?

A. It felt we had an agreement when I heard that it had been put in writing, on March 9th was the first time I heard it.

Q. Did--did you feel like this document was the agreement or did this merely reflect what you and Peter had talked about?

A. It--it really memorialized, I think, what we had previously talked about.

Q. It--

A. We --we had discussed those amounts, this is a reflection of what we'd discussed.

Q. And as I understand it, did you just talk 13,000 or did you talk five and eight?

A. We'd talked five and eight. We rounded it off to the \$13,000.

Appellant respectfully submits that the judgment has been liquidated, by virtue of the accord and satisfaction.

ARGUMENT THIRTEEN

APPELLEES ARE BARRED FROM FURTHER RECOVERY BY VIRTUE OF PROMISSORY ESTOPPEL

Appellant submits that promissory estoppel precludes the Defendant/Appellees, from any further recovery as there clearly was a promise, Appellant reasonably relied on the same, to his injury and detriment, should the Court not hold the Appellees to their word.

Appellant submits that it is without question that Peter reduced his promise to writing and then had his signature notarized.

Appellant would not know of the fact that Peter had followed through, had not Gerald Robinson, read parts of the same to Walsh over the phone.

Peter testified on page 46, that he fully expected that Mark would rely on his promise.

Q. Tell me, Peter, did you expect that I would get the original or a copy?

A. Probably a photocopy.

Q. You were going to notarize this and I'm just going to end up with a notarized - a copy of a notarized letter, is that what your testimony is?

A. That's my testimony, is that's what I probably expected. Yeah. I felt like Mark wanted the notarization because he wanted to make sure we really meant business.

It is important to note that Peter never told Mark, after

the letters and the payments, that they never had a deal, even though Peter and Mark had discussions after the same. Note page 62 and following.

This was also the case with Gerald Robinson, as noted on page 122 of the transcript.

On page 151 Mark Walsh testified about how he had relied on their promise, by going to family and the bank, raising the funds, etc.

Appellant submits that the claims of the Defendants/Appellees are barred on the basis of promissory estoppel.

ARGUMENT FOURTEEN

DEFENDANTS/APPELLEES WERE NOT ENTITLED TO ATTORNEYS FEES

As noted on the Order, denying the Motion for Summary Enforcement of Settlement, is the following:

ORDER, that the Plaintiff's Motion is hereby denied, and the Defendants are awarded \$3,200.00 in Attorneys fees, based upon 78-27-56 Utah Code Annotated as amended in 1988.

Under 78-27-56, the Utah State Legislature, 1988, provided as follows:

78-27-56 ATTORNEY'S FEES -- AWARD WHERE ACTION OR DEFENSE IN BAD FAITH - EXCEPTIONS

(1) In civil actions, the court shall award reasonable attorneys fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

As noted above, this Court should liquidate this judgment, if it stands against the prior ten arguments, on the basis of

contract, accord and satisfaction and promissory estoppel, and therefore the subject motion clearly had merit.

However, under no conditions can the lower Court's position stand that the matter was brought in bad faith.

Note Cady vs. Johnson, 671 P.2d 149 (Utah, 1983) which holds that without a showing of bad faith, attorneys fees can not be awarded.

CONCLUSION

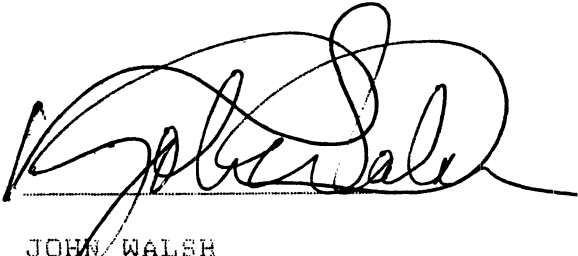
Appellant submits that this old partnership came to a close and the new one pick up the pieces, with new partners, new Star obligation.

Should this court disagree, appellant submits that the judgment has been liquidated by virtue of contract, accord and satisfaction and/or promissory estoppel.

Appellant respectfully submits that under no conditions should the Defendants be awarded any attorneys fees.

Appellant respectfully requests that the lower court be reversed as no cause of action.

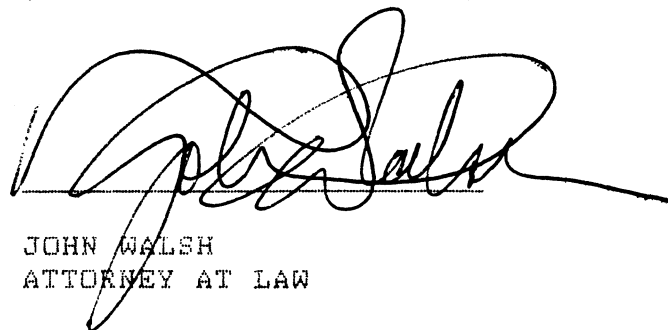
Dated this 2nd day of May, 1994.



JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two (2) true and correct copies of the foregoing APPELLANT'S BRIEF, to the Appellees by mailing the same in the United States Mails addressed to JOYCE MAUGHAN, ATTORNEY AT LAW, 455 SOUTH 300 EAST, SUITE 355, SALT LAKE CITY, UTAH, 84111, this 3rd day of May, 1994.

A handwritten signature in black ink, appearing to read "John Walsh", is written over a horizontal line. The signature is stylized with large, sweeping loops and a long horizontal stroke extending to the right.

JOHN WALSH
ATTORNEY AT LAW

ADDENDUM

38462

JOYCE MAUGHAN - 3833
Attorney for Defendant/
Counter Claimants Peter Van
Alstyne, Gerald Robinson
and Judith Erickson
455 South 300 East
Suite 355
Salt Lake City, UT. 84111
(801)359-5900

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

MARK O. WALSH,)	
)	
Plaintiff,)	ORDER AND JUDGMENT.
)	
vs.)	
)	Civil No. C 86-7199
)	
JUDITH ERICKSON a/k/a JUDE)	Judge Moffat
ERICKSON; PETER VAN ALSTYNE,)	
and GERALD ROBINSON,)	
)	
Defendants.)	
)	

THIS MATTER came on for trial before the Honorable Judge Richard H. Moffat on April 24 and 25, 1989. Plaintiff was present and represented by his attorneys Steven D. Crawley and John Walsh. Defendants Judith Erickson a/k/a Jude Erickson, Peter Van Alstyne, and Gerald Robinson were present and represented by their attorney Joyce Maughan. The Court having heard testimony of the witnesses, having reviewed the exhibits entered on file herein, having entered its Findings of Fact and Conclusions of Law, now therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Erickson is hereby granted judgment against Walsh as follows:



Actual damages of \$5,500.00 (five thousand five hundred and no/100 dollars) plus 10% pre-judgment interest from October 31, 1985 for restitution of Walsh's unjust enrichment;

2. Robinson is hereby granted judgment against Walsh as follows:

Total actual damages of \$5,359.23 (five thousand three hundred fifty nine and 23/100 dollars) plus 10% pre-judgment interest from and after May 21, 1987 for Walsh's one-half share of the unpaid portion of the \$30,000.00 loan and for repayment to Robinson of Walsh's one-half share of the unpaid portion of Robinson's \$5,200.00 loan to the Partnership business December 18, 1985 to pay Chytraus and Jet Star.

3. Van Alstyne is hereby granted judgment against Walsh as follows:

Actual damages of \$24,346.82 (twenty four thousand three hundred forty six and 82/100 dollars) plus 10% pre-judgment interest from and after May 21, 1989 pursuant to Van Alstyne's right of contribution, representing one-half of the partnership debts paid personally by Van Alstyne.

DATED this _____ day of _____, 19____.

BY THE COURT:

JUDGE RICHARD H. MOFFAT
District Court Judge

MAILING CERTIFICATE

I, the undersigned, certify that on the 4th day of October, 1990, I mailed a true and correct copy of the foregoing document by first-class mail to the following:

Steven D. Crawley, Esq.
WALSTAD & BABCOCK
254 West 400 South
Second Floor
Salt Lake City, Ut. 84101

John Walsh, Esq.
3865 South Wasatch Blvd.
Cove Point Plaza
Suite 202
Salt Lake City, Ut. 84109

Michelle Groll

JOYCE MAUGHAN - 3833
Attorney for Defendant/
Counter Claimants Peter Van
Alstyne, Gerald Robinson
and Judith Erickson
455 South 300 East
Suite 355
Salt Lake City, UT. 84111
(801)359-5900

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

MARK O. WALSH,

Plaintiff,

VS.

JUDITH ERICKSON a/k/a JUDE
ERICKSON; PETER VAN ALSTYNE,
and GERALD ROBINSON,

Defendants.

)
)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
)
)
) Civil No. C 86-7199
)
)
) Judge Moffat
)
)
)
)
)

THIS MATTER came on for trial before the Honorable Judge Richard H. Moffat on April 24 and 25, 1989. Plaintiff was present and represented by his attorney Steven D. Crawley and John Walsh. Defendants Judith Erickson a/k/a Jude Erickson, Peter Van Alstyne, and Gerald Robinson were present and represented by their attorney Joyce Maughan. The Court having heard testimony of the witnesses and having reviewed the exhibits entered on file herein, now therefore, the Court enters its

FINDINGS OF FACT

1. In December, 1984, plaintiff Mark Walsh (hereinafter "Walsh") entered

into an oral Partnership agreement with Van Alstyne and Robinson, creating the Universal Video Partnership (hereinafter the "Partnership").

2. Terms of the Partnership agreement included the following:

a. Robinson's obligations: Robinson agreed to and did loan \$30,000.00 to the Partnership for the purpose of paying a \$25,000.00 payment on the Jet Star Contract and \$5,000.00 for operating expenses. Robinson obtained the \$30,000.00 by taking out a second mortgage on his home, at the bank's interest rate of 16.41% per annum.

b. Walsh's and Van Alstyne's obligations:

(1) Walsh and Van Alstyne agreed to repay Robinson the full \$30,000.00 plus interest at 19.41% per annum (3% plus the 16.41% rate Robinson was paying to his bank for the mortgage he took out to loan the \$30,000.00 to start up the Universal Video Partnership. If the Universal Video business profits were not sufficient to repay Robinson, Walsh and Van Alstyne would personally repay Robinson.

(2) Walsh and Van Alstyne agreed to contribute time and labor to manage and run the business so as to satisfy the Partnership obligations and make a profit for the three partners. Robinson was a "silent partner" with no obligation to manage the business or pay its debts.

(3) Walsh and Van Alstyne cosigned with each other to be obligated on the following contractual obligations:

(a) Jet Star contract dated December 8, 1984 (hereinafter "Jet Star Contract"), pursuant to which Walsh and Van Alstyne agreed to be liable for purchasing from Jet Star Industries the business known as Universal Video

located at 5444 South 900 East, Murray, Utah.

(b) Consent to Assignment of lease of the premises, executed by Walsh and Van Alstyne December 21, 1984, pursuant to which Walsh and Van Alstyne agreed to be jointly and severally liable for the tenants' obligations under the Oakwood Village Partnership lease (hereinafter "Oakwood Lease") dated March 11, 1982. This obligated Van Alstyne and Walsh to an eighteen-month lease term, from December, 1984 through June, 1985, at monthly lease payments of \$1,420.00 to \$1,440.00.

(c) Application for Credit and personal guarantee to Oscar E. Chytraus Company (hereinafter, "Chytraus"), vendor of video tapes for the Universal Video Business, dated January 29, 1985, pursuant to which Walsh and Van Alstyne agreed to personally guarantee and be jointly and severally liable for Universal Video debts to Chytraus.

(4) When they signed as obligors on the Jet Star Contract, the Oakwood lease, neither Walsh nor Van Alstyne asked Robinson to be responsible for satisfaction of the obligations on those contracts or any other of the Universal Video business debts.

c. Rights to profits of the Universal Video Business: Walsh, Van Alstyne, and Robinson all agreed to share net profits equally after debts to Robinson and third parties had been paid. However, the debts exceeded the profits so there were no profits to distribute.

3. Walsh had induced Van Alstyne to enter into the Partnership business by Walsh's representations of his previous experience and self-professed success in the video retail business.

4. When Van Alstyne entered into the Jet Star contract, the Oakwood Lease, and the Chytraus obligations with Walsh. Van Alstyne did so in reliance on Walsh' financial statement in December, 1984, which financial statement showed Walsh's net worth to be approximately \$243,500.00

5. Robinson is related to Van Alstyne by marriage. Van Alstyne negotiated with Robinson for the \$30,000.00 loan to start up the Universal Video business. Van Alstyne told Walsh he did not want to have Robinson loan the \$30,000.00 without assurance that Robinson would be completely repaid. Walsh assured Van Alstyne that the Universal Video business revenue would repay Robinson, but that even if it did not, Walsh would mortgage his home if necessary to repay Robinson. In reliance on those assertions by Walsh, Van Alstyne assured Robinson that the \$30,000.00 loan would be a safe investment and the debt to Robinson would be completely repaid.

6. In reliance on those representations and on the fact that Walsh was a Bishop in the Church of Jesus Christ of Latter-Day Saints, Robinson loaned Walsh and Van Alstyne the \$30,000.00 to start up the Universal Video business.

7. During the first three months of operation under Walsh and Van Alstyne, the Universal Video business generated barely enough income to pay its monthly obligations.

8. During those first three months of operation, Walsh was concerned that the business revenue would not be sufficient to cover payments on the Oakwood lease (approximately \$1,500.00 per month), the debt service on the Jet Star Contract, and the other business debts.

9. Walsh had been concerned about that debt service since before entering

into the Jet Star Contract in December, 1984, and before getting the \$30,000.00 from Robinson.

10. Walsh did not tell Van Alstyne of this concern until January, 1985, after Robinson had already loaned the \$30,000.000, and after Walsh and Van Alstyne had cosigned on the Jet Star Contract, the Oakwood Lease, and the personal guarantee to Chytraus.

11. Van Alstyne's decision to cosign on those three contracts (Jet Star, Oakwood, and Chytraus) with Walsh, and his decision to let Robinson loan \$30,000.00 to the business, were decisions he made in reliance on Walsh's representations to Van Alstyne of Walsh's financial success in his previous video store and Walsh's assertions to Van Alstyne that the Universal Vide (Jet Star Contract) business would be a profitable venture, and that the Universal Vide Business revenue would certainly cover the obligations on the Jet Star Contract, the Oakwood lease, the Chytraus contract, and the repayment of \$30,000.00 plus interest to Robinson.

12. From January 1985 on, Walsh remained concerned that the business revenue couldn't cover the obligations to Jetstar, Oakwood, Chytraus, and Robinson.

13. Walsh knew that the nature of video retail business is a seasonal business such that the most lucrative months are the winter months, and that income drops in the summer.

14. In March, 1985, Walsh suggested to Van Alstyne that they put the business up for sale.

15. Walsh had to leave town for a few days, so Van Alstyne agreed to place

a newspaper ad to sell the business.

16. Van Alstyne placed the ad for a few days in a Salt Lake City local newspaper. The responses to the ad were discouraging.

17. Van Alstyne discontinued the ad because of the expense of the ad and the poor responses to the ad.

18. In March, 1985, Walsh told Van Alstyne that Walsh's personal financial situation was very poor and that he was facing bankruptcy and that, therefore, he had no assets to pay his obligations on the Universal Video obligations should the Universal Video business revenue be insufficient to pay those debts.

19. Van Alstyne was shocked and deeply concerned by this confession of Walsh's purported financial troubles.

20. In April, 1985, Walsh and Van Alstyne had an altercation because Van Alstyne had signed Walsh's name to several business checks to pay business debts.

21. Walsh had told Van Alstyne not to pay those certain business debts because of the Universal Video cash flow dearth. Van Alstyne disagreed, and signed Walsh's name to the checks because Walsh had refused to do so.

22. Shortly after the altercation described in the previous paragraph, Walsh acquiesced and approved of Van Alstyne's having paid the debts with Universal Video revenues.

23. In the Jet Star Contract negotiations, Van Alstyne had negotiated for a discount provision pursuant to which Van Alstyne and Walsh would receive a discount if they could pay the contract balance to the sellers by June, 1985.

24. With the newfound information of Walsh's personal financial distress, Van Alstyne hoped to find a new investor to help pay the approximately

\$35,000.00 payoff in June, 1985 to Jet Star and to Contribute additional monies for the business.

25. Defendant Judith Erickson (hereinafter "Erickson") was a clerk in the Universal Video store who had expressed interest in "buying into the store".

26. Van Alstyne and Erickson discussed the possibility of her becoming an additional "partner" in the business if she could contribute at least \$20,000.00 to the business.

27. Van Alstyne told her she had to provide the \$20,000.00 no later than May 31, 1985. She failed to do so by May 31, 1985 or thereafter.

28. Separate from Van Alstyne's negotiations with Erickson, Walsh negotiated with Erickson to sell her his Partnership interest for \$10,000.00.

29. Erickson telephoned Van Alstyne to inform him she intended to purchase Walsh's interest for \$10,000.00

30. Van Alstyne and others, including Erickson's legal counsel at the time, told Erickson that \$10,000.00 was far too much to pay Walsh.

31. When Erickson told Walsh that Van Alstyne had told Erickson that \$10,000 was too high a price, Walsh reassured Erickson that \$10,000.00 was a fair price and told her that if she didn't agree to pay him the \$10,000.00, Van Alstyne would pay Walsh more than \$10,000.00 to purchase Walsh's Partnership interest.

32. Because of Walsh's experience in the video business and because Walsh treated her such that she trusted him and believed he was looking out for her best interest, Erickson believed Walsh over Van Alstyne and the lawyer who was representing her at the time.

33. On or about May 2, 1985, Erickson and Walsh signed the Sales

Agreement and Promissory Note and the Assignment and Assumption Agreement/ Consent to Assignment those being the documents purporting to sell Erickson all of Walsh's Partnership rights and obligations.

34. The Sales documents in which Walsh purportedly sold his interest in the business to Erickson were prepared by the attorney who was representing Walsh at the time.

35. Neither Walsh nor Erickson showed Van Alstyne or Robinson the Sales Agreement, Promissory Note, Assignment and Assumption Agreement, or Consent to Assignment. The first time Van Alstyne or Robinson saw those documents was in the fall of 1986 when served with Summons and Complaint in this action. However, Walsh had indicated to Erickson that Van Alstyne had approved of the documents (Sales Agreement, Promissory Note, Assignment and Assumption Agreement, and Consent to Assignment) before May 2, 1985, the date she signed the documents.

36. Walsh received \$5,500.00 from defendant Erickson toward the \$10,000.00 sum, paid as follows: \$3,000.00 paid by Erickson May 2, 1985 and \$500.00 for each of the five following months (June through October, 1985).

37. After paying the October, 1985 \$500.00 installment to Walsh, Erickson ceased paying Walsh.

38. The reason Erickson ceased paying Walsh in October, 1985 is that the attorney who was representing her at the time told her to stop paying on the Walsh contract because she was not getting anything for her payments.

39. The Walsh-Erickson Sales Agreement speaks for itself but includes the following terms:

a. Walsh purportedly sold his Partnership rights and Partnership interest to Erickson;

b. Erickson purportedly assumed Walsh's Partnership obligations including the following: Jet Star obligation; Chytraus obligation; Oakwood Lease; and utilities.

40. On or about May 2, 1985 when Erickson and Walsh signed the Sales Agreement, Promissory Note, Assignment and Assumption Agreement, and Consent to Assignment, Erickson told Walsh that, contrary to the Sales Contract language, the Jet Star sellers would not let her assume Walsh's obligations on the Jet Star contract, and that she was concerned about assuming Walsh's obligations on the Jet Star contract and the other debts. In response, Walsh assured Erickson that there would be enough business revenue from the Universal Video business to pay the debts.

41. Further, regarding the debt to Robinson, Walsh told Erickson not to worry about the debt of \$30,000.00 owed to him.

42. At the time of the May 2, 1985 purported sale by Walsh to Erickson, or any time thereafter, Walsh did not inform Erickson that Van Alstyne had made demand on Walsh to help pay the Jet Star payoff May 31, 1985.

43. Even though Van Alstyne and Robinson were unaware of the terms of the written documents pursuant to which Walsh purportedly sold his Partnership interest to Erickson, they were aware that Erickson, commencing May, 1985 believed that she was entitled to be a partner in the Partnership.

44. After May 2, 1985 disputes and negotiations ensued between Erickson and Van Alstyne. The principal dispute was Erickson's claim that she was a full

one-third partner having totally replaced Walsh, and Van Alstyne's claim that she was not, primarily because she had not contributed the \$20,000.00 by June, 1985 to help satisfy Partnership obligations.

45. Between June, 1985 and spring, 1986, various settlement negotiations ensued between Erickson, Van Alstyne and Robinson regarding Erickson's Partnership status.

46. Erickson hired a lawyer to represent her against Van Alstyne in her claim of full one-third partner status.

47. Though several proposals were made back and forth, no agreement was ever reached between Van Alstyne, Robinson and Erickson regarding her status as a partner in the Universal Video Partnership.

48. At no time did Robinson or Van Alstyne ever agree or consent to having Erickson replace Walsh as a partner, even though there were times when Robinson or Van Alstyne contemplated accepting Erickson as an additional, not a replacement, partner, and they made various offers to Erickson regarding this.

49. At no time did Robinson or Van Alstyne ever release Walsh from his obligations to pay the Universal Video business debts.

50. Van Alstyne mortgaged his family residence to obtain funds to loan the Partnership \$30,000.00 in June, 1985, to pay on the Jet Star contract.

51. In the spring of 1985, Van Alstyne had told Walsh he might buy Walsh's Partnership rights and obligations for \$2,000.00, but that Van Alstyne would do so only if Walsh would first pay enough to contribute with Van Alstyne to satisfy the Partnership obligations.

52. In the spring of 1985, before completing the \$30,000.00 payoff to Jet

Star, Van Alstyne made demand on Walsh to help satisfy the Partnership obligations. Walsh refused, telling Van Alstyne he was facing bankruptcy and that he hadn't the assets to spend on those obligations. Van Alstyne made subsequent demands on Walsh and again was refused by Walsh.

53. The Oakwood Lease obligation, approximately \$1,500.00 monthly rent from January, 1985 through June, 1986, was satisfied from the Universal Video Partnership business revenue.

54. All but \$6,038.18 of the Chytraus contract obligations were satisfied from the Universal Video Partnership business revenue.

55. After several unsuccessful attempts to sell the Universal Video business, Van Alstyne and Robinson on or about June 23, 1986 sold its inventory to Video USA for the sum of \$25,835.00 payable with \$5,835.00 down and monthly payments of \$682.00 for 36 months, the last payment due May, 1989.

56. Van Alstyne's personal financial loss from his loans to the Partnership business for satisfying the business debts is as follows:

\$30,000.00	at 10% per annum June 3, 1985 for discounted payment on Jet Star [Defendants' Exhibit 25]
\$ 5,200.00	at 13% per annum December 18, 1985 for one-half of \$6,038.00 final payment to Chytraus and one-half of \$4,362.00 final payment on Jet Star contract
\$13,493.65	Total interest at the above specified 10% and 13% rates
<hr/>	
\$48,693.65	TOTAL VAN ALSTYNE PERSONAL FINANCIAL LOSS FROM HIS LOANS TO THE PARTNERSHIP BUSINESS FOR SATISFYING THE BUSINESS DEBTS

57. In addition to the initial \$30,000.00 loan at 19.41% per annum, Robinson loaned the business \$5,200.00 at 13% per annum December 18, 1985 for one-half of

the \$6,038.00 final payment to Chytraus and one-half of the \$4,632.00 final payment on the Jet Star Contract.

58. Robinson's loss from the loans set forth in the previous paragraph, after applying all of the Video USA sale proceeds to offset Robinson's loss, is \$10,718.45 through May 21, 1989.

From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

1. The Terms of the Partnership Agreement between Walsh, Van Alstyne, and Robinson were as set forth in paragraph 2 of the Facts above. In summary, in exchange for Robinson's loan of the \$30,000.00 start-up funds for the business, Walsh and Van Alstyne agreed: (a) to repay Robinson; (b) to be responsible for the partnership business debts; and (c) to share in equal thirds with Robinson the business profits, even though it finally turned out that there were no business profits.

a. Debts to Robinson: Walsh as a manager of the Partnership's Universal Video business with responsibility to manage the business so as to pay its debts, is responsible to repay Robinson for one-half of Robinson's loans to the Partnership as set forth in the Facts above. The debt to Robinson, after crediting to Robinson all of the proceeds of the June, 1986 sale of the Universal Video inventory to Video USA, totals \$10,718.45 with interest through May 21, 1989 for one-half that sum (paragraph 57, Facts above). Robinson should be granted judgment against Walsh effective May 21, 1989 against Walsh for one-half of that sum, \$5,359.23

b. Other partnership Business debts for which Walsh owes Van Alstyne:

Pursuant to the terms of the Partnership agreement (paragraph 2, Facts above), Walsh and Van Alstyne, and not Robinson, were equally responsible for the business debts to Chytraus, Jet Star, Oakwood, and other business creditors. Pursuant to his right of contribution per Section 48-1-15(1), Utah Code Annotated 1953, as amended, Van Alstyne should be granted judgment against Walsh effective May 21, 1989 against Walsh for \$24,346.82, which represents one-half of Van Alstyne's \$48,693.65 loss from paying those creditors from his personal funds (paragraph 59, Facts above).

2. Walsh is liable for breach of fiduciary duty to Van Alstyne and Robinson:

"Partners . . . occupy a fiduciary relationship and must deal with each other in the utmost good faith." Burke v. Farrell, 656 P.2d 1015, 1017 (Utah 1982) citing section 48-1-18, Utah Code Annotated 1953, as amended. The Court finds by clear and convincing evidence that Walsh breached his fiduciary duty to Van Alstyne and Robinson in several regards, including the following:

a. Before borrowing the \$30,000.00 from Robinson to purchase the Universal Video business under the Jet Star Contract, Walsh was wary of the debt service on the contract and was concerned that the business revenue would not cover the debt service, let alone the loan payments to Robinson and the other business debts, and yet he borrowed the \$30,000.00 from Robinson and had Van Alstyne cosign with Walsh on the underlying contracts and personal guarantee to Chytraus without warning Van Alstyne and Robinson of the risk involved.

b. Walsh abandoned the Partnership May 2, 1985, leaving Van Alstyne to manage and pay the debts of a business in which he had virtually no experience, and leaving the debt to Robinson unpaid.

c. Walsh attempted to sell his partnership interest to Erickson without fully disclosing to Van Alstyne and Robinson the terms of the sale and without informing them that he received \$5,500.00 from Erickson.

The Court finds by clear and convincing evidence that the said breaches of fiduciary duty were done by Walsh in a manner that showed a knowing and reckless indifference to and disregard of the rights of Van Alstyne and Robinson, and that Walsh either knew or should have known that he said conduct would, in a high degree of probability, result in substantial harm to Van Alstyne and Robinson.

For Walsh's breach of fiduciary duty to Van Alstyne, Van Alstyne should be granted judgment against Walsh for \$24,346.82 actual damages.

For Walsh's breach of fiduciary duty to Robinson, Robinson should be granted judgment against Walsh for \$5,359.23 actual damages.

3. Validity of Walsh-Erickson Sales Agreement: The Sales Agreement entered into by Walsh and Erickson May 2, 1985 [Defendants' Exhibit 12] is void for lack of consideration and void for failure of consideration. Section I of the Agreement purported to convey to Erickson all of Walsh's one-third partnership rights and interest in the Universal Video business. Walsh did not have the authority or right to convey his Partnership rights. Walsh's sale to Erickson was tantamount to the proverbial "sale of the Brooklyn Ridge". Walsh's promise to convey all of his partnership rights to Erickson was illusory because it required approval (never obtained) by Van Alstyne and Robinson.

When there exists only the facade of a promise, i.e., a statement . . . such . . . that the person making it commits himself to nothing, the alleged "promise" is said to be "illusory". An illusory promise, neither binds the person

making it, 1 Corbin on Contracts Section 145 (1963), nor functions as consideration for a return promise. Id. at 628.

✓ Resource Management Company v. Weston Ranch and Livestock Company Inc., 706 P.2d 1028, 1036 (Utah 1985). Thus the Sales Agreement is void for lack of consideration because Walsh's promise to convey his Partnership rights to Erickson was illusory because it committed Walsh to nothing because he had no legal right to make that commitment without consent from Van Alstyne and Robinson.

Even if the Sales Agreement were not void for lack of consideration, it is void for failure of consideration. When consideration is lacking, there is no contract. When consideration fails, there was a contract when the agreement was made, but the promised performance has failed. DeMentas v. Estate of Tallas, 95 Utah Adv. Rep. 28 (Utah App. 1988). Walsh failed to deliver the consideration (his Partnership rights) to Erickson because he was never authorized to do so by the other partners, Van Alstyne and Robinson.

a. All partners' consents are required for sale of partner's rights:
Pursuant to Sections 48-1-21 and 48-1-24, Utah Code Annotated 1953, as amended, both Van Alstyne's and Robinson's consent would be required to imbue Erickson with Walsh's Partnership rights (as apposed to his mere Partnership interest, which is the partner's right to profits) to manage or administer Partnership business or affairs.

b. Neither Van Alstyne nor Robinson consented, either explicitly or implicitly, to the Walsh-Erickson Sales Agreement. Van Alstyne and Robinson did not even see the document until this lawsuit was filed. After Erickson signed the documents and began paying Walsh the \$500.00 monthly installments, several

months of arguments ensued between Erickson and Van Alstyne because Van Alstyne and Robinson did not ever accept Erickson as a full one-third partner to replace Walsh.

c. Neither Van Alstyne nor Robinson released Walsh from his Partnership obligations. The fact that Van Alstyne and Robinson made significant Partnership business decisions after May 1, 1985 without consulting Walsh does not imply a release of Walsh or a consent to his sale to Erickson. Walsh abandoned the partnership May 2, 1985. Section 48-1-6, Utah Code Annotated 1953, as amended, provides that a partner who abandons the Partnership business does not have to be included in other partners' decisions to sell or assign Partnership property. There was no novation to substitute Erickson for Walsh to pay Walsh's Partnership obligations. "For a novation to occur, there must be (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one." ✓ Hormana v. Gordon, 740 P.2d 1346, 1352-1353 (Utah App. 1987). See also ✓ First American Commerce Company v. Washington Mutual Savings Bank, 743 P.2d 1193 (Utah 1987); and ✗ D.A. Taylor Company v. Paulson, 552 P.2d 1274 (Utah 1976).

d. Neither mistake of fact nor mistake of law by Erickson or Walsh would validate the Walsh-Erickson Sales Agreement. Even if Walsh and Erickson both mistakenly believed when they entered into the Sales Agreement that Van Alstyne and Robinson had consented to the Agreement, that mistake would not be grounds for validating the Sales Agreement. ✗ Langston v. McQuarrie, 741 P.2d 544 (Utah App. 1987); ✗ Mooney v. GR and Associates, 746 P.2d 1174 (Utah

App. 1987). To allow such a mistake of fact to validate the Sales Agreement would be analogous to validating a contract for sale of the Brooklyn Bridge by a seller who believed he had legal rights to sell the bridge but who in fact did not. Rather than being validated because it was obtained by mistake, the Sales Agreement is voidable because obtained by mistake. "An agreement obtained by misrepresentation, fraud, or mistake is generally voidable." ✓ Tanner v. District Judges of the Third Judicial District Court, 649 P.2d 5,6 (Utah 1982) citing 17 Am. Jr. 2nd Contracts Section 143, et seq.

Next, regarding mistake of law, ignorance of the law is no excuse. Walsh's or Erickson's mistake in legal interpretation of the Sales Agreement (mistakenly believing the Agreement was legally valid because of mistaken belief that partner's consent is not legal requirement for other partner's sale of his Partnership rights) would not be grounds sufficient for validating the Agreement. ✓ Klahtipes v. Mills, 649 P.2d 9 (Utah 1982).

e. The Walsh-Erickson Sales Agreement is not severable so as to make Erickson liable to Walsh for the \$10,000.00 contract price and award her only Walsh's Partnership interest (right to accounts receivable) instead of all of his Partnership rights (e.g., management rights not assignable without other partners' consent). There is no severability clause in the Sales Agreement. Section I of the Sales Agreement purports to sell all of Walsh's Partnership rights and interest in one total package. The Sales Agreement does not break down the \$10,000.00 sales price into units separately specifying a certain sum for Walsh' Partnership rights and another sum for Walsh's Partnership interest. Further, there was no indication by Walsh or Erickson at trial of any intent by either of

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

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

4. Walsh was unjustly enriched at Erickson's expense by his receiving and keeping the \$5,500.00 which Erickson paid him from May 2, 1985 through October, 1985 as installments on the Walsh-Erickson Sales Agreement. The Sales Agreement is void. Erickson received nothing of value from Walsh for the \$5,500.00 she paid him. Erickson is entitled to judgment against Walsh for the \$5,500.00 plus pre-judgment interest at 10% per annum from and after October 31, 1985.

Even if the Walsh-Erickson Sales Agreement were valid, Utah partnership law would require Walsh to hold as trustee for the Partnership the \$5,500.00 and any other funds he received from Erickson under the Sales Agreement.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

Section 48-1-18, Utah Code Annotated 1953, as amended. The \$5,500.00 was derived by Walsh from Erickson without the consent of Van Alstyne or Robinson and was connected with the conduct of the Partnership. Even if the Walsh-Erickson Sales Agreement were Valid, Utah Law would require Walsh to disgorge the \$5,500.00 to help Van Alstyne pay the Partnership debts.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Erickson should be granted judgment against Walsh as follows:

Actual damages of \$5,500.00 (five thousand five hundred and no/100 dollars) plus 10% pre-judgment interest from October 31, 1985 for restitution of Walsh's unjust enrichment.

Robinson should be granted judgment against Walsh as follows:

Total actual damages of \$5,359.23 (five thousand three hundred and fifty-nine and 23/100 dollars) plus 10% pre-judgment interest from and after May 21, 1987 for Walsh's one-half share of the unpaid portion of the \$30,000.00 loan and for repayment to Robinson of Walsh's one-half share of the unpaid portion of Robinson's \$5,200.00 loan to the Partnership business December 18, 1985 to pay Chytraus and Jet Star.

Van Alstyne should be granted judgment against Walsh as follows:

Actual damages of \$24,326.82 (twenty four thousand three hundred twenty six and 82/100 dollars) plus 10% pre-judgment interest from and after May 21, 1989 pursuant to Van Alstyne's right of contribution, representing one-half of the partnership debts paid personally by Van Alstyne.

DATED this _____ day of _____, 19____.

JUDGE RICHARD H. MOFFAT

MAILING CERTIFICATE

I, the undersigned, certify that on the 4th day of October, 1990, I mailed a true and correct copy of the foregoing document by first-class mail to the following:

Steven D. Crawley, Esq.
WALSTAD & BABCOCK
254 West 400 South
Second Floor
Salt Lake City, Ut. 84101

John Walsh, Esq.
3865 South Wasatch Blvd.
Cove Point Plaza
Suite 202
Salt Lake City, Ut. 84109

Michelle Moll

JOHN WALSH
ATTORNEY AT LAW
SUITE 270, 2319 FOOTHILL DRIVE
SALT LAKE CITY, UTAH
84109
Telephone: 467-9700

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

-----oooooooo-----
MARK O. WALSH :
Plaintiff/ : ORDER
Appellant, :
vs. : Civil No. 86-7199
JUDITH ERICKSON, et al., : Judge Moffatt
Defendants/ :
Appellees. :
-----oooooooo-----

The above entitled matter came on regularly for an evidentiary hearin on Plaintiff's Motion for Summary Enforcement of Settlement Agreement, on Monday, February 8, 1993, at the hour of 10:00 A.M., before the Honorable Richard Moffat, District Court Judge, with the Plaintiff appearing and represented by John Walsh, Attorney at Law, and the Defendants each appearing and represented by Joyce Maughan, Attorney at Law, and the Court

after hearing the testimony of the parties, reviewing the exhibits admitted into evidence, and after considering the arguments of Counsel, now for good cause appearing does hereby

CRDER, that the Plaintiff's Motion, is hereby denied, and the Defendants are awarded \$3,200.00 in Attorreys fees, based upon 78-27-56 Utah Code Annotated as amended in 1988.

Dated this ____ day of April, 1993.

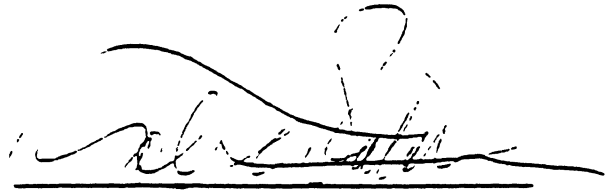
8-3-93

BY THE COURT:

DISTRICT COURT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that I personally hand delivered a true and correct copy of the foregoing: ORDER, to the Defendants/ .Appellees, by delivering the same to: JOYCE MAUGHAN, ATTORNEY AT LAW, 455 SOUTH 300 EAST, SUITE 335, SALT LAKE CITY, UTAH, 84111, this 23rd day of April, 1993.



JOHN WALSH
ATTORNEY AT LAW

In the formation of a partnership, the ability to contribute capital is of prime importance.

When we realized that Universal Video was not able to continue under the agreements Mark and Peter had with Jet Star, another partner with capital to invest was sought to replace Mark who had no capital to invest. Towards the end of February and the first of March you, Jude, approached us indicating you had between \$15,000 and \$25,000 you would like to invest with the intent of becoming a partner. Inasmuch as we liked your rapport with the customers, your drive and excitement in managing the business we felt you would be an excellent partner. We accepted you as a third partner based on the agreement that you and Peter would share equally in the purchase of the approximately \$60,000 contract with Jet Star Industries.

When the agreed upon date, May 31, 1985, for settlement with Jet Star Industries arrived and you had no money to purchase your share of the contract, you breached a vital agreement which was a condition upon your becoming a partner with us. Peter has purchased the entire contract which, in effect, under Utah Partnership Law included the purchase of your capital share of the partnership. We would still like to have you be a partner in Universal Video but only the following option is available under Utah Partnership Law:

Through your contribution of time and devotion to the partnership you are legally entitled to a share in the partnership determined by the value of your time and devotion. Assuming the value of the partnership assets is \$100,000, we feel that a 10% interest is an extremely generous settlement.

In order to provide you still an opportunity to become a full one

**PLAINTIFF'S
EXHIBIT**

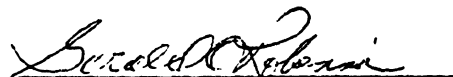
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third partner, we, the two general partners, invite you to meet the terms of the original agreement we had with you by repurchasing from Peter your share of the capital account, which is \$15,000. This offer expires Friday, June 7, 1985 at 5:00. If the offer expires we will assume that you accept a 10% interest as outlined above.

As a matter of record, we want to remind you that you were advised at an early date, by us and others, that the purchase agreement you were negotiating with Mark Walsh was, in our opinion, not prudent considering the indebtedness of the partnership at that time. You have been advised many times to obtain an attorney and re-evaluate the position that you are presently in. Our view is unchanged.

We hope that this letter clarifies the current status of the partnership of Universal Video. We look forward to continuing a profitable relationship with you.

Sincerely,


Gerald Robinson


Peter Van Alstyne

Mr. Roger Kennard, CPA
P.O. Box 2256
Salt Lake City, Utah 84110

Dear Roger

Having received your invoice for accounting services provided on behalf of Universal Video, we requested from you further classification and hourly itemization of services rendered. You responded saying that Universal Video "has everything" you have done for us and that you would not give us an hourly itemization.

With the assistance of our accountant, we have attempted to reconstruct an itemization of your time and services provided herein.

	<u>Hours</u>
1. Consultation regarding new business, and meeting with partners regarding cash controls and reporting procedures.	2.5
2. Prepare 1984 year-end payroll tax returns.	1.0
3. Prepare 1985 first-quarter payroll tax returns.	2.0
4. Prepare 1984 partnership tax returns.	2.0
5. Calculate payroll withholding on or about the 5th and 20th of January and February. (This item not on your invoice.)	1.0
Total	<hr/> 8.5

Hourly Rate: \$50/hr. x 8.5 = \$425

We believe that our hourly estimations are based on reasonable and generous assumptions with respect to what a typical CPA would require under the same factual circumstances you operated under.

We are particularly disturbed by your admission that the above enumerated services are the only services you provided Universal Video.

It had been our belief since Dec., 1984 that you had agreed at that time

(17b-1)

PLAINTIFF'S
EXHIBIT

to maintain our partnership financial records and that you were assisting us with timely and accurate reporting and payment of Federal and State Taxes.

You have stated to us that our belief is mistaken. We disagree. We had continuously forwarded to you all of our financial records, check-stubs, invoices, receipts, bank statements, tax-coupon book, correspondence from the IRS, Job service and Utah Tax Commission, and you received every daily summary of sales from the store. Infrequently, you were even contacted by telephone confirming whether or not you needed certain of the above referenced items to which you responded affirmatively.

At no time did you inform us, or imply to us, that you did not know why we were forwarding all of this material to you. Moreover, as a CPA, you had a duty to us to clarify our mutual understanding as to what tasks you would perform for us and not remain silent. You should have known by our actions that we believed you were maintaining books for us as well as ensuring our timely and accurate filing of taxes.

As a result of your negligent failure to perform, Universal Video is liable for Federal and State penalties in excess of \$400, and has suffered damages resulting from a lack of financial accounting. Specifically, you should have prepared and filed in our behalf (or at least- should have informed us to) monthly Federal payroll taxes, State sales taxes, and the 1984 Federal Tax. You led us to believe you were reconciling our bank statements and maintaining financial records from which we expected to receive periodic financial reports.

Enclosed herewith is payment in the amount of \$425 which we believe to be a fair and equitable settlement for your services. If you are willing to accept this as payment please forward to us all of our financial records now in your possession. Acceptance of this payment will be construed as acceptance of payment in full. In the meantime, we

will gladly prepare for Mark Walsh and for all partners a close-of-business tax statement as of the dissolution of that partnership.

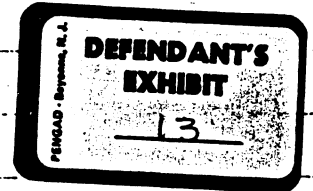
We do not intend to be unkind or unfair with you. We merely wish to achieve a fair, equitable, and proper settlement of this matter.

Sincerely,

Gerald Robinson

Peter Van Alstyne

Interim Agreement



Between Universal Video, Sellers, and Video USA, Buyers whereby Seller agrees to sell and Buyer agrees to buy the inventory of Universal Video as follows:

Approximately 870 Beta videotapes at \$8 each

925 VHS video tapes at \$17 each

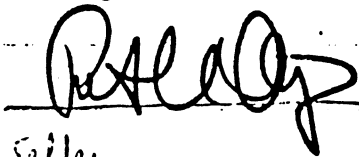
10 video cassette recorders at \$100 each and player system \$300

Total contract price \$25,835

Buyer paid Seller \$ 5835 as a down payment and Buyer and Seller shall execute at the earliest possible date a ~~proper~~ buy-sell contract of 36 months, 11% interest on the remaining balance of \$ _____

Buyer and Seller intend this agreement to be interim until such time a formal contract is executed.

SS/ June 18, 1986



Seller

For Universal Video



Buyer for Video U.S.A.

Peter Van and
Gerald Robinson

PURCHASE AGREEMENT

AGREEMENT made this _____ day of _____, 1986 between VIDEO, USA, a Utah corporation (referred to below as the Purchaser) and ~~UNIVERSAL VIDEO, a Utah partnership~~ (collectively referred to below as the Seller) for the purpose of setting forth the terms and conditions of the acquisition by the Purchasers of the Seller's inventory of its retail video store located at 5444 S. 900 E. Murray, Utah.

PURCHASE PRICE The purchase price paid by the Purchasers to the Seller is the sum of \$25,835.00 to be paid as follows:

a. The sum of \$5,835.00 on June 18, 1986;

b. A monthly payment amount of \$ 682 for the term of 36 months from the date of this document, which payment includes interest and principal payments.

C. The first payment shall be made on July 15, 1986, and a like amount every month thereafter until the amount has been paid.

D. Interest on the unpaid balance shall accrue at the rate of ~~10.25%~~ per annum.

11.00

ITEMS PURCHASED The Seller transfers to the Purchasers the following items and rights as a portion of the sales price:

a. 870 Beta video tapes as set forth in attached Exhibit "A." for a purchase price of \$8.00 for each Beta video tape (including the descriptive cover box for each tape);

b. 925 VHS video tapes as set forth in attached Exhibit "B" for a purchase price of \$19.00 for each VHS video tape (including the descriptive cover box for each tape);

c. 10 Video Cassette recorders for a purchase price of \$100.00 each; and

c. One player system consisting of a stereo tuner, two speakers and a television monitor for the price of \$300.00.

Any items possessed by the Purchasers in addition to the above items shall be purchased from the Sellers at an additional cost to the Purchasers. In the event the Sellers are unable to supply the full number of tapes set forth above, the purchase price shall be adjusted accordingly resulting in an adjusted monthly payment. In addition, if the Sellers are unable to provide a descriptive cover box in very good condition for each tape, the sales price per video tape shall be reduced by 15%.

ACQUISITION DATE The Seller shall turn over the above items to the Purchasers on the 23rd day of June, 1986. If the Sellers are unable or unwilling to supply the above items by such date, the Purchaser may rescind this contract and receive a

balance shall become immediately due and payable without demand in case of no option of seller.

On the last any monthly payment is fifteen days late, it shall begin to accrue interest at the rate of 18% per annum on 1/15.7%

return of all monies paid to date, plus interest at the rate of 15% per annum.

NO ASSUMPTION OF LIABILITIES The Purchaser is buying the above items free of all debts, liabilities, liens, security interests and claims of any and all parties. In the event any third party claims an interest in the assets sold to the Purchaser, the Seller agrees to hold the Purchaser harmless, and to protect and defend the interest of the Purchaser to all the assets set forth above.

WARRANTY OF TITLE AND OWNERSHIP The Sellers warrant that they hold undisputed title to the above assets, that no party has a security interest or claim to the assets being purchased, and that should any party assert a claim or interest in the assets, that the Sellers shall vigorously defend the matter in the interest of the Purchasers. The Sellers further warrant that they are transferring their entire interest in the assets to the Purchasers, and that ~~the undersigned, as partners of the Seller, are all of the Partners of the Seller and that~~ no other person(s) hold any interest whatsoever in the assets sold to the Purchaser.

PAYMENT OF ATTORNEY FEES AND COSTS In the event either party must take legal action to enforce its rights under the terms of this contract, the successful party shall be entitled to receive its reasonable attorney fees incurred in prosecuting the matter.

APPLICABLE LAW The parties agree that the law of the State of Utah shall govern the interpretation of this contract.

TERMINATION OF INTEREST OF THE SELLER This contract shall not give to the Seller any interest in the business of the Purchaser, and shall not create a partnership or joint venture, ~~nor shall it give any right by the Seller to any of the assets sold by the Seller to the Purchaser.~~ *Seller is entitled to a perfected security interest in the assets sold to the Purchaser by the appropriate UCC security interest filing.*

PURCHASER:

VIDEO USA

by: _____

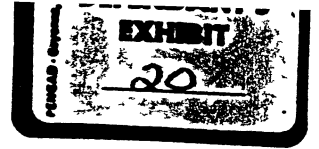
SELLER:

GERALD ROBINSON

PETER VAN ALSTYNE

MARK O. WALSH

JUDE ERICKSON



PURCHASE AGREEMENT

AGREEMENT made this 23 day of June, 1986 between VIDEO, USA, a Utah corporation (referred to below as the Purchaser) and PETER VAN ALSTYNE and GERALD PETERSON (collectively referred to below as the Seller) for the purpose of setting forth the terms and conditions of the acquisition by the Purchasers of the Seller's inventory of its retail video store located at 5444 S. 900 E. Murray, Utah.

PURCHASE PRICE The purchase price paid by the Purchasers to the Seller is the sum of \$25,835.00 to be paid as follows:

- a. The sum of \$5,835.00 on June 18, 1986;
- b. A monthly payment amount of \$682.00 for the term of 36 months from the date of this document, which payment includes interest and principal payments.
- c. The first monthly payment shall be made on July 15, 1986, with each monthly payment thereafter to be made on the 15th of each month thereafter until the full amount of the purchase price is paid in full.
- d. In the event that any payment is more than 15 days late, interest shall accrue on the unpaid monthly amount at the rate of 18% per annum until the payment is paid in full.
- e. Interest on the unpaid balance shall accrue at the rate of 11.00% per annum.
- f. In the event any payment becomes 30 days delinquent, then this agreement shall be in default and the entire balance due shall become immediately due and payable upon notice by the Seller. In the event the delinquency is due to a bookkeeping error, the Seller shall give the Purchaser five (5) days written notice by certified mail of the delinquency before declaring the default as set forth above.

ITEMS PURCHASED The Seller transfers to the Purchasers the following items and rights as a portion of the sales price:

- a. 870 Beta video tapes as set forth in attached Exhibit "A." for a purchase price of \$8.00 for each Beta video tape (including the descriptive cover box for each tape);
- b. 925 VHS video tapes as set forth in attached Exhibit "B" for a purchase price of \$19.00 for each VHS video tape (including the descriptive cover box for each tape);

c. 10 Video Cassette recorders for a purchase price of \$100.00 each; and

c. One player system consisting of a stereo tuner, two speakers and a television monitor for the price of \$300.00.

Any items possessed by the Purchasers in addition to the above items shall be purchased from the Sellers at an additional cost to the Purchasers. In the event the Sellers are unable to supply the full number of tapes set forth above, the purchase price shall be adjusted accordingly resulting in an adjusted monthly payment. In addition, if the Sellers are unable to provide a descriptive cover box in very good condition for each tape, the sales price per video tape shall be reduced by 15%.

ACQUISITION DATE The Seller shall turn over the above items to the Purchasers on the 23rd day of June, 1986. If the Sellers are unable or unwilling to supply the above items by such date, the Purchaser may rescind this contract and receive a return of all monies paid to date, plus interest at the rate of 15% per annum.

NO ASSUMPTION OF LIABILITIES The Purchaser is buying the above items free of all debts, liabilities, liens, security interests and claims of any and all parties. In the event any third party claims an interest in the assets sold to the Purchaser, the Seller agrees to hold the Purchaser harmless, and to protect and defend the interest of the Purchaser to all the assets set forth above.

WARRANTY OF TITLE AND OWNERSHIP The Sellers warrant that they hold undisputed title to the above assets, that no party has a security interest or claim to the assets being purchased, and that should any party assert a claim or interest in the assets, that the Sellers shall vigorously defend the matter in the interest of the Purchasers. The Sellers further warrant that they are transferring their entire interest in the assets to the Purchasers, and that no other person(s) hold any interest whatsoever in the assets sold to the Purchaser.

PAYMENT OF ATTORNEY FEES AND COSTS In the event either party must take legal action to enforce its rights under the terms of this contract, the successful party shall be entitled to receive its reasonable attorney fees incurred in prosecuting the matter.

APPLICABLE LAW The parties agree that the law of the State of Utah shall govern the interpretation of this contract.

TERMINATION OF INTEREST OF THE SELLER This contract shall

not give to the Seller any interest in the business of the Purchaser, and shall not create a partnership or joint venture. The Seller is entitled to a perfected security interest in the assets sold to the Purchaser by the filing of an appropriate UCC security interest.

PURCHASER:

VIDEO USA

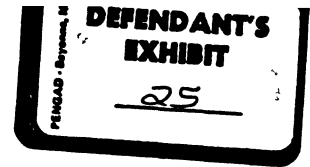
by:



SELLER:


GERALD ROBINSON


PETER VAN ALSTYN



PROMISSORY NOTE

FOR A GOOD AND SUFFICIENT CONSIDERATION, the receipt of which is hereby acknowledged, the undersigned, jointly and severally, promise to pay to the order of Jet Star Industries, a Utah corporation, at its office, 1260 East Vine Street, Salt Lake City, Utah, the sum of Seventy-Five Thousand Dollars (\$75,000), in lawful money of the United States of America, together with interest on the unpaid principal balance, from date until paid, both before and after judgment, at the rate of 11.0% per annum, strictly within the following times:

a. The sum of \$3,000, or more, on or before the 15th day of January, 1985, and the sum of \$3,000, or more, on or before the 15th day of each and every month until December 15, 1986, on which the entire balance owing hereunder, both principal and accrued interest, is paid in full; and

b. Balloon payments of \$5,000, or more, each, on or before the 15th days of March, June and September, 1985.

If any installment is not paid in full within ten days after its due date, or if the undersigned breach any of their covenants and obligations of performance as contained in that certain Agreement and that certain Assignment and Assumption Agreement between the parties, of even date herewith, then the entire unpaid balance hereof, with interest, shall, at the election of the holder, and without notice of said election, at once become due and payable. In the event of any such default and acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof, reasonable attorneys fees, legal expenses and lawful collection costs in addition to all other sums due hereunder.

The undersigned shall be entitled to discount the principal balance owed hereunder by an amount equal to \$1,000 for each full calendar month remaining between the date upon which this note, both principal and interest, is paid in full, and December 15, 1986.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived, and the undersigned consent to the release of any security, or any part thereof, with or without substitution.

This note is secured by a security agreement and assignment of lease, both of even date herewith.

DATED this 2nd day of December, 1984.

DXS-1

Cancelled
6-3-85
[Signature]

1-57K

Prudential-Bache Command Account

Statement

CONTROL NO. 2P-00218 PAGE 2

ACCOUNT OFF NUMBER 00Q	ACCOUNT AE 870528 62	* * * SUMMARY OF ALL ACCOUNT ACTIVITY FOR PETER J VAN ALSTYNE &	* * *	STATEMENT PERIOD	FROM JUN 1	TO JUN 30/85
---------------------------	-------------------------	--	-------	---------------------	---------------	-----------------

TE	TRANSACTION	QUANTITY	DESCRIPTION	PRICE OR EXPLANATION	DEBIT	CREDIT	CASH BALANCE	FUND BALANCE
1/11	SOLD	10,000-	COMMAND MONEY FUND A/O 06/10/85	AUTO SALE		10,000.00	\$1.66CR	921
1/25	DIVIDEND	42	COMMAND MONEY FND DIV REINVEST 05/25-06/25 INCOME VALUE IS			.45	\$1.11CR	963
5/30			CLOSING BALANCE				\$1.11CR	963

* * * PORTFOLIO SUMMARY * * *

TYPE	ENTRY	QUANTITY	DESCRIPTION	PRICE	VALUE	ESTIMATED INCOME	ANNUAL % YIELD
2.			COMMAND MONEY FUND*	1.000			
2			UTAH ST-HSC FIN ADV CAP APP RES MFG-SSA SUB SPL MAND RDMPT AID AT CAV PRIV INSD RG JJ 0% 07/01/2016 DTD 11/09/83	0.147			
			PORTFOLIO TOTALS				

* * SUMMARY OF CHECKING AND BILLPAY ACTIVITY * *

DATE WRITTEN	DATE PAID	CHECK NUMBER	PAYEE	TAX CODE DESCRIPTION	DEBIT	CREDIT	REFERENCE NUMBER
05/22/85	06/07/85	0310	BARBARA UTAH	UNSPECIFIED	\$150.00		444300060748966511
06/03/85	06/10/85	0311	JEST STAR INDUSTRIES	UNSPECIFIED	\$10,000.00		444300061048978381
			TOTAL CHECKING ACCOUNT ACTIVITY		\$10,150.00		
			TOTAL NUMBER OF CHECKS		2		

-----END OF STATEMENT-----DATE OF LAST STATEMENT 05/85
CREDITS OVER \$999 ARE AUTOMATICALLY INVESTED IN SHARES OF THE COMMAND MONEY FUND
ON THE NEXT BUSINESS DAY. CREDITS BELOW \$1000 ARE INVESTED WEEKLY.

PRUDENTIAL-BACHE BOND FUNDS ARE NOW VALUED AT THE BID PRICE. ED PLUS PRODUCTS
ARE PRICED AT FACE VALUE. MARKET PRICES MAY VARY FROM TIME TO TIME.
UNLISTED BOND PRICES ARE APPROXIMATE

*This is part of
the \$30,000
payment Peter
made to Jet Star*

deposits and Loans into Universal

~~Video - Peter Van Alstyne~~
DEPOSITED WITH

VALLEY BANK AND TRUST



VALLEY CENTRAL BANK
SILVER KING STATE BANK

\$5,200 each

eter Van Alstyne

nd Gerald

obinson

ALL ITEMS RECEIVED ARE
CREDITED TO YOUR ACCOUNT
SUBJECT TO FINAL PAYMENT

THIS IS YOUR RECEIPT

USE THIS RECEIPT WHEN CHECKING
DEPOSITS LISTED ON YOUR BANK
STATEMENT

ITEMS RECEIVED AFTER REGULAR BUSINESS HOURS OR ON SATURDAYS ARE RECEIVED FOR SAFEKEEPING
AND SHALL BE DEEMED TO HAVE BEEN RECEIVED AT THE OPENING OF THE NEXT BUSINESS DAY OF THE BANK.

2702VBT12/19/85#012

0,400.00 0

71 22934

20075218T REV. 5/84

Thank You

PETER J. VAN ALSTYNE
MARY ANN VAN ALSTYNE
1306 ROXBURY ROAD 582-7262
SALT LAKE CITY, UTAH 84108

1588

31-1/1240

Aug 14 1985

an repaid

tober 15, 1985

182

Pay to
the order of

Universal Video

\$ 1,000.00

One Thousand

Dollars

FOOTMILL OFFICE

First Security Bank of Utah

NATIONAL ASSOCIATION
2201 EAST 1300 SO. • SALT LAKE CITY, UT. 84108

For

Mary Ann Van Alstyne

DEPOSITED WITH

This is a
loan Peter made to Universal
& Peter was
repaid with
interest on Oct. 15

VALLEY BANK AND TRUST



VALLEY CENTRAL BANK
SILVER KING STATE BANK

ALL ITEMS RECEIVED ARE
CREDITED TO YOUR ACCOUNT
SUBJECT TO FINAL PAYMENT

THIS IS YOUR RECEIPT

USE THIS RECEIPT WHEN CHECKING
DEPOSITS LISTED ON YOUR BANK
STATEMENT

ITEMS RECEIVED AFTER REGULAR BUSINESS HOURS OR ON SATURDAYS ARE RECEIVED FOR SAFEKEEPING
AND SHALL BE DEEMED TO HAVE BEEN RECEIVED AT THE OPENING OF THE NEXT BUSINESS DAY OF THE BANK.

2702VBT 8/14/85#023

\$1,000.00 0

70228934

PETER J. VAN ALSTYNE
MARY ANN VAN ALSTYNE
1306 ROXBURY ROAD 582-7262
SALT LAKE CITY, UTAH 84108

1369

31-1/1240

June 3 1985

tial Capital

ed to pay

tstar

182

Pay to
the order of

JETSTAR INDUSTRIES

\$ 20,000.00

Twenty-Thousand AND 00/100 CENTS

Dollars

FOOTMILL OFFICE

First Security Bank of Utah

NATIONAL ASSOCIATION
2201 EAST 1300 SO. • SALT LAKE CITY, UT. 84108

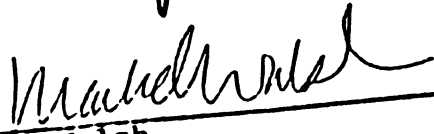
For

63801743

The other \$10,000
is referenced
on the first check
Statement =
Total: \$30,000

Cancelled
by
P.O.


Peter Van Alstyne


Mark O. Walsh

March 4, 1992

Joyce Maughan
Attorney at Law
455 South 300 East, Suite 355
Salt Lake City, Utah 84111

Dear Joyce:

We, Peter Van Alstyne and Gerald Robinson, have discussed issues and conditions for a settlement with Mark Walsh.

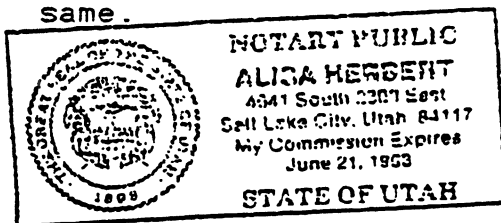
We will accept from Mark Walsh \$13,250 payable in full no later than May 1, 1992. (\$13,000 is the amount Gerald and Peter discussed. \$250 is the amount needed to pay Joyce's fees to conduct the settlement proceedings.)

Mark must waive all claims against Jude Erickson, Gerald Robinson and Peter Van Alstyne. The payment of the \$13,250 shall convey to Joyce Maughan simultaneously with the release of any judgments against Mark Walsh.

Joyce Maughan is hereby instructed to convey the amount of \$13,000 received in settlement from Mark Walsh to Gerald Robinson.

By 
Peter Van Alstyne

On the 4 day of March, 1992, before me personally appeared Peter Van Alstyne whose identity was proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged the same.



Alicia Herbert
Notary Public
My Commission Expires 6-21-93

By _____
Gerald Robinson

On the ____ day of _____, 1992, personally appeared before me Gerald Robinson whose identity was proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged the same.

Notary Public
My Commission Expires _____



May 13, 1992

PETER VAN ALSTYNE
1306 ROXBURY ROAD
SALT LAKE CITY, UTAH
84108

re: Walsh vs. Erickson

Dear Peter,

I am pleased to be able to say that I have settled with Gerald Robinson, consistent with the terms extended to me.

I am grateful to you for your assistance in bringing this matter to a head.

You have suggested that I make my offer to you in writing as per our telephone conversation a couple of weeks ago.

I hereby commit to pay you the balance of the \$13,000.00, as per my oral commitment to you, and consistent with the notorized letter that you sent to Gerald Robinson, which he signed and had notorized, before sending it on to your Counsel.

After Mr. Robinson read the final settlement to me over the phone, I instructed by Counsel to back off the Appeal, as we had settled the matter, mostly by your assistance.

I deeply appreciate your leadership in bringing this matter to a fair resolution.

This is my formal offer of settlement that you requested on the phone, and I hope that you will get back to me immediately as we discussed on the phone.

Again, I appreciate all of your efforts in finally bringing this matter to a conclusion.

Kindest regards,



Mark



April 21, 1992

GERALD O. ROBINSON
649 SOUTH ISLAND VIEW DRIVE
CENTERVILLE, UTAH
84014

Dear Mr. Robinson:

Consistent with our agreement, I enclosed herewith the sum of \$5,359.23 (five thousand three hundred fifty nine and 23/100) as payment in full of the judgment.

Based in part from what you read to me over the phone, I have instructed my Attorney to release you from the appeal, and have contacted Peter Van Alstyne that I will be forwarding to him the amounts that we discussed.

After my discussion with you I contacted my bank, met with family as well as instructed my Attorney that we had settled this case, and have now borrowed the sum enclosed consistent with what you read to me over the phone.

This constitutes payment of one hundred cents on the dollar for the judgment, and should enable you to stop paying attorneys fees for this unfortunate litigation, as I will have you dismissed from the appeal forthwith.

Kindly return a Satisfaction of Judgment as your earliest convenience.

I wish you the best in future endeavors.

Kindest regards,

Mark O. Walsh

cc: Peter Van Alstyne
John Walsh, Attorney



West One Bank, Utah Salt Lake City, Utah 84101

Cashiers Check

WEST ONE
BANK

No 16925

Date

Apr. 27, 1992

1c

$\frac{31-4}{1240}$

Pay to the Order of

Gerald O. Robinson

\$ ***5,359.23***

WEST ONE
5,359.23

Purchased by Mark Oliver Walsh

Lillian Kallidge

Authorized Signature

⑈061016925⑈ ⑆124000041⑆ 799059934105⑈

SAD-Bureau, N.J.

860907199
PLAINTIFF'S
EXHIBIT
6

the means most effective and economical under the circumstances. The county executive may sell all captured horses.

1993

47-2-6. Owners may reclaim — Damages — Taxes.

Any person owning any horses which are running at large in any county in which the county executive has given notice of intention to make a drive, as provided in this chapter, may within 30 days after the posting or the first publication of the notice mentioned in Section 47-2-4 file with the county executive a description of such horses claimed by him, giving the marks and brands, if any, which appear thereon, and, if the county executive shall take into its possession any horses so claimed, it shall by registered letter addressed to the owner or claimant of such horses notify him that the same may be claimed within ten days from the mailing of such notice; and such owner or claimant shall be permitted upon application to the board to take possession of such horses upon payment of the expense of caring for the same from the date of capture. If any horses are killed by order of the county executive under the provisions of this chapter, a description of which has been reported by the owner thereof to the board, and ownership of such animals can be satisfactorily established, such owner shall receive as damage therefor a sum not exceeding \$10 for each animal; provided, that he has paid all taxes assessed against said animal; provided further, that payment of such claims may be made only from proceeds of sales of captured horses.

1993

47-2-7. Elimination from private property on request.

Abandoned horses may be eliminated from privately owned land by the county executive in the same manner as from the open range when requested so to do by the owner of such land.

1993

TITLE 48

PARTNERSHIP

Chapter

1. General Partnership.
2. Limited Partnership (Repealed).
- 2a. Utah Revised Uniform Limited Partnership Act.
- 2b. Utah Limited Liability Company Act.

CHAPTER 1

GENERAL PARTNERSHIP

Section	
48-1-1.	Definition of terms.
48-1-2.	Interpretation of knowledge and notice.
48-1-3.	"Partnership" defined.
48-1-3.1.	Joint venture defined — Application of chapter.
48-1-4.	Rules for determining the existence of a partnership.
48-1-5.	Partnership property.
48-1-6.	Partner agent of partnership as to partnership business.
48-1-7.	Conveyance of real property of partnership.
48-1-8.	Partnership bound by admission of partner.
48-1-9.	Partnership charged with knowledge of or notice to partner.

Section

48-1-10.	Partnership bound by partner's wrongful act.
48-1-11.	Partnership bound by partner's breach of trust.
48-1-12.	Nature of partner's liability.
48-1-13.	Partner by estoppel.
48-1-14.	Liability of incoming partner.
48-1-15.	Rules determining rights and duties of partners.
48-1-16.	Partnership books.
48-1-17.	Duty of partners to render information.
48-1-18.	Partner accountable as a fiduciary.
48-1-19.	Right to an account.
48-1-20.	Continuation of partnership beyond fixed term.
48-1-21.	Extent of property rights of a partner.
48-1-22.	Nature of a partner's right in specific partnership property.
48-1-23.	Nature of partner's interest in the partnership.
48-1-24.	Assignment of partner's interest.
48-1-25.	Partner's interest subject to charging order.
48-1-26.	"Dissolution" defined.
48-1-27.	Partnership not terminated by dissolution.
48-1-28.	Causes of dissolution.
48-1-29.	Dissolution by decree of court.
48-1-30.	General effect of dissolution on authority of partner.
48-1-31.	Right of partner to contribution from copartners after dissolution.
48-1-32.	Power of partner to bind partnership to third persons after dissolution.
48-1-33.	Effect of dissolution on partner's existing liability.
48-1-34.	Right to wind up.
48-1-35.	Rights of partners to application of partnership property.
48-1-36.	Rights where partnership is dissolved for fraud or misrepresentation.
48-1-37.	Rules for distribution.
48-1-38.	Liability of persons continuing the business in certain cases.
48-1-39.	Rights of retiring or estate of deceased partner when the business is continued.
48-1-40.	Accrual of actions.

48-1-1. Definition of terms.

In this chapter:

"Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation or profession.

"Person" includes individuals, partnerships, corporations and other associations.

"Bankrupt" includes bankrupt under the federal bankruptcy laws or insolvent under any state insolvency law.

"Conveyance" includes every assignment, lease, mortgage or encumbrance.

"Real property" includes land and any interest or estate in land.

1993

48-1-2. Interpretation of knowledge and notice.

(1) Within the meaning of this chapter, a person is deemed to have knowledge of a fact not only when he has actual knowledge thereof, but also when he has knowledge of such other facts that to act in disregard of them shows bad faith.

(2) A person has notice of a fact within the meaning of this chapter when the person who claims the benefit of the notice:

- (a) states the fact to such person; or,
- (b) delivers through the mail, or by other means of communication, a written statement of the fact to such person, or to a proper person at his place of business or residence.

1963

48-1-3. "Partnership" defined.

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

1963

48-1-3.1. Joint venture defined — Application of chapter.

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights of joint ventures.

1965

48-1-4. Rules for determining the existence of a partnership.

In determining whether a partnership exists these rules shall apply:

(1) Except as provided by Section 48-1-13, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As an annuity to a widow or representative of a deceased partner.
- (d) As interest on a loan, though the amounts of payment vary with the profits of the business.
- (e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.

1963

48-1-5. Partnership property.

All property originally brought into the partnership stock, or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

Unless the contrary intention appears, property acquired with partnership funds is partnership property.

Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor, unless a contrary intent appears.

1963

48-1-6. Partner agent of partnership as to partnership business.

(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership, unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all of the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.

(b) Dispose of the good will of the business.

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership.

(d) Confess a judgment.

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

1963

48-1-7. Conveyance of real property of partnership.

Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property, unless the partner's act binds the partnership under the provisions of Section 48-1-6(1), or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner in making the conveyance has exceeded his authority.

Where title to real property is in the name of the partnership a conveyance executed by a partner in his own name passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where title to real property is in the name of one or more but not all of the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property, if the partners' act does not bind the partnership under the provisions of Section 48-1-6(1), unless the purchaser or his assignee is a holder for value without knowledge.

Where the title to real property is in the name of one or more or all of the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own

name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. 1953

48-1-8. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership. 1953

48-1-9. Partnership charged with knowledge of or notice to partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operates as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. 1953

48-1-10. Partnership bound by partner's wrongful act.

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. 1953

48-1-11. Partnership bound by partner's breach of trust.

The partnership is bound to make good the loss:

- (1) where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and,
- (2) where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. 1953

48-1-12. Nature of partner's liability.

All partners are liable:

- (1) Jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11.
- (2) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. 1953

48-1-13. Partner by estoppel.

(1) When a person by words spoken or written or by conduct represents himself, or consents to another's representing him, to anyone as a partner, in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made who has on the faith of such representation given credit to the actual or apparent partnership, and, if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by, or with the knowledge of, the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as if he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability; otherwise, separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of an existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. 1953

48-1-14. Liability of incoming partner.

A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as if he had been a partner when such obligations were incurred, except that his liability shall be satisfied only out of partnership property. 1953

48-1-15. Rules determining rights and duties of partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(3) A partner who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute shall be paid interest from the date of the payment or advance.

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(5) All partners have equal rights in the management and conduct of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(7) No person can become a member of a partnership without the consent of all the partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. 1953

48-1-16. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them 1953

48-1-17. Duty of partners to render information.

Partners shall render on demand true and full information of all things affecting the partnership to any partner, or the legal representatives of any deceased partner, or partner under legal disability 1953

48-1-18. Partner accountable as a fiduciary.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property

This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. 1953

48-1-19. Right to an account.

Any partner shall have the right to a formal account as to partnership affairs.

(1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners.

(2) If the right exists under the terms of any agreement

(3) As provided by Section 48-1-18

(4) Whenever other circumstances render it just and reasonable. 1953

48-1-20. Continuation of partnership beyond fixed term.

When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination so far as is consistent with a partnership at will.

A continuation of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. 1953

48-1-21. Extent of property rights of a partner.

The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership and (3) his right to participate in the management. 1953

48-1-22. Nature of a partner's right in specific partnership property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes but he has no right to possess such property for any other purpose without the consent of his partners

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representative of a deceased partner, cannot claim any right under the homestead or exemption laws

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representatives. Such surviving partner or partners, or the legal representatives of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin. 1953

48-1-23. Nature of partner's interest in the partnership.

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property 1953

48-1-24. Assignment of partner's interest.

A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, or, as against the other partners in the absence of agreement, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

In case of a dissolution of a partnership, the assignee is entitled to receive his assignor's interest, and may require an account from the date only of the last account agreed to by all the partners 1953

48-1-25. Partner's interest subject to charging order.

(1) On due application to a competent court by any judgment creditor of a partner the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon and may then or later appoint a receiver of his share of the profits and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made or which the circumstances of the case may require

(2) The interest charged may be redeemed at any time before foreclosure, or, in case of a sale being directed by the court, may be purchased without thereby causing a dissolution

(a) with separate property, by any one or more of the partners or

(b) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold

(3) Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws as regards his interest in the partnership 1953

48-1-26. "Dissolution" defined.

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business. 1953

48-1-27. Partnership not terminated by dissolution.

On dissolution a partnership is not terminated, but continues until the winding up of partnership affairs is completed. 1953

48-1-28. Causes of dissolution.

Dissolution is caused:

(1) Without violation of the agreement between the partners:

(a) By the termination of the definite term or particular undertaking specified in the agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified.

(c) By the express will of all the partners who have not assigned their interests, or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking.

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership.

(4) By the death of any partner.

(5) By the bankruptcy of any partner or the partnership.

(6) By decree of court under Section 48-1-29. 1953

48-1-29. Dissolution by decree of court.

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

(b) A partner becomes in any other way incapable of performing his part of the partnership contract.

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

(e) The business of the partnership can only be carried on at a loss.

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under Section 48-1-24 or 48-1-25:

(a) After the termination of the specified term or particular undertaking.

(b) At any time, if the partnership was a partnership at will, when the interest was assigned or when the charging order was issued. 1953

48-1-30. General effect of dissolution on authority of partner.

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

(1) With respect to the partners:

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or.

(b) when the dissolution is by such act, bankruptcy or death of a partner in cases where Section 48-1-31 so requires.

(2) With respect to persons not partners as declared in Section 48-1-32. 1953

48-1-31. Right of partner to contribution from copartners after dissolution.

Where the dissolution is caused by the act, death or bankruptcy of a partner each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless:

(1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or.

(2) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. 1953

48-1-32. Power of partner to bind partnership to third persons after dissolution.

(1) After dissolution a partner can bind the partnership, except as provided in paragraph (3):

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.

(b) By any transaction which would bind the partnership, if dissolution had not taken place, provided the other party to the transaction:

1st Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or.

2nd Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place, if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1)(b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution:

(a) unknown as a partner to the person with whom the contract is made; and.

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution:

(a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or.

(b) where the partner has become bankrupt; or.

(c) where the partner has no authority to wind up partnership affairs except by a transaction with one who

1st Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority or

2nd Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1)(b) 2nd.

(4) Nothing in this section shall affect the liability under Section 48-1-13 of any person who after dissolution represents himself or consents to another's representing him as a partner in a partnership engaged in carrying on business. 1953

48-1-33. Effect of dissolution on partner's existing liability.

(1) The dissolution of a partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged for any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts. 1953

48-1-34. Right to wind up.

Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representatives or his assignee upon cause shown may obtain a winding up by the court. 1953

48-1-35. Rights of partners to application of partnership property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities either by payment or agreement under Section 48-1-33(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have:

1st All the rights specified in paragraph 1 of this section and

2nd The right as against each partner who has caused the dissolution wrongfully to damages for breach of the agreement

b) The partners who have not caused the dissolution wrongfully and they all desire to continue the business in the same name either by themselves or jointly with others, may do so during the agreed term for the partnership, and for that purpose may possess the partnership property; provided, they pay to any partner who has caused the dissolution wrongfully the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2)(a) 2nd of this section or secure the payment by bond approved by the court, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

1st If the business is not continued under the provisions of paragraph (2)(b), all the rights of a partner under paragraph (1), subject to clause (2)(a) 2nd of this section.

2nd If the business is continued under paragraph (2)(b) of this section, the right as against his copartners, and all claiming through them, in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good will of the business shall not be considered. 1953

48-1-36. Rights where partnership is dissolved for fraud or misrepresentation.

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled:

(1) to a lien on, or right of retention of, the surplus of the partnership property, after satisfying the partnership liabilities to third persons, for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and,

(2) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and,

(3) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. 1953

48-1-37. Rules for distribution.

In settling accounts between the partners after dissolution the following rules shall be observed, subject to any agreement to the contrary:

(1) The assets of the partnership are:

(a) The partnership property.

(b) The contributions of the partners necessary for the payment of all the liabilities specified in Subsection (2).

(2) The liabilities of the partnership shall rank in order of payment, as follows:

a Those owing to creditors other than partners

b Those owing to partners other than for capital and profits

c Those owing to partners in respect of capital

d Those owing to partners in respect of profits

(3) The assets shall be applied in the order of their declaration in Subsection (1) to the satisfaction of the liabilities

(4) The partners shall contribute as provided by Subsection 48-1-15(1) the amount necessary to satisfy the liabilities, but if any but not all, of the partners are insolvent or not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and in the relative proportions in which they share the profits the additional amount necessary to pay the liabilities

(5) An assignee for the benefit of creditors, or any person appointed by the court, shall have the right to enforce the contributions specified in Subsection (4)

(6) Any partner or his legal representative shall have the right to enforce the contributions specified in Subsection (4) to the extent of the amount which he has paid in excess of his share of the liability

(7) The individual property of a deceased partner shall be liable for the contributions specified in Subsection (4)

(8) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore

(9) Where a partner has become bankrupt or his estate is insolvent, the claims against his separate property shall rank in the following order

(a) Those owing to separate creditors.

(b) Those owing to partnership creditors.

(c) Those owing to partners by way of contribution.

1992

48-1-38. Liability of persons continuing the business in certain cases.

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representatives of a deceased partner assign) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first, or dissolved, partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representatives of a deceased partner assign) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued, as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partner or the representatives of the deceased partner, but without any assign-

ment of his right in partnership property rights of creditors of the dissolved partnership and of creditors of the person or partnership continuing the business shall be as if such assignment had been made

4 When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership creditors of the dissolved partnership are also creditors of the person or partnership continuing the business

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of Section 48-1-35(2)(b) either alone or with others and without liquidation of the partnership affairs creditors of the dissolved partnership are also creditors of the person or partnership continuing the business

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business

(7) The liability of a third person becoming a partner in the partnership continuing the business under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representatives of the deceased partner, have a prior right to any claim of the retired partner or the representatives of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership, or on account of any consideration promised for such interest, or for his right in partnership property

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

1953

48-1-39. Rights of retiring or estate of deceased partner when the business is continued.

When any partner retires or dies and the business is continued under any of the conditions set forth in Section 48-1-38(1), (2), (3), (5), (6), or Section 48-1-35(2)(b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representatives as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representatives, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided, that the creditors of the dissolved partnership as against the separate creditors or the representative of the retired or deceased partner shall have priority on any claim

arising under this section, as provided by Section 48-1-38(8). 1963

48-1-40. Accrual of actions.

The right to an account of his interest shall accrue to any partner or his legal representative as against the winding-up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution in the absence of any agreement to the contrary. 1963

CHAPTER 2

LIMITED PARTNERSHIP

(Repealed by Laws 1990, ch. 233, § 71.)

48-2-1 to 48-2-27. Repealed.

CHAPTER 2a

UTAH REVISED UNIFORM LIMITED PARTNERSHIP ACT

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