1972

Prince-Covey & Company, Inc., A Utah Corporation v. Jerry v. Strand : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COU[illegible]

of the

STATE OF UTAH

[illegible]ovey & Company, Inc.,
Corporation,

Plaintiff-Respondent,

vs.

[illegible] Strand,

Defendant-Appellant.

[illegible]

APPELLANT'S BRIEF

Appeal from Judgment of [illegible]
[illegible]dicial District Court for Sal[illegible]
Hon. D. Frank Wilkins, Ju[illegible]

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TABLE OF CONTENTS

IN THE SUPREME COURT

of the

STATE OF UTAH

PRINCE-COVEY & COMPANY, INC., a Utah Corporation,

Plaintiff-Respondent,

vs.

JERRY V. STRAND,

Defendant-Appellant.

Case No. 12964

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by Plaintiff-Respondent on a contract for the sale of securities to Defendant-Appellant. Plaintiff-Respondent is a licensed broker-dealer, engaging in the securities business through the regular and customary channels of interstate commerce. As such broker-dealer, Plaintiff-Respondent both bought and sold various securities for the account of the Defendant-Appellant. Under the contract in question, Plaintiff-Respondent extended credit to Defendant-Appellant, for which payment was not made. Defendant-Appellant counterclaimed against Plaintiff-Respondent for the conversion of various securities which Plaintiff-Respondent sold from Defendant-Appellant's account, without consent.

DISPOSITION IN LOWER COURT

After a non-jury trial on the merits, the trial court granted Plaintiff judgment in the amount of $34,696.16. The lower court found that Defendant owed the Plaintiff $100,702.84. Further, that Plaintiff realized $63,267.00 from the liquidation of Defendant's account, resulting in a net amount due on the account by the Defendant to the Plaintiff in the amount of $37,435.84. Also, the lower court found that Plaintiff sold securities owned by Defendant from his account, without the consent of the Defendant. It was found that the fair market value of the converted stock within a reasonable period of time after date of conversion, less the amounts realized from the sale of such stock, resulted in damage to the Defendant in the amount of $6,430.00. This amount was offset against the amount found to be due from Defendant to Plaintiff, resulting in a judgment in favor of the Plaintiff in the amount of $34,696.16, which amount includes interest computed at the rate of six per cent (6%) per annum.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment granted Plaintiff. If the Appellate

Court reverses Plaintiff's Judgment, Defendant seeks judgment for $20,137.60. If the Appellate Court allows Plaintiff relief, then Defendant seeks review of the evidence and an order of this Court fixing Plaintiff's damages at $13,501.08, to be determined by the conversion measure of damages, and judgment on Defendant's counterclaim for $20,147.60. Offsetting those amounts, judgment should be granted Defendant for $6,636.52. If the Appellate Court affirms the trial court on the relief granted Plaintiff, Defendant seeks a review of the evidence supporting the counterclaim and seeks amendment of the counterclaim judgment to Plaintiff, after appropriate offsets, of $31,614.40. Also, Defendant seeks an award of attorney's fees and costs of the appeal.

STATEMENT OF FACTS

Plaintiff, a Utah Corporation, is a licensed broker-dealer which buys and sells securities through interstate commerce (R. 135-36). Sometime in late 1969, Defendant opened a special cash account with Plaintiff (Ex. 1-P & R. 136), which account was perhaps the biggest account of Plaintiff (R. 138). Defendant placed orders with Plaintiff for the purchase and sale of various stocks and Plaintiff executed such orders until May 18, 1970 (Exs. 1-P & 2-D, and R. 136, 201 & 239).

Plaintiff treated Defendant's account as a COD account from about April 10 or 11, 1970 (R. 143-45). There was no written agreement of such COD account with Defendant (R. 143), there was no customer information card indicating a COD account (R. 152), the terms of such COD account were never communicated to Defendant (R. 156-57, 178-91, & 214-15). Defendant's stock was placed in a single folder (R. 223), COD confirmations were handled like any other confirmations (R. 225), and such COD confirmations had no special notation that a COD transaction was involved (R. 227-28).

Approximately May 19, 1970, Plaintiff received a check of Defendant in the amount of $16,000.00, which was returned by the bank (R. 199). Plaintiff immediately commenced to liquidate Defendant's account by selling all of his stock, which included large blocks of stock in Classic Mining Corporation and Investestate (Ex. 3-P, R. 145 & 239). At the conclusion of the liquidation, which took approximately one month (Exs. 2-D & 3-P and R. 145), Defendant's account had a debit balance of

$40,542.58 (Ex. 1-P & R. 203), which amount included commission charges of the liquidation (Ex. 2-D), resulting in a net debit balance in Defendant's account of $37,435.84 (R. 78).

Defendant owned certain stocks which were sold through the liquidation by Plaintiff, without consent of Defendant (R. 190 & 234). Defendant owned 27,500 shares of Classic Mining Corporation, 700 shares of Agau Mines, 30,000 shares of Investestate, 4,000 shares of Stansbury, and 2,000 shares of King Oil. The fair market value of said stocks within two weeks from the commencement of the liquidation was $17,980.00 (Ex. 7-P & R. 235). Plaintiff realized $9,462.00 from the sale of said stock, which was credited to Defendant's account, resulting in a net loss to the Defendant of $8,518.00 (Ex. 7-P &

R. 263-64). Allowable interest thereon to May 11, 1972, is $993.76, thereby entitling Defendant to judgment on his counterclaim in the amount of $9,511.76.

ARGUMENTS

POINT I

THE PLAINTIFF DID NOT SUSTAIN ITS BURDEN OF PROVING AN AGREEMENT, OR ANY BREACH THEREOF, AS ALLEDGED IN ITS COMPLAINT.

Defendant had an account with Plaintiff (R. 53 & 136). Plaintiff introduced no written agreement defining the kind of account it had with Defendant, and the testimony established there was none (R. 150-51).

Keith Sudbury, a trader-broker agent for Plaintiff, testified that he assumed Defendant's account "was a special account payable within seven days, as all the rest of them were." Yet he did not know what kind of account was involved, since it had been set up before he went to work for Plaintiff (R. 137 & 153). There was no testimony from the two principals of Plaintiff, or from anybody, as to what kind of account was established for Defendant. There was no evidence of when such account was opened, no evidence of who set up the account, and no evidence of what, if any, terms of such account might have been, i.e., prices, quantities, delivery dates, limitations and restrictions on credit, if any, payment dates, whether the account was corporate, individual, joint tenancy, trust account, custodial account, or what parties, if more than one, were authorized to transact business in connection therewith.

On April 10 or 11, 1970 (R. 144), Plaintiff supposedly opened a COD account for Defendant, yet there was no written agreement regarding such COD account (R. 143). Federal security law does not grant authority to create a COD account. No such account properly exists. Under Regulation T, Federal Reserve System, 12 C.F.R., Section 220.4 (c)(5), which was promulgated under Section 7(c) of the Securities Exchange Act of 1934, 15 U.S.C., Section 78g(c), as amended July 29, 1968, P.L. 90-437, 82 STAT. 452, a broker-dealer may vary from the usual seven business days to thirty-five calendar days to obtain payment from a customer. Section 220.4 of the Federal Reserve System Regulations covers the subject of special accounts, with sub-paragraph (5) permitting the broker thirty-five calendar days, rather than the usual seven business days, in which it must collect from a customer on a given transaction (R. 94-97).

Specifically, the Regulation requires (1) the broker to act in good faith, (2) the broker and the customer to have an understanding when the broker purchases a security for the customer under this provision, (3) that delivery of the securities must be promptly made to customer, (4) that full cash payment must be promptly made by customer against such delivery, and (5) that such special accounts must be recorded seperately and must be confined to transactions and to relations specifically authorized.

The foregoing provision of the Regulations was intended for use by institutional accounts, or for special situations where usual means of transmittal make impossible the physical delivery of a given stock within a matter of two or three days. The testimony of Plaintiff indicated that a

COD account was created for Defendant (R. 143), and Mr. David E. Nelson, a certified public accountant, an officer and director of Plaintiff, and one of its principals treated Mr. Strand's account as a COD account, notwithstanding the <u>clear and unmistakable limitation</u> of the Regulation restricting the COD collection period of thirty-five days to <u>individual transactions</u> (R. 198-99).

Defendant's account was Keith Sudbury's biggest account, and was perhaps the biggest account of Plaintiff (R. 138). According to Mr. Sudbury, "Mr. Strand's account produced in excess of $20,000.00 in gross commissions . . . in a period of about five months" (R. 139). In fact, commissions on the Strand account from January 1, 1970 to May 18, 1970 amounted to $27,133.29 (Exs. 1-P & 2-D).

Not only was it a large account (R. 138), producing substantial and profitable commissions (R. 139), but Defendant had always paid promptly (R. 143).

According to David E. Nelson, who was "responsible for all of the accounting functions of the firm, which includes cashiering" (R. 198), Plaintiff received a bad check from Defendant on May 19, 1970, which was returned from the bank (R. 199). Plaintiff demonstrated its good faith by immediately commencing liquidation of Defendant's account (Exs. 1-P, 2-D & R. 145). There was no testimony or other evidence that Plaintiff gave notice to Defendant, or that any reasonable, good faith effort was made by Plaintiff to effect recovery on the check.

In addition, there was no testimony or evidence as to why Defendant delivered a $16,000.00 check to Plaintiff, i.e., what stock was involved, if any, whether Plaintiff had delivered, or tendered delivery of any stock to the Defendant, or his agent, and in fact, whether Plaintiff had received the appropriate stock so that it could have delivered same to Defendant (R. 224). No confirmation, or confirmations, of the transaction or transactions relating to the $16,000.00 were ever produced. In fact, what $16,000.00 check? None was ever offered in evidence by Plaintiff. Clearly it can be seen that there was no evidence of what, if anything, Defendant might have owed Plaintiff at that time.

Mr. David E. Nelson testified that there was a debit balance in the account on May 18, 1970 in the amount of $84,607.84

(R. 201), but there was no testimony or evidence that such amount, or any part thereof, was actually due from the Defendant to Plaintiff. Mr. Nelson conceded that had the check cleared, Defendant would still not "have been in violation," _i.e._, the account was current (R. 209). Not one single confirmation was produced as evidence of what was due.

Plaintiff did not obtain Defendant's consent to liquidate. In fact, Defendant had requested Keith Sudbury not to liquidate the account (R. 168). There was no evidence that Defendant had pledged, hypothecated, agreed to indemnify, or in any way granted Plaintiff contractual authority to liquidate his account, or any single transaction pertaining to the account. Sub-paragraph (2) of paragraph (c) of Section 220.4 of the Regulations provides that if full cash payment is not made when due that the broker-dealer shall "promptly cancel or otherwise liquidate the transaction." (Emphasis added.) (R. 94-97). Thus, the applicable law grants authority to a broker-dealer to liquidate a transaction, not an account. David E. Nelson testified that "in some instances, the liquidation could have occurred prior to us [Prince-Covey] actually receiving the stock from the other side." (R. 224) On a COD transaction, payment is not due from the customer until delivery. Therefore, in those instances, the account clearly was not due.

David E. Nelson also testified that the account was immediately charged for a purchase when Defendant placed his purchase order (R. 208). Plaintiff had charged $100,702.84 to Defendant (R. 202), but there was no testimony or evidence that any stock had been delivered to Defendant. (See, Section 70A-8-313, Utah Code Annotated, 1953.) Accordingly, it was impossible for the trial court to ascertain what, if anything, was in fact due from Defendant to Plaintiff thereby justifying the liquidation of a single stock transaction, much less the whole account.

At the time of the liquidation, Plaintiff's capital position or ratio was very "precarious." In fact, Plaintiff had to obtain more capital to satisfy their net capital requirements under the Regulations of the National Association of Securities Dealers, of which they were a member (R. 192-97). Plain and simple, Plaintiff was in "bad trouble." (R. 189) Plaintiff elected to save its own hide by sacrificing the Defendant. Plaintiff well knew that Defendant had "a ton of stock" (R. 249) in his account, and that a total and immediate liquidation of the account would knock the bottom out of things. Mr. Almon M. Covey, who was a part-owner of Plaintiff and who was a registered securities broker, indicated that the stocks which Defendant was dealing in were "so speculative and the market dropped so fast that the equity declined so fast that it was virtually overnight, so our ratio wasn't completely adhered to because of those circumstances" (R. 187). Notwithstanding this knowledge, Plaintiff nonetheless went ahead with a wholesale liquidation, appreciating that as a natural consequence of its actions, Defendant would be greatly and irreparably damaged.

Plaintiff as a licensed and registered broker-dealer, engages in a highly sophisticated and regulated business. Such a business is at all times under the thumb and careful scrutiny of the Federal Reserve Board, the Securities and Exchange Commission, the Utah State Securities Commission, the National Association of Securities Dealers, and the local, regional and national stock exchanges. A broker-dealer, such as Plaintiff, handles millions of dollars of the general public's money through thousand of transactions. For a broker-dealer to manage such responsibility, it necessarily must have a highly refined accounting system, with the capacity to collate, organize, store and <u>retrieve on relatively short notice</u>.

As a certified public accountant, and as a principal of Plaintiff, Mr. Nelson was certainly in a position to closely monitor and supervise the whole accounting function of the Plaintiff. Notwithstanding the fact that very substantial sums of money were involved in this litigation, with extremely important results, to the rights of both parties being involved, David E. Nelson testified it was too much of a job to pull the confirmations (R. 224).

Plaintiff's system was adequate enough to retrieve confirmations on both sides of a March 31, 1970 transaction wherein Defendant purchased 2,000 shares Investestate (Ex. 4-P & 5-P). It is patently apparent that Plaintiff could have provided confirmations on every transaction with the

Defendant, since such confirmations were filed by the Plaintiff in numerical sequence by transaction number (R. 244). Plaintiff's computer run on the account for the period in question contains a full list of the transaction numbers (Ex. 1-P). David E. Nelson admitted that he could pull all of the confirmations, <u>if necessary</u> (R. 224).

It is respectfully submitted that it was <u>necessary</u> for Plaintiff to provide <u>all</u> of the confirmations in question. Sub-section (2) of paragraph (a) of Section 220.4 of the Federal Reserve Regulations requires that each special account must be recorded seperately. Plaintiff did not even pay lip service to such requirement since it accounted for all transactions in account No. 01-182048-009 (Exs. 1-P, 2-D & R. 203-4). This was done notwithstanding the distinct difference between the usual special account seven day business credit period and the COD transactions with their thirty-five calendar day credit period. Plaintiff co-mingled all of Defendant's stocks, both owned by him and purchased by him on the special cash account, including COD transactions, in a single file (R. 224). Considering that all purchases were posted to Defendant's account immediately (R. 208), and that liquidation could have occured prior to Plaintiff's actual receipt of stock from other brokerage firms (R. 224), thus making delivery impossible, there was no possible way for the trial court to determine the amount due without written confirmations thereof.

Not only was it impossible from the record to know what kind of account was involved, but it became apparent that there was some doubt as to <u>whose</u> account was involved. Keith Sudbury testified that some Agau stock was available for $6.00, and he bought 2,000 shares of said stock for some other parties and charged the $12,260.00 purchase price to the <u>Strand</u> account May 12, 1970 (R. 175-76).[1]

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[1]David E. Nelson testified the 2,000 shares of Agau were part of the Strand liquidation (R. 206). It is apparent from Exhibit 2-D that Plaintiff did not reverse (R. 206) the $12,260.00 debit from the Strand account until after the liquidation was completed. Note on Exhibit 2-D the debit balance of the Strand account of $44,545.38. Compare that with the adjusted debit balance in Exhibit 3-P of $40,542.58. It readily can be seen that the large debit balance of Defendant's account on May 18, 1970, was greatly increased by Plaintiff's own shenanigans. Accordingly, Plaintiff's own debit balance figured in its decision to commence liquidation of Defendant's account.

POINT II

PROPER MEASURE OF DAMAGES WAS NOT APPLIED BY TRIAL COURT TO PLAINTIFF'S FIRST CAUSE OF ACTION.

Plaintiff's action is predicated upon the charge of $100,702.84 to Defendant's account before May 18, 1970 (R. 202). Said charges were immediately posted to Defendant's account when he placed a purchase order (R. 208). However, Defendant had no legal obligation to pay for the charges made until there was actual delivery of such stock (See, Section 70A-8-313, Utah Code Annotated, 1953.), i.e., a COD transaction is one where the customer makes full cash payment for a stock against its delivery (R. 95; Section 220.4(c)(5), supra).

Plaintiff only acquired right to payment when delivery was made to Defendant. Otherwise, Defendant owed Plaintiff nothing.

When the trial court entered judgment for Plaintiff, it could only have done so by finding at least a constructive delivery by Plaintiff to Defendant. Concluding, as the trial court must have done, either actual or constructive delivery of the stock to Defendant, it follows that Defendant was legal owner thereof.

Plaintiff obtained no consent from Defendant to liquidate the account (R. 168). There was no evidence that Plaintiff had any contractual authority to liquidate the account. The applicable Regulation of the Federal Reserve Board grants a broker-dealer authority to liquidate a single transaction. Plaintiff failed to prove a single transaction where delivery had been made and which had not been paid. There was no evidence that Plaintiff had any other authority in law to proceed with liquidation. Such an unlawful deprivation by Plaintiff of Defendant's property, without legal justification therefor, was a conversion. Prosser, Law of Torts 66 (2d ed. 1955). The measure of damages rule applicable to conversion of securities is set forth in Western Securities Co. v. Silver King Consolidated Mining Co. of Utah, 57 Utah 88, 192 Pac. 664, 672(Utah, 1920). Defendant is entitled to the fair market value of the stocks converted within a reasonable time after he received notice of the conversion.

Paragraph 4 of the Counter-claim First Cause of Action lists the various stocks Defendant fully owned before May 18, 1970, and which Plaintiff sold in its liquidation without Defendant's consent or authority (R. 64). Defendant testified that the dollar amounts for each stock in Paragraph 4 were the fair market values of the stock within thirty days after the liquidation sale of such stock (R. 235 & 243). Defendant's testimony was based upon actual sales transactions, or actual trades, within a two week period after he first got notice of the liquidation (R. 243-44).

Using the amounts of stock and fair market value prices set forth in Paragraph 4 (R. 64), the fair market value unit prices are: Classic Mining, 34¢; Investestate, 12¢; Stansbury, 8¢; Agau, $5.50; King Oil, 43¢.

Using Plaintiff's Exhibit 3-P for purposes of illustration, it can be seen that the trial court's award of damages to Plaintiff was in error. First, the shares which were fully owned by Defendant when the liquidation commenced (See, Exhibit 7-P.) should be subtracted from the stocks scheduled on Exhibit 3-P. Accordingly, the schedule of Exhibit 3-P should include only 99,000 shares of Classic Mining, 65,000 shares of Investestate, 7,100 shares of Agau and no King Oil. Second, those stocks in those amounts should be multiplied by the unit prices referred to above. Third, after making those adjustments, the Court must use the remaining amounts realized from liquidation on Exhibit 3-P, since the trial court had no other evidence before it. Following this line of reasoning, Plaintiff should have received $85,541.50 from its liquidation. Subtracting that amount from the $100,702.84 which Plaintiff claimed Defendant owed on May 18, 1970, the trial court should have found Defendant owed $15,161.34, less commissions charged on the liquidation in the amount of $3,106.74,[2] resulting in a net amount due from Defendant to Plaintiff in the amount of $12,054.60. If the Court concludes that Defendant owed Plaintiff anything, then that amount, plus interest at 6 percent per annum from May 19, 1970 to May 11, 1972, in the amount of $1,446.48, or a total of $13,501.08, should be the amount awarded Plaintiff on its complaint.

POINT III

THE TRIAL COURT'S FINDING OF $6,430.00 DAMAGE TO DEFENDANT ON ITS COUNTER-CLAIM IS NOT SUPPORTED BY THE EVIDENCE.

If this Court concludes Plaintiff did not prove an agreement, or a breach thereof, then Plaintiff is entitled to no damages.

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[2] The trial court adjusted the final amount awarded Plaintiff by the commissions charged by Plaintiff on the liquidation. This can be derived by totaling the individual transaction commissions which appear in Exhibits 1-P and 2-D.

Assuming that conclusion, Defendant would be entitled to judgment against the Plaintiff for $17,980.00,[3] plus interest at 6 percent per annum from May 19, 1970 to May 11, 1972, in the amount of $2,157.60, or a total of $20,147.60 (R. 64 & 235).

Assuming this Court finds there was a contract and a breach thereof, the Court should apply the fair market value measure of damages which is fully described in Point II, supra. Following this conclusion, the $12,054.60 damages to Plaintiff should be offset against the $20,137.60 damages to Defendant, resulting in a net judgment to Defendant on May 11, 1972 in the amount of $8,083.00.

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[3] Defendant testified the total damages were $16,980.00 (R. 235), but there was an error in addition. Taking the individual figures pertaining to the stocks in question, the loss to Defendant was $17,980.00 (R. 64). Mr. Prince recognized this mathematical error (R. 237).

Finding No. 19 of the trial court that Defendant was damaged in the amount of $6,430.00 is palpable error (R. 78). Defendant testified he had been damaged in the amount of $16,980.00 [sic.— $17,980.00] (R. 78). The trial court concluded that $6,430.00 was the difference between the fair market value of the stocks which were fully owned by Defendant at the date liquidation commenced, and the amounts already realized through liquidation of such securities.

The only evidence that the trial court had before it converted amounts realized from the sale of Defendant's fully-owned stock is Exhibit 7-P. There is no other controverting evidence about that point in the record.

Accordingly, the trial court was compelled to find Plaintiff realized

$9,462.00 from the conversion of Defendant's stock. Deducting that amount from the conversion damages to Defendant in the amount of $17,980.00, the Court must find, as appears in Exhibit 7-P, that Defendant's conversion loss was $8.518.00. Allowable interest at 6 percent per annum from May 19, 1970 to May 11, 1972, is $993.76, making the total due Defendant $9,511.76 on May 11, 1972, the amount which the trial court should have awarded Defendant as an offset against anything awarded Plaintiff.

POINT IV

PAYMENT FOR THE SALE OF SECURITIES BY PLAINTIFF TO DEFENDANT IS UNENFORCEABLE.

Section 70A-8-319, Utah Code Annotated, 1953, sets forth the applicable statute of frauds concerning contracts for sale of securities. Sub-paragraph (a) applies in cases where the party to be bound signs a writing. Plaintiff did not have the Defendant sign anything (R. 150). Sub-paragraph (b) requires that delivery of a security (See, Section 70A-8-313, Utah Code Annotated, 1953.) be accepted by the person to be bound. There was no evidence of delivery on a single transaction, or the acceptance thereof by the Defendant. Sub-paragraph (c) provides that the party against whom enforcement is sought must within a reasonable time after a sale or purchase receive a written confirmation of said transaction, and unless he sends the broker-dealer a written objection to the contents of such confirmation, he is bound by its contents. Not a single confirmation of a single transaction was introduced by Plaintiff, though

David E. Nelson testified that all of them could have been pulled (R. 224). Further, he testified that a confirmation was mailed to a customer on every trade in the usual and ordinary course of business (R. 222). He did not testify that confirmations were mailed to Defendant, and no confirmations were produced on transactions of Defendant. There was no testimony that Defendant received one confirmation. Sub-paragraph (d) provides that if the party sought to be bound "admits in his pleading, testimony or otherwise in court that a contract was made for a sale of a stated quantity of described securities at a defined or stated price the statute of frauds requirement would be met." There was no admission by Defendant in pleading, testimony, or otherwise, that (1) a contract was made, (2) that there was a stated quantity on a given transaction (3) that the securities of such transaction were described, and (4) that there was a defined or stated price as to such security, or securities.

CONCLUSION

Defendant acknowledges that he had an account with Plaintiff. There was some evidence that Defendant had a special cash account with Plaintiff. However, Plaintiff's evidence was that about April 10, 1970, Defendant's account was converted to a <u>COD account</u>. The federal law permits a broker-dealer to handle individual <u>transactions</u> on a COD basis, but compels strict accounting for such transactions, separate recording of special accounts, specific authorization on transactions where there is an understanding between broker and customer, prompt delivery of the security in question to the customer, and full cash payment for the security upon delivery. All of Plaintiff's evidence indicated there were no segregation of accounts and it was candidly admitted that both the usual special account transactions and the COD transactions were all handled in one account. All of Defendant's stock was kept in one folder, without segregation. There was no evidence about any understandings between the parties on any transaction, about delivery of stocks on any transaction, about cash payment from Defendant on any transaction, or about any other specific term or terms of an account or transaction agreement.

One major difference between the usual special cash account transaction and the COD transaction is that a broker-dealer has seven business days in which to collect from a customer on the usual special cash account transaction, and thirty-five calendar days in which to collect from a customer on the COD transaction. Since Plaintiff saw fit to lump everything together in one account, without any specific segregation, it is impossible for the Court to determine what, if anything, Defendant might have owed Plaintiff.

It is respectfully submitted that Plaintiff, to avoid meeting Defendant's substantial and meritorius defense which had application to one kind of transaction but not the other, consciously changed its position. In so doing, it was unable to prove its case.

Accordingly, this Court should reverse the trial court on any relief granted Plaintiff, and should modify the relief granted on the counter-claim, awarding

Defendant the full relief sought in the Counter-claim First Cause of Action.

Costs and attorney's fees should be awarded Appellant-Defendant.

Respectfully submitted,

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Received two copies of this APPELLANT'S BRIEF this _____ day of December, 1972.

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