

1990

H. Glenn Olson v. Park-Craig-Olson, Inc. and J. Samuel Park, and Ellis Edward Craig : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

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

Reed L. Marineau; Bryce D. Panzer; Snow, Christensen and Martineau; Attorneys for Appellee.

Brent R. Armstrong; Jeffrey W. Shields; Paul M. Simmons; Suttter, Axland, Armstrong and Hanson; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *Olson v. Park-Craig-Olson, Inc. and Craig*, No. 900545.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3291

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

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
K & U

SL
A10

DOCKET NO. _____

960545-CA

IN THE UTAH SUPREME COURT

H. GLENN OLSON,
Plaintiff-Appellee,
vs.
PARK-CRAIG-OLSON, INC. and
J. SAMUEL PARK,
Defendants-Appellants,
and
ELLIS EDWARD CRAIG,
Defendant.

Case No. 900056

Priority No. 16

90-0545-CA

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, UTAH
HONORABLE RICHARD H. MOFFAT

BRENT R. ARMSTRONG, ESQ. (#0124)
JEFFREY W. SHIELDS, ESQ. (#2948)
PAUL M. SIMMONS, ESQ. (#4668)
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Appellants
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

REED L. MARTINEAU, ESQ. (#2106)
BRYCE D. PANZER, ESQ. (#2509)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellee
10 Exchange Place #1100
Salt Lake City, Utah 84111
Telephone: (801) 521-9000

FILED

AUG 8 1990

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

H. GLENN OLSON,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	Case No. 900056
)	
PARK-CRAIG-OLSON, INC. and)	Priority No. 16
J. SAMUEL PARK,)	
)	
Defendants-Appellants,)	
and)	
)	
ELLIS EDWARD CRAIG,)	
)	
Defendant.)	

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, UTAH
HONORABLE RICHARD H. MOFFAT

BRENT R. ARMSTRONG, ESQ. (#0124)
JEFFREY W. SHIELDS, ESQ. (#2948)
PAUL M. SIMMONS, ESQ. (#4668)
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Appellants
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

REED L. MARTINEAU, ESQ. (#2106)
BRYCE D. PANZER, ESQ. (#2509)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellee
10 Exchange Place #1100
Salt Lake City, Utah 84111
Telephone: (801) 521-9000

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
A. Nature of the Case	2
B. Statement of Facts	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. THE TRIAL COURT ERRED IN CONCLUDING THAT OLSON WAS ENTITLED TO CONTRIBUTION FROM PARK	9
A. Park Was Not Liable for Contribution Because He Paid More Than His Proportionate Share of PCO's Debt to the Bank	9
B. Olson Did Not Pay More Than His Fair Share of the Debtt	11
II. THE TRIAL COURT ERRED IN CALCULATING THE AMOUNT OF CONTRIBUTION TO WHICH OLSON MAY HAVE BEEN ENTITLED	15

	<u>Page</u>
III. THE TRIAL COURT ERRED IN CONCLUDING THAT PARK'S COUNTERCLAIM DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED	17
A. Park's Counterclaim Should Not Have Been Dismissed If the Facts Alleged Would Entitle Him to Relief Under Any Legal Theory	17
B. Park Has Set Forth Facts Which Establish a Claim for Relief in Quantum Meruit	18
IV. THE TRIAL COURT ERRED IN AWARDING OLSON ATTORNEY FEES INCURRED IN THIS ACTION AS WELL AS IN THE EARLIER ACTION OF <u>FIRST</u> <u>SECURITY BANK V. PARK-CRAIG-OLSON, INC.</u>	28
CONCLUSION	30
ADDENDUM	33

TABLE OF AUTHORITIES

Cases

<u>Arrow Industries, Inc. v. Zions First National Bank</u> , 767 P.2d 935 (Utah 1988)	2, 18
<u>Berrett v. Stevens</u> , 690 P.2d 553 (Utah 1984)	24, 25, 27
<u>Brill v. Swanson</u> , 36 Wash. App. 396, 674 P.2d 211 (1984)	12, 14
<u>Bossard v. Sullivan</u> , 206 Mont. 392, 670 P.2d 1389 (1983)	13
<u>Chetopa State Bancshares, Inc. v. Fox</u> , 6 Kan. App. 2d 326, 628 P.2d 249 (1981)	29
<u>Colman v. Utah State Land Board</u> , 132 Utah Adv. Rep. 3 (Utah 1990)	2, 18
<u>Curtis v. Cichon</u> , 462 So.2d 104 (Fla. Dist. Ct. App. 1985)	12, 14
<u>Davis v. Olsen</u> , 746 P.2d 264 (Utah App. 1987)	18, 19
<u>Ferree v. State</u> , 784 P.2d 149 (Utah 1989)	1, 2
<u>First Nat'l Bank of Layton v. Egbert</u> , 663 P.2d 85 (Utah 1983)	29
<u>Gardner v. Bean</u> , 677 P.2d 116 (Utah 1984)	9, 16
<u>Hanover Ltd. v. Cessna Aircraft Co.</u> , 758 P.2d 443 (Utah Ct. App. 1988)	29
<u>Harris v. Handmacher</u> , 185 Ill. App. 3d 1023, 542 N.E.2d 77 (1989)	11, 15
<u>Miller v. Miles</u> , 400 S.W.2d 4 (Tex. Civ. App. 1966)	11, 12, 13, 14
<u>Olivetti Corp. v. Ames Business Sys., Inc.</u> , 319 N.C. 534, 356 S.E.2d 578 (1987)	1

	<u>Page</u>
<u>Peter Fabrics, Inc. v. S.S. "Hermes"</u> , 765 F.2d 306 (2d Cir. 1985)	29, 30
<u>Sacks v. Tavss</u> , 237 Va. 13, 375 S.E.2d 719 (1989)	16
<u>Sparks v. Gustafson</u> , 750 P.2d 338 (Alaska 1988)	20, 23
<u>Utah Farm Prod. Credit Ass'n v. Watts</u> , 737 P.2d 154 (Utah 1987)	29
<u>Western Coach Corp. v. Roscoe</u> , 133 Ariz. 147, 650 P.2d 449 (1982)	28

Constitution and Statutes

Utah Code Ann. § 70A-3-415(1) (1980)	29
Utah Code Ann. § 70A-3-415(5)	28-29
Utah Code Ann. § 78-2-2(3)(j)	1
Utah Constitution, article VIII, section 3	1

Other Authorities

18 Am. Jur. 2d <u>Contribution</u> § 22 (1985)	15
18 Am. Jur. 2d <u>Contribution</u> § 23	13
18 Am. Jur. 2d <u>Contribution</u> § 24	16
38 Am. Jur. 2d <u>Guaranty</u> § 128 (1968)	11, 12
1 <u>Corbin on Contracts</u> , § 19 (1963)	19
13A <u>Fletcher Cyclopedia of the Law of Private Corporations</u> § 6219 at 35 (rev. perm. ed. 1984)	12
Restatement of Restitution § 1, comment <u>b</u> (1936)	20
Restatement of Restitution § 76	28

	<u>Page</u>
Restatement of Restitution § 80	28
Restatement of Restitution § 80, comment <u>c</u>	28
Restatement of Restitution § 80, comment <u>d</u>	28
Restatement of Restitution § 85, comment <u>c</u>	11
Restatement of Restitution § 85, comment <u>e</u>	10, 11
Restatement of Restitution § 154, comment <u>e</u>	10
Restatement of Security § 149	9
Restatement of Security § 154(4) (1941)	11
Restatement of Security § 154, comment <u>c</u>	16
Restatement of Security § 154, comment <u>d</u>	16
Restatement of Security § 154, comment <u>f</u>	11, 16
<u>Webster's New Collegiate Dictionary</u> 580 (1977)	26

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to the Utah Constitution, article VIII, section 3, and Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES

1. Did the trial court err in concluding that the plaintiff, Olson, was entitled to contribution from defendant Park?

On appeal from a summary judgment this Court resolves only legal issues and does not defer to the trial court's rulings. It determines only whether the trial court correctly held that there were no genuine issues of material fact and whether the trial court erred in applying the governing law to the facts. Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

2. If Olson was entitled to contribution from Park, did the trial court err in calculating the amount of contribution to which Olson was entitled?

This is a question of law which the Court reviews for correctness. See Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Olivetti Corp. v. Ames Business Sys., Inc., 319 N.C. 534, 356 S.E.2d 578, 586-87 (1987).

3. Did the trial court err in concluding that Park's counterclaim did not state a claim upon which relief could be granted?

The Court will affirm a dismissal for failure to state a claim only if it clearly appears that the claimant can prove no set of facts in support of his claim. Colman v. Utah State Land Board, 132 Utah Adv. Rep. 3, 4 (Utah 1990). In making this determination the appellate court must accept the material allegations of the claimant's pleading as true, construe the pleading in the light most favorable to the claimant and indulge all reasonable inferences in his favor. Id.; Arrow Indus., Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988).

4. Did the trial court err in awarding Olson attorney fees incurred in the present action as well as in the earlier action of First Security Bank v. Park-Craig-Olson, Inc.?

This is a question of law, which the Court reviews for correctness. See Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

STATEMENT OF THE CASE

A. Nature of the Case.

The plaintiff, H. Glenn Olson, brought this action seeking indemnity from defendant Park-Craig-Olson, Inc. and contribution from defendants J. Samuel Park and Ellis Edward Craig for amounts he paid to First Security Bank as a co-guarantor on certain notes. Defendant Park counterclaimed against Olson for unreimbursed expenditures he advanced and services he per-

formed in obtaining releases of other obligations that Olson had guaranteed. The trial court dismissed Park's counterclaim and entered summary judgment in favor of Olson. Park-Craig-Olson, Inc. and Park have appealed the trial court's Order Dismissing Counterclaim of J. Samuel Park; Summary Judgment Against Park-Craig-Olson, Inc. and J. Samuel Park; and Order Denying Objections to Proposed Orders.

B. Statement of Facts.

1. Defendant Park-Craig-Olson, Inc. ("PCO") was at all relevant times a Utah corporation. Except for the period from January 1985 through September 1987, defendant J. Samuel Park held 54.33 percent of the outstanding shares of the corporation. At all relevant times defendant Ellis Edward Craig owned 29 percent and the plaintiff, H. Glenn Olson, owned 16.67 percent of the outstanding shares of the corporation. Record ("R.") at 240-41 ¶ 2.

2. PCO owned and operated six Marie Callender restaurants--one in Arcadia, California, and five in Utah (on Foothill Drive in Salt Lake City, on 3900 South in Salt Lake City, in Bountiful, in Midvale and in West Valley City). Id. at 241 ¶ 3.

3. In operating the restaurants, PCO incurred certain debts, including obligations on two notes to First Security Bank (the "Bank"). The first note, dated November 17, 1981, was for the principal amount of \$215,000.00. The second note, dated

January 6, 1983, was in the principal amount of \$225,000.00. Id. at 243-44 ¶ 7; 103 ¶ 3; 117; 120.

4. PCO was also obligated under real estate leases for each of its six locations. Id. at 245 ¶ 8.

5. By separate instruments, Park, Craig and Olson each personally guaranteed PCO's indebtedness to the Bank. The personal liability of each guarantor was limited to \$550,000. Id. at 103 ¶ 4; 124-26.

6. Park, Craig and Olson also personally guaranteed certain other obligations of PCO, including the leases for the West Valley City, Bountiful and Foothill Drive stores and two master franchise agreements with Marie Callender Pie Shops, Inc. Olson personally guaranteed a renewal lease on the Arcadia store for which Park was not a guarantor. Id. at 245-46; 403 ¶ 11.

7. On January 30, 1985, defendant Park sold his shares in PCO to a group of investors known as the Marsh Group. Id. at 242 ¶ 4.

8. In the summer of 1987, the Marsh Group defaulted on its payments to Park. At this time Park learned that the restaurants owned and operated by PCO were in serious financial trouble, threatening the investment of PCO's shareholders, including Mr. Olson. Id. at 243 ¶ 6.

9. PCO defaulted on its payments to the Bank, and in June 1987 the Bank sued PCO and Park, Craig and Olson, as guarantors on the notes. Id. at 107-16.

10. In September 1987, Park repossessed his shares in PCO from the Marsh Group. Id. at 243 ¶ 6; 400 ¶ 7.

11. From August 1987 through June 1988 Park personally expended his own time and money to try to save PCO's restaurants. He negotiated with creditors, sought sources to refinance PCO's debts, and sought buyers for PCO's assets. Id. at 247-49.

12. Despite the fact that Olson was a shareholder of PCO and was personally liable as guarantor on several of PCO's obligations, Olson did not assist in any of these efforts and refused to participate in any negotiations with creditors or to contribute any funds to the work-out efforts. Id. at 248 ¶ 13.

13. Through Park's efforts and expenditure of funds, Olson was released from his liability as guarantor on the leases of the West Valley City, Bountiful, Foothill Drive and Arcadia stores, either directly or through cancellation of the underlying obligations. The landlord of the West Valley City store, however, insisted that Park remain personally liable as a guarantor on that lease, which he did. Id. at 250-52.

14. At the time Olson was released from his guaranty of the West Valley City lease, the lease had a remaining term of nineteen years at the rate of the greater of \$6,424.50 or 5.5

percent of gross sales per month, for a minimum total remaining obligation of \$1,464,786.00. The West Valley City location was the least profitable of all the PCO locations and was incurring average net operating losses of \$15,000.00 per month, including the lease payment. Id. at 251 ¶ 15(a).

15. At the time Olson was released from liability as a guarantor of the lease on the Arcadia store, there was \$91,948.07 in accrued and unpaid percentage rent due under that lease. Id. at 407 ¶ 17(b). Park was not a guarantor of the Arcadia lease. Id. at 245-46 ¶ 8(e).

16. At the time Olson was released from liability as a guarantor of the lease on the Foothill Drive store, there was \$70,935.18 in accrued and unpaid percentage rent due under that lease. Id. at 408 ¶ 17(c).

17. At the time Olson was released from liability as a guarantor of the lease on the Bountiful store, the lease had a remaining term of 208 months at the rate of \$4,420.00 per month, for a total remaining liability of \$919,360.00. The Bountiful location was historically unprofitable and was eventually closed because of poor performance. Id. at 252 ¶ 15(d).

18. A significant part of Park's efforts was also expended negotiating the release of the guarantors on the two franchise agreements with Marie Callender Pie Shops, Inc.-- with respect to the Arcadia and Foothill Drive stores. Through Park's

efforts, he obtained the termination of both franchise agreements and the forgiveness of all accrued and unpaid franchise fees. The effect of those efforts was to release Olson from liability for accrued and unpaid franchise fees of \$115,375.47 as to the Arcadia store, and \$96,459.38 as to the Foothill Drive store, for a total of \$211,834.85. Id. at 408-09 ¶ 18.

19. Park negotiated a settlement with the Bank by which he agreed to pay the Bank \$235,000.00 for the release of PCO, Park and Craig from any liability on any obligations to the Bank. The Bank reserved its right to pursue Olson for approximately \$80,000.00 still due on the notes. Id. at 248-49 ¶ 13; 257-70.

20. Park's efforts culminated in the sale of PCO's assets to Marie Callender Ventures, Inc., in June 1988. Id. at 249 ¶ 14; 136-93.

21. As part of that transaction, Park was reimbursed for the \$235,000.00 he paid to the Bank. Id. at 250 ¶ 14.

22. The Bank obtained a judgment against Olson, and Olson paid the Bank \$84,307.65. Id. at 103 ¶¶ 5 & 6; 128-33.

23. Olson incurred and paid attorneys' fees of \$1,310.50 in connection with the Bank's lawsuit. Id. at 104 ¶ 8.

24. Olson then brought this action against PCO, Park and Craig, seeking, under his first claim, indemnity from PCO

and, under his second claim, contribution from Park and Craig. Id. at 2-7.

25. Park counterclaimed against Olson, seeking payment for monies he advanced and services he performed to rescue PCO and to obtain releases of PCO's obligations that Olson had personally guaranteed. Id. at 397-411.

26. The trial court dismissed Park's counterclaim, granted summary judgment in favor of Olson and against all defendants, and denied the defendants' objections to the form of the orders. Id. at 482-83; 528-30; 592-94; 605-08; 612-14; 615-18. The judgment against PCO included an award of \$2,500.00 for attorney fees incurred in this action. Id. at 616 ¶ C.

SUMMARY OF ARGUMENT

Park and Olson were co-guarantors of PCO's debt to the Bank. Olson was only entitled to contribution from Park if Olson paid more than his proportionate share of PCO's debt and Park did not pay his proportionate share. Neither condition was met in this case. The trial court erred in concluding that Olson was entitled to contribution from Park because Park had paid more than his share of PCO's debt (point I-A) and Olson did not pay more than his share (point I-B).

Even if the trial court were correct that Olson was entitled to contribution, it erred in measuring the amount of contribution. (Point II.)

The trial court also erred in concluding that Park's counterclaim did not state a claim for relief. The counterclaim set forth facts that, if proved, would entitle Park to relief under a theory of quantum meruit. (Point III.)

Finally, the trial court erred in awarding Olson his attorney fees incurred both in the Bank's action against him and in this action. (Point IV.)

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT OLSON WAS ENTITLED TO CONTRIBUTION FROM PARK.

A. Park Was Not Liable for Contribution Because He Paid More Than His Proportionate Share of PCO's Debt to the Bank.

A surety or guarantor who discharges more than his proportionate share of his principal's debt is entitled to contribution from a co-guarantor or co-surety. Gardner v. Bean, 677 P.2d 1116, 1118 (Utah 1984); Restatement of Security § 149 (1941). Olson claimed that he was entitled to contribution from Park and Craig because the **three** of them were co-guarantors of PCO's debt to the Bank and Olson had paid more than his share of that debt.

Nowhere in the record does it state the entire amount owing to the Bank on April 15, 1988, the date Olson made the payment for which he seeks contribution. For this reason alone, the trial court erred in granting Olson's motion for summary judgment against Park because, without knowing the entire amount of the debt, the trial court could not say as a matter of law that Olson had paid more than his proportionate share of the debt--a prerequisite to Olson's claim for contribution. Nevertheless, assuming that PCO's total liability was the total amount paid to the Bank on PCO's debts, the total liability would have been \$319,307.65 (the \$235,000 paid by Park plus the \$84,307.65 paid by Olson). Assuming further that Olson is correct in arguing that the co-guarantors' proportionate share of liability should have been based on their respective percentage of ownership in PCO (a proposition Park disputes, see infra, part I-B), Olson was still not entitled to contribution from Park.

The law is clear that, where one guarantor pays less than the entire debt owed by the principal but more than his share, he can recover from any co-guarantor who has not paid his share "such excess up to the amount of the unpaid share of the other" Restatement of Restitution § 85 comment e (1936). Olson's payment was clearly less than the entire amount that PCO owed the Bank. Thus, he was only entitled to contribution from Park if Park had not paid his share of the debt. Under

Olson's own theory of proportionality, Park's share of the debt was \$173,479.84 (\$319,307.65 x 54.33 percent, Park's percentage of ownership in PCO). It is undisputed that Park paid the Bank \$235,000 on PCO's obligation. Park therefore paid more than his proportionate share of the obligation and could not be liable to Olson for contribution. The fact that Park may have later been reimbursed for his \$235,000 payment to the Bank is simply irrelevant. See Restatement of Security § 154(4).¹

B. Olson Did Not Pay More Than His Fair Share of the Debt.

The trial court also erred in concluding that Olson had paid more than his proportionate share of the entire debt owed to the Bank.

The general rule of apportionment in contribution is that all co-obligors must contribute equally in discharging their common obligation. See, e.g., Harris v. Handmacher, 185 Ill. App. 3d 1023, 542 N.E.2d 77, 80 (1989); Miller v. Miles, 400 S.W.2d 4, 7 (Tex. Civ. App. 1966); 38 Am. Jur. 2d, Guaranty § 128 (1968); Restatement of Security § 154 comment f (1941). This is especially true where the co-guarantors are all equally liable, see Restatement of Restitution § 85 comment e (1936),

¹ The fact that Park was reimbursed might bar or limit any claim he may have had against Olson for contribution, see Restatement of Restitution § 85 comment c, but Park has not sought contribution from Olson for any payment Park made to the Bank in excess of his proportionate share.

or where, by the terms of their contracts of guaranty, they provide that each shall be jointly and severally liable and that each shall bear an equal proportion of the obligation, see 38 Am. Jur. 2d Guaranty § 128; Curtis v. Cichon, 462 So.2d 104, 106 (Fla. Dist. Ct. App. 1985). Park, Craig and Olson each guaranteed PCO's indebtedness to the Bank up to \$550,000, and each was jointly and severally liable. R. at 124-26. The fact that they were all equally liable to the Bank (up to \$550,000 each) shows that they in fact intended to bear equally any liability to the Bank.

The common law rule of equal contribution holds true even if the loan is on behalf of a corporation and the guarantors are shareholders of the corporation whose ownership interests in the corporation are not equal. Curtis, 462 So.2d at 106; Brill v. Swanson, 36 Wash. App. 396, 674 P.2d 211, 212-13 (1984); Miller v. Miles, 400 S.W.2d at 7. This is because the guarantors' liability in such a case arises from the guaranty agreement, not from their status as stockholders. Curtis, 462 So.2d at 105; 13A C. Thompson, Fletcher Cyclopedica of the Law of Private Corporations § 6219 at 35 (rev. perm. ed. 1984). Park, for example, remained personally liable on his guaranty even after he severed his relationship with PCO in January 1985 and was not a shareholder in PCO in June 1987, when the Bank sued him on his guaranty.

In Miller three guarantors jointly and severally agreed to guarantee the indebtedness of a corporation. The guarantors' proportionate shares of stock in the corporation were 52, 40 and 8 percent. The corporation defaulted on the note, and the obligor who owned 52 percent of the stock paid off the balance and filed suit against the owner of 40 percent of the stock for contribution. The jury used the 40 percent amount of stock ownership to determine the amount of contribution payable. The court of appeals reversed, holding that, in the absence of an agreement limiting the liability of the guarantors as between themselves, coguarantors "are required to bear equally the loss occasioned them by default of the principal obligor." 400 S.W.2d at 7. The same rule should apply in this case. There was no agreement among the three guarantors limiting their liability among themselves. In fact, they each agreed to bear the same liability to the Bank. Therefore they should each be required to bear equally PCO's obligation, each being liable for one-third of the total debt.

An exception to the general rule of equal contribution applies where the co-obligors have received unequal benefits from the common obligation. In such a case, each co-obligor must contribute according to the benefit received. See, e.g., Bossard v. Sullivan, 206 Mont. 392, 670 P.2d 1389, 1391 (1983); 18 Am. Jur. 2d Contribution § 23 at 31 (1985). Olson argues that,

because his and Park's ownership of stock in PCO was unequal, the exception applies and each should be liable in proportion to his shares of stock in PCO. Apart from the fact that other courts have rejected similar arguments, see, e.g., Curtis, 462 So.2d at 105-06; Miller, 400 S.W.2d at 7-5; Brill, 674 P.2d at 213, Olson has failed in his burden of proving that the benefits he and Park received from their common obligation were unequal.

The record shows that the Bank's first loan to PCO was made on November 17, 1981, and was for a period of five years. R. at 10. The Bank's second loan was made on January 6, 1983, and was also for a period of five years. Id. at 13. PCO defaulted on the loans some time before May 26, 1987. Id. at 12-15. Although Park was a stockholder of PCO when the loans were made and the guarantees given, he sold his stock in PCO in January 1985 and did not repossess it until September 1987, after PCO defaulted on the loans and the Bank brought its action. Id. at 242 & 246. Park remained personally liable as a guarantor on the obligations throughout this period but, because he had sold his PCO shares, did not receive any benefit from the loans after January 1985. Thus, there was a period of over two years in which Park received no benefit from the common obligations to the Bank while Olson, as a stockholder in PCO, did receive a benefit. The trial court erred in requiring Park to pay a dispro-

portionate amount in contribution absent proof that he received disproportionately large benefits from the common obligation. In the absence of such proof, it is presumed that all joint obligors benefited equally and hence must contribute equally as among themselves. Harris v. Handmacher, 542 N.E.2d 77, 80 (Ill. App. Ct. 1989); 18 Am. Jur. 2d Contribution § 22 at 30-31. And in fact the contracts of guaranty show that the parties were equally liable to the Bank, despite their different percentages of stock ownership.

Because Park, Craig and Olson were all equally liable as guarantors, Olson's proportionate share of PCO's debt to the Bank was one-third of the total debt, or \$106,435.88 (\$319,307.65 divided by 3). Olson only paid \$84,307.65. Because he did not pay more than his proportionate share, he was not entitled to contribution from Park.

II. THE TRIAL COURT ERRED IN CALCULATING THE AMOUNT OF CONTRIBUTION TO WHICH OLSON MAY HAVE BEEN ENTITLED.

Even if the trial court were otherwise correct in concluding that Olson was entitled to contribution from Park, the court erred in calculating the amount of contribution.

The trial court granted Olson judgment against Park in the principal amount of \$45,804.35. It arrived at this figure by applying Park's percentage of stock ownership in PCO (54.33 percent) to the amount Olson paid to the Bank (\$84,307.65). R.

at 617. Even if Olson were otherwise correct in arguing that Park's and Craig's liability for contribution should be based on the parties' respective percentages of stock ownership in PCO, the principal obligor, the trial court applied the wrong measure of damages.

A co-guarantor has a right to contribution only after he has paid more than his proportionate share of the entire debt and can be reimbursed only for amounts he paid in excess of his proportionate share. See Gardner v. Bean, 677 P.2d 1116, 1118 (Utah 1984); Restatement of Security § 154 comments c, d & f; 18 Am Jur. 2d Contribution § 24. In determining the plaintiff's proportionate share in a case such as this, the court must consider the amount owed and not the amount paid in settlement. Sacks v. Tavss, 237 Va. 13, 375 S.E.2d 719, 721 (1989). Even if Olson were correct that his proportionate share was 16.67 percent (his percentage ownership in PCO), his proportionate share of the total debt would be \$53,228.59 (16.67 percent of \$319,307.65). He is only entitled to contribution for the amount he paid in excess of his proportionate share, or in other words, for \$31,079.06 (\$84,307.65 minus \$53,228.59). This amount alone is less than the judgment against Park. But Park would only be liable for his proportionate share of this amount. Using Olson's theory of proportionality, as between Park and Craig, Olson's co-obligors, Park's share of the overpayment would be 65.2 percent

or \$20,263.55, since Park owned 65.2 percent of the total shares of PCO stock owned by Park and Craig. Thus, the trial court's judgment is over twice what it should be, even under Olson's theory of the case.

The error in the trial court's judgment is apparent if one looks at the judgment from another perspective. The trial court granted Olson judgment against Park in the principal amount of \$45,804.35 and judgment against Craig in the principal amount of \$24,449.22, for a combined liability to Olson of \$70,253.57. See R. at 617 & 529. Thus, under the trial court's ruling, Olson was ultimately liable for only \$14,054.08 (\$84,307.65 minus \$70,253.57). That amounts to only 4 percent of the total obligation of \$319,307.65--well below the 16.67 percent that Olson claims was his proportionate share.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT PARK'S COUNTERCLAIM DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

A. Park's Counterclaim Should Not Have **Been** Dismissed If the Facts Alleged Would Entitle Him to Relief Under Any Legal Theory.

The trial court dismissed Park's counterclaim on the grounds that it failed to state a claim on which relief could be granted. See R. at 432, 482-83.

A dismissal is a severe measure and should not have been granted unless it was clear that Park was not entitled to relief

under any state of facts which could be proved in support of his claim. See, e.g., Colman v. Utah State Land Board, 132 Utah Adv. Rep. 3, 3-4 (Utah 1990); Arrow Indus., Inc. v. Zions First Nat'l Bank, 767 P.2d 935, 936 (Utah 1988). "The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." Colman, 132 Utah Adv. Rep. at 4.

In reviewing the dismissal of Park's counterclaim, the Court must accept the material allegations of the counterclaim as true and must construe the counterclaim in the light most favorable to Park and draw all reasonable inferences in his favor. Id.; Arrow Indus., 767 P.2d at 936. As discussed below, Park has set forth facts which establish a claim for relief under a theory of quantum meruit.

B. Park Has Set Forth Facts Which Establish a Claim for Relief in Quantum Meruit.

Quantum meruit allows recovery for labor performed in a variety of circumstances in which the claiming party would not be able to sue on an express contract. Davis v. Olson, 746 P.2d 264, 268 (Utah Ct. App. 1987). The purpose of allowing recovery under the theory of quantum meruit is to prevent the defendant's enrichment at the plaintiff's expense. Id. at 269.

Quantum meruit has two distinct branches. The first branch consists of contracts implied in law (also known as quasi-contract or unjust enrichment), the elements of which are: "(1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." Id. The second branch consists of contracts implied in fact, the elements of which are: (1) the defendant requested the plaintiff to do the work; (2) the plaintiff expected the defendant to compensate him for his services; and (3) the defendant knew or should have known that the plaintiff expected compensation. Id. As neither party has claimed the existence of an "implied in fact" contract based on conduct, Park will concentrate only upon the first branch of quantum meruit, namely, contract implied in law (quasi-contract or unjust enrichment).

A quasi-contractual relation is one that is "created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent." See 1 A. Corbin, Corbin on Contracts § 19 at 46 (1963). Considerations of equity and morality play a large part in finding a quasi-contract. Id.

Park's counterclaim states a claim upon which relief can be granted since all three elements of a claim for quasi-contractual relief are pled and each is supported by the record.

1. Olson Received a Benefit.

A person confers a benefit upon another if he gives the other some interest in money, land or possessions, performs services beneficial to or at the request of the other, satisfies a debt of the other or in any way adds to the other's advantage. Restatement of Restitution § 1, comment b. The facts in the record establish that Park conferred a benefit on Olson by securing his release from literally millions of dollars' worth of potential liability as a personal guarantor on four leases and two franchise agreements: the leases on the West Valley City, Bountiful, Arcadia and Foothill Drive stores and the franchise agreements with respect to the Arcadia and Foothill Drive stores. These obligations represented some \$2.8 million in potential liability for Olson. Cf. Sparks v. Gustafson, 750 P.2d 338, 342 (Alaska 1988) (plaintiff's services by which he kept the defendant's business operating and paid its debts conferred a benefit on the defendant).

Olson himself admitted in his deposition that Park's services and efforts in obtaining the releases of the guarantees were of value to him:

Q. (By Mr. Shields) Let me represent to you that you have, in fact, been released from your guarantees on the West Valley and Bountiful leases. Assuming that

representation to be true, obtaining those releases was of value to you, was it not, in terms of forgiving your guarantee obligation?

A. Yes.

Olson Deposition at p. 43, lines 12-18.²

2. Olson Had an Appreciation or Knowledge of the Benefit.

From the record, one can reasonably infer that Olson knew of the benefit that he received from Park's efforts. Olson knew that he was obligated as a guarantor on the notes to the Bank, on the leases and on the franchise agreements because he was a party to those guarantees. See R. at 401-03 ¶¶ 9-11. Olson knew that PCO was in dire financial straits as early as February 19, 1987, when he telephoned defendant Craig and proposed that they, as minority stockholders, sue Park and two successive management groups. See id. at 512 ¶ 4. Moreover, Olson investigated PCO's financial affairs in June 1987, when he contacted an officer of First Security Bank. Olson Deposition at 35. Olson knew that Park was trying to negotiate compromises with creditors, a sale of PCO's assets and a release of their guaranty obligations because Park asked him "to participate in the negotiations or to help in any way, either financially or in person," but Olson refused. R. at 254 ¶ 15(f) & 248 ¶ 13. Finally, Olson

² The cited portions of Olson's deposition are reproduced in the Addendum.

and his counsel had an opportunity to review the proposed agreement for the sale of PCO's assets to Marie Callender Ventures, Inc. before the sale took place and knew or should have known that, as a result of the sale that was negotiated by Park, Olson would be released from his personal guarantees on the Bountiful and West Valley City store leases. Olson Deposition at 44-45 & ex. 6. From all of these facts, one can conclude that Olson knew of the benefit he received from Park's efforts.

3. The Circumstances Surrounding the Benefit Conferred on Olson Made It Unjust for Him to Retain the Benefit Without Paying for It.

It is clear from the allegations of the counterclaim that Olson refused to participate in the negotiations which saved PCO from ruin. Without Park's substantial efforts in obtaining a buyer, Olson would have been subject to joint and several liability on the four real estate leases and the two franchise agreements. Park's services resulted in the release of Olson as a personal guarantor on over a million dollars' worth of current or potential liabilities. Park repeatedly asked Olson to participate in the negotiations with creditors and potential buyers and to contribute to the transactions that were necessary to save PCO from ruin, but Olson refused to participate in any way. Yet, when Park's efforts resulted in releases of Olson from personal liability on the four real estate leases and the two franchise agreements, Olson readily accepted the fruits of

Park's labors. Under the circumstances, it would be unjust for Olson to retain the benefit of Park's services without paying for them.

This case is similar to Sparks v. Gustafson, 750 P.2d 338 (Alaska 1988). The plaintiff in that case performed management services that kept the defendant's business operating, paid its debts and made substantial repairs and improvements to its property. 750 P.2d at 342. The court held that it would be just to require the defendant to compensate the plaintiff because the plaintiff's services were of the type for which one would ordinarily expect to be paid and benefited the defendant (although they may also have benefited the plaintiff). See id. at 343. Similarly, Park's extensive efforts to save PCO by negotiating with and paying off creditors were the sort for which one would ordinarily expect to be paid, and Park in fact asked Olson to contribute to these efforts, "either financially or in person." R. at 254 ¶ 15(f). Park's efforts clearly benefited Olson, and he accepted and retained that benefit. Under the circumstances, it would be inequitable to allow him to retain the benefit without paying for it.

Olson argued below, however, that his retention of the benefit of Park's services was not inequitable because Park performed the services for his own advantage, making any benefit to Olson "incidental."

Olson relies for his position on Berrett v. Stevens, 690 P.2d 553 (Utah 1984). The plaintiffs in that case sold real property to the defendants under contract. The defendants gave Murray First Thrift (MFT) a mortgage on the property to secure a loan for improvements. To insure repayment of the loan, MFT required the defendants to obtain credit life insurance policies. One of the buyers died, and a dispute arose over the amount due under the life insurance policy. At the same time, the defendants became delinquent in their payments to the plaintiffs under the real estate contract. The plaintiffs agreed to accept a deed from the defendants in lieu of foreclosure and to assume the obligation to MFT. The plaintiffs further agreed that, if the defendants' claim for additional insurance proceeds was resolved in their favor and the "disputed amount" was either applied against the loan from MFT or paid directly to the plaintiffs, the plaintiffs would pay "said same amount" to the defendants. At the time the parties entered into this agreement, the defendants were claiming an additional \$10,000.00 in insurance proceeds. The insurance company eventually paid an additional \$20,000.00. The plaintiffs paid the defendants \$10,000.00 of this amount and applied the rest to the defendants' obligation to MFT, which the plaintiffs had assumed. The defendants, however, claimed that they were entitled to the entire \$20,000.00.

The court concluded that there was "little doubt that plaintiffs did receive some benefit" from the defendants' efforts in making the claim for additional insurance proceeds and pursuing negotiations with MFT and the insurance company. 690 P.2d at 557. "However," the court continued, "the mere fact that a person benefits another is not by itself sufficient to require the other to make restitution. The value of services performed by a person for his own advantage and from which another benefits incidentally are not recoverable." Id. at 557-58 (footnotes omitted).³ Olson relies on this language for his argument that Park failed to state a claim for unjust enrichment. Olson argues that Park performed the services for his own advantage, so any benefit to Olson must have been incidental.

Olson is wrong on both counts. Park's services were not performed for his own advantage, and any benefit to Olson was not "incidental."

Park's services were meant to save PCO from financial ruin. Park first advanced money to save PCO in August 1987. At that time, Park was not even a stockholder of PCO. (He repos-

³ Berrett did not establish a new element for a claim for unjust enrichment. The party making such a claim does not need to prove that the services he performed were not incidental. Rather, whether or not the services were performed for his own advantage and whether or not any benefit to the other party was incidental are simply factors the court may consider in determining whether retention of the benefit without payment would be inequitable under the circumstances. See 690 P.2d at 557-58.

sessed his PCO shares from the Marsh Group in September 1987.) See R. at 404 ¶ 14 & 403 ¶ 13. Olson, on the other hand, was a shareholder of PCO throughout the relevant time. More importantly, with respect to two of the obligations, Park's efforts to secure Olson's release from personal liability did not result in any corresponding benefit to Park. First, Park secured Olson's release from liability as a guarantor on the lease of the Arcadia store, even though Park was not a guarantor on that lease and thus was not personally liable on that obligation, as Olson was. Second, through Park's sole efforts the landlord of the West Valley City store was persuaded to release Olson as a guarantor on that lease but insisted that Park remain personally liable as a guarantor on the lease, which he did. One can hardly say that Park performed that service for his own advantage where he remained personally liable for a lease obligation of \$1,464,786 and Olson emerged with absolutely no personal liability whatsoever. Thus, Park's services were performed for PCO's advantage, not Park's, and benefited Olson in ways Park was not benefited.

Moreover, any benefit to Olson was not "incidental." "Incidental" means "occurring merely by chance or without intention or calculation." Webster's New Collegiate Dictionary 580 (1977). Park spent a significant part of his efforts to save the PCO enterprise in negotiating the release of Olson from the four

leases and two franchise agreements. R. at 406-08 ¶¶ 17 & 18. One can infer from this that the release of Olson from his personal liability on those obligations did not occur "merely by chance or without intention or calculation." In this regard, this case is distinguishable from Berrett, the case Olson relies on. The benefit in that case "was clearly unanticipated by either of the parties." 690 P.2d at 557 (quoting the trial court's memorandum decision). Moreover, Berrett involved an express contract that clearly limited the plaintiffs' liability. See 690 P.2d at 557. In the present case there is no explicit limitation based on an express contract, and the benefit conferred on Olson was clearly not "incidental."

Park's extensive services, rendered in the face of Olson's refusal to involve himself in the affairs of the corporation, directly resulted in the release of Olson from over a million dollars' worth of personal guarantees. Olson himself, in his deposition, admitted that those services were of value to him; certainly, these are "circumstances that would make it unjust for the [plaintiff] to retain the benefit without paying for it." Berrett, 690 P.2d at 557.

IV. THE TRIAL COURT ERRED IN AWARDING OLSON ATTORNEY FEES INCURRED IN THIS ACTION AS WELL AS IN THE EARLIER ACTION OF FIRST SECURITY BANK V. PARK-CRAIG-OLSON, INC.

A guarantor who has paid the principal obligation is entitled to reimbursement from the principal debtor. See, e.g., Western Coach Corp. v. Roscoe, 133 Ariz. 147, 650 P.2d 449, 453 (1982); Restatement of Restitution §§ 76 & 80. If the guarantor became a surety on the principal obligation with the consent or because of the fault of the principal debtor, he is entitled to reimbursement for all expenses reasonably incurred by him in connection with the obligation. Restatement of Restitution § 80 & comment d. The record in this case is silent as to whether or not Olson became a guarantor with the consent or because of the fault of PCO. If he voluntarily became surety for PCO without PCO's consent or fault, he is only entitled to reimbursement to the extent that his payment to the Bank diminished the debt of PCO. Id. comment c. Because Olson failed to show that he became a guarantor with PCO's consent or fault, he is entitled to be reimbursed only for the payment he made on PCO's debt and not for any attorney fees incurred in the Bank's action against him, since the latter did not diminish PCO's debt to the Bank.

Moreover, Olson is not entitled to be reimbursed for his attorney fees in this action. In Utah, attorney fees may be awarded only if provided by statute or contract. The only statute that Olson relied on in the trial court--Utah Code Ann.

§ 70A-3-415(5)--is inapplicable. That statute states, "An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party." The statute defines "accommodation party" as "one who signs the instrument . . . for the purpose of lending his name to another party to it." Utah Code Ann. § 70A-3-415(1) (emphasis added). Olson did not sign the instruments that he claims give him his right to attorney fees, namely, PCO's notes to the Bank. Thus, he is not an accommodation party within the meaning of the statute. Cf. Utah Farm Prod. Credit Ass'n v. Watts, 737 P.2d 154, 158-59 (Utah 1987) (an accommodation party is one who signs the note as a surety); First Nat'l Bank of Layton v. Egbert, 663 P.2d 85, 86 (Utah 1983) (cosigners of notes were accommodation parties).

Moreover, there is no contract between Olson and PCO entitling Olson to recover his attorney fees incurred in this action. Under the circumstances, the general rule applies, namely, that an indemnitee cannot recover his attorney fees incurred in establishing his right to indemnification. See, e.g., Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 450 (Utah Ct. App. 1988); Peter Fabrics, Inc. v. S.S. "Hermes", 765 F.2d 306, 316 (2d Cir. 1985); Chetopa State Bancshares, Inc. v. Fox, 6 Kan. App. 2d 326, 628 P.2d 249, 256 (1981). The reason for this rule is that costs incurred in establishing the existence of an

obligation to indemnify are costs incurred for breach of an implied contract to indemnify and thus "fall within the ordinary rule requiring a party to bear his own expenses of litigation." Peter Fabrics, Inc., 765 F.2d at 316 (citation omitted).

For these reasons, the trial court erred in awarding Olson his attorney fees incurred in this and the earlier action of First Security Bank v. Park-Craig-Olson, Inc., et al.

CONCLUSION

For the reasons discussed in part I, supra, the Court should reverse the trial court's grant of summary judgment against Park on Olson's second claim for relief and remand this case to the district court for entry of judgment in favor of Park. At a minimum, for the reasons discussed in part II, supra, the case should be remanded so that the amount of the judgment against Park can be corrected.

For the reasons discussed in part III, supra, this Court should reverse the dismissal of Park's counterclaim and remand this action to the trial court to allow that claim to be decided on its merits.

On Olson's first claim for relief, the Court should reverse that part of the judgment awarding Olson his attorney's fees and remand this action to the district court for entry of a modified judgment in favor of Olson.

DATED this 8th day of August, 1990.

SUITTER AXLAND ARMSTRONG & HANSON

Paul M. Simmons

BRENT R. ARMSTRONG, Esq.

JEFFREY W. SHEILDS, Esq.

PAUL M. SIMMONS, Esq.

Attorneys for Appellants

(Original signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Brief of Appellants was mailed, postage prepaid thereon, this 8th day of August, 1990, to:

Reed L. Martineau, Esq.
Bryce D. Panser, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellee
10 Exchange Place #1100
Salt Lake City, Utah 84111

Paul M. Simmons

(Original signature)

A D D E N D U M

1 GOING TO GO AFTER P.C.O., AFTER ELLIS CRAIG OR AFTER ME FOR
2 THAT PAYMENT. EVENTUALLY, I HAD TO PAY IT.

3 Q ALL RIGHT. BUT WHEN YOU GOT SUED BY FIRST
4 SECURITY IN JUNE OF 1987, DIDN'T YOU WONDER AT THAT POINT
5 WHAT WAS GOING ON?

6 A YES.

7 Q ALL RIGHT. NOW, WITH RESPECT TO THAT, DID YOU
8 START INVESTIGATING WHAT WAS HAPPENING?

9 A YES.

10 Q ALL RIGHT. TELL ME WHAT YOU DID TO FIND THAT
11 OUT.

12 A I CONTACTED THE OFFICE ON FOOTHILL BOULEVARD, AND
13 ALL I COULD--UNSATISFACTORY TO THE INFORMATION THEY WOULD
14 GIVE ME OR THE HELP THEY WOULD GIVE ME IS THAT THE BILL
15 WOULD BE--OBLIGATION WOULD BE TAKEN CARE OF.

16 Q FIRST SECURITY TOLD YOU THAT THE OBLIGATION WOULD
17 BE TAKEN CARE OF?

18 A NO. THE OFFICE AT MARIE CALLENDER ON FOOTHILL
19 BOULEVARD.

20 Q I SEE.

21 A THE FELLOWS IN CHARGE OF THE BOOKS AND EVERYTHING.
22 THEY SAID, "WE HAD BEEN IN THE HOLE. WE'RE MAKING MONEY NOW
23 AND EVERYTHING'S ALL RIGHT. I THINK THAT THE OBLIGATIONS
24 WILL BE TAKEN CARE OF."

25 Q DO YOU RECALL WHO YOU TALKED TO?

1 Q ALL RIGHT. NOW, WERE YOU AWARE, PRIOR TO DECEMBER
2 OF 1988, THAT THOSE NEGOTIATIONS RESULTED IN YOUR BEING
3 RELEASED FROM YOUR PERSONAL GUARANTEES ON THE LEASES ON
4 BOUNTIFUL AND WEST VALLEY?

5 A NO.

6 Q ALL RIGHT. DO YOU KNOW THAT NOW?

7 A NO.

8 Q PRIOR TO THIS OCCASION TODAY, DID YOU EVER WONDER
9 WHAT WAS HAPPENING WITH THE WEST VALLEY LEASE IN TERMS OF
10 THE FACT THAT YOU MAY BE CALLED ON TO PAY ON YOUR GUARANTEE?

11 A NO.

12 Q LET ME REPRESENT TO YOU THAT YOU HAVE, IN FACT,
13 BEEN RELEASED FROM YOUR GUARANTEES ON THE WEST VALLEY AND
14 BOUNTIFUL LEASES.

15 ASSUMING THAT REPRESENTATION TO BE TRUE, OBTAINING
16 THOSE RELEASES WAS OF VALUE TO YOU, WAS IT NOT, IN TERMS OF
17 FORGIVING YOUR GUARANTEE OBLIGATION?

18 A YES.

19 Q AND THE VALUE WOULD BE, WOULD IT NOT, THE REMAINING
20 AMOUNT OF THE LEASE OBLIGATION?

21 A I DON'T UNDERSTAND YOUR QUESTION.

22 Q WELL, MY QUESTION IS, UNDER BOTH OF THOSE LEASES,
23 AT THE TIME THAT YOUR GUARANTEE WAS RELEASED, THERE WERE
24 SEVERAL YEARS STILL YET TO GO ON BOTH OF THEM. DO YOU HAVE
25 ANY PROBLEM WITH THAT REPRESENTATION?

1 A I'M NOT AWARE OF IT.

2 Q ALL RIGHT. AND YOU WERE A JOINT PERSONAL GUARANTOR
3 ON BOTH OF THOSE LEASES, CORRECT?

4 A OKAY.

5 Q OKAY. SO BUT FOR THOSE RELEASES, YOU WOULD HAVE
6 HAD A CONTINGENT OBLIGATION TO SATISFY THOSE, WOULD YOU NOT?

7 A WELL, I WAS ASSUMING THAT WHEN SAM SOLD OUT, THAT
8 WHOEVER BOUGHT THE STORES WOULD HAVE ASSUMED ALL THOSE
9 LEASES.

10 Q AND THEY DID. LET ME REPRESENT TO YOU THAT THEY
11 DID.

12 A OKAY.

13 Q MR. OLSON, LET ME SHOW YOU WHAT I'LL HAVE MARKED
14 AS EXHIBIT 6.

15 (WHEREUPON, DEPOSITION EXHIBIT NO. 6 WAS
16 MARKED FOR IDENTIFICATION.)

17 Q (BY MR. SHIELDS) THIS IS A LETTER DATED JUNE 21,
18 1988, FROM YOUR COUNSEL TO MY CO-COUNSEL IN THIS CASE,
19 MR. ARMSTRONG. HAVE YOU EVER SEEN THIS LETTER BEFORE?

20 A YES.

21 Q ALL RIGHT, LOOKING AT THE CARBON COPY INDICATIONS.
22 MR. OLSON, THAT LETTER INDICATES THAT YOU OR YOUR LEGAL
23 COUNSEL RECEIVED NOTICE OF A MEETING OF SHAREHOLDERS IN THE
24 CORPORATION SCHEDULED FOR JUNE 22, I BELIEVE, RIGHT ON THE
25 FIRST PAGE, CONCERNING VOTING ON THE SALE TO MARIE CALLENDER'S

1 VENTURES OWNED BY RAMADA.

2 IS THAT YOUR RECOLLECTION, THAT YOU HAD NOTICE
3 OF THAT MEETING PRIOR TO IT OCCURRING? AS A MATTER OF FACT,
4 I BELIEVE IT TALKS ABOUT IT IN THE VERY FIRST PARAGRAPH OF
5 THE LETTER.

6 A WELL, WHATEVER'S INCLUDED IN THE LETTER. THE
7 LETTER SPEAKS FOR ITSELF.

8 Q ALL RIGHT. WELL, THE REASON I ASKED THAT IS THIS
9 LETTER IS NOT FROM YOU, IT'S FROM YOUR LEGAL COUNSEL, AND
10 I'M JUST MAKING SURE THAT YOU WERE AWARE OF THE INFORMATION
11 CONTAINED IN THE LETTER. I GUESS WHAT YOU'RE TELLING ME IS
12 THAT YOU WERE.

13 MR. PANZER: LET ME CLARIFY YOUR QUESTION, JEFF.
14 ARE YOU STILL TALKING JUST ABOUT THE SPECIAL MEETING OF
15 SHAREHOLDERS?

16 MR. SHIELDS: YES.

17 Q (BY MR. SHIELDS) I'M TRYING TO ASK, MR. OLSON,
18 WHETHER YOU PERSONALLY EVER HAD NOTICE OF THAT MEETING PRIOR
19 TO THE DATE IT WAS SCHEDULED FOR, THAT BEING JUNE 22.

20 A I DON'T RECALL.

21 Q ALL RIGHT. AS I UNDERSTAND IT, YOU DID NOT ATTEND
22 THAT MEETING. IS THAT CORRECT?

23 A I DON'T RECALL.

24 Q SO YOUR TESTIMONY IS THAT YOU DON'T KNOW WHETHER
25 YOU WENT OR YOU DIDN'T GO?

LAW OFFICES
SNOW, CHRISTENSEN & MARTINEAU
10 EXCHANGE PLACE, ELEVENTH FLOOR
POST OFFICE BOX 45000
SALT LAKE CITY, UTAH 84145
TELEPHONE (801) 521-9000
TELECOPIER (801) 363-0400

June 21, 1988

**DEPOSITION
EXHIBIT**

Hand Delivered

Brent R. Armstrong
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101

RE: H. Glenn Olson/Park-Craig-Olson, Inc.
Special Meeting of Shareholders set for June 22, 1988

Dear Brent:

We have now had an opportunity to meet with our client, Glenn Olson, regarding the above-referenced special meeting of shareholders and the subject matter thereof, i.e., the sale of the assets of PCO to Marie Callender Ventures, Inc. Mr. Olson wishes to advise the company and Sam Park that generally he does not object to a sale of the assets of PCO, and does not wish to exercise any dissenter's rights available under Utah Code Ann. §§ 16-10-75 and -76. On behalf of Mr. Olson, we would, however, like to express the following concerns and objections to the sale as proposed in the Asset Sales Agreement, a draft of which was furnished to us, and the proposed disbursement of the sale proceeds.

As you are well aware, it is the opinion of Mr. Olson that hundreds of thousands of dollars were wrongfully paid by PCO to Sam Park, Doug Powelson, the L.D.S. Church, and Merrill Lynch Private Capital, from and after the date Mr. Park sold his stock in PCO to the Marsh group. Because of the state of the records, and, in particular, the commingling of bank accounts and financial records (which, incidentally, appears to have continued to date), it is difficult to tell the exact nature and extent of the payments. It is perfectly clear, however, that Sam Park, Doug Powelson, and Merrill Lynch Private Capital group had complete knowledge that PCO was making the payments, even though the true indebtedness was that of the Marsh group. In fact, it is reported to us that Sam Park specifically requested the bookkeeper to set up the balance due him as a note payable on PCO's records.

In short, Mr. Olson is of the opinion that PCO has substantial claims against Sam Park, Doug Powelson, the L.D.S. Church and Merrill Lynch Private Capital on account of these monies. Each payment would, under the circumstances, be a fraudulent conveyance or otherwise recoverable under applicable law. Despite this knowledge, Mr. Park, as controlling shareholder of PCO since last fall, has made no attempt to recover the fraudulent conveyances. We believe the money wrongfully paid to these individuals and entities were a proximate cause of the apparent failure of the business. Obviously, other factors enter into this, most notably the large amounts of money apparently withdrawn by MacArthur and Marsh. Mr. Park is not, however, without blame. In addition, there are the potential claims we have discussed regarding liability of Mr. Park for the sale of the controlling interest in the corporation to the Marsh group. At this time, we do not know the extent of Mr. Park's knowledge of the financial arrangements between Marsh and Merrill Lynch Private Capital or whoever else financed the purchase; however, we suspect that Mr. Park was fully aware of such arrangements and the likelihood that PCO assets would be used to repay the Marsh indebtedness, essentially making the transaction a leveraged buyout (but without buying out the minority shareholders).

It has been impossible for Mr. Olson to analyze the financial aspects of the proposed sale of PCO assets, primarily because the assets have been lumped together with Sam Park's other stores and are being sold as a group. It is not possible to determine the consideration being paid for the PCO as opposed to non PCO stores. Accordingly, although the transaction may be considered fair if between a single buyer and seller, it is not possible to determine whether, for example, Marie Callender Ventures is assuming debts of Sam Park stores in consideration for the purchase of PCO stores.

The proposed Asset Sales Agreement also appropriates to Sam Park apparent PCO opportunities, by providing for a payment to Sam Park of 50% of any negotiated decreases in "old debt." See Exhibit C, paragraph (h). There is also a \$25,000 cash payment to Mr. Park that is unexplained.

Mr. Park is also to receive \$560,000 on account of alleged loans to PCO. Although represented to us that this is only a portion of the amounts he has advanced, it is not at all clear that that is correct. If Mr. Park advanced monies to his other stores, which he owns personally, it could hardly be said that he is owed money by himself. We were advised that he advanced approximately \$560,000 to PCO, but do not know the truth of that representation.

Brent R. Armstrong
June 21, 1988
Page 3

As you are aware, Mr. Olson paid \$84,307.65 to First Security Bank on account of debts owed by PCO. To that extent at least, Mr. Olson is a direct creditor of PCO; however, this debt is apparently not disclosed and is certainly not paid as a consequence of the sale. Instead, we understand that Mr. Park, who supposedly advanced \$235,000 to pay off the remainder of the First Security debts, intends to take the full amount of his advance out of the sale proceeds. We do not have any idea how this disparate treatment can be justified, except on the fact that Sam Park owns a controlling interest in the corporation.

We request that the company add to proposed Exhibit "D", Excluded Assets, claims against Doug Powelson, Merrill Lynch Private Capital, J. Samuel Park, and Ann Park.

While the proposed sale appears to be an arms length transaction, and it appears Marie Callender Ventures is, viewed as a whole, paying a fair consideration, it is not possible to determine whether a fair consideration is being received by PCO. Mr. Olson objects to the proposed disbursement of sale proceeds. First, it is our contention that Mr. Park is not owed anything by PCO. Any funds he put into PCO since last fall were, in our opinion, merely repayments of fraudulent conveyances. Secondly, Mr. Park is, to the extent he receives payment on account of a reduction of debt by negotiation, misappropriating a corporate opportunity. Thirdly, Mr. Olson should, at a bear minimum, receive payment on account of the First Security loan to the same extent Mr. Park receives payment. If Mr. Park is going to be repaid in full, Mr. Olson should also be paid in full.

In closing, we wish to advise you that absent a fair and reasonable settlement with Mr. Olson on account of his claims and the claims of PCO against Mr. Park and others, it is the intention of Mr. Olson to forthwith initiate a lawsuit. It is likely that a derivative action will also be brought, since many of the claims against Mr. Park are, at first blush, property of PCO. To the extent a demand is necessary, please consider this letter a demand that the company initiate actions against Mr. Park, Doug Powelson, and Merrill Lynch Private Capital to recover fraudulent conveyances and assert other claims against the individuals and entities. We presume, however, that no such actions will be brought because of Mr. Park's majority ownership of the stock of PCO.

Brent R. Armstrong
June 21, 1988
Page 4

clon
Mr. ~~Park~~ does not intend to attend the special meeting of
the shareholders.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

Bryce D. Panzer
Bryce D. Panzer

BDP/sw
cc: Glenn Olson
Reed Martineau