

1992

Jim Pratt Hansen, et al. v. George Sutton, et al. : Response to Petition for Rehearing

Utah Court of Appeals

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Earl Spafford; L. Charles Spafford; Scott B. Mitchell; Spafford & Spafford; Attorneys for Appellants. Jan Graham; Attorney General; Bryce H. Pettet; Assistant Attorney General; Michael N. Emery; Richards, Brandt, Miller & Nelson; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

JIM PRATT HANSEN, et al.,)	
)	
Plaintiffs/Appellants,)	STATE APPELLEES' RESPONSE
)	TO APPELLANTS' PETITION
v.)	FOR REHEARING
)	
GEORGE SUTTON, et al.,)	Priority No. 16
)	
Defendants/Respondents.)	Case No. 920686

PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

JUDGE TIMOTHY R. HANSEN

EARL SPAFFORD
L. CHARLES SPAFFORD
SCOTT B. MITCHELL
(of counsel)
SPAFFORD & SPAFFORD
425 East 100 South
Salt Lake City, UT 84111
Attorneys for
Plaintiffs/Appellants

JAN GRAHAM #1231
Attorney General
BRYCE H. PETTEY #2593
Assistant Attorney General
50 South Main Street, Suite 900
Salt Lake City, UT 84144
Attorneys for Defendants/Appellees:
the State of Utah; the Department of
Financial Institutions of the State
of Utah; George Sutton, individually,
as Commissioner of Financial
Institutions of the State of Utah,
and as Trustee of the retained assets
of Murray First Thrift and Loan; and
Elaine B. Weis, individually, and as
former Commissioner of Financial
Institutions of the State of Utah

UTAH COURT OF APPEALS
BRIEF

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MICHAEL N. EMERY
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite 700
50 Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Defendants/Appellees:
George Sutton, as Commissioner in
Possession of the Industrial
Guaranty Corporation of Utah
Industrial Loan Guaranty Corporation
of Utah

FILED

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Mary Hanna

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(of counsel)
SPAFFORD & SPAFFORD
425 East 100 South
Salt Lake City, UT 84111
Attorneys for
Plaintiffs/Appellants

JAN GRAHAM #1231
Attorney General
BRYCE H. PETTEY #2593
Assistant Attorney General
50 South Main Street, Suite 900
Salt Lake City, UT 84144
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the State of Utah; the Department of
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Institutions of the State of Utah

MICHAEL N. EMERY
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite 700
50 Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
Attorneys for Defendants/Appellees:
George Sutton, as Commissioner in
Possession of the Industrial Loan
Guaranty Corporation of Utah; and the
Industrial Loan Guaranty Corporation
of Utah

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, and the August 16, 1993 request of the Utah Court of Appeals for a response from defendants/appellees to the Petition for Rehearing ("Rehearing Petition", or "Reh. Pet.") filed by the plaintiffs/appellants ("Plaintiffs"), these defendants/appellees ("State Defendants")¹ respectfully submit this response.

I. THE JULY 9, 1990 AMENDMENT TO THE JUNE 6, 1989 ORDER IN HARRIS REINSTATED ONLY A CAUSE OF ACTION AND RELATED FACTS WHICH WERE NOT, AND ARE NOT, AT ISSUE IN THE INSTANT CASE, EITHER IN THE COURT BELOW OR IN THE APPEAL BEFORE THIS COURT, AND THEREFORE THE UTAH SAVINGS STATUTE CANNOT BE APPLIED.

In its opinion dated July 20, 1993, this Court affirmed the lower Court's dismissal of Count I of the complaint, finding Count I had not been filed within the time allowed under Utah Code Ann. § 78-12-40 (1993). This Court determined Utah Code Ann. § 78-12-40 (1992) ("Utah Savings Statute"), the statute cited by Plaintiffs to preserve Count I, could not be invoked, because all causes of action Harris², which Plaintiffs used to invoke the Utah Savings Statute with respect to Count I, had been dismissed with prejudice by Order of the Harris Court dated June 6, 1990 ("Judgment of Dismissal") (Addendum 1 hereto).

¹ The term "State Defendants" is the same designation used for these defendants/appellees in their initial appellate brief. The State Defendants are: the State of Utah; the Utah Department of Financial Institutions; George Sutton, individually, as Utah Commissioner of Financial Institutions, and as Trustee of the retained assets of Murray First Thrift and Loan; and Elaine B. Weis, individually, and as former Utah Commissioner of Financial Institutions.

² Harris, et al. v. Weis, et al., Case No. C87-0041S (United States District Court for the District of Utah).

In their Rehearing Petition, Plaintiffs correctly point out the Judgment of Dismissal was later amended. Plaintiffs insist this means the cause of action in Harris on which they rely to invoke the Utah Savings Statute was thus dismissed "otherwise than on the merits", so they may invoke the Utah Saving Statute to preserve Count I.

Plaintiffs are correct in stating the Judgment of Dismissal was amended. On July 9,³ 1990, the Hon. David Sam entered an Order under Rule 60(b)(1) ("Rule 60(b)(1) Order") (Addendum 2 hereto), F.R.C.P., granting the relief the Harris plaintiffs had requested. However, it is important to examine that Rule 60(b)(1) Order and the related pleadings and orders, as set forth in the record before the instant Court, to see just what relief the Harris plaintiffs in that action requested, and what relief Judge Sam granted at that time.

In his September 30, 1988 "Ruling and Order" (Rec. at 148-57) (Addendum 3 hereto), Judge Sam made his findings, and then ruled:

IT IS HEREBY ORDERED that the first, second, third, fourth, fifth, sixth, seventh, eighth (as to derivative claims and as to direct claims against the non-state defendants), ninth, and eleventh claims of the amended complaint, together with the corresponding claims of the second amended complaint, are dismissed on the merits and with prejudice.

³ Plaintiffs state Judge Sam entered this Rule 60(b)(1) Order on July 20, 1990. [Reh. Pet. at 2.] Although it is not a material point, the copy of the Order in the record before this Court which contains the language quoted by Plaintiffs in their Rehearing Petition is dated July 9, 1990, and was entered on July 11, 1990. [Rec. at 260-61.]

IT IS FURTHER ORDERED that all claims against the State of Utah and its officers in their official capacities are dismissed on the merits and with prejudice.

This order does not dismiss the eighth claim of the amended complaint as replaced by the eighth claim of the second amended complaint, insofar as it asserts a claim against the state defendants in their individual capacities, nor does it dismiss the tenth claim of the amended complaint as replaced by the ninth claim of the second amended complaint. Aside from these exceptions, all claims and this entire action are hereby dismissed on the merits and with prejudice as to all defendants. Defendants are entitled to their costs. (Emphasis added.) (Rec. at 156-57.)

Six months later, several of the defendants in Harris moved for entry of judgment dismissing all claims with prejudice. On April 21, 1989, Judge Sam entered the following "Ruling" (Addendum 4 hereto):⁴

⁴ Whether Judge Sam's April 21, 1989 Ruling -- dismissing ALL CLAIMS against ALL DEFENDANTS ON THE MERITS AND WITH PREJUDICE -- was intended to supersede his September 30, 1988 "Ruling and Order" -- which would not have dismissed certain counts involving the State defendants in their individual capacities -- need not be argued here. That Ruling, and the motion(s) which led to it, does negate, however, the insinuations in Footnote 1 of Plaintiffs' Rehearing Petition, which implies some sinister motive to the State defendants in not submitting their Order based upon the Court's September 8, 1988 Ruling and Order until after Plaintiffs' counsel had withdrawn. At last count, since the Commissioner took possession of the business and property of MFT&L on July 22, 1982, Plaintiffs had used well over 40 different lawyers at various phases of their disputes with the Commissioner and related entities. The "Who's In, and Who's Out" maneuvers of Mr. McDonald and Mr. Leedy, with respect to the filing of the First, Second, and Third Amended Complaints in the Harris proceedings (see September 30, 1988 "Ruling and Order"), illustrates how difficult it probably would have been for counsel for the State defendants NOT to have submitted a proposed order at a time shortly after one of Plaintiffs' counsel had just withdrawn -- no matter when State defendants' counsel might have submitted a proposed order. As the April 21, 1989 Ruling shows, however, this was not a case of State defendants' counsel waiting for seven months after Judge Sam had entered his September 30, 1988 "Ruling and Order" before State defendants' counsel submitted an order implementing that "Ruling and Order" (and, as

On March 31, 1989, several defendants moved for entry of judgment dismissing all claims with prejudice in the above entitled matter. The time for responding to defendants' motion having now expired without any opposition having been filed, and it appearing to the court that all claims in the case have now been dismissed, defendants' motion is granted. The court requests the movants to coordinate with other defense counsel to prepare an appropriate final order and judgment for the court's signature and to circulate the same for approval as to form pursuant to Rule 13(e) of the Civil Rules of Procedure.
(Rec. at 158.)

Subsequently, on May 18, 1989,⁵ counsel for the State

Plaintiffs would now have us believe, until after Plaintiffs' counsel had withdrawn from this case). Rather, on March 31, 1989, six months after the entry of the "Ruling and Order", "several defendants moved for entry of judgment dismissing all claims with prejudice in the above entitled matter", and, twenty days later, when no objections had been filed to the motion, Judge Sam entered a "Ruling" granting the motion. The June 5, 1989 "Judgment of Dismissal with Prejudice" was not in response to Judge Sam's "Ruling and Order" of September 30, 1988, but was rather in response to the April 21, 1989 "Ruling" of Judge Sam granting of the motion(s) of "several defendants", which motion(s) had been filed on March 21, 1989. Judge Sam had before him an entirely separate motion. Unfortunately, the motion(s) filed by the "several defendants" are not in the record before the instant Court, so there is no way to determine whether those "several defendants" raised points in the motion(s) which convinced Judge Sam to revise his thinking in his September 30, 1988 "Ruling and Order" and decide ALL CAUSES OF ACTION with respect to ALL DEFENDANTS should be dismissed with prejudice. This apparently was not the case, since Judge Sam did amend his July 5, 1989 "Judgment of Dismissal with Prejudice" through his July 9, 1990 Rule 60(b)(1) Order. However, the "several defendants" having made their motion (which one assumes was supported with a "Memorandum of Points and Authorities"), and no objection having been filed thereto, it was certainly reasonable for counsel for those "several defendants" to assume Judge Sam had been influenced by their arguments and had changed his mind about not dismissing the State defendants in their individual capacities or certain claims against those State defendants. Thus, no sinister motive can be imputed to counsel for the State defendants, or counsel for any of the other defendants, in Harris.

⁵ The date on the certificate of mailing shows the proposed order was mailed to counsel of record on May 18, 1989. (Rec. at 163.) The date stamp on the copy in the record shows it was

Defendants⁶ submitted to all counsel a proposed "Judgment of Dismissal with Prejudice". Judge Sam signed this Judgment of Dismissal on June 5, 1989. (Rec. at 161.) The Judgment provided:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Rule 54(b) Federal Rules of Civil Procedure, that all claims in the Amended Complaint, together with the corresponding claims of the Second Amended Complaint are dismissed with prejudice.
(Rec. at 161-62.)

At that point, all causes of action in the First and Second Amended complaints had been dismissed with prejudice. The Harris Plaintiffs recognized this, because they had to petition Judge Same under Rule 60(b)(1) to amend the Judgment of Dismissal to reinstate a cause of action. On July 9, 1990, Judge Sam signed the Rule 60(b)(1) Order. That Order, in its entirety, reads as follows:

Plaintiffs, Gary S. Harris, et al., have moved this court for relief from the June 5, 1989 Judgment of Dismissal to the extent that it relates to the ninth claim of the second amended complaint which alleges a state law claim for defamation.

This court has already indicated in its Order dated February 27, 1990, that it did not intend to dismiss that claim with prejudice but that dismissal was only for lack of jurisdiction. Accordingly, the relief requested by plaintiffs is hereby granted.
(Emphasis supplied.) (Rec. at 260.)

Thus Judge Sam only granted the relief requested by "Plaintiffs, Gary S. Harris, et al.", and that relief requested was only with respect to the "June 5, 1989 Judgment of Dismissal

received in Judge Sam's office on May 19, 1989.

⁶ Christensen, Jensen & Powell and the Utah Attorney General's Office represented the State defendants, and Kipp & Christian represented the State's insurance carriers.

to the extent that it relates to the ninth claim of the second amended complaint which alleges a state law claim for defamation" (emphasis added). Plaintiffs did not request relief with respect to the June 5, 1989 Judgment of Dismissal to the extent it relates to "the eighth claim of the amended complaint as replaced by the eighth claim of the second amended complaint, insofar as it asserts a claim against the state defendants in their individual capacities", even though Judge Sam had also ruled to that effect in his September 30, 1988 Ruling and Order. Since in his Rule 60(b)(1) Order Judge Sam granted only the relief requested, it follows he did not amend his June 5, 1989 Judgment of Dismissal to reinstate "the eighth claim of the amended complaint as replaced by the eighth claim of the second amended complaint, insofar as it asserts a claim against the state defendants in their individual capacities".

The ninth claim of the Second Amended Complaint (Addendum 5 hereto) shows it relates only to certain defamatory statements allegedly made about Gary S. Harris, a plaintiff in Harris, by former Commissioners of Financial Institutions Elaine B. Weis and George Sutton, and by Darwin M. Larsen and Ed H. Throndsen. (Rec. at 381-86.) The ninth claim in the Second Amended Complaint has nothing to do with MFT&L, or the Plaintiffs in the instant appeal, or any of the facts surrounding MFT&L or any of the Plaintiffs in the instant appeal! That limited cause of action in the ninth claim was also recognized by from Judge Sam's Rule 60(b)(1) Order, in which Judge Sam says "the ninth claim of

the second amended complaint . . . alleges a state law claim for defamation."

The eighth claim in the Second Amended Complaint arguably could relate to the Complaint filed with the Court below in the instant appeal -- the eighth claim was for damages under 42 U.S.C. § 1983 for actions allegedly taken by at least some of the State Defendants in the instant appeal. Some of the Plaintiffs in the instant action were the same as some of the Plaintiffs in Harris, and some of the facts arguably were the same. HOWEVER, plaintiffs in Harris did not ask Judge Sam to amend his June 6, 1989 Judgment of Dismissal to reinstate the eighth claim, and thus it remains "dismissed with prejudice". Nor do the State Defendants believe the Harris plaintiffs could, at this late date, successfully submit another Rule 60(b)(1) motion to Judge Sam for him to again amend his June 6, 1989 Judgment of Dismissal. Through their motion which resulted in Judge Sam's July 9, 1990 Rule 60(b)(1) Order, plaintiffs in Harris showed they had knowledge of the June 6, 1989 Judgment of Dismissal. The Harris plaintiffs also showed they knew some of the provisions of the June 6, 1989 Judgment of Dismissal did not comport with Judge Sam's September 30, 1989 Ruling and Order; however, the Harris plaintiffs asked Judge Sam only to amend the June 6, 1989 Judgment of Dismissal to reinstate the ninth claim, relating only to the alleged defamation of Gary Harris; they did not ask the Court to amend the June 6, 1989 Judgment of Dismissal to reinstate the eighth claim, which related to MFT&L and some of the Plaintiffs in the instant appeal.

Therefore, as State Defendants stated in their brief and at oral argument, the allegations with respect to a breach in Harris were dismissed with prejudice by that Court, and the instant Court was correct when it affirmed the dismissal by the Court below of Count I, since that part of Harris on which the Plaintiffs in the instant case relied to invoke the Utah Savings Statute was dismissed by Judge Sam with prejudice in his June 6, 1989 Judgment of Dismissal.

II. PLAINTIFFS' ARGUMENT IN FAVOR OF RECONSIDERATION OF THE AFFIRMATION BY THE UTAH COURT OF APPEALS OF DISMISSAL OF COUNT TWO IS RAISED FOR THE FIRST TIME IN PLAINTIFFS' PETITION FOR RECONSIDERATION.

In dismissing Count II of the Complaint, this Court recognized the obligation which Count II alleged the State Defendants as to have breached as having arisen on or about June 13, 1983, at the conclusion of the six month period after execution by all the relevant parties of the Purchase and Assumption Agreement ("P&A"). In their Rehearing Petition, however, Plaintiffs now assert the Court incorrectly failed to recognize Plaintiffs had argued in Paragraph XXXI of their Complaint:

Alternatively, the P & A Agreement contained an implied promise that Sutton and the DFI would turn over the retained assets to MFT&L and terminate their role in connection therewith at the earliest possible time consistent with Sutton's⁷ statutory responsibilities.

⁷ Presumably, Plaintiffs mean "the Commissioner's statutory responsibilities", rather than "Sutton's statutory responsibilities", since Mr. Sutton not only was not Commissioner on December 13, 1982, when the P&A Agreement was signed (he was Commissioner from April 11, 1987 to and through May 31, 1992), he wasn't even employed by the Department of Financial Institutions of the State of Utah at that time.

Plaintiffs assert there has always been a question of fact as to whether the P&A Agreement included a certain letter, dated November 5, 1982, which contained language supposedly requiring the Commissioner to surrender possession of any retained assets of MFT&L six months after the execution of the P&A Agreement. Plaintiffs argue this factual dispute is the basis of their factual assertion in Paragraph XXXI of their Complaint, and assert Paragraph XXXI presented an alternative under which the Commissioner's obligation to turn over any retained assets did not arise on June 13, 1983, but rather at some point apparently much later, which was at "the earliest possible time consistent with Sutton's statutory responsibilities". Plaintiffs now inform the Court they "could indeed 'prove a set of facts in support of [their] claims' which would not be time-barred." (Reh. Pet. at 5 (brackets in original).)

This issue is raised for the first time in the Petition for Rehearing. An issue which was not adequately raised and ruled upon in the trial court cannot be raised for the first time on appeal. Rees v. Intermountain Health Care, 808 P.2d 1069, 1075-76 (Utah 1991); Espinal v. Salt Lake City Bd. of Educ., 797 p>2d 412,413 (Utah 1990); Franklin Financial v. New Empire Development Co., et al., 659 P.2d 1040, 1043-44 (Utah 1983). Furthermore, even if the issue could have been raised on appeal, Plaintiffs waived their right to raise it by not raising it in their initial brief. See Romrell v. Zions First Nat'l Bank, 611 P.2d 392, 395 (Utah 1980). An appellate court will ordinarily not consider issues raised for the first time in a petition for rehearing.

State v. Sampson, 808 P.2d 1100, 1112 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991); Lockhart Company v. Anderson, 646 P.2d 648 (Utah 1982). As such, this argument must be rejected. In none of the several pleadings Plaintiffs filed with the Court⁸ below did they make this argument, or even hint at it. Nor did Plaintiffs raise this point in either their initial appellate brief or their reply brief, or at oral argument. Aside from putting the above-quoted language into Paragraph XXXI of their Complaint, and repeating it verbatim in their factual allegations in paragraph 17 of their initial brief⁹, Plaintiffs never referred to this language or asserted Paragraph XXXI might allege facts constituting still another breach in Count II.

The placement of the factual allegations in Count II and within the "Statement of Facts" in Plaintiffs' initial brief is instructive in analyzing Plaintiffs' argument a new breach was alleged in Paragraph XXXI. Summarized, the allegations in Paragraphs XXIX through XXXXII of the Complaint (and paragraphs 15-24 of the Statement of Facts in Plaintiffs' initial brief) are:

⁸ Plaintiffs filed the following pleadings below: "Complaint" (Rec. at 2-48); "Response to Motion to Dismiss" and "Memorandum of Points and Authorities" (Rec. at 93-181); "Response to Motion to Dismiss" and "Memorandum of Points and Authorities" (Rec. at 182-298); "Supplemental Memorandum in Response to Motion to Dismiss Filed by DFI, Sutton and Weis; and Reply in Support of Motion for Leave to File Amended Complaint; and Motion to Strike Notice to Submit for Decision" (Rec. at 334-408).

⁹ Plaintiffs repeated verbatim most of the facts alleged in their Complaint verbatim in their "Statement of Facts" in their initial brief.

- XXIX The P&A Agreement required the Commissioner to turn over the retained assets of MFT&L within 6 months after the P&A Agreement was signed
- XXX The Commissioner breached the requirement in Paragraph XXIX by not turning over the assets
- XXXI Alternatively, the P&A Agreement contained an implied promise Sutton would turn over the assets
- XXXII Sutton and DFI agreed not to impede the sale or development of the Bel Marin Keys Property ("BMK")
- XXXIII Plaintiffs have performed all their obligations under the P&A Agreement
- XXXIV Despite repeated demands by Plaintiffs, Sutton and DFI refused to turn over any retained assets
- XXXV These paragraphs detain the alleged sale of BMK, through and how the sale of BMK by Sutton allegedly
XXXXII violated the terms of the P&A Agreement

One is left to wonder whether Count II alleged one, two, three breaches. For example, Plaintiffs' initial brief stated:

Like Count One, Count Two alleges a cause of action for the breach of a written contract, i.e., the P & A Agreement. The breaches are alleged to have occurred between May and November of 1987.

In this statement, Plaintiffs appear to assert the alleged "breaches" asserted Count II occurred "between May and November of 1987", which would seem to mean the sale of BMK. This seems rather inconsistent, however, with the numerous arguments in Plaintiffs' pleadings in the Court below, and in Plaintiffs' briefs on appeal, which assert the claim of breach in Count II was kept alive under the Utah Savings Statute by Nelson¹⁰ and Harris. Nelson was filed May 30, 1986 (Plaintiffs' initial brief

¹⁰ Frank A. Nelson, et al. v. First Security Financial, Inc., et al., Case No. C86-2894 (United States District Court for the Northern District of California).

at 17)), so it obviously couldn't refer to alleged breaches which would take place in May through November of 1987. Nor could Harris, which was filed January 22, 1987 (Plaintiffs' initial brief at 19). Rather, the breaches alleged in Nelson and Harris both had to refer to the alleged breach of the P&A Agreement at the end of the six month period after December 13, 1982.

Presumably, the breach referred to in Paragraph XXXI does not refer to the sale of BMK, for the following reasons:

a. As pointed out above, Plaintiffs made their the specific allegations regarding the BMK sale in eight (8) separate paragraphs in Count Two of the Complaint, repeated these allegations in other pleadings filed with the Court below, and repeated the allegations in their initial and reply briefs filed on appeal. Thus the specifics of the allegations relating to the sale of BMK were known to the Court below and to this Court, and both rejected the assertion the breach occurred when BMK was sold, determining instead the breach occurred at the end of the six-month period which began December 13, 1982.

b. In their Rehearing Petition, Plaintiffs do not assert the BMK sale constituted the breach they claim to have asserted in Paragraph XXXI.

c. Sequentially, in Count Two of the Complaint, the assertion in Paragraph XXXI immediately follows the paragraphs which allege the Commissioner was required to turn over the assets within 6 months after the signing of the P&A Agreement. There are three more paragraphs before the sale of BMK begins being discussed.

d. As pointed out above, in their initial brief, and in their reply brief, Plaintiffs argue the breach they assert in Count II IS the sale of BMK.

e. The wording of Paragraphs XXX and XXXI does not indicate Plaintiffs thought there were two different of breaches; rather, the wording of these two paragraphs indicates Plaintiffs believed the Commissioner was obligated to return the assets to the Plaintiffs, either (1) within six months after the signing of the P&A Agreement, as expressly required by the November 5, 1982 letter, or (2) when the Commissioner had fulfilled his statutory responsibilities, as impliedly required by the P&A Agreement itself. Again, Plaintiffs argued the first scenario in other pleadings before the lower Court and in its initial and reply briefs on appeal, but Plaintiffs never raised the alleged breach of the second scenario until they submitted their Rehearing Petition.

To what breach, then, does the allegation in Paragraph XXXI refer? To six months after December 13, 1982? If so, this Court has already determined Count II was filed beyond the statute of limitations. To the sale of BMK in 1987? If so, this Court has already correctly determined the alleged breach actually took place June 13, 1983, with the sale of BMK in 1987 being just a further result of that breach. To still a third alleged breach? If so, it has been raised for the first time in the Petition for Rehearing, and must therefore be rejected by this Court.

In reality, Paragraph XXXI appears to have been a fall-back position in the event a court were to determine the November 5,

1982 letter was not a part of the P&A Agreement. Regardless, the position Plaintiffs now appear to take -- that Paragraph XXXI asserts a third breach in addition to the one which took place on June 13, 1982, and the one which took place in November of 1987 - - was never argued in the Court below nor on appeal, and is inconsistent with the positions Plaintiffs took whenever Count II was discussed or argued.

III. EVEN SHOULD THE COURT REVERSE ITSELF ON EITHER OR BOTH OF ITS RULINGS ON COUNT I AND COUNT II OF ITS JULY 20, 1993 DECISION, THE COURT SHOULD AFFIRM THE DISMISSAL OF BOTH COUNTS BY THE COURT BELOW FOR ANY OF THE NUMBER OF ADDITIONAL REASONS PRESENTED BY DEFENDANTS.

Should this Court determine it was in error when it issued its July 20, 1993 opinion, either as to Count I or Count II, or both, the State Defendants still submit this Court should affirm the dismissal by the Court below for each of the reasons set forth by the State Defendants in their initial brief, and at oral argument. Perhaps the most compelling reason for dismissal is the assets of MFT&L retained by the Commissioner were always under the jurisdiction of the Court with jurisdiction over the MFT&L proceedings.¹¹ The Commissioner never did anything with any asset of MFT&L without first submitting a petition to the MFT&L Court, giving notice to all interested parties (including all the Plaintiffs in the instant proceedings), and receiving the approval of the MFT&L Court. While the MFT&L Court could only reverse the determinations of the Commissioner if the MFT&L Court


¹¹ In re the Possession by the Banking Commissioner of Murray First Thrift and Loan Company, Case No. 820905951 (Third Judicial District Court in and for Salt Lake County, State of Utah).

found those determinations to be "arbitrary, capricious, fraudulent, or otherwise contrary to law" (Utah Code Ann. § 7-2-12(1) (Supp. 1993), the MFT&L Court was well aware of the P&A Agreement; indeed, that Court had originally approved the P&A Agreement, and continued to have jurisdiction over it. Plaintiffs often raised their objection to the Commissioner's continued possession of the remaining assets of MFT&L. If their interpretation of the P&A Agreement was correct, the Court could have rejected the Commissioner's determinations as being "contrary to law", because they would have violated a contract (the P&A Agreement) which had been approved by the MFT&L Court. The MFT&L Court continually rejected the Plaintiffs' position, as should this Court.

For each of the foregoing reasons, the State Defendants respectfully move the Court to deny the Plaintiffs' Rehearing Petition, or, in the alternative, to affirm the dismissal of Counts I and II by the Court below for any or all of the additional reasons cited by the State Defendants in their brief and at oral argument

Dated this 14th day of September, 1993.

JAN GRAHAM
Attorney General


BRYCE H. PETTEY
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 1993, two copies of State Appellees' Response to Appellants' Petition for Rehearing were mailed, first class postage prepaid, to the following:

Scott Mitchell
LEHMAN, MITCHELL & WALDO
136 South Main Street, Suite 721
Salt Lake City, UT 84101

Earl Spafford
L. Charles Spafford
SPAFFORD & SPAFFORD
425 East 100 South
Salt Lake City, UT 84111

Michael N. Emery
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, UT 84110

Byrne H. Petty

ADDENDUM 1

UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

JUN 6 1989

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CLERK

MAY 19 1989

OFFICE OF JUDGE
DAVID SAM

RAY, QUINNEY

JUN 09 1989

& NEFFER

Ray R. Christensen
Jay E. Jensen
Elwood P. Powell
Denton M. Hatch
CHRISTENSEN, JENSEN & POWELL, P.C.
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

David L. Wilkinson
Stephen J. Sorenson
Bryce Pettey
ATTORNEY GENERAL'S OFFICE
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7627

Carman E. Kipp
Gregory J. Sanders
KIPP AND CHRISTIAN
City Centre I, #330
175 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 521-3883

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DISTRICT OF UTAH

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DEPUTY CLERK 8/11/89

Attorneys for Defendants Elaine B. Weis, George Sutton,
R. Scott Baker, Mary Amidan, Robert S. Gale and the
State of Utah

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GARY S. HARRIS, et al.,)	
)	
Plaintiffs,)	JUDGMENT OF DISMISSAL
)	WITH PREJUDICE
vs.)	
)	
ELAINE B. WEIS, et al.,)	Civil No. C 87-0041S
)	
Defendants.)	

The court, having entered its Order of Entry of Judgment
on _____, 1989,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant
to Rule 54(b) Federal Rules of Civil Procedure, that all claims

in the Amended Complaint, together with the corresponding claims
of the Second Amended Complaint are dismissed with prejudice.

DATED this 5th day of June, 1989.



Honorable Davis Sam
U. S. District Court Judge

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FILED
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUN 6 10 50 AM '89
MARCO A. STEIN
CLERK
BY: [Signature]

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of ^{May}~~March~~, 1989, a true and correct copy of the foregoing ORDER OF ENTRY OF JUDGMENT was mailed, postage prepaid, to the following:

Robert M. McDonald
McDONALD & BULLEN
American Plaza III
47 West 200 South #450
Salt Lake City, Utah 84101

Richard J. Leedy
Attorney at Law
230 East 300 South #100
Salt Lake City, Utah 84111

David L. Wilkinson
Stephen J. Sorenson
Bryce Pettey
Attorney General's Office
236 State Capitol Building
Salt Lake City, Utah 84114

Carman E. Kipp
Gregory J. Sanders
KIPP AND CHRISTIAN
City Centre I, Suite 330
175 East 400 South
Salt Lake City, Utah 84111

Jack C. Helgesen
HELGESEN & WATERFALL
4768 Harrison Boulevard
Ogden, Utah 84403

Gayle F. McKeachnie
NIELSEN & SENIOR
363 East Main Street
Vernal, Utah 84078

R. Stephen Marshall
Alan F. Mecham
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
50 South Main Street, #1600
Salt Lake City, Utah 84144
f

ant H. Murdock, Esq.
 thony B. Quinn, Esq.
 AY, QUINNEY & NEBEKER
 . O. Box 45385
 alt Lake City, UT 84145

arman E. Kipp, Esq.
 regory J. Sanders, Esq.
 .75 East Fourth South
 ity Centre I Suite 330
 alt Lake City, UT 84111

Stephen J. Sorenson, Esq.
 Bryce Pettey, Esq.
 Asst. Atty. General
 236 State Capitol
 Salt Lake City, UT 84114

Ray R. Christensen, Esq.
 Jay E. Jensen, Esq.
 Elwood P. Powell, Esq.
 Denton Hatch, Esq.
 CHRISTENSEN, JENSEN & POWELL
 175 South West Temple #510
 Salt Lake City, UT 84101

Gayle F. McKeachnie, Esq.
 NIELSEN & SENIOR
 63 East Main St.
 Wernal, UT 84078

Dennis V. Haslam, Esq.
 WINDER & HASLAM
 175 West 200 South
 Suite 4004
 Salt Lake City, UT 84101

Henry S. Nygaard, Esq.
 BEASLIN, NYGAARD, COKE & VINCENT
 333 North 300 West
 Salt Lake City, UT 84103

Allen M. Swan, Esq.
 KIRTON, McCONKIE & BUSHNELL
 330 South 300 East
 Salt Lake City, UT 84111

Geoffrey W. Mangum, Esq.
 PRINCE, YEATES & GELDZAHLER
 175 East Fourth South #900

Richard A. Rappaport, Esq.
 Cohn, Rappaport & Segal
 P.O. Box 11008
 SLC, UT 84147

Sharon Green, Esq.
 722 Montgomery St. #25
 San Francisco, CA 94111

Roy G. Haslam, Esq.
 BIELE, HASLAM, HATCH
 50 West Broadway, 4th Floor
 Salt Lake City, UT 84101

James R. Holbrook, Esq.
 R. Willis Orton, Esq.
 Russell Kearl, Esq.
 CALLISTER, DUNCAN & NEBEKER
 800 Kennecott Bldg.
 Salt Lake City, UT 84133

Gary F. Bendinger, Esq.
 Scott A. Call, Esq.
 GIAUQUE, WILLIAMS, WILCOX & BENDING
 500 Kearns Bldg.
 Salt Lake City, UT 84101

Peter W. Billings, Jr., Esq.
 Michele Mitchell, Esq.
 FABIAN & CLENDENIN
 215 South State, 12th Floor
 Salt Lake City, UT 84111

Jack C. Helgesen, Esq.
 Helgesen & Waterfall
 4768 Harrison Bldg.
 Ogden, UT 84403

R. Stephen Marshall, Esq.
 VAN COTT, BAGLEY, CORNWALL & McCAN
 P. O. Box 45340
 Salt Lake City, UT 84145
 Paul Cotro-Manes, Esq.
 311 South State Street
 #280
 Salt Lake City, UT 84111
 Leroy S. Axland, Esq.
 Jerold G. Oldroyd, Esq.
 SUMTER, AXLAND, ARMSTRONG & HANE
 175 South West Temple

Suite 700
 Salt Lake City, UT 84101

ADDENDUM 2

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

JUL 11 1990

MARKUS B. ZIMMER, CLERK
BY Sm #
DEPUTY CLERK

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GARY S. HARRIS, et al.,)
Plaintiff(s),)
vs.) ORDER GRANTING RELIEF
ELAINE B. WEIS, et al.,) UNDER RULE 60(b)(1)
Defendant(s).) Civil No. 87-C-0041-S

Plaintiffs, Gary S. Harris, et al., have moved this court for relief from the June 5, 1989 Judgment of Dismissal to the extent that it relates to the ninth claim of the second amended complaint which alleges a state law claim for defamation.

This court has already indicated in its Order dated February 27, 1990, that it did not intend to dismiss that claim with prejudice but that dismissal was only for lack of jurisdiction. Accordingly, the relief requested by plaintiffs is hereby granted.

DATED this 9th day of July, 1990.

attys 7/11/90sm

y G. Martineau, Esq.
aron Green, Esq.
y G. Haslam, Esq.
nes R. Holbrook Esq.
ry F. Bendinger, Esq.
ter W. Billings, Esq.
C. Helgesen, Esq.

cc mailing list attached

BY THE COURT:

David Sam
DAVID SAM
U.S. DISTRICT JUDGE

Sharon Green, Esq.
722 Montgomery St. #25
San Francisco, CA 94111

Roy G. Haslam, Esq.
BIELE, HASLAM, HATCH
50 West Broadway, 4th Floor
Salt Lake City, UT 84101

James R. Holbrook, Esq.
R. Willis Orton, Esq.
Russell Kearn, Esq.
CALLISTER, DUNCAN & NEBEKER
800 Kennecott Bldg.
Salt Lake City, UT 84133

Gary F. Bendinger, Esq.
Scott A. Call, Esq.
GIAUQUE, WILLIAMS, WILCOX & BENDINGER
500 Kearns Bldg.
Salt Lake City, UT 84101

Peter W. Billings, Jr., Esq.
Michele Mitchell, Esq.
FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, UT 84111

Jack C. Helgesen, Esq.
HELGESEN & WATERFALL
2650 Washington Blvd. Suite 102
Ogden, UT 84401

R. Stephen Marshall, Esq.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
P. O. Box 45340
Salt Lake City, UT 84145

Leroy S. Axland, Esq.
Jerald G. Oldroyd, Esq.
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple
Suite 700
Salt Lake City, UT 84101

Geoffrey W. Mangum, Esq.
PRINCE, YEATES & GELDZAHLER
175 East Fourth South #900
Salt Lake City, UT 84111

Kent H. Murdock, Esq.
Anthony B. Quinn, Esq.
RAY, QUINNEY & NEBEKER
P. O. Box 45385
Salt Lake City, UT 84145

Carman E. Kipp, Esq.
Gregory J. Sanders, Esq.
175 East Fourth South
City Centre I Suite 330
Salt Lake City, UT 84111

Stephen J. Sorenson, Esq.
Bryce Pettey, Esq.
Asst. Atty. General
236 State Capitol
Salt Lake City, UT 84114

Ray R. Christensen, Esq.
Jay E. Jensen, Esq.
Elwood P. Powell, Esq.
Denton Hatch, Esq.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple #510
Salt Lake City, UT 84101

Gayle F. McKeachnie, Esq.
NIELSEN & SENIOR
363 East Main St.
Vernal, UT 84078

J. Michael Wilkins, Esq.
LARSEN & WILKINS
Ten East South Temple #500
Salt Lake City, UT 84133

Dennis V. Haslam, Esq.
WINDER & HASLAM
175 West 200 South
Suite 4004
Salt Lake City, UT 84101

Henry S. Nygaard, Esq.
BEASLIN, NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, UT 84103

Richard A. Rappaport, Esq.
COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, UT 84111

Allen M. Swan, Esq.
KIRTON, MCCORMIE & BUSHNELL
330 South 300 East
Salt Lake City, UT 84111

ADDENDUM 3

SEP 30 1988

MARKUS B. ZIMMER, CLERK

BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

GARY S. HARRIS, et al.,)

Plaintiffs,)

vs.)

RULING AND ORDER

ELAINE B. WEIS, et al.,)

Defendants.)

Case No. 87-C-0041-S

This matter comes before the court on plaintiffs' and defendants' objections to the magistrate's report and recommendation advising the court to 1) dismiss plaintiffs' second amended complaint, and 2) grant Rule 11 sanctions against the plaintiffs in the amount of \$100 to each answering defendant. Also pending before this court are defendants' motion to 1) strike plaintiffs' objections to the report and recommendation, 2) strike plaintiffs' 3rd amended complaint, and 3) grant additional Rule 11 sanctions.

Before addressing the objections, some background may be helpful. On November 25, 1987, this court adopted the prior reports and recommendations of the magistrate, dated July 17, 1987, July 23, 1987 and August 10, 1987, granting, in part, defendants' motions to dismiss. Resolution of these reports and recommendations was significantly delayed by conflicts between plaintiffs and their counsel. The court, however, in an abundance of caution,

allowed plaintiffs until December 21, 1987 to amend the complaint to cure defects noted by the magistrate, stating, "All claims recommended for dismissal, which cannot be cured by filing an amended complaint, will be dismissed with prejudice." As indicated by the minute entry of November 20, 1987, and the ruling of November 25, 1987, the court took particular caution to insure plaintiffs were properly notified of its decision.

On December 21, 1987, Robert M. McDonald, on plaintiffs' behalf, requested until December 31, 1987 to file a second amended complaint. The court granted the request. On January 4, 1988, Mr. McDonald again moved for an extension of time until January 15, 1988. The court again accommodated. The second amended complaint was filed January 15, 1988 by Richard J. Leedy, who has been replaced by Mr. McDonald as plaintiffs' counsel. Defendants were granted extensions of time and were allowed to file briefs in excess of page limitations to support their motions to dismiss the second amended complaint. Because the second amended complaint did not cure "glaring errors" in the first amended complaint, which the court had brought to plaintiffs' attention, the magistrate recommends dismissal of the second amended complaint and Rule 11 sanctions against plaintiffs in the amount of \$100 per answering defendant.

On May 20, 1988, defendants Johnson and Jarman objected to the report and recommendation for two reasons. First, it did not address all of the grounds for dismissal raised by Johnson and Jarman, including

- (1) There is no private right of action under Section 17(a) of the 1933 Securities Act;
- (2) Plaintiffs' civil rights claims do not allege a constitutional violation and do not allege conspiracy with the requisite particularity;
- (3) Plaintiffs' fraud claims fail to satisfy the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure; and
- (4) Plaintiffs' RICO and RICE claims fail to adequately allege the requisite elements of those alleged violations.

Second, the amount awarded under Rule 11 (\$100 per defendant) was allegedly insufficient to compensate for their fees. They request a sanction of \$5,080.

On May 23, 1988, plaintiffs, through new counsel Robert M. McDonald, objected to dismissal of the second amended complaint and sanctions for the following reasons:

(a) [T]he basis giving rise to the recommendation arose by reason of the negligence of prior counsel who drafted the Second Amended Complaint and failed to correct the defects specifically enumerated by the magistrate; (b) a litigant with a meritorious (sic) claim should not be penalized by the inability of counsel to properly state his claim and comply with simple procedural rules; (c) the Magistrate's recommendation is moot inasmuch as Plaintiffs have filed a Third Amended Complaint which they are permitted to do without leave of Court pursuant to Rule 15, F.R.C.P. inasmuch as no

responsive pleading has been filed; (c) the Third Amended Complaint (a copy of which is attached) and the Memorandum filed with this objection demonstrates that Plaintiffs have meritorious (sic) claims and that the problems leading to the Magistrate's recommendation have been corrected and are not dispositive of Plaintiffs' claims.

On May 26, 1988, defendants Dobson and Van Winkle objected to the report and recommendation asserting that the Rule 11 sanctions should be increased to include all reasonable fees and costs incurred after the filing of the defective second amended complaint. They request \$3,284.00.

On June 8, 1988, defendants Johnson and Jarman moved 1) to strike plaintiffs' objection to the report and recommendation (together with the 3rd amended complaint), and 2) for further Rule 11 sanctions. They assert the following:

1. With regard to plaintiffs' Objection to Report & Recommendation of the United States Magistrate, plaintiffs chose not to offer any opposition whatsoever to Johnson's and Jarman's Motion to Dismiss the Second Amended Complaint prior to the Magistrate's determination of that motion despite every opportunity to do so. The objections they now raise, having never been raised before the magistrate, should not be considered by the Court.

2. With regard to plaintiffs' Third Amended Complaint, plaintiffs have already used their one free amendment under Rule 15 of the Federal Rules of Civil Procedure and therefore have no right to file the Third Amended Complaint absent leave of the Court. Further, plaintiffs' claims in this action, as stated in the Second Amended Complaint, have essentially been dismissed with prejudice and therefore plaintiffs have no right to amend their complaint without leave of the Court on that ground as well.

3. Plaintiffs, and particularly their counsel, Robert M. McDonald, have filed their Third Amended Complaint and Objection to Report & Recommendation of the United States Magistrate with no basis in fact or in law for filing those pleadings. Therefore, under Rule 11 of the Federal Rules of Civil Procedure, defendants Johnson and Jarman should be awarded their reasonable attorneys' fees incurred in bringing this motion.

On June 10, 1988, defendants Dobson and Van Winkle likewise filed a motion to strike. On that same day, state defendants' also joined in Johnson's and Jarman's motion to strike.

Considering the case history and the failure of plaintiffs to file a motion for leave of court to file a third amended complaint, the third amended complaint is not properly before the court and will not be considered. The court rejects plaintiffs' contention that leave is not required because no responsive pleadings were filed to the second amended complaint. Plaintiffs' Rule 15 opportunity to amend without leave was clearly used when the first amended complaint was filed on February 12, 1987 without defendants' consent and without leave of court. The court stretched the bounds of propriety first by allowing a second amended complaint after resolution of defendants' motions to dismiss was significantly delayed due to failure of the plaintiffs to timely address the magistrate's reports and recommendations, and second by granting two subsequent motions to extend time to file an amended complaint. In this situation, the contention that a third amended complaint,

submitted May 23, 1988, some five months after the court's final extended deadline, is allowed without leave of court and without a proper motion is frivolous at best. The court grants Rule 11 sanctions in the amount of the reasonable expenses incurred in moving to strike the third amended complaint, the amount of which will be determined upon further hearing. Defendants' motions to strike the third amended complaint are granted.

The court turns its attention to the second amended complaint and whether it cures the defective claims the magistrate previously recommended dismissing. If it does not, then, pursuant to the court's ruling of November 25, 1987, these claims will be dismissed with prejudice. Upon review of both the first amended complaint and the second, the court concludes that the defects were not curable or were not cured. The magistrate's report and recommendation of July 17, 1987, recommended dismissal of the claims of plaintiffs Harris, Hansen, Nelson, Gordon, and MFT Mortgage Company, found in the first, second, third, fifth, sixth, seventh, eighth (as to its derivative claims), and eleventh claims of the first amended complaint. The July 17th report and recommendation also recommended dismissal of the fourth claim for failure to state a claim, in that no private right of action exists under § 17 of the Securities Act of 1933. The eighth (as to claims for direct injury), ninth, and tenth claims were not recommended for dismis-

sal. The eighth claim was asserted against "all defendants", the ninth against the State of Utah only, and tenth against defendants Weis, Sutton, Larsen, and Throndsen.

The court notes that the numbering of claims in the second amended complaint corresponds to the numbering of claims in the first, with one exception. The ninth claim in the first amended complaint is abandoned in the second and therefore claim ten in the first amended complaint corresponds to claim nine in the second. The only claim which follows the ninth claim in the second amended complaint is not numbered but corresponds to claim eleven of the first amended complaint.

The magistrate's report and recommendation of July 23, 1987 recommended dismissal of all claims against the State of Utah and its officers in their official capacity.

The magistrate's report and recommendation of August 10, 1987 recommended dismissal of the remaining claims found in the eighth claim (as to claims for direct injury) against the "non-state defendants" for failure to state a claim, i.e., failure to plead the elements of the claim with the requisite particularity. It also recommended dismissal of all claims of MFT Mortgage Company, since the latter could not assert derivative claims (not being a shareholder of any party) and asserted no claims for injury directly to itself. The issue of whether the eighth claim (as to

claims for direct injury) states a claim against the state defendants in their individual capacities remains open.

The claims of the first amended complaint which were not susceptible to curative amendment by plaintiffs Hansen, Nelson, Gordon, and MFT Mortgage Company and which have been recommended for dismissal under prior reports and recommendations adopted by this court are the first, second, third, fourth, fifth, sixth, seventh, eighth (as to derivative claims), ninth, and eleventh claims. The claims of the first amended complaint which were not susceptible to curative amendment by plaintiff Harris are the fourth and ninth claims. The claims susceptible to curative amendment by plaintiff Harris are the derivative claims found within the first, second, third, fifth, sixth, seventh, eighth and eleventh claims, but only upon condition that plaintiffs 1) make demand upon Citizens Bankshares, Thrift Holding Company, and Charter Thrift & Loan to bring a derivative action on behalf of Thrift Holding Company and Charter Thrift & Loan; 2) obtain permission of the state court supervising the receivership of Thrift Holding Company and Charter Thrift & Loan to bring suit on their behalf or against the receiver; 3) verify the second amended complaint; and 4) join Citizens Bankshares, Thrift Holding Company, and Charter Thrift & Loan as parties. The eighth claim (as to direct injury claims) remains in place against the state defendants

in their individual capacities; against the non-state defendants it is recommended for dismissal absent amendment sufficient to cure its pleading deficiencies. The remaining claim not recommended for dismissal is the tenth claim, which is plaintiff Harris' claim for defamation against defendants Weis, Sutton, Larsen, and Throndsen.

The state defendants are: Elaine B. Weis, George R. Sutton, State of Utah, Darwin M. Larsen, R. Scott Baker, Mary Amidan, and Robert S. Gale.

The non-state defendants are Stanley A. Anderson, Robert B. Beckstead, Mirvin D. Borthick, Dean G. Christensen, Richard A. Christenson, W. Harold Dobson, John A. Firmage, Jr., Larry E. Grant, Larry R. Hendricks, Robert L. Howe, Carl A. Hulbert, Edward M. Jamison, John C. Jarman, Russell B. Jex, Charles E. Johnson, Irene Jorgensen, Fred S. Kohlruss, Ronald C. Lease, T. Kay Lyman, Paul A. Miller, Richard D. Paul, Richard M. Robinson, Ed H. Throndsen, Richard A. Van Winkle, Dr. Terry Warner, First Security Corporation, a corporation, First Security Financial, and Does 1 through 40. The second amended complaint adds Thrift Holding Company and Charter Thrift and Loan.

Plaintiffs do not contend that the second amended complaint cures the defects in the first. To the contrary, plaintiffs' counsel "acknowledges that the Second Amended Complaint is deficient in many respects and unresponsive to the directives of the

magistrate." (Plaintiffs' Memorandum in Support of Objection to Magistrate's Report and Recommendation, March 23, 1988, p.4). Plaintiffs' counsel relies instead on a subsequent submission on May 23, 1988 of a third amended complaint which he asserts he can file without leave of court despite 1) the court's ruling of November 25, 1987 allowing plaintiffs until December 21, 1987 to file an amended complaint and requiring that plaintiffs be notified of the court's decision and 2) plaintiffs' counsel's own motions for extension of time to file the second amended complaint. The court therefore concludes that the second amended complaint was not well grounded in fact or warranted by existing law. Accordingly, the court grants defendants' motion for Rule 11 sanctions against the plaintiffs in the amount of the reasonable expenses incurred because of the filing of the defective second amended complaint, including a reasonable attorney's fee, to be determined upon further hearing.

Upon the basis of the foregoing,


IT IS HEREBY ORDERED that the first, second, third, fourth, fifth, sixth, seventh, eighth (as to derivative claims and as to direct claims against the non-state defendants), ninth, and eleventh claims of the amended complaint, together with the corresponding claims of the second amended complaint, are dismissed on the merits and with prejudice.

IT IS FURTHER ORDERED that all claims against the State of Utah and its officers in their official capacities are dismissed on the merits and with prejudice.

This order does not dismiss the eighth claim of the amended complaint as replaced by the eighth claim of the second amended complaint, insofar as it asserts a claim against the state defendants in their individual capacities, nor does it dismiss the tenth claim of the amended complaint as replaced by the ninth claim of the second amended complaint. Aside from these exceptions, all claims and this entire action are hereby dismissed on the merits and with prejudice as to all defendants. Defendants are entitled to their costs.

DATED this 30th day of September, 1988.

BY THE COURT:



DAVID SAM
U.S. DISTRICT JUDGE

cc: attys 10/4/88:dp
Roy G. Haslam, Esq.
Sharon Green, Esq.
James R. Holbrook, Esq.
Gary F. Bendinger, Esq.
Peter W. Billings, Jr., Esq.
Jack C. Helgesen, Esq.
R. Stephen Marshall, Esq.
LeRoy S. Axland, Esq.
Kent H. Murdock, Esq.
Carman E. Kipp, Esq.
Stephen ^W Sorenson, AAG
Ray R. Christensen, Esq.
Gayle F. McKeachnie, Esq.
J. Michael Wilkins, Esq.
Allen M. Swan. Esq.

Geoffrey W. Mangum, Esq.
LeRoy S. Axland, Esq.

00137

COUNSEL OF RECORD IN C 87-41 S

Kent H. Murdock, Esq.
Anthony B. Quinn, Esq.
RAY, QUINNEY & NEBEKER
P. O. Box 45385
Salt Lake City, UT 84145

Carman E. Kipp, Esq.
Gregory J. Sanders, Esq.
175 East Fourth South
City Centre I Suite 330
Salt Lake City, UT 84111

Stephen J. Sorenson, Esq.
Bryce Pettey, Esq.
Asst. Atty. General
236 State Capitol
Salt Lake City, UT 84114

Ray R. Christensen, Esq.
Jay E. Jensen, Esq.
Elwood P. Powell, Esq.
Denton Hatch, Esq.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple #510
Salt Lake City, UT 84101

Gayle F. McKeachnie, Esq.
NIELSEN & SENIOR
363 East Main St.
Vernal, UT 84078

....

Dennis V. Haslam, Esq.
WINDER & HASLAM
175 West 200 South
Suite 4004
Salt Lake City, UT 84101

Henry S. Nygaard, Esq.
BEASLIN, NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, UT 84103

Allen M. Swan, Esq.
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, UT 84111

Geoffrey W. Mangum, Esq.
PRINCE, YEATES & GELDZAHLER

Richard A. Rappaport, Esq.
Cohne, Rappaport & Segal
P.O. Box 11008
SLC, UT 84147

Sharon Green, Esq.
722 Montgomery St. #25
San Francisco, CA 94111

Roy G. Haslam, Esq.
BIELE, HASLAM, HATCH
50 West Broadway, 4th Floor
Salt Lake City, UT 84101

James R. Holbrook, Esq.
R. Willis Orton, Esq.
Russell Kearl, Esq.
CALLISTER, DUNCAN & NEBEKER
800 Kennecott Bldg.
Salt Lake City, UT 84133

Gary F. Bendinger, Esq.
Scott A. Call, Esq.
GIAUQUE, WILLIAMS, WILCOX & BENDI
500 Kearns Bldg.
Salt Lake City, UT 84101

Peter W. Billings, Jr., Esq.
Michele Mitchell, Esq.
FABIAN & CLENDENIN
215 South State, 12th Floor
Salt Lake City, UT 84111

Jack C. Helgesen, Esq.
Helgesen & Waterfall
4768 Harrison Bldg.
Ogden, UT 84403

R. Stephen Marshall, Esq.
VAN COTT, BAGLEY, CORNWALL & McCI
P. O. Box 45340
Salt Lake City, UT 84145
Paul Cotro-Manes, Esq.
311 South State Street
#280
Salt Lake City, UT 84111
Leroy S. Axland, Esq.
Jerold G. Oldroyd, Esq.
SUITTER, AXLAND, ARMSTRONG & HAN
175 South West Temple

Suite 700
Salt Lake City, UT 84101

ADDENDUM 4

APR 21 1989

MARKUS B. ZIMMER, CLERK

BY [Signature]
DEPUTY CLERK

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DISTRICT

GARY S. HARRIS, et al.,)

Plaintiff(s),)

vs.)

R U L I N G

ELAINE B. WEIS, et al.,)

Defendant(s).)

Case No. 87-C-0041-S

On March 31, 1989, several defendants moved for entry of judgment dismissing all claims with prejudice in the above entitled matter. The time for responding to defendants' motion having now expired without any opposition having been filed, and it appearing to the court that all claims in the case have now been dismissed, defendants' motion is granted. The court requests the movants to coordinate with other defense counsel to prepare an appropriate final order and judgment for the court's signature and to circulate the same for approval as to form pursuant to Rule 13(e) of the Civil Rules of Practice.

DATED this 21st day of April, 1989.

4/25/89:dp
Copies mailed to counsel
listed on attached page

BY THE COURT:

[Signature]
DAVID SAM
U.S. DISTRICT JUDGE

ADDENDUM 5

Richard J. Leedy
Attorney for Plaintiffs
230 East 300 South, Suite 1010
Salt Lake City, Utah 84102

FILED
DISTRICT COURT OF UTAH
MAR 15 4 11 PM '88
JAMES H. SUMNER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

GARY S. HARRIS; GARY S. HARRIS,)
acting derivatively for and on)
on behalf of THRIFT HOLDING)
COMPANY, a corporation and CHARTER)
THRIFT & LOAN, a corporation; MFT)
MORTGAGE COMPANY, a corporation;)
FRANK A. NELSON Jr, JIM P. HANSEN,)
and RODNEY F. GORDON, acting)
individually and derivatively for)
and on behalf of MURRAY FIRST)
THRIFT & LOAN CO., a corporation,)
and MFT FINANCIAL, INC., a corp-)
oration,)

Plaintiffs,)

vs.)

ELAINE B. WEIS, individually;)
ELAINE B. WEIS, in her capacity as)
Commissioner of the Department of)
Financial Institutions of the State)
of Utah; GEORGE R. SUTTON; GEORGE)
R. SUTTON, in his capacity as)
Assistant Commissioner of the)
Department of Financial Institu-)
tions of the State of Utah; THE)
STATE OF UTAH; DARWIN M. LARSEN;)
R. SCOTT BAKER; R. SCOTT BAKER, in)
his capacity as a duly authorized)
representative and agent of the)
Utah Commissioners of Financial)
Institutions; MARY AMIDAN; MARY)
AMIDAN, in her capacity as a duly)
authorized representative and agent)
of the Utah Commissioner of)
Financial Institutions; ROBERT S.)
GALE; ROBERT S. GALE, in his cap-)
acity as a duly authorized repre-)
sentative and agent of the Utah)

SECOND AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

Civil No. C 87-0041 S

00317

Commissioner of Financial Institu-)
tions; STANLEY A. ANDERSON; ROBERT)
B. BECKSTEAD; MIRVIN D. BORTHICK;)
DEAN G. CHRISTENSEN; RICHARD A.)
CHRISTENSON; W. HAROLD DOBSON;)
JOHN A. FIRMAGE, JR.; LARRY E.)
GRANT; LARRY R. HENDRICKS; ROBERT)
L. HOWE; CARL A. HULBERT; EDWARD M.)
JAMISON; JOHN C. JARMAN; RUSSELL B.)
JEX; CHARLES E. JOHNSON; IRENE)
JORGENSEN; FRED S. KOHLRUSS; RONALD)
C. LEASE; T. KAY LYMAN; PAUL A.)
MILLER; RICHARD D. PAUL; RICHARD M.)
ROBINSON; ED H. THRONDSSEN; RICHARD)
A. VAN WINKLE; DR. TERRY WARNER;)
FIRST SECURITY CORPORATION, a corp-)
oration; FIRST SECURITY FINANCIAL,)
a corporation; THRIFT HOLDING)
COMPANY, a Utah corporation,)
currently in control of an)
adversarial receiver; CHARTER)
THRIFT AND LOAN COMPANY, a corpora-)
tion currently in the hands of an)
adversarial receiver in possession;)
DOES 1 through 40,)
))
Defendants.)

Plaintiffs allege:

I.

JURISDICTION AND VENUE

1. The jurisdiction of this court is invoked under Title 28 U.S.C. section 1331 et seq. as to the First through Fifth Claims, and the Eighth Claim; and under Title 18 U.S.C. sections 1961-1964 as to the Sixth and Seventh Claims. This court's jurisdiction over the Ninth and Tenth Claims is pendent to its jurisdiction over the federal claims for relief.

2. Venue as to each defendant is laid in the central division of this judicial district under 28 U.S.C. section 1391

(b) and (c), and 1393, and 18 U.S.C. section 1965 in that (a) one or more of the defendants resides, maintains an office, transacts business, has an agent, or is found within this district and division, (b) plaintiffs' claims arose in this district and division, (c) the offer and sale of securities herein complained of took place in this district and division, (d) the violations of securities law set forth in this complaint took place in this district and division, (e) the defendants made, sent, telephoned or caused to be made, sent or telephoned into this district and division false and misleading statements in connection with the sale of securities. Through such misrepresentations and related nondisclosures plaintiffs were induced to agree to, and did, pay consideration for the issuance of Industrial Loan Guarantee Corporation notes.

II.

PLAINTIFFS

3. Plaintiff Gary S. Harris ("Harris") is a resident of Weber County, Utah. Harris was a major shareholder, director, officer and managing agent of Thrift Holding Company, ("Thrift Holding") and its subsidiary, Charter Thrift & Loan ("Charter") both of which are Utah corporations. Harris brings this action individually on his own behalf and derivatively on behalf of Thrift Holding and Charter. Defendant Weis, acting under color of state law, seized Thrift Holding Company and Charter on or about June 30, 1986, and thereupon usurped the functions of the shareholders, directors, officers, and principal managing agents

of Thrift Holding and Charter and has at all time since June 30, 1986 exercised exclusive management control over all operations of Thrift Holding and Charter, claiming that she in doing so she has acted as "receiver in possession." Any demand served upon Weis to initiate this action against herself, the State of Utah or the other defendants who were her co-conspirators, including directors of Industrial Loan Guaranty Corporation of Utah ("ILGC") a Utah corporation, would be futile, and a useless act. The making of any such demand prior to initiating this action is therefore excused.

4. Plaintiffs Frank A. Nelson, Jr. ("Nelson"), Jim P. Hansen ("Hansen"), and Rodney F. Gordon ("Gordon") are residents of Salt Lake County, Utah; directly and indirectly they are the principal shareholders of the Murray First entities and infused more than \$11,000,000 of their personal assets into Murray First Thrift & Loan pursuant to an agreement dated July 17, 1981, to which all defendants were or became parties.

5. Plaintiff Murray First Thrift & Loan Co. ("Murray First") is a Utah corporation, wholly owned by plaintiff MFT Financial, Inc. ("MFT Financial"). The majority of the stock of MFT Financial is owned by Nelson, Hansen and Gordon. MFT Mortgage Company, a Utah corporation, is a wholly owned subsidiary of MFT Financial. These three corporate entities and Nelson, Hansen and Gordon are collectively referred to herein as the "Murray First entities."

6. Nelson, Hansen and Gordon bring this action individually, each on his own behalf, and derivatively on behalf of Murray First Thrift & Loan, MFT Financial, and MFT Mortgage Company. Defendant Weis, acting under color of state law, seized Murray First on July 22, 1982 and MFT Financial on or about August 26, 1982. Defendant Weis has usurped the functions of the shareholders, directors, officers and principal managing agents of the Murray First entities and has at all times since usurping said functions exercised exclusive management control over all operations of Murray First and MFT Financial, claiming that she in doing so she has acted as "receiver in possession by deliberately failing to file tax returns and other documents requisite to maintaining Murray First entities in good standing. Any demand served upon Weis to initiate this action against herself, the State of Utah or the other defendants who were her co-conspirators, including directors of Industrial Loan Guaranty Corporation of Utah ("ILGC") a Utah corporation, would be futile, and a useless act. The making of any such demand prior to initiating this action is therefore excused.

7. Defendant Elaine B. Weis ("Weis") is the Commissioner of Financial Institutions for the State of Utah.

8. Defendant George R. Sutton ("Sutton") is the Deputy Commissioner of Financial Institutions for the State of Utah. Weis and Sutton are collectively referred to herein as the "Public Servant" defendants.

9. Defendants Darwin S. Larsen ("Larsen"), Scott Baker ("Baker"), Mary Amidan ("Amidan") and Robert Gale ("Gale") are residents of Weber County, and acted as the representatives and agents of defendant Weis in conducting the affairs of Charter Thrift and Loan; such agency and employment of Baker, Amidan and Gale was formally acknowledged by Weis on or about July 31, 1986; plaintiff Harris is informed and believes, and on that ground alleges that a de facto agency existed for many months before July 31, 1986. Larsen, Baker, Amidan and Gale are each sued individually and as agents of Weis and the other defendants.

10. Stanley A. Anderson, Robert B. Beckstead, Mirvin D. Borthick, Dean G. Christensen, Richard A. Christenson; W. Harold Dobson, John A. Firmage, Jr., Larry E. Grant, Larry R. Hendricks, Robert L. Howe, Carl A. Hulbert, Edward M. Jamison, John C. Jarman, Russell B. Jex, Charles E. Johnson, Irene Jorgensen, Fred S. Kohlruss, Ronald C. Lease, T. Kay Lyman, Paul A. Miller, Richard D. Paul, Richard M. Robinson, Ed H. Throndsen, Richard A. Van Winkle, and Dr. Terry Warner served at various times as the directors of ILGC from March 22, 1982 to July 31, 1986. They are collectively referred to herein as the "ILGC directors." Each of the defendants named in this paragraph is a resident of this judicial district as set forth in attached Exhibit 1.

11. Defendant First Security Financial Corporation is a Utah corporation, an industrial loan corporation with thrift powers, doing business in Salt Lake City as a thrift institution.

12. The true names of defendants Does 1 through 40 are presently unknown to plaintiffs, who will amend this complaint to allege their true names, when they become known. Defendants First Security Financial and Does 1 through 20 are each thrift or banking institutions who at relevant times owned one or more industrial loan corporation with thrift powers doing business in this judicial district as a thrift institution. One or more employees of each defendant named in this paragraph served as a director of ILGC during the relevant time period. The defendants named in this paragraph are collectively referred to herein as the "private party" defendants.

13. Does 21 through 40 are bonding companies and sureties for the State of Utah. The Utah State Auditor has refused to identify Does 21 through 40 to plaintiffs' counsel. Plaintiffs will amend this complaint when their identities have been ascertained.

14. Defendant State of Utah is one of the United States, and was admitted to statehood in 1896.

15. The ILGC directors, Weis, Sutton, Larsen, Baker, Amidan, Gale and the private party defendants were the agents of each other, and the State of Utah, in committing the wrongful acts alleged, and each acted in the course and scope of such agency in committing the misrepresentations and failures to disclose which are alleged herein. The ILGC directors, Weis, Sutton, Larsen, Baker, Amidan, Gale, the private party defendants, and the State of Utah ratified each of the acts of

the other defendants committed pursuant to such agency and employment.

16. Weis, Sutton, Larsen, Baker, Amidan, Gale and each of the ILGC directors conspired and agreed to commit the wrongful acts alleged herein, and the overt acts alleged were committed in furtherance of their conspiracy.

17. Defendants Thrift Holding Company and Charter Thrift & Loan Company are defendants because they are in the antagonistic hands of a defendant receiver and/or receiver in possession and/or trustee however characterized who willfully refused, declined and neglected to bring this action on behalf of said parties.

18. ILGC is a Utah non-profit corporation, organized under the laws of the State of Utah, organized with the stated purpose "to guarantee full payment of account obligations of members up to ten thousand dollars for each account," later increased to fifteen thousand dollars. Neither the enabling legislation, nor the Articles of Incorporation grant general corporate powers to the ILGC. Plaintiffs are informed and believe, and on that ground allege that the ILGC lacked authority to issue securities.

V.

FIRST CLAIM

Against Defendants Weis, Sutton, and
the ILGC directors)

19. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

20. On or about July 17, 1981 the Defendant State of Utah, through its Department of Financial Institutions and in conspiracy and consort with the other defendants, proposed an agreement in writing which agreement was affirmed and accepted by Plaintiffs Hansen, Nelson and Gordon and others.

21. Pursuant to this agreement, Plaintiffs Hansen, Nelson and Gordon were to become owners of controlling stock interests (not less than 80%) in Murray First Thrift & Loan, MFT Financial, MFT Mortgage and MFT Leasing Company by investing their personal cash, certain personal assets and assets of associates into said companies capital account in an amount of approximately \$11,100,000. Other corporate affiliates of those companies were to be dissolved including Reading Holding Company, Irving Financial Corporation, and other "affiliates and related entities." A time frame was set forth to accomplish reorganization and the issuance of shares in MFT Financial for the infusion of capital which was subsequently extended by mutual agreement. The capital was infused by Plaintiffs for stock interest provided in the form and in the manner demanded by defendants. However, on July 22, 1982, prior to final reorganization and issuance of shares, Murray First Thrift was seized by the State of Utah and such seizure included the capital infused by Plaintiffs for which shares had not yet been issued pending completion of reorganization.

22. On October 6, 1982, by order of the Third District Court the ILGC was appointed as agent for the State of Utah to

negotiate a sale of assets of Murray First Thrift & Loan to several qualified purchasers together with the Plaintiffs who were designated as owners and owners' representatives acting for and in behalf of Murray First Thrift & Loan.

23. On November 3, 1982 by subsequent order of the Third District Court, Defendant Weis was prohibited from interfering or even participating in negotiations for the sale of the banking function of Murray First Thrift & Loan. Her role was limited to submission of any agreement reached between Plaintiffs Hansen, Nelson, and Gordon and ILGC and First Security Bank to the Federal Reserve Board with her recommendation for approval.

24. On November 5, 1982 a series of agreements between ILGC, First Security and the Plaintiffs were executed and a purchase and assumption agreement agreed to involving all of the parties hereto. As part and parcel of said agreement the capital invested by Hansen, Nelson and Gordon set forth in paragraph 19 above, was "retained" for their benefit and use and for the benefit and use of the Murray First entities and by specific terms of the agreements were to be conveyed to an independent trust to be managed by Hansen and Gordon pending approval of the purchase and assumption agreement by the Federal Reserve Board.

25. Commencing on or about November 15, 1982 and ending in June 1986, ILGC issued securities in the form of (1) promissory notes pursuant to the purchase and assumption agreement executed by the Murray First entities with a total face value of \$7,000,000 issued November 15, 1982; and an additional \$3,000,000

issued over a period of time ending in December 1986; and (2) promissory notes issued to other thrift investors in the total face amount of at least \$13,000,000 which plaintiffs are informed and believe were issued at various times between November 1984 and June 1986. In all cases the promissory notes were secured by or offset against the Plaintiffs Hansen, Gordon and Nelson assets infused into Murray First Thrift according to the July 17, 1981 uncompleted agreement. 1. On or about November 1984 Charter was induced by Weis to purchase \$2,400,000 worth of ILGC promissory notes from ILGC in connection with Charter's acquisition of Continental Thrift & Loan. Weis had seized Continental Thrift on the basis that its capital was impaired. Plaintiffs are informed and believe, and on such grounds allege that ILGC notes, in the total face amount of not less than \$23,000,000 were issued by the ILGC directors as obligations of ILGC, at the behest of Weis, and were purchased by other thrift institution investors, in addition to the \$2,400,000 sold to Charter.

26. On November 15, 1982 Murray First Thrift, MFT Financial, and MFT Mortgage, Rodney F. Gordon, Frank A. Nelson, and Jim P. Hansen entered into a purchase and assumption agreement with ILGC, First Security Financial, and Weis. Gordon, Hansen and Nelson retained assets in Murray First Thrift & Loan together with the other interests of the Murray First entities specifically acknowledged. In addition, consideration totaling \$10,000,000 to ILGC for ILGC promissory notes in the amount of

\$10,000,000 were issued to First Security Financial. As a result of the purchase and assumption agreement, \$7,000,000 in ILGC notes were issued to First Security Financial on or about November 15, 1982 and \$3,000,000 in notes were issued to First Security Financial by December 31, 1986. All of the consideration for \$10,000,000 in ILGC promissory notes issued to First Security Financial were paid by the capital assets which were the property of Hansen, Nelson and Gordon and the Murray First Thrift entities.

27. Plaintiffs are informed and believe, and on that ground allege, that ILGC directors issued and Weis induced sales of ILGC notes to the following entities in the amounts set forth:

- (a) \$3,000,000 to Commerce Financial Thrift;
- (b) \$2,000,000 to Copper State Thrift;
- (c) \$4,000,000 to Interlake Thrift;
- (d) \$2,000,000 to Western Heritage Thrift.

28. The securities purchased by plaintiffs as well as similar securities purchased by other investors were issued by ILGC for the following purposes: (i) to induce the Murray First entities to enter into the purchase and assumption agreement, and (ii) to replace the capital which Plaintiffs Hansen, Gordon and Nelson had infused pursuant to the July 17, 1981 agreement, and (iii) to induce Charter to acquire Continental Thrift; plaintiffs are informed and believe that (iv) ILGC promissory notes in the face amount of \$3,000,000 were sold on or about February 17, 1984 to Commerce Financial Thrift by Weis to induce Commerce to

acquire Cottonwood Thrift and Loan, which had been seized by Weis on the grounds that its capital was impaired; (v) plaintiffs are further informed and believe that ILGC promissory notes in the face amount of \$2,000,000 were sold in December 1984 to Kent Brown and W. Hendricks by Weis to induce Hendricks and Brown to acquire Western Heritage Thrift and Loan, which had been seized by Weis on the grounds that its capital was impaired; (vi) ILGC promissory notes in the face amount of \$2,000,000 were sold (at dates unknown to plaintiffs,) to Copper State Thrift by Weis to induce Copper State Thrift to acquire American Fidelity Thrift and Loan, which had been seized by Weis on the grounds that its capital was impaired; (vii) \$4,000,000 in ILGC promissory notes were sold to Freedom Savings and Loan in connection with its acquisition of Interlake Thrift which had been seized by Weis on the grounds that its capital was impaired.

29. Plaintiffs are informed and believe that the promissory notes were issued by ILGC, and sold by Weis, in part to evade ILGC's obligations to depositors of Cottonwood Thrift, American Fidelity Thrift, Continental Thrift, Western Heritage Thrift and Interlake Thrift.

30. The securities issued by ILGC and sold by Weis to the Murray First entities and Charter Thrift were securities within the meaning of Section 2 of the Securities Act of 1933, 15 U.S.C. Section 77b(1) and Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. section 78c(a)(10).

31. Said securities were offered and sold to Hansen, Nelson and Gordon through the Murray First entities and Charter by use of instrumentalities of transportation and telephone and wire communications in interstate commerce and the mail, including but not limited to interstate telephone calls from Weis to Hansen, soliciting the sale of ILGC notes in which she made fraudulent misrepresentations alleged herein, and a telephone conference call from Weis in Utah to Hansen in Idaho and to Mendell Borthwick in Hawaii, wherein Weis stated that Honolulu Federal Savings and Loan (who had earlier agreed in principal to acquire Murray First Thrift and Loan by replacing the assets invested pursuant to the July 17, 1981 agreement) to acquire Murray First Thrift & Loan or any of its assets it would be required to purchase ILGC securities, and letters more fully described below.

32. In connection with the offering and sale of said securities defendant Weis acted as an underwriter within the meaning of Section 2(11) of the Securities Act of 1933, 15 U.S.C. section 77b(11). Weis was an active participant in the offering and sale in that, among other things, plaintiffs are informed and believe that: (i) Weis systematically solicited investors, including Charter, W. Hendricks, Kent Brown, Freedom Savings & Loan, and Copper State Thrift, among others, to purchase the notes issued by ILGC; (ii) Weis was and held herself out to be ILGC's advisor and the exclusive agent for placement of these securities; (iii) acceptances were communicated to Weis and the terms of purchase were negotiated by Weis in each instance; (iv)

the directions, representations, warranties and recommendations made by Weis were the significant factor in inducing the Murray First entities to pay for the notes issued to First Security Financial, and in inducing Harris to make the investment decision to acquire the ILGC securities in the name of Charter, and but for her representations and directions the Murray First entities would not have entered into the purchase and assumption agreement nor would plaintiffs have parted with any consideration for ILGC notes.

33. But for the directions, representations, warranties and recommendations of defendant Weis, Charter would not have acquired Continental Thrift, and Harris would not have made the investment decision which caused Charter to purchase ILGC notes in the amount of \$2,400,000.

VI.

SECOND CLAIM

Amended (Against Defendant Weis, Sutton, the ILGC Directors
and the Private Party defendants under
Section 12(2) of the 1933 Securities Act)

34. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

35. In making such offers and sales, Weis and the ILGC director defendants made untrue statements of material fact, and omitted to state material facts necessary in order to make the statements, in light of the circumstances under which they were made, not misleading to the Murray First entities and to Charter

as described below.

36. In connection with each sale, Weis and the ILGC directors represented to plaintiffs, among other things:

(a) That ILGC had obligated, and would obligate itself to pay Charter and First Security Financial the sums stated and to perform other obligations according to the terms stated in the ILGC promissory notes;

(b) That the securities, and specifically the dollar amounts shown on the face of the notes, were fully backed by the credit of ILGC;

(c) In the case of Murray First entities, that Weis and ILGC could and would fully perform under the terms of the purchase and assumption agreement and return the capital to Hansen, Nelson and Gordon infused through the July 17, 1981 agreement.

(d) In the case of Charter, the defendants represented to Gary Harris that the ILGC notes would be accepted by the federal regulators as capital assets for the purpose of determining the liquidity of Charter required by federal law and Federal Reserve regulations.

37. These representations were untrue, among other reasons, because:

(a) Neither Weis nor the ILGC directors had the ability to pay any holder of the ILGC promissory notes pursuant to the terms of the notes executed by the

ILGC, nor did Weis or ILGC otherwise have the ability to otherwise perform their obligations thereunder, because ILGC was insolvent at the time the notes were issued;

(b) Neither Weis nor the ILGC directors had any means in reality of raising the required funds on behalf of ILGC sufficient to enable ILGC to pay the notes according to their terms;

(c) Weis and the ILGC directors had been informed by the FDIC that the ILGC notes were unacceptable to the federal regulators, and would not be considered by the FDIC in determining the liquidity of any Utah thrift institution.

38. In making the offers and sales, Weis and the ILGC directors induced, forced, and otherwise manipulated Hansen, Nelson and Gordon and the Murray entities, Harris, Charter and other investors to pay consideration for said securities and representations and warranties including those set forth above and representations and warranties and terms of the purchase and assumption agreement and "mutual release" supplement thereto, that omitted to state material facts necessary in order to make such representations not misleading, in light of the circumstances under which they were made. In this connection, neither Weis nor the ILGC directors ever disclosed to Plaintiffs in connection with any sale of ILGC notes, any of the following:

(a) That ILGC was insolvent;

(b) Neither Weis nor the ILGC directors had any intention of paying Charter, First Security, or any other holder of the ILGC promissory notes pursuant to the terms of the notes executed by the ILGC or of otherwise performing their obligations thereunder, because ILGC was insolvent at the time the notes were issued, and in truth and in fact intended to pay and did pay off notes with the Hansen, Nelson and Gordon assets.

(c) Weis had no intention of fulfilling her obligation and exercising her authority to require the members of the ILGC to make pro rata contributions to pay the notes when they became due, in the event ILGC was unable to pay them;

(d) Weis had no intention of fulfilling her obligation and exercising her authority to increase the capital of ILGC by assessments levied against its members.

(e) Weis and the ILGC directors had no intention of performing the contractual obligations assumed by Weis and the ILGC under the purchase and assumption agreement with the Murray entities and the July 17, 1981 agreement to which Hansen, Nelson and Gordon were signatories and sole investors of the capital assets.

(f) Weis and the ILGC directors knew that the ILGC promissory notes were unacceptable to the federal regulators, and would not be considered by the FDIC in determining the liquidity of any Utah thrift institution.

39. No later than January 1, 1983 and long before the sale to Charter, Weis and the ILGC directors knew, but did not disclose to Charter or Gary Harris, that a massive and systematic fraud on investors had already been committed in the sale of ILGC promissory notes.

40. To the extent that the ILGC directors did not actually know some or any of the facts set forth in the foregoing paragraphs, or did not know the falsity of some or any of the fraudulent representations, at the time of the solicitations and sales to Plaintiffs, said defendants in the exercise of reasonable care, should have known of said facts or said falsity.

41. At all material times, plaintiffs were not aware that the defendants' representations to them were untrue nor were they aware of the misleading character of Weis' solicitations. In making their investments in ILGC securities the plaintiffs were also unaware of the material matters not disclosed by Weis and the ILGC directors.

42. Under Section 12(2) of the Securities Act of 1933, 15 U.S.C. section 77-1(2), Weis and the ILGC directors are jointly and severally liable to repay the consideration paid by the Murray First entities and Charter with interest, or to pay

damages. Plaintiffs stand ready, willing and able to take all actions necessary to rescind the transactions wherein the securities were purchased including both the July 17, 1981 agreement for the purchase of controlling interest in MFT by the investment of \$11,000,000 and the purchase and assumption agreement by all parties by which those assets invested would be retained and returned after Federal Reserve Board approval.

43. Plaintiffs did not discover, and through the exercise of reasonable diligence, could not have discovered that defendants' representations and omissions, as described above, were false and misleading, until at least July 31, 1986.

44. All of the defendants knowingly aided and abetted the violations of Section 12(2) set forth in this count.

45. All of the defendants knowingly conspired and agreed to perform the acts which constitute the violations set forth in this count, and performed acts in furtherance of said conspiracy.

46. All of the defendants knowingly conspired and agreed to conceal the acts of omission which constitute the violations set forth in this count, and performed acts in furtherance of said fraudulent concealment.

VII.

THIRD CLAIM

(Against Defendant Weis, Sutton, the ILGC Directors
and the Private Party defendants under

Section 10 of the 1933 Securities Act, and Rule 10b-5)

47. Plaintiffs hereby incorporate all of the allegations of

this complaint into this claim.

48. The conduct of the defendants as alleged above constituted a device, scheme, or artifice to defraud the plaintiffs.

49. Defendants, directly or indirectly, by the use of means or instrumentalities of interstate commerce, or the mails, employed a device, scheme or artifice to defraud plaintiffs, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaged in acts, practices, and courses of business which operated as a fraud and deceit upon plaintiffs, all in connection with the purchase or sale of securities, and all in violation of Section 10 of the Securities Act of 1933, 15 U.S.C. section 78-j and rule 10b-5.

50. Defendants made such misrepresentations or omissions intentionally, knowingly, or recklessly, intending that plaintiffs would rely thereon.

51. Plaintiffs reasonably relied on said misrepresentations, omissions, and other violation of Section 10 and Rule 10b-5, and were damaged and injured thereby.

52. All of the defendants knowingly aided and abetted the violations of Section 10 and Rule 10b-5 set forth in this count.

53. All of the defendants knowingly conspired and agreed to perform the acts which constitute the violations of Section 10

and Rule 10b-5 set forth in this count, and performed acts in furtherance of said conspiracy.

54. Plaintiffs are entitled to recover from defendants the consideration paid for said securities, or in the alternative, to recover damages from defendants, including punitive damages.

VIII.

FOURTH CLAIM

dismissed
(Against Defendant Weis and the ILGC Director Defendants
under Section 17 of the 1933 Securities Act)

55. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

56. Weis and the ILGC directors misrepresented the facts as set forth herein, and refused to disclose said material considerations with the intent to induce Charter and the Murray First entities to purchase said securities. Each of said defendants knew of the untruth of their representations and were aware of the nondisclosed information set forth above. Plaintiffs were unaware that said representations were false and misleading, and justifiably relied on said misrepresentations and nondisclosures in purchasing said securities.

57. To the extent that any of the ILGC directors did not know of the falsity of said misrepresentations or omissions at the time of each offer and sale, each was so unaware only because said defendant intentionally and willfully acted to be shielded from the truth by willfully refusing to conduct the thorough and immediate investigation reasonably required in the circumstances.

Such refusal was in willful and reckless disregard of said defendants' responsibilities to ascertain and disclose to plaintiffs the truth of such misrepresentations and material omissions. Defendants' duty to conduct such an investigation arises from the following, among other things:

(a) Weis acted as the underwriter, and as a participant in effecting the sales of worthless notes to Charter and converting the capital assets of the plaintiffs and of the Murray First entities and others. Weis held herself out to plaintiffs as a skilled advisor who would not offer or recommend an issue without having thoroughly investigated the issue and without fully disclosing all material risks. Before and during Weis' solicitations to plaintiffs Weis had participated in the day to day operations of ILGC. As a result of this pre-existing relationship, and in light of Weis' superior knowledge concerning ILGC, and the securities at issue, Weis knew that plaintiffs relied on the financial advice and investment recommendations of Weis and that plaintiffs believed Weis would not recommend ILGC securities as an investment to them without having thoroughly investigated the issue and without fully disclosing all material considerations to the plaintiffs, and in the case of personal plaintiffs, Hansen, Nelson and Gordon, relied on Weis to perform her fiduciary obligation to

them with respect to the retained assets described above.

(b) The ILGC directors endorsed and authorized the issuance of the ILGC promissory note securities, and made direct and material representations and warranties to plaintiffs in the transactional documents, with the intent and purpose of convincing the plaintiffs that they were purchasing valid and binding ILGC obligations. The ILGC directors also knew that the plaintiffs reasonably believed in good faith that Weis was acting on ILGC's behalf and for ILGC's benefit in promoting said securities.

58. Because of said misrepresentations and material omissions, Weis and the ILGC directors violated Section 17 of the Securities Act of 1933, 15 U.S.C. section 77q, in offering and selling said securities to plaintiffs.

59. As a proximate result of such violations, plaintiffs Nelson, Hansen, Gordon, and the Murray First entities have been damaged in an amount of at least \$2,400,000 and such other amount as may be proven at trial, which amounts plaintiffs are entitled to recover from said defendants, jointly and severally.

dismissed

IX.

FIFTH CLAIM

(Against Defendant Weis, Sutton, the ILGC Directors
and the Private Party defendants under
Section 10 of the Securities Exchange Act of 1934
and Rule 10b-5)

60. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

61. Because of the misrepresentations and material omissions, Weis and the ILGC directors violated Section 10 of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereto, in the sale of said securities to plaintiffs.

62. As a proximate result of such violations, plaintiffs Nelson, Hansen, Gordon, and the Murray First entities have been damaged in an amount of at least \$10,000,000 and such other amounts as may be proven at trial, which amounts plaintiffs are entitled to recover from said defendants, jointly and severally.

63. As a proximate result of such violations, plaintiffs Harris and Charter have been damaged in an amount of at least \$2,400,000 and such other amounts as may be proven at trial, which amounts plaintiffs are entitled to recover from said defendants, jointly and severally.

X.

SIXTH CLAIM

(Against all Defendants under 18 U.S.C. section 1962(c))

64. Plaintiffs hereby incorporate all of the allegations of

*RICO
dismissed*

this complaint into this claim.

65. At all material times the ILGC was an enterprise engaged in, and whose activities affected interstate commerce, in that, among other things, its deposit guaranty business and securities sales were conducted through interstate transactions. In addition, Weis, ILGC, the ILGC directors, and the private party defendants were an enterprise within the meaning of 18 U.S.C. section 1961(4) and 1962(c) for the purpose of issuing, selling and defaulting on ILGC promissory notes.

66. Weis, the ILGC directors and the private party defendants were each employed by or associated with said enterprise(s) in that, among other things:

(a) Weis was associated with the enterprise(s) as she sold ILGC promissory notes to the plaintiffs and other thrift institutions by means of, among other things, written and oral communications and interstate telephone calls to the plaintiffs.

(b) the ILGC directors were associated with the enterprise(s) through their approval and authorization of the issuance of worthless ILGC promissory notes, which they had the authority to control.

(c) the private party defendants were associated with the enterprise(s) by virtue of their active participation as members in ILGC, in part through the employment of their employees as directors of ILGC. The private party defendants were also associated with

the enterprise(s) by participation in ILGC's decision making process, specifically in the systematic and intentional undercapitalization of ILGC, which occurred through their control over the affairs of ILGC.

67. Weis, the ILGC directors, and the private party defendants participated directly or indirectly in the conduct of the affairs of the enterprise(s) through a pattern of racketeering activity by each committing two or more acts involving securities fraud in violation of federal law, indictable mail or wire fraud, all in violation of 18 U.S.C. sections 1341, 1343, 1510, in furtherance of a systematic scheme to defraud the private party plaintiffs of their assets by and through Murray First entities, and in furtherance of another systematic scheme to defraud Gary Harris and Charter, and schemes to defraud other investors in the sale of various issues of ILGC promissory notes, and then default on the notes and force the purchaser thrift institutions into receivership. These acts included:

(a) Weis, with intent to defraud plaintiffs and other investors and for the benefit of ILGC, systematically and willfully made and caused to be made repeated and knowingly false and misleading statements to plaintiffs and other investors and purposefully concealed from them material facts about ILGC and the promissory note securities for the purpose of inducing plaintiffs and other investors to purchase them, as set

forth in detail above. In furtherance of the fraudulent scheme, Weis, the ILGC directors and the private party defendants used interstate mails and wires, including repeated mailings and telephone calls from Utah to California, in connection with the Murray First Thrift Purchase and Assumption Agreement, and repeated telephone calls from Utah to Idaho to promote the scheme to defraud Gary Harris and Charter.

(b) In connection with the scheme to defraud the Murray First entities, Weis, the ILGC directors and some of the private party defendants caused to be transported in interstate commerce forged, altered or counterfeited documents, including different fraudulent versions of the Murray First Purchase and Assumption Agreement, and the disposition of Hansen, Nelson and Gordon's retained assets therein. Four different fraudulently altered versions of the Murray First Purchase and Assumption Agreement were sent by mail by the defendants or their agents in furtherance of the defendants' scheme to defraud the Murray First entities: (i) one from Elmer Tucker, First Security Bank mailed to the Federal Reserve of San Francisco (Dec. 10, 1982); (ii) one from Don Allen, First Security Bank mailed to the Federal Reserve of San Francisco; (iii) one from Weis mailed to the Federal Reserve Board in Washington, D.C. (Nov. 9, 1982);

(iv) a later version mailed by First Security to the Federal Reserve Bank in San Francisco (April 1986).

(c) Weis, the ILGC directors, and the private party defendants willfully endeavored to obstruct and prevent their employees and others not associated with the enterprise from communicating information to the criminal justice system or to the public concerning the mail and wire frauds alleged in this count, by misrepresentations, and by destroying or withholding records relating to these frauds. Furthermore, as described above, Weis and the ILGC directors committed violations involving federal securities fraud and Weis falsely accused the plaintiff Gary Harris of stealing funds from Charter, and absconding to Idaho with them.

68. Each of the defendants knowingly aided and abetted each of the acts and omissions of the others.

69. As a proximate result of the participation of Weis, the ILGC directors and the private party defendants in the conduct of said enterprise(s)' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c) Gary Harris and Charter have suffered injury to their business and property and loss in the amount of at least \$2,400,000 each, plus other damages to be proved at trial.

70. As a proximate result of the participation of Weis, the ILGC directors and the private party defendants in the conduct of said enterprise(s)' affairs through a pattern of racketeering

activity in violation of 18 U.S.C. section 1962(c) Nelson, Hansen and Gordon having been induced by defendant Borthick and subsequently by defendant Weis and members of the ILGC to purchase controlling interest in the Murray First entities by a series of agreements which the defendants had no intention of honoring. And the Murray First entities have suffered injury to their business and property and loss in the amount of at least \$10,000,000 each, plus other damages to be proved at trial.

71. Pursuant to 18 U.S.C. section 1964(c), plaintiffs are entitled to recover treble damages, costs and attorney's fees from defendants.

XI.

SEVENTH CLAUSE

*File
damages*

Against all Defendants under 18 U.S.C. section 1962(c))

72. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

73. Weis, the ILGC directors, and the private party defendants conspired to conduct said enterprise(s) through the pattern of racketeering activity described above in the sale of ILGC securities to plaintiffs and other investors.

74. As a proximate result of the participation of Weis, the ILGC directors and the private party defendants in the conduct of said enterprise(s)' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c) Harris and Charter have suffered injury to their business and property and

loss in the amount of at least \$2,400,000 each, plus other damages to be proved at trial.

75. As a proximate result of the participation of Weis, the ILGC directors and the private party defendants in the conduct of said enterprise(s)' affairs through a pattern of racketeering activity in violation of 18 U.S.C. section 1962(c) Nelson, Hansen, Gordon and the Murray First entities have suffered injury to their business and property and loss in the amount of at least \$10,000,000 each, plus other damages to be proved at trial.

76. Pursuant to 18 U.S.C. section 1964(c), plaintiffs are entitled to recover treble damages, costs and attorney's fees from defendants.

XII.

EIGHTH CLAIM

(Against all Defendants under 42 U.S.C. section 1983)

77. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

78. At times relevant to this claim Weis purported to act as the Commissioner of Financial Institutions; Borthick was her predecessor also purporting to act in the same capacity. Sutton was the Deputy Commissioner of Financial Institutions for the State of Utah. These defendants were responsible at various times for the supervision and control of others who acted as agents, employees and consultants to the State of Utah, while purporting to act on behalf of the State of Utah were in fact

acting for their own benefit and for the purposes of the other defendants and conspirators herein.

79. In doing the acts alleged the public servant defendants purported to act under authority of state law but were in reality acting for themselves under color of law and under color of the statutes, regulations, customs and usages of the State of Utah, including the provisions of Title 7 of the Utah code, governing financial institutions.

80. The ILGC directors, and the private party defendants combined and conspired with the public servant defendants to deny the plaintiffs their federal constitutional rights to due process and equal protection of the laws. The concerted action between the private party defendants, the ILGC directors and the public servant defendants constitutes state action for the purposes of 42 U.S.C. section 1983.

81. The public servant defendants and the ILGC director defendants deliberately misinterpreted and abused their power and authority to regulate plaintiffs' thrift institutions. Plaintiffs have been singled out for oppressive decisions; the public servant defendants have imposed unreasonable, arbitrary and capricious conditions on the individual plaintiffs and Murray First Thrift, and Charter including, but not limited to, inducing and requiring them to purchase stock in the Murray First entities and requiring them to purchase ILGC notes, and inducing private plaintiffs Hansen, Nelson, Gordon and Murray First Thrift & Loan, MFT Mortgage and MFT Financial through their president Jim P.

Hansen to enter into the purchase and assumption agreement and ancillary agreements dated November 5, 1982 and November 15, 1982. Plaintiffs have been the victims of intentional and purposeful discrimination by the public servant and ILGC director defendants. State officials Weis, Borthick, Sutton and their agent Richard A. Christenson deliberately misinterpreted the powers of the Commissioner and ILGC and have purposely singled out the plaintiffs for such misinterpretations. Such unequal application of the law and regulations constitutes a denial of equal protection of the laws.

82. Plaintiffs were deprived of their federal constitutional rights because they were selectively treated by the public servant defendants acting in concert with the ILGC directors, and the private party defendants. Unfair, discriminatory and burdensome conditions and requirements were imposed on plaintiffs which were not imposed on other similarly situated thrift institutions. More particularly, such conditions and requirements were not imposed on the private party defendants in the operation of their affiliated thrift institutions.

83. The selective treatment of plaintiffs by the public servant defendants was based on impermissible considerations; namely, an intent to cover up the mismanagement and insolvency of ILGC by issuing notes and Net Worth Certificates and planned to plunder the assets of the private plaintiffs and of plaintiffs' corporations and to accord preferential treatment to the private party defendants and their affiliates.

84. The defendants acted with malicious intent to deprive plaintiffs of due process and equal protection of the laws, and the concerted acts of the defendants caused such deprivations to occur. The defendants' concerted action under color of law has deprived plaintiffs of rights, privileges, and immunities secured to them by the Constitution and laws of the United States; particularly their rights not to be deprived of property without due process of law and just compensation, guaranteed by the Fifth and Fourteenth Amendments to the Constitution; and their rights to the equal protection of the laws guaranteed under the Fourteenth Amendment.

85. In addition to general damages, plaintiffs are entitled to punitive damages as may be proved.

86. As the direct and proximate result of the acts of the defendants alleged above, plaintiffs have suffered out of pocket pecuniary losses and damages to their business and property, including the loss to the Murray First entities of not less than \$13,000,000 in Murray First assets conveyed to First Security Financial for no consideration; plaintiffs Harris, Hansen, Nelson and Gordon have suffered anxiety and emotional distress; their reputations have been impaired, and they have been compelled to expend substantial sums of money and much of their time pursuing fruitless applications and submissions to Commissioner Weis.

87. As a direct and proximate result of defendants' violations of law; including their fraudulent sale of securities, plaintiffs have been injured in their business and property and

have sustained actual damages the full extent of which cannot be presently calculated, but which exceeds the sum of \$23,000,000.

88. Plaintiffs' damages include, but are not limited to: (a) increased development costs for Bel Marin Keys; (b) the loss of the going business value of the thrift institutions owned by the plaintiffs; (c) the loss incurred through expenditures for court costs and necessary legal expenses ;and (d) the loss of reputation as competent businessmen in the financial community.

Unsettled

XIII.

NINTH CLAIM

(Plaintiff Harris Against defendants Weis, Sutton, Larsen, and Throndsen for Defamation.)

89. Plaintiff Harris hereby incorporates all of the allegations of this complaint into this claim.

90. Harris was associated with the banking industry in Northern Utah for 21 years, from 1964 to 1985, during which time he acquired a valuable statewide and regional reputation as a competent, conservative and honest banking executive. His statewide reputation within the banking industry was enhanced by his tenure as a director of the Utah Bankers' Association from 1983 to 1985.

91. Harris had a business reputation in the State of Utah as a competent banker, worthy to hold positions of public trust. He served as a chairman of the Northern Division, Utah, American Cancer Society, and served on the Board of Directors of the Red Cross; for 30 years Harris has held leadership positions in the

LDS Church, exercising stewardship over church funds, and properties.

92. Defendant Weis, on numerous occasions in September and October 1986, with no reasonable grounds for believing them to be true, made false and defamatory statements about Harris. The exact content of the statements are presently unknown to Harris, but the defamatory gist of the statements includes the following:

(a) That Harris had taken \$11,000,000 from Charter, that the bulk of the stolen funds were taken by Harris to Idaho, to build houses, and that Weis did not know Harris' whereabouts;

(b) That Harris had run Citizens Bank as his own personal, private bank, that he had gutted Citizens financially and then started the same process on Charter.

93. An ordinary listener would understand the defamatory statements to mean that Harris had absconded to places unknown with the funds of Charter and Citizens' Bank, and could not be found by authorities.

94. Weis knew the foregoing statements were false at the time she made them, because she knew that no funds were stolen, or otherwise wrongfully taken by Harris from Citizens' Bank or from Charter.

95. Weis knew, or should have known, that the demise of Citizens' Bank was caused by a \$9,000,000 real estate trade made in March or April 1985 by a director, Darwin Larsen, who was then

acting de facto, as the chief executive officer of Citizens' Bank.

96. Moreover, Weis knew, or should have known, at the time she made the defamatory statements set forth above, that the FBI had investigated Citizens' Bank after its closure in 1985 and reported no wrongdoing by Harris.

97. In addition, Weis had a full time bank examiner from the Department of Financial Institutions of the State of Utah employed full time at Charter from approximately March, 1985 until Weis seized Charter on June 30, 1986. During the entire 16 months that her employee and representative was present at Charter, every transaction in which Harris was involved was examined in complete detail by him. Not once did the State examiner discover or report any wrongdoing by Harris.

98. Furthermore, the Federal Reserve Bank audited the books and records of Citizens Bankshares, and all of its subsidiaries and affiliates, including Charter Thrift and Citizens' Bank, every year during the time Harris was involved with these entities. The last Federal Reserve review during the time Harris was involved with Charter and Citizens was conducted in June 1985. At that time no defalcations were reported. Under its rules, as Weis knew, any misconduct, defalcation, misappropriation, or self dealing must be reported. No wrongful act, or questionable transactions by Harris or members of his family were found by the Federal Reserve.

99. In spite of the facts known to Weis, she made further false statements about Harris, announcing in October 1986 that the Department of Financial Institutions and the Federal Deposit Insurance Corporation ("FDIC") were bringing criminal charges against Harris. At the time she made these statements, Weis had no reasonable grounds for believing them to be true.

100. The ordinary listener would understand this statement to mean that criminal charges had been brought against Harris for wrongfully taking funds from Charter or Citizens' Bank. Listeners did so understand Weis' statements.

101. On or about September 15, 1986, on Channel 5 TV in Salt Lake City, Utah, defendant Sutton made false and defamatory statements about Harris, the exact content of which is unknown to Harris at this time, but the defamatory gist of which is that Harris had committed the most egregious defalcation in the history of the Department of Financial Institutions for the State of Utah. This statement was made soon after the conviction of Val Costley for embezzlement of \$5,400,000 from Family Bank

102. Ordinary listeners would understand Sutton's statements to mean that Harris had embezzled more than \$5,400,000 from Charter Thrift and Citizens' Bank. Listeners did so understand Sutton's statements.

103. Plaintiff is informed and believes that Sutton also falsely stated that Harris stole \$11,000,000 which was the direct cause of the demise of Charter, and had used family, business

friends, and shell corporations to effect his thefts. Such statements were false in their entirety.

104. At the time he made the statements Sutton had no reasonable grounds for believing them to be true.

105. At the time Weis and Sutton made the statements alleged herein they knew that such statements would be republished by others, and they made the defamatory statements intending that such republications would occur.

106. The defamatory statements originated by Weis and Sutton were republished by defendants Larsen and Throndsen, who made such republications with knowledge that the statements were false.

107. Such statements proximately caused Harris special damages to his business and property, including but not limited to curtailment of credit, denial of loan applications, and demands for additional collateral, disruption of a partnership, and the creation of additional burdens in all of Harris' business dealings, all to his damage in an amount subject to proof at trial, but not less than \$7,000,000 as to each defendant.

108. Defendants' statements have caused Harris to be shunned and avoided, and have caused disruption in his family relationships, created anxiety, and emotional distress, all to Harris' damage in an amount subject to proof at trial, but in no event not less than \$8,500,000 as to each defendant.

109. Weis, Sutton, Larsen and Throndsen published the foregoing defamatory statements about Harris willfully,

purposefully and maliciously. Plaintiff is therefore entitled to punitive damages according to proof, but in no event less than \$10,000,000 as to each defendant.

XIV.

(Against all Defendants Under Utah Racketeering
Influences and Criminal Enterprise Act)

110. Plaintiffs hereby incorporate all of the allegations of this complaint into this claim.

111. The actions of the defendants and each of them, as alleged herein, constitute violations of Utah Code Ann. Section 76-10-1601 et. seq. (1953), as amended, and are the legal and factual causes of injury for which the defendants are liable and actual damage of no less than \$2,400,000 each as to Plaintiffs Harris, Thrift Holding Company and Charter Thrift & Loan, and \$10,700,000 each as to Plaintiffs Nelson, Hansen, Gordon, Murray First Thrift & Loan, MFT Financial, and \$1,000,000 as to Plaintiff MFT Mortgage, which sum should be trebled, and for costs of suit, reasonable attorneys' fees and punitive damages.

XV.

PRAYER

WHEREFORE, Plaintiffs demand judgment as follows:

1. Under the FIRST through EIGHTH, and the ELEVENTH CLAIM, for such general and special damages jointly and severally against each and every defendant above named defendant as may be established at the trial, but in no event less than \$2,400,000 each in favor of Plaintiffs Harris, Thrift Holding Company and

Charter Thrift & Loan, and \$10,700,000 each in favor of Plaintiffs Nelson, Hansen, Gordon, Murray First Thrift & Loan, MFT Financial, and \$1,000,000 as to Plaintiff MFT Mortgage, trebled on the SIXTH, SEVENTH, and EIGHTH CLAIMS against all defendants except the State of Utah.

2. Under the SIXTH and SEVENTH CLAIMS, an injunctive order divesting all defendants from any interest in the property or future conduct of the enterprise, including divestiture of any trusteeships or receiverships exercised by defendant Weis in her capacity as trustee conservator receiver, or however characterized, and the ILGC.

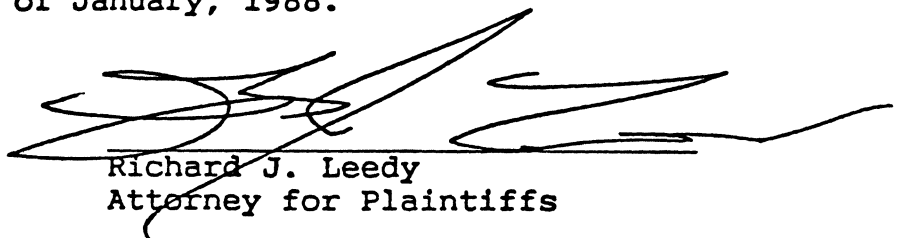
3. Under the NINTH CLAIM for such general and special damages against each and every defendant above named as may be established at the trial, but in no event less than \$7,000,000 special damages, \$8,500,000 general damages and \$10,000,000 each in favor of Plaintiff Harris.

4. Under the EIGHTH and TENTH CLAIMS, for reasonable attorneys' fees.

5. From an order of this court making Charter Thrift & Loan and Thrift Holding Company parties plaintiff to this action.

6. For such other and further relief, including court costs, as the court deems just.

DATED this 15th day of January, 1988.



Richard J. Leedy
Attorney for Plaintiffs